Webster v. Doe: Toward Constitutional Protection of Gays Against Governmental Discrimination

Introduction

The United States Supreme Court, in *Webster v. Doe,*[1] largely reaffirmed its traditional "hands off" approach to constitutional review of claims of governmental discrimination against homosexuals. In the opinion, delivered by Chief Justice Rehnquist on June 15, 1988, the Court "decline[d] to consider . . . at this stage of the litigation" whether the Constitution precludes an agency of the federal government from discharging an employee based solely on his sexual orientation.[2] Nevertheless, the Court offered some hope that it might assume a more active role in deciding such cases in the future.

The Court held that employment termination decisions made by the Director of the Central Intelligence Agency (CIA) according to his broad discretion pursuant to section 102(c) of the National Security Act of 1947[3] were not reviewable under sections 701 to 706 of the Administrative Procedure Act.[4] The Court found that the Director's decisions were subject to constitutional review, however, and it remanded the case to the District Court for the District of Columbia for review of Doe's constitutional claims.[5] The Court expressly refused to adopt the Government's argument that Doe had failed to present even a colorable constitutional claim.[6]

This Comment first analyzes preclusion of judicial review under the APA and under the Constitution, and then addresses the underlying claim in *Webster* — equal protection rights of homosexuals in the public employment context. Part I presents the factual background of the case. Part II sets out the legal background of the issue of statutory preclusion of judicial review under the APA, and discusses the analysis of the issue by the majority and dissent in *Webster.* Part III discusses the Court's treatment in *Webster* of the issue of constitutional preclusion of judicial

1. 108 S. Ct. 2047 (1988).
2. *Id.* at 2054 n.9.
3. 50 U.S.C. § 403(c) (1982) [hereinafter NSA].
4. 5 U.S.C. §§ 701 to 706 (1982) [hereinafter APA]. 108 S. Ct. at 2049-53.
5. 108 S. Ct. at 2053-54.
6. 108 S. Ct. at 2054 n.9. *See* Brief for the Petitioner at 27-28 n.23, Webster v. Doe, 108 S. Ct. 2047 (1988) (No. 86-1294).

review. Part IV argues that the Court should address the merits of the equal protection claim raised by Doe. The Comment concludes that the Court should act promptly to overrule or limit its prior 5-4 decision in *Bowers v. Hardwick*,[7] which held that homosexuals have no fundamental right under the Constitution to engage in sodomy, and should establish homosexuality as a quasi-suspect classification entitled to heightened judicial scrutiny when subjected to discriminatory governmental practices.

I. Facts and Procedural History

The respondent in *Webster*, proceeding under the pseudonym John Doe because of his sensitive position as a covert electronics technician, had an unblemished record with the CIA during his nine years of employment. Doe received promotions and consistent ratings of excellent or outstanding on periodic fitness reviews.[8] The CIA's dissatisfaction with Doe began in 1982, when Doe voluntarily informed a CIA security officer that he was a homosexual.[9] Doe was promptly placed on administrative leave.

Doe maintained that he was open and not ashamed about his homosexuality[10] and that he was not susceptible to blackmail.[11] Doe also alleged that he had never had sexual relations with, nor disclosed classified information to, foreign nationals.[12] On two occasions, Doe was interviewed by a CIA polygraph officer, who concluded that Doe's denials of disclosure or of sexual relations with foreign nationals were truthful.[13]

Despite these facts and the government's failure to allege any improprieties other than Doe's sexual orientation, Doe was told by a CIA security officer "that the circumstances of his homosexuality posed a security threat,"[14] and he was asked to resign. The officer refused to elaborate.[15] When Doe refused to resign, the Office of Security recommended to the Director that Doe be dismissed.[16] Upon review, the Director determined that it was "necessary and advisable in the interests of the United States to terminate" Doe's employment.[17] The CIA offered

7. 478 U.S. 186 (1986).

8. 108 S. Ct. at 2049.

9. *Id.*

10. Brief for Respondent at 2, Webster v. Doe, 108 S. Ct. 2047 (1988) (No. 86-1294).

11. *Id.*

12. 108 S. Ct. at 2049.

13. *Id.*

14. Brief for the Petitioner, *supra* note 6, at 4.

15. *Id.*

16. 108 S. Ct. at 2049.

17. *Id.* at 2049-50 (quoting letter from CIA Deputy Counsel to respondent's counsel, May 11, 1982). Director Webster, respondent, was preceded by Director Casey, who made the final decision to terminate Doe's employment.

no specific reasons for the decision.[18]

Doe filed an action in the United States District Court for the District of Columbia seeking reinstatement or a statement of reasons for the discharge.[19] He alleged that the CIA had fired him because of his homosexuality, denying him equal protection of the laws and violating his constitutional right to privacy.[20] Doe also alleged that the CIA had violated its own regulations and section 706 of the APA,[21] and had deprived him of liberty and property without due process of law.[22] The district court granted Doe's motion for partial summary judgment, deciding that the NSA does not preclude judicial review under the APA and that the CIA had violated its own procedures, but declining to decide Doe's constitutional claims.[23]

The Court of Appeals for the District of Columbia agreed that review under the APA was possible, but determined that the CIA had not violated its regulations.[24] It found the record unclear as to the Director's reason for terminating Doe, but stated that if Doe had been discharged as part of a ban against employing homosexuals, the discharge would give rise to an arguable constitutional claim.[25] The Supreme Court granted certiorari to decide the question whether the Director's decision to discharge an employee pursuant to section 102(c) of the NSA was judicially reviewable.[26]

II. Statutory Preclusion

This section of the Comment first briefly describes the APA and the NSA, and then summarizes the *Webster* majority and dissenting opinions regarding preclusion of review under the APA. Following a discussion of the line of cases governing statutory preclusion of judicial review

18. *See* Brief for Respondent, *supra* note 10, at 4.

