HARVARD LAW SCHOOL LAMBDA SECOND ANNUAL GAY AND LESBIAN LEGAL ADVOCACY CONFERENCE "DON'T ASK, DON'T TELL"*

MARCH 2–3, 2007
HARVARD UNIVERSITY
CAMBRIDGE, MASSACHUSETTS

I. OPENING REMARKS: JOSEPH C. STEFFAN 1173
II. PANEL ONE: IS "DON'T ASK, DON'T TELL" GOOD PUBLIC POLICY? 1185
III. PANEL TWO: WHAT DOES *LAWRENCE V. TEXAS* MEAN FOR THE FUTURE OF "DON'T ASK, DON'T TELL"? 1205
IV. PANEL THREE: THE CONTOURS OF JUDICIAL DEFERENCE TO MILITARY PERSONNEL POLICIES 1230
V. PANEL FOUR: SERVICE MEMBER EXPERIENCES 1255
VI. GALLA LEADERSHIP AWARD: PRESENTED TO C. DIXON OSBURN ON BEHALF OF SERVICEMEMBERS LEGAL DEFENSE NETWORK 1286

I. OPENING REMARKS**

JOSEPH C. STEFFAN***

MR. SORKIN:

Welcome to HLS Lambda's Second Annual Gay and Lesbian Legal Advocacy Conference. This conference was born out of last year's Supreme Court decision in *Forum for Academic and Institutional Rights, Inc. (FAIR) v. Rumsfeld*.[1] Almost one year ago, on March 6, 2006, the Court ruled that the Solomon Amendment was constitutional and that law schools around the

* Transcribed remarks.

The Editors of the *Duke Journal of Gender Law & Policy* would like to thank the students of Harvard Law School Lambda for hosting this extraordinary conference and for the opportunity to publish these remarks. In particular, we would like to thank Harvard Law student Brian A. Schroeder for coordinating with the panelists and the Journal throughout this project.

** Friday, Mar. 2, 2007, 12:00 p.m.–1:45 p.m. EST, Harvard Faculty Club Library.

*** Attorney Joseph C. Steffan was the plaintiff in *Steffan v. Cheney*, the first case challenging the military's policy of discriminating on the basis of sexual orientation. *See* 733 F. Supp. 121 (D.D.C. 1989) (dismissing claim based on discovery violation), *rev'd*, 920 F.2d 74 (D.C. Cir. 1990) (reversing dismissal for discovery violation), *remanded to* 780 F. Supp. 1, 13 (D.D.C. 1991) (granting summary judgment on merits), *aff'd en banc sub nom.*, Steffan v. Perry, 41 F.3d 677 (D.C. Cir. 1994) (affirming summary judgment on merits).

Mr. Steffan was introduced by Harvard Law students Adam R. Sorkin and Brad Rosen.

1. 547 U.S. 47 (2006).

nation, including Harvard, had to allow military recruiters on their campuses or give up their university-wide funding.

For the over 160 schools in the American Association of Law Schools, allowing a discriminatory employer to recruit on campus was and is a violation of their mutually agreed-upon nondiscrimination policy, which includes equal opportunity for students to obtain employment without discrimination. For large universities such as Harvard, this would have meant giving up all of their federal money, including public health and medical research money. For Harvard, that was over $400 million. At oral arguments in the *FAIR* case, Justice Breyer suggested that the remedy for the military's discriminatory speech was not less speech but more speech. And so we at HLS Lambda got to talking.

We decided to turn our focus away from the minutiae of the Solomon Amendment to the broader discrimination of the "Don't Ask, Don't Tell" policy. We sought to organize a conference to bring together students, scholars, and practitioners to discuss "Don't Ask, Don't Tell" not solely as an intellectual exercise, but to rekindle the national dialogue about the policy almost a decade and a half after its codification.

Our conference comes on the heels of Representative Marty Meehan's reintroduction of the Military Readiness Enhancement Act this past Wednesday. His bipartisan bill, with 109 co-sponsors, would repeal "Don't Ask, Don't Tell" and allow men and women to serve their country without respect to their sexual orientation.

