

**RECENT DEVELOPMENTS IN CIVIL RIGHTS:
Patriot Act, Alien Tort Statute, and
The GLBT Community**

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I. THE PATRIOT ACT

A. A BRIEF REVIEW OF TITLE II OF THE PATRIOT ACT AS MODIFIED BY THE USA PATRIOT IMPROVEMENT AND REAUTHORIZATION ACT.

In response to the tragic events of September 11, 2001, the United States Congress passed the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act. On October 26, 2001, President George W. Bush signed the USA PATRIOT Act of 2001 into law.

Since its enactment, Americans have expressed concern over certain provisions in Title II of the Act (“Enhanced Surveillance Procedures”) which expanded the Government’s ability to conduct surveillance and searches in anti-terrorism and counterintelligence investigations. The Government’s expanded powers included:

- The authority under the Foreign Intelligence Surveillance Act of 1978 (FISA) to use pen registers and trap and trace devices¹ against U.S. persons (U.S. citizens and lawful permanent aliens), Patriot Act, 115 Stat. 272, §214, codified at 50 U.S.C. §1842(a)(1)(2006);
- The authority to allow the FBI to obtain under FISA an order requiring a third party to produce in perpetual secrecy any tangible things (including books, records, papers, documents, and other items) requested by the Government,² Patriot Act, §215, codified at 50 U.S.C. §1861;

¹ A pen register is a mechanical device that records outgoing telephone numbers and email addresses while a trap and trace device records incoming telephone numbers and email addresses. American Civil Liberties Union v. U.S. Dep’t of Justice, 265 F.Supp.2d 20, footnote 3 (D.D.C. 2003).

² In addition to §215, §358 and §505 of the Patriot Act allow the Government to obtain consumer reports, internet and telephone records, and financial records from third parties upon written

- The authority under FISA to use a roving “John Doe” wiretap in order to intercept a suspect’s communications, Patriot Act, §206, codified at 50 U.S.C. §1805;
- The ability under FISA to obtain a warrant to conduct electronic surveillance and physical searches of a “foreign power or an agent of foreign power” upon certification “that a significant purpose of the surveillance is to obtain foreign intelligence information,”³ Patriot Act, §218, codified at 50 U.S.C. §1804(a)(7)(B) and 50 U.S.C. §1823(a)(7)(B).⁴
- The ability to obtain a “sneak and peak” warrant from any federal court so as to search for and seize any property or materials that constitute evidence of a federal crime while delaying the provision of notice to the suspect for a reasonable period of time, Patriot Act, §213, codified at 18 U.S.C. §3103a.

These provisions were passed subject to a sunset clause in §224 of the Patriot Act which rendered them ineffective as of December 31, 2005. Due to the sunset clause, the USA PATRIOT Improvement and Reauthorization Act of 2005 (Patriot Act II) was enacted on March 9, 2006. Patriot Act II modified some of the controversial provisions in Title II. The modifications in part increased the

certification that the information is necessary for an anti-terrorism or counterintelligence investigation. The disclosing party must keep the government’s request confidential.

³ Prior to the passage of the Patriot Act, the government had to certify that “the purpose of the surveillance is to obtain foreign intelligence information.”

⁴ In Mayfield v. United States, 504 F.Supp.2d 1023 (D. Or. September 26, 2007), the District Court held that these provisions were unconstitutional because they violate the Fourth Amendment. The government has appealed the District Court’s decision. But see, In re Sealed Case, 310 F.3d 717 (FISCR 2002) (holding that “significant purpose” language did not violate the Fourth Amendment); and United States v. Wen, 477 F.3d 896 (7th Cir. 2007) (holding that it was permissible for the government to use evidence that it compiled under a “significant purpose” warrant to prosecute defendant for a domestic crime).

public's right to know about governmental activity under Title II. See Patriot Act II, §106A (Requiring the Department of Justice to perform a comprehensive audit of the FBI's use of investigative authority under FISA and to submit reports to Congress in an unclassified form).