19. Doe v. Casey, 601 F. Supp. 581 (D.D.C. 1985), *rev'd* 796 F.2d 1508 (D.C. Cir. 1986), *rev'd in part sub nom.* Webster v. Doe, 108 S. Ct. 2047 (1988).

20. Amended Complaint for Declaratory and Injunctive Relief, Doe v. Casey, 601 F.Supp 581 (D.D.C. 1985) (No. 85-5291), *see* Joint Appendix at 5, 12-13, Webster v. Doe, 108 S. Ct. 2047 (1988) (No. 86-1294).

21. 5 U.S.C. §§ 701 to 706. Section 706 provides reviewing courts with the power to hold unlawful and set aside agency action, findings and conclusions found to be—

> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> (D) without observance of procedure required by law.

5 U.S.C. § 706.

22. Amended Complaint, *supra* note 20 at 12.

23. Doe v. Casey, 601 F. Supp. at 590.

24. Doe v. Casey, 796 F.2d 1508, 1513-20 (D.C. Cir. 1986).

25. *Id.* at 1522.

26. Webster v. Doe, 107 S. Ct. 3182 (1987).

of federal agency action, this section concludes with an analysis of the portion of the *Webster* Court's decision relating to that line of cases.

A. Statutory Context

The federal government formerly enjoyed significantly more freedom from judicial intervention than it does today. Absent congressional authorization or consent, an agency of the federal government could not be sued, and the United States had unlimited "power to withdraw the privilege of suing the United States or its instrumentalities."[27] Although this doctrine has continued validity today,[28] the APA[29] now guarantees that most actions of federal agencies are subject to review unless one of the specified exceptions applies. Section 701(a) of the APA creates two exceptions to reviewability: "(1) [when] statutes preclude judicial review; or (2) [when] agency action is committed to agency discretion by law."[30]

Congress adopted the NSA[31] shortly after World War II and one year after it adopted the APA. The NSA established the CIA to acquire and analyze intelligence data.[32] Because Congress was aware that secrecy is important to the ability to conduct intelligence activities,[33] it provided the Director of Central Intelligence with broad discretion in the control of personnel. The NSA states that the Director may "terminate the employment of any officer or employee of the Agency whenever he shall deem such termination necessary or advisable in the interests of the United States . . . ,"[34] but does not address the issue of judicial review. The legislative history of the NSA is silent regarding its intended interaction with the APA.

B. The Majority Opinion

The *Webster* majority found that section 701(a)(2) of the APA precluded judicial review of the Director's employment termination decisions.[35] The Court reasoned that since section 102(c) of the NSA allows termiation of a CIA employee whenever the Director "shall *deem* [it]

27. Maricopa County v. Valley Nat'l. Bank of Phoenix, 318 U.S. 357, 362 (1943).

28. *See, e.g.*, United States v. Mitchell, 445 U.S. 535, 538 (1980).

29. 5 U.S.C. §§ 701 to 706.

30. 5 U.S.C. § 701(a). For a discussion of the APA and its recent application by the D.C. Circuit Court of Appeals, including the Court's ruling in *Doe v. Casey*, see *Administrative Law: Availability of Judicial Review of Administrative Action*, 55 GEO. WASH. L. REV. 729 (1987).

31. National Security Act of 1947, 61 Stat. 496 (codified as amended in scattered sections of 5 and 50 U.S.C.).

32. *See* S. REP. NO. 239, 80th Cong., 1st Sess. 2 (1947); H.R. REP. NO. 961, 80th Cong., 1st Sess. 3-4 (1947); CIA v. Sims, 471 U.S. 159, 170 (1985).

33. 471 U.S. at 172. *See also* Brief for Petitioner, *supra* note 6, at 18 n.14.

34. 50 U.S.C. § 403(c).

35. 108 S. Ct. at 2053. Chief Justice Rehnquist was joined by Justices Brennan, White, Marshall, Blackmun and Stevens.

necessary or advisable in the interests of the United States'. . . [and] not simply when the dismissal *is* necessary or advisable[,]"[36] the NSA exhibits "extraordinary deference to the Director."[37] The Court concluded that the language of section 102(c) indicates that "Congress meant to commit individual employee discharges to the Director's discretion . . . ."[38]

The Court relied on *Citizens to Preserve Overton Park v. Volpe*,[39] which interpreted section 701(a)(2) as applicable "in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.' "[40] According to the *Webster* Court, review under the APA is possible only when a "meaningful standard against which to judge the agency's exercise of discretion"[41] can be identified. The Court found no such meaningful standard, since only "cross-examination of the Director concerning his views of the Nation's security" would allow a court to "properly assess an Agency termination decision."[42]

C. Dissenting Opinions

Both Justices who wrote separately favored a broader reading of the "committed to agency discretion by law" exception to reviewability, resulting in even stricter limits on judicial oversight over agency decisions. Justice Scalia disagreed with the Court's analysis, but not the result, of its APA preclusion decision, arguing that the Court's "no law to apply" test is too narrow and should be expanded to exclude review of cases such as those involving sensitive and inherently discretionary judgments, judgments that have traditionally been nonreviewable, as well as those cases in which review would be disruptive to the agency as a practical matter.[43] In her brief opinion, Justice O'Connor concurred with the portion of the Court's opinion denying APA review, subject to the qualification that "the exception in § 701(a)(2) is [not] necessarily or fully defined by reference to statutes 'drawn in such broad terms that in a given case there is no law to apply.' "[44]