This coming Wednesday, [March 7, 2007,] the First Circuit Court of Appeals will hear oral arguments in the case of *Cook v. Gates*, a constitutional challenge to "Don't Ask, Don't Tell" brought by twelve discharged veterans who are seeking reinstatement in the U.S. Armed Forces.[2] And if this wasn't enough speech, at the end of this month, Servicemembers Legal Defense Network will hold its annual lobby days in support of Congressman Meehan's bill.

So I welcome you to the conference. I challenge you to keep the dialogue going after the conference adjourns. And before I turn the mic over to Brad Rosen, our Communications Director, who will introduce our opening speaker, Joseph Steffan, I would like to just thank all of our generous law firm sponsors for their support and thank all of you for attending and our panelists and moderators for generously donating their time and wisdom to make this all possible. Thank you.

MR. ROSEN:

Today we have a very special speaker. This is kind of important; we were actually just talking about this. He asked how old I was, and I gave a certain date and said, "Yes, you were fighting for these rights before I even knew I was gay."

MR. STEFFAN:

Before you were walking, I think.

2. Cook v. Gates, No. 06-2313 (1st Cir. argued Mar. 7, 2007).

MR. ROSEN:

Before I was walking. So I think one of the things that's important today, for many of us at this conference, the issues we're discussing are oftentimes merely academic to us. So for myself, I'm not going to be serving in the military any time soon. I'm also not going to be getting married any time soon, although I would like to. But in the fight and struggle for these rights, we oftentimes take positions that don't directly affect us, at least not at the current time.

Joe Steffan is an individual that these rights actually mattered to. He was actually personally involved with this particular fight and through an unfortunate sequence of events is no longer associated with the United States military.

Ranked as one of the highest midshipmen in his class in 1987, he had to leave the Naval Academy at Annapolis. His legal battle is well documented in both public media and a book that he wrote called *Honor Bound*.[3] Additionally, it's been covered in many other venues. Today he is here to speak to us about "Don't Ask, Don't Tell" in the larger context of the gay rights movement and share with us some of his personal views.

Those of you that know me know that brevity is not exactly my strong point, but today I will endeavor to strive to be a better person, which I think we should all do, and to that end, without anything further, I give you Joe Steffan.

MR. STEFFAN:

Thank you, Brad.

As those of you who know me realize, I never do this any more. I had my fifteen minutes of fame. It was fun while it lasted, and I'm actually grateful to have moved beyond it. One of the nice things about having been a minor celebrity is that you can go back to being just a regular person. And it's quite amusing to me, actually, that so many people in the room not only don't know who I am but were four years old when all of this happened.

It's also interesting to be recorded, which is bringing back memories of my deposition at the Department of Justice by the military, but hopefully I'll say something worth putting in writing.

Part of the reason I made the decision to speak today—which, again, in the last ten years I think I've spoken publicly maybe three times on the issue—is because there is a rather important anniversary approaching for me that I don't think, Brad, even you were aware of, and that is that April 1st next month will be the 20th anniversary of my discharge from the Naval Academy—at least that event that I associate most fundamentally with my discharge. That was the day when I went into the Academic Board, which was the second of a two-stage discharge process at the Naval Academy.

As Brad mentioned, I was at the time a battalion commander, which made me one of the ten highest-ranking midshipmen at the Naval Academy, with direct command over one-sixth of the Academy's 4500 midshipmen. I guess that's, what, about 800. Like many gay people, I had come to terms with my

3. JOSEPH STEFFAN, HONOR BOUND: A GAY AMERICAN FIGHTS FOR THE RIGHT TO SERVE HIS COUNTRY (1992).

sexual orientation while I was in college and chose initially to hide it. Ultimately, for a variety of personal reasons, I decided to confide in two friends of mine, which led to presumably one of them discussing it with someone else. Eventually a rumor started at the Naval Academy that the Naval Investigative Service was called in to investigate. So my friends were called into interrogations, which I learned about.

Having learned about the ongoing investigation, it seemed fairly clear to me that a chain of events had been set into motion that I wanted to participate in, which culminated in a meeting with the Commandant of Midshipman in which he asked me the simple question, "Are you willing to state that you're gay?," to which I responded, "Yes, sir." That was, in retrospect, I realize, my real coming out. The unusual context in which it occurred put in motion the events that culminated in my appearing before the Academic Board.