The modifications also increased judicial oversight as follows:

- Third parties who receive a §215 order to produce documents have the right to consult with an attorney and the right to challenge the order in the FISA court on the grounds that the order does not comply with the requirements in §215 or is otherwise unlawful, Patriot Act II, 120 Stat. 192, §106, codified at 50 U.S.C. §1861 (2006);
- The recipient of a request for records or information under 18 U.S.C. §2709(b) (telephone and internet records),⁵ Sections 626(a), 626(b) or 627(a) of the Fair Credit Reporting Act (consumer reports), Section 1114(a)(5)(A) of the Right to Financial Privacy Act (financial records), or Section 802(a) of the National Security Act of 1947 (known as a “national security letter”) may file a petition in federal district court for an order modifying or setting aside the request if compliance would be unreasonable, oppressive, or otherwise unlawful, Patriot Act II, §115, codified at 18 U.S.C. §3511(2006);⁶

⁵ In Doe v. Gonzales, 500 F.Supp.2d 379 (S.D. N.Y. September 6, 2007), the District Court held that 18 U.S.C. §2709(c) (“prohibition of certain disclosure”) was unconstitutional under the First Amendment. The Court further held that the provision could not be severed from the remainder of the statute and therefore 18 U.S.C. §2709 was declared unconstitutional in its entirety. The government has appealed the District Court's decision.

⁶ In all judicial proceedings under 18 U.S.C. §3511, the court shall, upon request of the government, review ex parte and in camera any submission from the government which may include classified information. Id. The use and ex parte judicial review of classified information in national security cases has been held constitutional. See, United States v. Ott, 827 F.2d 473 (9th Cir. 1987), United States v. Belfield, 692 F.2d 141 (D.C. Cir. 1982).

- The recipient of a national security letter may also obtain judicial review of a permanent non-disclosure requirement; however, if the Government certifies that disclosure may endanger the national security of the United States or interfere with diplomatic relations, the certification shall be treated as conclusive unless the court finds that the certification was made in bad faith, Id.;⁷ and,
- The Government must give notice to a suspect of a “sneak and peak” warrant within a reasonable period of time not to exceed 30 days after the date of its execution, or on a later date certain if the facts of the case justify a longer period of time, subject to court-approved extensions (presumptively limited to 90 days) for good cause shown, Patriot Act II, §114, codified at 181 U.S.C. §3103a (2006).

In addition, Patriot Act II repealed the sunset clause in §224 of the Patriot Act. Thus, the provisions in Title II are now permanent, with the exception that §206 (roving “John Doe” wiretaps) and §215 (access to business records under FISA) are subject to a new sunset clause which takes effect on December 31, 2009. Patriot Act II, §102.

B. OTHER PROVISIONS IN THE PATRIOT ACT AND PATRIOT ACT II WHICH IMPEDE UPON OUR CIVIL LIBERTIES.

The Government’s expanded powers in Title II of the Patriot Act raise significant First Amendment, Fourth Amendment, Due Process, and right to privacy issues. However, these are not the only provisions in the Patriot Act and Patriot Act II which raise significant civil liberty issues. The following paragraphs review the effect of other parts of the Patriot Act and Patriot Act II on our civil liberties.

⁷ In Doe v. Gonzales, supra at footnote 5, the District Court also held that 18 U.S.C. §3511(b) was unconstitutional under the First Amendment and the separation of powers doctrine.

1. First Amendment Concerns.

a. Special Events of National Significance

Patriot Act II has codified the Bush Administration's efforts to minimize and segregate public protests at national events. Title VI of the Patriot Act II (Secret Service Authorization and Technical Modification Act of 2005) makes it a federal crime to:

(1) willfully and knowingly ... enter or remain in any posted, cordoned off, or otherwise restricted area of a building or grounds where the President or other person protected by the Secret Service is or will be temporarily visiting;

(2) willfully and knowingly ... enter or remain in any posted, cordoned off, or otherwise restricted area of a building or grounds so restricted in conjunction with an event designated as a special event of national significance....

Patriot Act II, §602, codified at 18 U.S.C. §1752 (2006). A non-violent violation of this section is punishable by a fine and/or imprisonment of less than one year. This provision will effectively allow the Government to remove all visible signs of protest at any event which involves the President or has been designated by the Government as a "special event of national significance."⁸

In addition, Title VI creates a permanent police force known as the "United States Secret Service Uniformed Division." This police force is subject to the supervision of the Secretary of Homeland Security and has the authority to police special events of national significance. Title VI was apparently tacked on as an amendment to Patriot Act II and enacted into law without any debate in the House of Representatives or Senate.

⁸ See United States v. Bursey, 416 F.3d 301 (4th Cir. 2005) (affirming conviction of a war protestor who knowingly and willfully entered an area restricted for a presidential event sponsored by the Republican Party of South Carolina).

b. Lawful expert advice or assistance to groups designated as “foreign terrorist organizations.”