D. The "Committed to Agency Discretion" Exception

The *Webster* Court drew upon a line of cases regarding statutory

36. *Id.* at 2052 (emphasis in original) (citing 50 U.S.C. § 403(c)).
37. *Id.* at 2052-53.
38. *Id.* at 2053.
39. 401 U.S. 402 (1971).
40. *Id.* at 410 (quoting S. REP. No. 752, 79th Cong., 1st Sess. 26 (1945)); *see infra* notes 46-49 and accompanying text.
41. 108 S. Ct. at 2052 (quoting Heckler v. Chaney, 470 U.S. 821, 830 (1985)).
42. *Id.*
43. *Id.* at 2057 (Scalia, J., dissenting).
44. *Id.* at 2055 (O'Connor, J., concurring in part and dissenting in part) (quoting Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 410 (1971)).

preclusion of review and the meaning of section 701(a)(2) of the APA,[45] which provides an exception to reviewability when an action is committed to agency discretion by law. In *Abbott Laboratories v. Gardner*,[46] the Court found a strong presumption in favor of judicial review of agency action, ruling that statutory preclusion of review could be established only by "clear and convincing evidence" constituting "persuasive reason to believe that such was the purpose of Congress."[47]

The Court stated in *Citizens to Preserve Overton Park v. Volpe*[48] that the exception to the presumption of reviewability for action committed to agency discretion was "very narrow" and only applicable "in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.' "[49] The Court in *Volpe* found that there was law to apply because the relevant statutes barred the Secretary of Transportation from approving highway construction projects "through public parks if a 'feasible and prudent' alternative route exists."[50] Thus, because of the "feasible and prudent" qualification, the Court determined that the Secretary's decision was not committed to agency discretion by law.[51]

In *Heckler v. Chaney*,[52] the Court purported to follow its "no law to apply" test, but relaxed it somewhat. The applicable statute giving the Food and Drug Administration (FDA) power to enforce provisions prohibiting misbranding, and requiring FDA approval of new drugs, was found to "commit complete discretion to the Secretary" of Health and Human Services.[53] The Court stated that the "committed to agency discretion" exception required that "review is not to be had if the statute is drawn so that a court would have *no meaningful standard* against which to judge the agency's exercise of discretion."[54] Therefore, the FDA's failure to enforce a prohibition of certain drugs used in conjunction with administering the death penalty constituted an unreviewable exercise of discretion under the APA.[55]

More recently, the Court of Appeals for the District of Columbia Circuit in *Padula v. Webster*[56] found that the Federal Bureau of Investi-

45. 5 U.S.C. § 701(a)(2).

46. 387 U.S. 136 (1967).

47. *Id.* at 140-41. *See* Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667 (1986).

48. 401 U.S. 402 (1971).

49. *Id.* at 410 (quoting S. REP. NO. 752, 79th Cong., 1st Sess. 26 (1945)).

50. 401 U.S. at 405 (quoting Department of Transportation Act § 4(f), 49 U.S.C. § 1653(f) (Supp. V 1964)).

51. *Id.* at 413.

52. 470 U.S. 821 (1985).

53. *Id.* at 835.

54. *Id.* at 830 (emphasis added).

55. *Id.* at 837-38.

56. 822 F.2d 97 (D.C. Cir. 1987).

gation's (FBI) policy regarding employment of homosexuals was committed to agency discretion by law, and, therefore, was nonreviewable under the APA.[57] The court expanded the "no law to apply" test to include the agency's "formal and informal policy statements and regulations as well as . . . statutes . . . ."[58] In rejecting the homosexual's claim, the court argued that it could find neither a "meaningful statutory standard [nor] voluntarily adopted, binding policies that limit [the FBI's] discretion."[59] Thus, the court said that it could not find law to apply under the APA. Although the FBI had issued various statements and letters regarding their policy of hiring homosexuals, the court said "the FBI was very careful—if a bit clever—not to tie its hands in any way."[60]

E. Analysis

The courts have moved far from the original requirement in *Abbott Laboratories* that review under the APA can be precluded only by clear and convincing evidence.[61] The government must now show statutory language or intent precluding review, or an absence of any meaningful standard for review of the agency action, in order to overcome the presumption of reviewability.[62] *Webster*, like *Padula*, strained to find an absence of any meaningful standard that courts could apply,[63] despite the standard set forth in the NSA: "the Director . . . may . . . terminate the employment of any officer or employee of the Agency whenever (the Director) shall deem such termination *necessary or advisable in the interests of the United States* . . . ."[64]

The "no meaningful standard" inquiry[65] allows clever agencies and courts to preempt judicial review without any real inquiry into whether Congress intended to allow agencies unbridled discretion. The APA was intended "to afford a remedy for every legal wrong."[66] Congress recognized that statutes "[v]ery rarely withhold judicial review."[67] Only in the absence of "statutory standards, definitions, or other grants of power" that guide agency action was the "no law to apply" exception intended to

57. *Id.* at 100.

58. *Id.* at 100. The Supreme Court in *Heckler* had left open the question "whether an agency's rules might under certain circumstances provide courts with adequate guidelines for informed judicial review" under the APA. Heckler v. Chaney, 470 U.S. 821, 836 (1985).