The Academic Board was preceded by a Military Performance Board, which is an administrative prerequisite to the discharge mechanism at the Naval Academy, in which, because I was, under then-enacted military regulations, incapable of military duties because I had stated I was a homosexual, my previous seven semesters of A's in military performance were changed to F's. I was then recommended to the Academic Board for discharge on the basis of having received F's in military performance.

Despite a plea that I be allowed to continue the remaining few weeks to graduation, the Academic Board chose to recommend my discharge to the Secretary of the Navy. At that point I was advised that it was simply an administrative mechanism, and the only choice I really had was whether to wait those six to eight weeks at the Naval Academy or to move on with my life. I chose to submit my resignation and move on with my life.

At the same time I had called my parents on the phone in Warren, Minnesota, to advise them that they should cancel the hotel reservations they had made the day I was inducted four years earlier for my graduation, which they had been advised to make because of the press of parents making those reservations. That was my second coming out. After dwelling on my discharge for about a year, I decided to fight back. I was inspired by examples like Perry Watkins and Leonard Matlovich and Miriam Ben-Shalom. And I approached—through a friend of mine, Copy Berg, who was himself a military plaintiff and also a Naval Academy graduate, I was put in touch with Lambda Legal Defense and, significantly, Tom Stoddard, who was then their executive director.

And because, of course, it was a perfect case—you know, you had a young, Midwestern guy who did well at the Naval Academy and was discharged based solely on a statement—they were ultimately convinced to take the case. I believe it was in December of 1988 that we filed our complaint in the Federal District Court for the District of the District of Columbia. I hope, Dixon, you will interject if I make any substantive errors of law, because although I am now myself an attorney, I claim no expertise whatsoever in this subject matter, other than my own personal experience. I'm just a technology lawyer.

The lawsuit was executed with, I think, a very well-considered media strategy as well. I think what distinguished our case in many ways from those that preceded it was that we had a media strategy, and we had literally a

Beverly Hills publicist doing our media strategy, Howard Bragman, whom many of you know as well.

And the case garnered immediate national attention. Literally, you know, one day I was driving to my job in Fargo, North Dakota, where I was in technical support for a software company, and the next day I was flying to appear on Nightline with Lawrence Korb, who I'm glad to see is here today, to debate then-Congressman Bob Dornan from Orange County, California, who you may recall as one of the most troglodytic opponents of this issue who has ever manifested himself.

It was an amazing experience for me to make that transition from obscurity to national attention, and what ensued was a six-year roller-coaster—briefly summarized, we lost, we won, we lost, we won, we lost.

We were heard by Oliver Gasch, a District Court judge in D.C., who was a former military lawyer, and who you may recall we sought a writ of mandamus to remove from the case when he referred to me twice in open court as a "homo," which the D.C. Circuit chose not to hear. I think it was a *per curiam* dismissal, essentially a dismissal without an opinion, I think in part because he had announced his retirement as the appeal was pending, and when the opinion was rendered he announced that he would only retire when his current case load had been resolved, of which ours was one.

The context of these events is also extremely reminiscent to me now, because, of course, as you know, we were in a Bush Administration. We were in a Gulf War in Iraq. And we were in a presidential election cycle in which a candidate was expressing a desire to overturn this policy.

I'm particularly proud that my case is entitled *Steffan v. Cheney*,[4] which is also somewhat reminiscent, because I love to tell people that I was suing Dick Cheney before it was in vogue.

To make the legal story short, because many of you are far more expert in this issue in my case than I am, we obviously were making arguments principally based on equal protection, which Judge Gasch concluded—we failed in the District Court. I should note, however, that there was an earlier appeal on a technical matter.

The first appeal was actually an interesting procedural appeal in which the military had tried to get me to talk about my sexual activity, and we had said, no, it has never been relevant to the case, because the regulation and the facts on which I was discharged required only a statement, and those were the only facts in evidence. There had never been an allegation of misconduct. And Judge Gasch said, "No, saying you're gay means that you're engaged in sexual conduct. It's relevant." We said, "No, it's not," and he dismissed us on a discovery violation.

Now, interestingly, this particular phase of the case is what is now in a number of procedural casebooks being used in law schools today and how many people are familiar with the case. The D.C. Circuit issued a unanimous

4. Steffan v. Cheney, 287 U.S. App. D.C. 143 (D.C. Cir. 1990).

reversal that, no, it was not relevant to the case, because it was not a basis on which the legal claim rested or any of the facts rested.