Section 805 of the Patriot Act included “expert advice or assistance” within the definition of prohibited material support for foreign terrorist organizations under 18 U.S.C. §2339A.⁹ The term “expert advice or assistance” was subject to challenge under (1) the First Amendment because it arguably prohibited lawful activities and advocacy and (2) the Due Process Clause because the phrase was unconstitutionally vague. See Humanitarian Law Project v. Ashcroft, 309 F.Supp.2d 1185 (C.D. Cal. 2004) (rejecting a First Amendment challenge, but holding that the phrase was unconstitutionally vague).

On December 17, 2004, Congress passed the Intelligence Reform and Terrorism Prevention Act which amended AEDPA. As amended, 18 U.S.C. §2339A defined the phrase “expert advice or assistance” to mean “advice or assistance derived from scientific, technical or other specialized knowledge.” On December 10, 2007, the U.S. Court of Appeals for the Ninth Circuit held that the phrase “other specialized knowledge” was void for vagueness, but that the remainder of the definition was constitutional under the First and Fifth Amendments.

2. Limitations on Rights of Redress.

The Bush Administration has repeatedly sought to eliminate or reduce the abilities of Americans to seek redress in the courts. In the Patriot Act, President Bush was successful in obtaining the passage of the following provisions:

- Any person who is aggrieved by any willful violation of Chapters 119 or 121 of Title 18 of the U.S. Code or of Sections 106(a), 305(a), or 405(a) of FISA may commence an action against the United States to recover actual damages (but not less than \$10,000, whichever amount is greater) and litigation costs, Patriot Act I, §223, codified at 18 U.S.C. §2712;

⁹ A provision of the Antiterrorism and Effective Death Penalty Act (“AEDPA”).

- Any financial institution that voluntarily discloses to the Government any possible violation of law or regulation shall not be liable to any person for the disclosure or for failing to provide notice to any person identified in the disclosure, Patriot Act I, §351, codified at 31 U.S.C. §5318;¹⁰
- Any federal insured depository institution that voluntarily discloses (to another insured depository institution) in a written employment reference its suspicions that the employee was involved in potentially unlawful activity shall not be liable to any person identified in the disclosure unless the voluntary disclosure was made with malicious intent, Patriot Act I, §355, codified at 12 U.S.C. §1828; and,
- Any person who donates qualified fire control or rescue equipment to a volunteer fire company shall not be liable for civil damages for personal injuries, property damage or loss, or death caused by the equipment after the donation, unless: (1) the act or omission constitutes gross negligence or intentional misconduct, (2) the person manufactured the equipment, or (3) the person modified or altered the equipment after it was re-certified as meeting manufacturer specifications, Patriot Act II, §125, codified at 15 U.S.C. §2233.

¹⁰ A financial institution is prohibited from notifying any person involved in a transaction that the transaction was reported to the Government as suspicious. Id.

II. ALIEN TORT STATUTE

The Alien Tort Statute (“ATS”), also known as the “Alien Tort Claims Act,” was originally passed by Congress as part of the Judiciary Act of 1789. The original ATS stated that the federal courts “shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States.” 1 Stat. 77. This section will provide a brief overview of the ATS.

A. THE ALIEN TORT STATUTE DOES NOT CREATE A CAUSE OF ACTION.

The statute has been slightly modified since its original enactment and now reads in its entirety as follows: “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” 28 U.S.C. §1350. The ATS is a jurisdictional statute only. It does not establish an independent cause of action. Sosa v. Alvarez-Machain, 542 U.S. 692, 124 S.Ct. 2739 (2004). Thus, the ATS confers federal subject matter jurisdiction when (1) an alien sues, (2) for a tort, (3) that was committed in violation of the law of nations or a treaty ratified by the United States. Vietnam Ass’n for Victims of Agent Orange v. Dow Chem. Co., 517 F.3d 104 (2nd Cir. 2008).

B. WHAT CONDUCT VIOLATES THE LAW OF NATIONS?

In Sosa, the United States Supreme Court observed that the ATS is “best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time.” Id., 542 U.S. at 724, 124 S.Ct. at 2761. At the time of its enactment these causes of action recognized in common

law included violation of safe conducts,¹¹ infringement of the rights of ambassadors, and piracy. Id.

In addition to the original three causes of action, the Supreme Court has instructed the federal courts to “not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when §1350 was enacted.” Id., 542 U.S. at 732, 124 S.Ct. at 2765.¹² The Supreme Court further cautioned the courts to (1) evaluate the practical consequences of making the cause of action available to litigants in federal court, and (2) apply a policy of case-specific deference to the executive branch’s view of the case’s impact on foreign policy. Id., 542 U.S. at 732-33, 124 S.Ct. at 2765.