59. Padula v. Webster, 822 F.2d at 100.

60. *Id.* at 101.

61. *See supra* note 47 and accompanying text.

62. *See supra* notes 52-60 and accompanying text.

63. Webster v. Doe, 108 S. Ct. at 2052; *see supra* note 42 and accompanying text.

64. 50 U.S.C. § 403(c) (emphasis added).

65. *See, e.g.*, Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 410 (1971); Heckler v. Chaney, 470 U.S. at 830. *See supra* notes 48-55 and accompanying text.

66. S. REP. No. 752, 79th Cong., 1st Sess. 9 (1945).

67. *Id.* at 26.

prevail.[68]

Under the NSA, the Director's discretion to terminate employment is not unlimited. It is qualified by allowing only terminations that the Director believes to be in the best interests of the United States. Congress arguably intended the standard to prevent arbitrary termination such as claimed by Doe. The Director should bear the burden of demonstrating a basis for his determination in court. This is the only interpretation of the NSA that gives more than lip service to the congressional requirement that the Director find terminations necessary or advisable in the national interest. The Court's "no meaningful standard" inquiry circumvents the language of section 701(a)(2) of the APA and could keep meritorious cases out of court.[69]

III. Constitutional Preclusion

Although the Court handled the issue of preclusion of constitutional review in *Webster* largely as a matter of statutory interpretation, some discussion of the background of the problem is necessary to understand the Court's decision on this issue.

A. Background

The system of separation of powers set forth in the Constitution of the United States leaves a critical question unresolved: whether Congress can pass a law containing a provision that completely deprives the federal courts of jurisdiction to review constitutional claims arising under that law. The Supreme Court acknowledged this problem in *Johnson v. Robison*,[70] in which the plaintiff challenged the constitutionality of a statute that granted educational benefits to active duty veterans but disqualified conscientious objectors who performed alternate civilian service. The statute precluded judicial review of " 'decisions of the Administrator on any question of law or fact under any law administered by the Veterans Administration.' "[71] The Supreme Court expressed a preference for construction of statutes in a manner that avoids the "serious questions concerning the constitutionality" of a statute barring federal courts from deciding constitutional claims.[72] The Court found that "no explicit provision" of the statute barred judicial consideration of the constitutional

68. *Id.*

69. For an argument concluding that such inquiry is unnecessary and "needlessly confusing" see Sunstein, *Constitutionalism After The New Deal*, 101 HARV. L. REV. 421, 478 (1987). For a recent application of the *Webster* APA analysis, see Dubbs v. CIA, 866 F.2d 1114 (9th Cir. 1989) (denying APA review under the "no law to apply" analysis).

70. 415 U.S. 361 (1974).

71. *Id.* at 367 (quoting 38 U.S.C. § 211(a)).

72. *Id.* at 366-67. *See* Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 681 n.12 (1986).

claims,[73] and upheld the veteran benefits statute under a rational basis standard.[74]

The Court of Appeals for the District of Columbia elaborated on this preference, requiring "clear and convincing" evidence that Congress intended to preclude review when "constitutional rights form the basis of the action over which judicial review is sought."[75] The court ruled that due process requires the availability of a judicial forum for resolution of constitutional claims.[76]

Article III of the U.S. Constitution bestows original or appellate jurisdiction upon the Supreme Court over all cases within "the judicial Power of the United States,"[77] but empowers Congress to make exceptions and regulations to its appellate jurisdiction.[78] This ambivalence in Article III provides no answer to the serious constitutional question that would arise if Congress were to enact a statute that clearly precluded review of constitutional claims. Although the Judiciary Act of 1789[79] granted the Court jurisdiction to hear specified types of cases without making formal exceptions to its appellate jurisdiction,[80] this "affirmative description has been understood to imply a negation of the exercise of such appellate power as is not comprehended within it."[81]

In *Ex parte McCardle*,[82] the Court accepted the view that a statutory grant of appellate jurisdiction was required for the Court to hear a case.[83] In *Martin v. Hunter's Lessee*,[84] however, the Court interpreted Article III as requiring Congress "to vest the *whole judicial power*" in the courts.[85] The Court found this power to "extend to *all cases*" arising under the Constitution and laws of the United States,[86] and that it could "be exercised to the utmost constitutional extent."[87]

Marbury v. Madison[88] established long ago that the judicial branch is charged with the ultimate responsibility of determining constitutional requirements.[89] Chief Justice Marshall proclaimed that "[t]he very es-

73. 415 U.S. at 367.
74. *Id.* at 381-82.
75. Bartlett v. Bowen, 816 F.2d 695, 699 (D.C. Cir. 1987).
76. *Id.* at 704-07.
77. U.S. CONST. art. III, § 1.
78. U.S. CONST. art. III, § 2, cl. 2.
79. Ch. 20, 1 Stat. 73.
80. *Id.* at 80-81.
81. Durousseau v. United States, 10 U.S. (6 Cranch) 307, 314 (1810).
82. 74 U.S. (7 Wall.) 506 (1869).
83. *Id.* at 514.
84. 14 U.S. (1 Wheat.) 304 (1816).
85. *Id.* at 330 (emphasis in original).
86. *Id.* at 334 (emphasis in original).
87. *Id.* at 337.
88. 5 U.S. (1 Cranch) 137 (1803).
89. *See* Cooper v. Aaron, 358 U.S. 1, 18 (1958).