The causes of action that are likely to violate the law of nations include:

- Torture, Filartiga v. Pena-Irala, 630 F.2d 876 (2nd Cir. 1980), Aldana v. Del-Monte Fresh Produce, N.A., Inc. 416 F.3d 1242 (11th Cir. 2005);¹³
- Slave trading, Id.;
- Genocide, Kadic v. Karadzic, 70 F.3d 232 (2nd Cir. 1995);
- Prolonged arbitrary detention, Sosa, 542 U.S. at 737, 124 S.Ct. at 2768 (citing, Restatement (Third) of Foreign Relations Law of the United States, §702 (1986));
- Systematic racial discrimination, Sarei v. Rio Tinto, PLC, 487 F.3d 1193 (9th Cir. 2007);
- Murder or causing the disappearance of individuals, See Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984);

¹¹ Safe conduct is “a privilege granted by a belligerent allowing an enemy, a neutral, or some other person to travel within or through a designated area for a specified purpose.” Black’s Law Dictionary, 8th Ed. at p. 1363.

¹² “Whether an alleged norm of international law can form the basis of an ATS claim will depend upon whether it is (1) defined with specificity comparable to these familiar paradigms; and (2) based upon a norm of international character accepted by the civilized world.” Vietnam Ass’n, 517 F.3d at 117.

¹³ But see Enahoro v. Abubakar, 408 F.3d 877 (7th Cir. 2005) (holding that claims for torture and killings were only actionable under the Torture Victim Protection Act, 106 Stat. 73).

- Consistent patterns of gross violations of internationally recognized human rights; Id.

C. WHAT ARE THE PITFALLS?

Since 9/11, victims of the wars in Afghanistan and Iraq have attempted to obtain relief under the ATS. Most of these claims have been unsuccessful. However, in Rasul v. Bush, 542 U.S. 466, 124 S.Ct. 2686 (2004) Guantanamo detainees obtained a small victory. In Rasul, the detainees filed a petition for a writ of habeas corpus along with a claim under the ATS for the denial of their rights under international law (violation of their rights to be informed of the charges against them, to meet with their families and with counsel, and to have access to the courts or an impartial tribunal). The District Court and the United States Court of Appeals for the District of Columbia Circuit both dismissed the lawsuit for lack of jurisdiction. The United States Supreme Court granted certiorari and held that the federal courts could exercise jurisdiction over the detainees' claims under the habeas corpus statute and under the ATS.

The primary plaintiffs in the Rasul decision subsequently had their ATS claims dismissed on the merits. The dismissal of their claims, as well as other claims since 2001, illustrate the pitfalls that exist. These pitfalls include:

- The difficulties associated with establishing a violation of the law of nations, Sosa, supra (holding that a single illegal detention of less than a day did not establish a cause of action);
- Acts of torture by private governmental contractors are not actionable under the ATS, Ibrahim v. Titan Corp., 391 F.Supp.2d 10 (D. D.C. 2005);
- Acts of torture committed by U.S. military personnel within the course and scope of their employment are preempted by the Federal Tort Claims Act, Rasul v. Myers, 512 F.3d 644 (D.C. Cir. 2008); In re Iraq and Afghanistan Detainees Litigation, 479 F.Supp.2d 85 (D. D.C. 2007);¹⁴

¹⁴ In Rasul v. Myers and In re Iraq, the ATS claims were converted to FTCA claims (pursuant to the Westfall Act) and then dismissed on the grounds that the plaintiffs failed to exhaust their administrative remedies.

- The states secret privilege, El Masri v. United States of America, 479 F.3d 296 (4th Cir.) (dismissing Bivens and ATS claims on the grounds that plaintiff's claim could not be fairly litigated without the disclosure of state secrets – the CIA's extraordinary rendition program); and,
- Political question doctrine, Mujica v. Occidental Petroleum Corp., 381 F. Supp.2d 1164 (C.D. Cal. 2005);¹⁵ Corrie v. Caterpillar, Inc., 503 F.3d 974 (9th Cir. 2007).

D. TORTURE VICTIM PROTECTION ACT OF 1991.

The ATS historical and statutory notes include the Torture and Victim Protection Act of 1991 ("TVPA"), 106 Stat. 73. The TVPA states, in pertinent part, as follows:

An individual who under actual or apparent authority, or color of law, of any foreign nation - -

(1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or

(2) subjects an individual to extrajudicial killing shall, in a civil action, be liable to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.