sence of civil liberty certainly consists in the right of every individual to claim the protection of the laws . . . ."[90] A broad reading of Article III's grant of power to Congress to make exceptions and regulations to the judicial power would thus undermine the judicial branch's essential role in a system of separation of powers.[91] Nevertheless, the Court itself has precluded constitutional review in the past. For example, the Court has held that "political questions" are nonjusticiable, in part because of the doctrine of separation of powers, and in part because of the absence of an adequate judicial standard to apply.[92]

B. The *Webster* Decision

The *Webster* Court rejected the Government's argument that judicial review would jeopardize national security and that Congress intended to preclude constitutional review.[93] "[I]n part to avoid the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim,"[94] the Court found that any intent by Congress to preclude review of constitutional claims must be "clear."[95] Presumably, this standard would require some specific mention of the unavailability of constitutional review in the law itself. The Court found no such clear intent in its reading of the NSA.[96]

In his dissent, Justice Scalia argued at length that Congress may constitutionally determine which claims require a judicial remedy, making the "serious constitutional question" feared by the Court an illusory one.[97] He contended that Congress, by enacting section 102(c) of the NSA, had precluded review of both the statutory and constitutional claims.[98] He stated that the Court was inconsistent in finding the decision both unreviewable under the APA and reviewable under the Constitution, since Congress intended termination decisions to be the Director's

90. 5 U.S. (1 Cranch) at 163.

91. *See* THE FEDERALIST No. 48 (J. Madison); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); U.S. v. Nixon, 418 U.S. 683 (1974).

92. *See* Baker v. Carr, 369 U.S. 186 (1962); Coleman v. Miller, 307 U.S. 433 (1939). For other examples of preclusion of constitutional review by the Court itself, see Frothingham v. Mellon, 262 U.S. 447 (1923) (case dismissed for lack of injury required for standing to sue); DeFunis v. Odegaard, 416 U.S. 312 (1974) (case dismissed on account of mootness); United Pub. Workers v. Mitchell, 330 U.S. 75 (1947) (case dismissed because claim not ripe).

93. 108 S. Ct. at 2054.

94. *Id.* (citing Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 681 n.12 (1986)).

95. *Id.* at 2053 (citing Johnson v. Robinson, 415 U.S. 361, 373-74 (1974)).

96. *Id.* For a recent application of the *Webster* constitutional preclusion analysis, see Dubbs v. CIA, 866 F.2d 1114, 1120 (9th Cir. 1989) (finding that the CIA's denial of a security clearance to a homosexual is reviewable under the Constitution).

97. 108 S. Ct. at 2058-60 (Scalia, J. dissenting).

98. *Id.* at 2058, 2060-61 (Scalia, J. dissenting).

alone.[99]

Justice O'Connor dissented with respect to the constitutional preclusion portion, arguing that Congress can and did preclude constitutional review of the Director's decisions under section 102(c) for the inferior courts only.[100] She based this argument on the President's exclusive constitutional power over international relations.[101]

C. Analysis

The Court's avoidance of the difficult constitutional question is understandable. The NSA contains no language specifically precluding judicial review of constitutional claims. Therefore, any attempt by the Court to resolve the inherent tension in our delicate system of separation of powers and in Article III itself would have been inappropriate.

If a case presented itself in which such preclusion were explicit, one could only hope the Court would not subordinate national ideals for national security. Since *Marbury vs. Madison*,[102] the Court has largely recognized and protected its role under our tripartite form of government to interpret and apply the Constitution. Any derogation of the judiciary's role of implementing the Constitution would undermine both the intent of the Framers and the liberties they sought to protect. As the Court stated in *United States v. Robel*:[103] "It would indeed be ironic if, in the name of national defense, we would sanction the subversion of those liberties . . . which make the defense of the Nation worthwhile."[104]

IV. Equal Protection Analysis

The Court in *Webster* avoided not only the issue of the constitutionality of preclusion of constitutional review, but also the issue of the availability of equal protection analysis to homosexuals who allege governmental discrimination on the basis of sexual orientation. Thus, the Court dodged the important, unresolved question at the heart of the case: whether homosexuals constitute a suspect class entitled to heightened judicial scrutiny when faced with discriminatory governmental action.

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99. *Id.* at 2060 (Scalia, J., dissenting).

100. *Id.* at 2054-55 (O'Connor, J., concurring in part and dissenting in part). Justice O'Connor presumably relied on Article III, § 1 of the Constitution for the proposition that Congress' power to "ordain and establish" the inferior courts gives it authority to curtail their judicial power. Justice Scalia adopted a similar argument in his dissent. *See id.* at 2058 (Scalia, J., dissenting).

101. *Id.* at 2055 (O'Connor, J., concurring in part and dissenting in part).

102. 5 U.S. (1 Cranch) 137 (1803). *See supra* notes 88-91 and accompanying text.

103. 389 U.S. 258 (1967).

104. *Id.* at 264.

The Court did not disturb the court of appeals' decision that Doe had presented an arguable constitutional claim of impermissible discrimination on the basis of sexual orientation.[105] Although the Government argued that Doe's admission in his amended complaint that he had engaged in homosexual activities was sufficient to dispose of his constitutional claims,[106] the Court remanded the case to the District Court to "address respondent's constitutional claims and the propriety of the equitable remedies sought."[107]

The most recent opportunity taken by the Court to adjudge the constitutional rights of homosexuals was in *Bowers v. Hardwick*,[108] which devastated the gay community by denying any privacy right for sexual relations between homosexuals.[109] In *Webster*, however, the Court offered some hope of greater sensitivity to the rights of homosexuals by remanding the case for further consideration of Doe's constitutional claims. This indicates some possibility that the Court will establish equal protection rights for homosexuals in the future.