In order to pursue an action under the TVPA, the claimant must (a) exhaust all adequate and available remedies in the place in which the actionable conduct occurred and (b) file the lawsuit within 10 years after the cause of action arose. The U.S. Court of Appeals for the Ninth Circuit has applied the 10-year statute of limitations in the TVPA to claims under the ATS. Papa v. United States of America, 281 F.3d 1004 (2002).

The TVPA may provide relief to an alien who is tortured or killed by an individual acting under actual or apparent authority, or color of law, of a foreign nation. See Corrie v. Caterpillar, Inc., 403 F.Supp.2d 1019 (W.D. Wash. 2005)

¹⁵ The Foreign Sovereign Immunity Act, 28 U.S.C. §1604, et seq., is likely to bar most claims that are directly against a foreign nation under the ATS.

(holding that the TVPA does not authorize an action against a corporation). However, the availability of a TVPA action (like an ATS action) is limited.

III. GLBT COMMUNITY

Within the past twelve years, the United States Supreme Court issued two important decisions that affected the GLBT community: (1) Romer v. Evans, 517 U.S. 620, 116 S.Ct. 1620 (1996) and (2) Lawrence v. Texas, 539 U.S. 558, 123 S.Ct. 2472 (2003). In the wake of each decision, efforts were made to advance GLBT rights through the court system. However, the courts have generally been reluctant to strike down laws that discriminate against the GLBT community. This section will review the Romer and Lawrence decisions as well as recent challenges to bans on same-sex marriage, the Defense of Marriage Act, and the military's Don't Ask, Don't Tell policy.

A. Romer v. Evans – Equal Protection.

In 1992, the State of Colorado amended its Constitution to include the following amendment entitled “No Protected Status Based on Homosexual, Lesbian or Bisexual Orientation”:

Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination.

In Romer v. Evans, the Supreme Court was asked to address the constitutionality of the Colorado amendment. The Court held that the amendment violated the Equal Protection Clause because “the amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group, an exceptional and ... invalid form of legislation ... [and] ... its sheer breadth is so discontinuous with the reasons offered for it that the amendment

seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests.” Id., 517 U.S. at 632, 116 S.Ct. at 1627. The Court thus concluded that the Colorado amendment was unconstitutional because it impermissibly tried to make homosexuals unequal to everyone else and a class of persons a stranger to Colorado laws. Id., 517 U.S. at 635, 116 S.Ct. at 1629.

B. LAWRENCE v. TEXAS – SUBSTANTIVE DUE PROCESS.

In Lawrence v. Texas, 539 U.S. 558, 123 S.Ct. 2472 (2003), the Supreme Court was asked to address the constitutionality of a Texas law that criminalized certain sexual conduct between two consenting men in the privacy of their home. The Court framed the legal issue as “whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution.” Id., 539 U.S. at 564, 123 S.Ct. at 2476.

The Supreme Court observed that the case did not involve minors; did not involve persons who might be injured, coerced, or unable to voluntarily consent to the conduct; did not involve public conduct or prostitution; and, did not involve government recognition of a relationship between homosexual persons. Rather, the case involved “two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle.” Id., 539 U.S. at 578, 123 S.Ct. at 2484. The Court concluded that “[t]he State cannot demean their [petitioners] existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in conduct without intervention of the government.” Id., 539 U.S. at 578, 123 S.Ct. at 2484. The Court further noted that “[t]he Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.” Id. The Texas law was declared

unconstitutional in violation of the petitioners' right to liberty under the Due Process Clause.¹⁶

C. BAN ON SAME-SEX MARRIAGE.

On November 18, 2003, the Supreme Judicial Court of Massachusetts issued Goodridge v. Department of Public Health, 440 Mass. 309, 798 N.E.2d 941 (2003). In Goodridge, the Massachusetts Court was asked whether the Commonwealth of Massachusetts could, under state law, bar same-sex couples from civil marriage. The Court in a landmark ruling held that that the marriage ban did not meet the rational basis test for either due process or equal protection under the Massachusetts Constitution. Id., 440 Mass. at 331, 798 N.E.2d at 961. In rendering its decision, the Court observed the following:

The marriage ban works a deep and scarring hardship on a very real segment of the community for no rational reason. The absence of any reasonable relationship between, on the one hand, an absolute disqualification of same-sex couples who wish to enter into civil marriage and, on the other, protection of public health, safety, or general welfare, suggests that the marriage restriction is rooted in persistent prejudices against persons who are (or who are believed to be) homosexual. The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect. Limiting the protections, benefits, and obligations of civil marriage to opposite-sex couples violates the basic premises of individual liberty and equality under law protected by the Massachusetts Constitution. Id., 440 Mass. at 341-42, 798 N.E.2d at 968.