A. *Bowers v. Hardwick* and Its Aftermath

In 1986 the Court faced a challenge to a Georgia statute making sodomy a criminal offense. Respondent, a homosexual, questioned the constitutionality of the sodomy statute after being charged with violation of the statute for engaging in the act with a consenting partner in his own bedroom.[110] The Court, in an opinion by Justice White, undertook to decide the question "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of many States that still make such conduct illegal and have done so for a very long time."[111]

Finding that sodomy bears no resemblance to family, marriage, or procreation, the Court first determined that homosexual activity is not protected by any of the existing line of cases upholding a constitutional right of privacy under the Due Process Clause of the Fourteenth Amendment.[112] Next, observing that prohibition of sodomy is ancient and widespread, the Court refused to bestow heightened judicial protection on homosexual sodomy because it did not recognize the right to engage in

105. 108 S. Ct. at 2054 n.9.

106. Brief for the Petitioner, *supra* note 6, at 27-28 n.23.

107. 108 S. Ct. at 2054.

108. 478 U.S. 186 (1986).

109. *See infra* notes 111-114 and accompanying text.

110. 478 U.S. at 187-88.

111. *Id.* at 190.

112. *Id.* at 189. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973) (right of privacy encompasses a woman's decision to have an abortion); Griswold v. Connecticut, 381 U.S. 479 (1965) (right of privacy protects the use of contraceptives by married couples); Prince v. Massachusetts, 321 U.S. 158 (1944) (right of privacy encompasses family relationships).

such activity as a fundamental liberty interest.[113] The Court instead applied a rational basis test, claiming that "majority sentiments about the morality of homosexuality" were adequate to support the statute.[114]

Bowers provided new ammunition that some courts have used to continue the assault on homosexual rights already begun with cases like *Dronenburg v. Zech*.[115] In *Dronenburg*, a Navy petty officer discharged for homosexual conduct brought an action challenging the Navy's policy and seeking an order for his reinstatement on the grounds that the discharge violated his right to privacy and his right to equal protection of the laws. Judge Robert Bork spoke for a three-judge panel, which included then-Judge Scalia, in finding that private homosexual conduct was not constitutionally protected.[116] Citing the interest of "morale and discipline" in the military, the possibility of relationships developing between members of the Navy, "the possibility of homosexual seduction" by military superiors, and the dislike and disapproval likely to be generated among those members of the armed forces who find homosexuality morally offensive,[117] the court refused, much as the Supreme Court did in *Bowers*, to extrapolate, from the cases establishing a constitutional right to privacy, a general principle in favor of protecting homosexuals' right to engage in sex.[118] The court also asserted without explanation that a favorable resolution of appellant's equal protection argument "is to some extent dependent upon" a finding of a right of privacy.[119] Apparently analyzing the equal protection claim under a fundamental rights theory only, the court made no mention of the other branch of the modern equal protection standard applying heightened scrutiny to suspect classifications.[120] Thus, the court disposed of appellant's equal protection claim without further consideration.

The D. C. Circuit followed this approach to equal protection analysis in *Padula v. Webster*.[121] In *Padula*, however, the issue presented was whether homosexuals constitute a suspect or quasi-suspect class, not

113. 478 U.S. at 191-94.

114. *Id.* at 196.

115. 741 F.2d 1388 (D.C. Cir. 1984).

116. *Id.* at 1396.

117. *Id.* at 1398.

118. *Id.* at 1396.

119. *Id.* at 1391.

120. *See* United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938); Craig v. Boren, 429 U.S. 190 (1976). In San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973), Justice Powell spelled out the modern equal protection standard, building on Shapiro v. Thompson, 394 U.S. 618 (1969). The test outlined in *Rodriguez* indicates that when governmental action abridges a fundamental right or creates a class with "traditional indicia of suspectness," it is subject to the "most exacting scrutiny," and the government must show both that it has a compelling interest in making the classification and that the law is narrowly tailored to legitimate governmental interests to withstand this strict scrutiny. 411 U.S. at 28. *See Forum: Equal Protection and the Burger Court*, 2 HASTINGS CONST. L.Q. 645, 646 (1975).

121. 822 F.2d 97 (D.C. Cir. 1987).

whether homosexuals have a fundamental right to engage in sodomy.[122] Nevertheless, the court defined the class "as persons who engage in homosexual conduct,"[123] and interpreted *Dronenburg* to have settled the question of equal protection "by its conclusion that the Constitution does not afford a privacy right to engage in homosexual conduct."[124] Thus, the court rejected appellant's equal protection argument finding that it would be "anomalous . . . to declare status defined by conduct that states may constitutionally criminalize as deserving of strict scrutiny . . . ."[125]

Other courts have evaluated equal protection claims of homosexuals independently of the fundamental rights question foreclosed by *Bowers*. In *High Tech Gays v. Defense Industrial Security Clearance Office*,[126] plaintiffs challenged the Department of Defense's practice of subjecting active homosexual applicants for security clearance to increased investigation, delays, and mandatory adjudication by a committee set up to review only candidates with adverse or questionable information in their preliminary background checks.[127] The court found that "[Bowers v.] *Hardwick* does not address the level of scrutiny classifications that disadvantage lesbians and gay men should receive under the equal protection clause. *Hardwick* holds only that under the due process clause lesbians and gay men have no fundamental right to engage in sodomy."[128] The court decided that homosexuals constitute a quasi-suspect class.[129]

The *High Tech* court also distinguished "sodomy" as defined by the Georgia statute in *Bowers v. Hardwick* from general "affectional and sexual intimacy" and found a fundamental right to engage in the latter.[130] Although the court acknowledged a significant governmental interest in protecting national security, it determined that the Department of Defense's policies and procedures regarding homosexuals were "neither closely related, substantially related, or rationally related to the government's interest . . . ."[131] Thus, the court concluded that the government's actions were violative of homosexuals' constitutional rights of privacy and equal protection.[132]

In *Watkins v. U.S. Army*,[133] the Ninth Circuit faced another challenge to employment discrimination against homosexuals in the national

122. 822 F. 2d at 102.
123. *Id.*
124. *Id.* at 103 (citing Dronenburg v. Zech, 741 F.2d at 1391 & 1398).
125. *Id.* The Seventh Circuit recently adopted this approach. Ben-Shalom v. Marsh, 881 F. 2d 454 (7th Cir. 1989).
126. 668 F. Supp. 1361 (N.D. Cal. 1987).
127. *Id.* at 1366.
128. *Id.* at 1369 (citing Bowers v. Hardwick, 478 U.S. at 188).
129. *Id.* at 1368.
130. *Id.* at 1370.
131. *Id.* at 1377.
132. *Id.*
133. 875 F.2d 699 (9th Cir. 1989) (en banc).

security context. Watkins, an open homosexual, had been the subject of repeated Army investigations during his distinguished fourteen-year career with the Army because of his admissions of homosexuality.[134] After promulgating a regulation mandating the discharge of all homosexuals in 1981,[135] the Army decided to discharge Watkins.[136] A panel of the Ninth Circuit, in an opinion by Judge William Norris, initially found that the Army's regulations discriminated on the basis of homosexuality (or sexual orientation), as distinguished from sexual activity, and that nothing in *Bowers* made discrimination by the government on the basis of sexual orientation permissible.[137] The panel determined that *Bowers* was "a substantive due process case," and its concern about limiting judicial intervention applied only to interpretation of the unwritten right of privacy.[138] Proceeding to Watkins' equal protection claim, the panel concluded that homosexuals constitute a suspect class meriting strict scrutiny and that "the regulations are not necessary to promote a legitimate compelling governmental interest."[139]

On rehearing en banc, the Ninth Circuit held that the Army was estopped from barring Watkins' reenlistment on the basis of his homosexuality.[140] Thus, the court found it "unnecessary to reach the constitutional issues raised" in the panel's decision.[141]

B. Analysis

Although indicating a possible willingness to consider protection of homosexuals from improper classifications by government, the *Webster* decision failed to clear up the confusion in this area of law. The message from *Bowers* was indecisive and has produced inconsistent results. It is possible to interpret the decision as *Padula* did and disregard any equal protection claims of members of the class whose "defining characteristic," the practice of sodomy, may be constitutionally criminalized. It is also possible to view homosexuality as a suspect or quasi-suspect classification deserving heightened judicial scrutiny[142] when faced with discriminatory governmental practices.

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134. *Id.* at 701-04.

135. *Id.* at 702.

136. *Id.* at 702-03.

137. 847 F.2d 1329, 1339 (9th Cir. 1988), *vacated and withdrawn*, 875 F.2d 699 (9th Cir. 1989).

138. 847 F.2d at 1340.

139. *Id.* at 1351.

140. 875 F.2d at 704-05.

141. *Id.* at 705. *Contra id.* at 711 (Norris, J., concurring); *Id.* at 731 (Conby, J., concurring).

142. This Comment uses the term "heightened judicial scrutiny" to include both strict scrutiny and intermediate scrutiny. *See supra* note 120 and accompanying text, and *infra* notes 150-154 and accompanying text.

The Supreme Court has identified several factors bearing on the determination of whether a classification deserves heightened judicial scrutiny in an equal protection analysis. These include history of purposeful discrimination,[143] relationship of the trait that defines the class to ability to perform or contribute to society,[144] unique disabilities faced by the class because of prejudice and antipathy,[145] immutability of the trait,[146] and impairment of the group's political voice, making it a discrete and insular minority.[147] Substantial evidence exists that gays have long suffered from ridicule and discrimination, that their homosexuality does not lessen their capability to contribute to society, and that homosexuals face great disabilities in employment and social life, as evidenced by the tendency of many to hide their homosexuality even today.[148] In addition, increasing evidence indicates that homosexuality is at least partially immutable.[149]

In *Craig v. Boren*,[150] the Court articulated a formal standard of review known as intermediate scrutiny: "classifications by gender must

143. *See* Cleburne v. Cleburne Living Center, 473 U.S. 432, 441 (1985); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 28 (1972).

144. *See* Frontiero v. Richardson, 411 U.S. 677, 686 (1973).

145. *See Cleburne*, 473 U.S. at 440-44; *Rodriguez*, 411 U.S. at 28.

146. *See Frontiero*, 411 U.S. at 686.

147. *See, e.g.*, United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938) (prejudice against discreet and insular minorities may merit heightened judicial scrutiny).