After Goodridge was issued, the Massachusetts Senate asked the Court to comment on the constitutionality of a proposed bill that would bar civil marriage but allow members of the same sex to form civil unions with all the benefits, protections, rights, and responsibilities of marriage. On February 3, 2004, the

¹⁶ The Supreme Court also overruled Bowers v. Hardwick, 478 U.S. 186, 106 S.Ct. 2841 (1986), which had held that a similar law in Georgia was constitutional.

Supreme Judicial Court of Massachusetts held that the proposed civil union bill would violate equal protection and due process because it “maintains an unconstitutional, inferior, and discriminatory status for same-sex couples....” In re Opinions of the Justices to the Senate, 440 Mass. 1201, 1210, 802 N.E.2d 565, 572 (2004).

In contrast, appellate courts in Arizona and New Jersey have upheld state bans on same-sex marriage. In Stanhardt v. Superior Court, 206 Ariz. 276, 290, 77 P.3d 451, 465 (2003), the Court of Appeals of Arizona held that the “fundamental right to marry protected by our federal and state constitutions does not encompass the right to marry a same sex partner.” In Lewis v. Harris, 378 N.J. Super. 168, 194, 875 A.2d 259, 274 (2005), the Appellate Division of the New Jersey Superior Court rejected a constitutional challenge holding that “absent legislative action, there is no basis for construing the New Jersey Constitution to compel the State to authorize marriages between members of the same sex.” In addition, a due process and equal protection challenge to a Florida statute prohibiting homosexuals from adopting children was rejected by the U.S. Court of Appeals for the Eleventh Circuit. Lofton v. Secretary of the Dep’t of Children and Family Serv., 358 F.3d 804 (11th Cir. 2004).

D. DEFENSE OF MARRIAGE ACT.

The Defense of Marriage Act (DOMA) was enacted by the United States Congress on September 21, 1996. Section 2 of DOMA provided that “[n]o State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State ... respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State ..., or a right or claim arising from such relationship.” 110 Stat. 2419, §2, codified at 28 U.S.C. §1738C. Section 3 of DOMA defined marriage (for the purpose of federal law) to mean “a legal union between one man and one woman as husband and wife” and spouse as “a

person of the opposite sex who is a husband or a wife.” 110 Stat. 2419, §3, codified at 1 U.S.C. §7.

After Lawrence and Goodridge were issued, DOMA was challenged as unconstitutional in violation of the Due Process and Equal Protection clauses, the Full Faith and Credit clause, and various state constitutional provisions. In each case, same sex couples sought recognition of their civil union or marriage in contravention of DOMA. However, the courts reviewed DOMA under a rational basis test and held that it was constitutional because same sex couples did not have a fundamental right to marry and were not a suspect class. See In re Kandu, 315 B.R. 123 (W.D. Wash. 2004) (DOMA also did not violate the 10th amendment or the couple’s 4th amendment rights); Wilson v. Ake, 354 F.Supp.2d 1298 (M.D. Fl. 2005) (DOMA also did not violate the Privileges and Immunities clause or Commerce clause); Andersen v. King County, 158 Wash.2d 1, 138 P.3d 963 (2006).

E. DON’TASK, DON’T TELL.

The U.S. military’s Don’t Ask, Don’t Tell policy is codified at 10 U.S.C. §654. The policy states, in pertinent part, as follows:

(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.

10 U.S.C. §654(b).

The Don't Ask, Don't Tell policy was unsuccessfully challenged in several lawsuits during the 1990's. Since Lawrence was issued, lawsuits have again been filed challenging the constitutionality of the policy on the grounds that it violates due process, equal protection, and freedom of speech. The courts have rejected the constitutional challenges holding that the policy survives rational basis scrutiny under the due process and equal protection clauses and does not implicate free speech rights. See Cook v. Rumsfeld, 429 F.Supp.2d 385 (D. Mass. 2006); Witt v. United States Dep't of Air Force, 444 F.Supp.2d 1138 (W.D. Wash. 2006).

IV. CONCLUSION

The Patriot Act, Alien Tort Statute, and GLBT constitutional rights are complex topics with many unresolved legal issues. Each topic could support a full continuing legal education seminar. This manuscript is intended to provide a brief overview of recent developments and should only be used as a starting point when researching these topics.