148. *See* M. WEINBERG & C. WILLIAMS, MALE HOMOSEXUALS: THEIR PROBLEMS AND ADAPTATIONS 17-26 (1974) (arguing that the Judeo-Christian tradition and American Puritanism have contributed to an antisexual morality in the United States that degrades and penalizes homosexuality as deviant sexual expression); V. BULLOUGH, HOMOSEXUALITY: A HISTORY 1-2 (1979) (describing the adverse effects of the derogatory terms, stereotypes, and misconceptions applied to homosexuals); J. KATZ, GAY AMERICAN HISTORY: LESBIAN AND GAY MEN IN THE U.S.A. 11-128 (1976) (documenting oppression of homosexuals); A. BELL & M. WEINBERG, HOMOSEXUALITIES 229-30 (1978) (arguing that irrational stereotypes held against homosexuals have resulted in misconceptions and discrimination); W. DUBAY, GAY IDENTITY: THE SELF UNDER BAN 96-97 (1987) (arguing that gay-identified persons have been stigmatized and oppressed); J. D'EMILIO & E. FREEDMAN, INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA 292-94, 347 (1988) (depicting social, political and physical attacks on homosexuals). *See also* Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 HARV. L. REV. 1285 (1985) (arguing for application of heightened scrutiny under the equal protection clause to classifications based on homosexuality); Note, *An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality*, 57 S. CAL. L. REV. 797 (1984) [hereinafter Note, *An Argument*] (arguing that homosexuality should be a suspect classification).

149. Some researchers have concluded that sexual preference is immutable because of biological predisposition or factors in early development. *E.g.*, A. BELL, M. WEINBERG & S. HAMMERSMITH, SEXUAL PREFERENCE: ITS DEVELOPMENT IN MEN AND WOMEN 190-92, 212-20 (1981) (finding that homosexual orientation is deeply ingrained and may have a biological basis); S. HOLBROOK, FIGHTING BACK: THE STRUGGLE FOR GAY RIGHTS 9-10 (1987) (arguing that sexual preference is not determined by individual choice). *See* Note, *An Argument*, *supra* note 148, at 817-21 and authorities cited therein.

150. 429 U.S. 190 (1976).

serve important governmental objectives and must be substantially related to achievement of those objectives."[151] The Court also applied this "quasi-suspect" classification to illegal aliens in *Plyer v. Doe*.[152] Because "undocumented status is not irrelevant to any proper legislative goal" and is not "an absolutely immutable characteristic since it is the product of conscious, indeed unlawful, action,"[153] the Court applied intermediate scrutiny to hold a Texas statute denying public education to illegal alien children violative of equal protection.[154]

Homosexuality is amenable to intermediate scrutiny analysis, especially in the national security context. As *Bowers*, *Dronenburg*, and *Padula* indicate,[155] homosexuality and homosexual activity are not irrelevant to all legitimate legislative goals, because of society's interest in maintaining morality, discipline in the military, and public health, especially in light of the AIDS crisis. The classifications should be forced to closely serve proper and important governmental purposes, however, because of the discrimination and disabilities faced by homosexuals.

The Court should act now to curb the confusion and unfairness surrounding *Bowers*. It should tackle the difficult issue of equal protection for homosexuals and the "irrational prejudice and outmoded stereotypes"[156] that have plagued homosexuals since ancient times.[157]

Conclusion

In *Webster v. Doe* the Supreme Court laid the foundation for a decision extending heightened equal protection analysis to governmental classifications based on sexual orientation. Although the Court chose to utilize its "no meaningful standard" inquiry to circumvent the language of the APA and deny judicial review thereunder, it did preserve the right of constitutional review of CIA employment termination decisions notwithstanding Congress' grant of broad discretion. This preservation

151. *Id.* at 197. *See also* Califano v. Webster, 430 U.S. 313 (1977) (upholding social security provision affording women a chance at higher old-age benefits as serving the important governmental objective of remedying past economic discrimination); Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982) (striking down a statute allowing only females to attend nursing school as not substantially related to any important governmental objective).

152. 457 U.S. 202 (1982).

153. *Id.* at 220.

154. *Id.* at 223-50.

155. Bowers v. Hardwick, 478 U.S. 186 (1986), *see supra* text accompanying notes 110-114; Dronenburg v. Zech, 741 F. 2d 1388 (D.C. Cir. 1984), *see supra* text accompanying notes 115-120; Padula v. Webster, 822 F. 2d 97 (D.C. Cir. 1987), *see supra* text accompanying notes 56-60 & 121-125.

156. High Tech Gays v. Defense Indus. Sec. Clearance Office, 668 F. Supp. 1361, 1373 (N.D. Cal. 1987).

157. *See Bowers*, 478 U.S. at 189-91; V. BULLOUGH, HOMOSEXUALITY: A HISTORY 2-16 (1979).

of constitutional review was not only prudent; it protected the preeminence of the Constitution and the courts' power to enforce it.

The Court should now use this power to address the questions left open by *Bowers*. The Court refused to entertain the government's argument in *Webster* that Doe had failed to present a valid constitutional claim, but it did nothing to settle the disagreement in the lower courts over the proper level of scrutiny to be applied.

Since homosexuals share many of the same disabilities faced by other protected classes and have long suffered discrimination and prejudice, a heightened level of scrutiny should be applied to classifications based on sexual orientation. Such a decision would be a logical extension of the precedent that this Court has inherited, which has boldly contributed to the end of discrimination based on race, alienage, national origin, illegitimacy and gender. *Webster*'s preservation of constitutional review for discretionary acts of agencies of the federal government has laid the foundation. Now the Court should use the strong constitutional framework of equal protection to uphold the values it is designed to protect.

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