So we went back down to Judge Gasch on the merits, and he again ruled against us. And we went up to yet another appeal at the D.C. Circuit Court of Appeals, and we won yet another unanimous reversal, this time in an opinion that was written by [Judge] Abner Mikva, joined by the other two judges whose names I don't recall. Again, I'm not an expert, but I have read that opinion on a couple of occasions. It was really, as I recall, a beautifully succinct statement of the issue. I believe, and again correct me if I'm wrong, the basis for the equal protection decision was a rational basis as opposed to a quasi-suspect or suspect basis. But that's sort of beside the point. One of the interesting things in the opinion, a parallel drawn in the opinion, was the Sedition Act and the fact that you must have the ability to engage in speech. And in the context, for example, of the Sedition Act, you could criticize the government and that wasn't criminal—it could not be punished.

And Judge Mikva and his colleagues drew a parallel in the fact that I had simply made a statement and that there was nothing in that statement which could be harmful to the military and form the basis of government action.

The case went up to appeal—actually, the case was taken by the D.C. Circuit en banc and chosen for an immediate appeal to the en banc Appellate Court, which is a fairly unusual administrative procedure as well. But basically it foreclosed an opportunity at that point for the then, I believe, Clinton Administration to take the appeal to the Supreme Court.

At the same time, of course, in the context of these events, the presidential election was in process, and then-Governor Clinton had announced that he would, upon winning the election, sign an executive order overturning the military's policy. All of these things came together: my case; the presidential election; the emergence of other prominent gay and lesbian military service members such as Jim Holobaugh, whom you may recall, from Washington University in St. Louis, who was a prominent ROTC case, and Greta Cammermeyer, of course, who also became very prominent at that time.

And yet again here is a link to Harvard, because Jim and I came to Harvard and MIT to speak at the peak of what was yet another parallel sort of thing going on, which was the stepping into this fight by universities, including Harvard and MIT, to debate whether their ROTC programs should be allowed to remain on campus, even though they openly discriminated on the basis of sexual orientation. And this lent intense momentum to the political dynamic of the issue, which led to, I believe it was, an MIT ROTC student, Rob Bettiker, coming out. And we all came to Harvard and to MIT to speak, as we did at many different colleges at that time.

Of course, as you know, following his election, President Clinton did not promptly issue an executive order, which in my feeling was potentially reflective of a lack of sincerity, but in any case a critical strategic mistake, because it created a window of opportunity, and into that window of opportunity stepped Senator Sam Nunn, who I believe at the time was the head of the Armed Services Committee.

Also stepping into that vacuum was [Gen.] Colin Powell, then Chairman of the Joint Chiefs of Staff. Both of them engaged in a subtle but quite insidious marketing effort, if you will, to cause public reaction to the plan. And those of you who were around at the time and not four years old will remember that it literally involved pictures appearing in the New York Times of Sam Nunn inspecting bunks on submarines to show how closely juxtaposed they were.

And really at that point the public opinion swung. A very interesting parallel to where we are today is that the Gallup polls that were being performed leading up to and following the election were finding sixty percent of Americans in favor of overturning the ban and forty percent against. After the Sam Nunn-Colin Powell dynamic took place, those numbers switched in the course of months. They inverted, such that forty percent were in favor and sixty percent opposed to changing the policy.

There was also a signal by [Rep.] Barney Frank, and I don't recall the specific facts, but essentially a nod was given by Barney that potentially a compromise could be had, which I don't understand well enough to know how much, if at all, to blame him. But the net result was that "Don't Ask, Don't Tell" began to gain momentum as a potential compromise and was spun really as a way in which gay people were going to have a better life in the military if they were willing to simply not speak about it.

At this time I had also entered law school. I went to UConn [University of Connecticut, Hartford]. I chose, interestingly, not to apply to Harvard and Yale, because I went to a military school, my grades weren't amazing, and I wasn't sure I could afford it. So maybe if I went to, you know, Harvard Law, I would be an important Wall Street lawyer or something some day, but I chose to go to UConn, and now I'm a Wall Street lawyer. So maybe that wasn't such a bad thing. But anyway I went to UConn in part because I wasn't sure if I wanted to practice public interest law, and I didn't want to have a large debt hanging over my head if I chose to go in that direction.

In retrospect do I regret not applying to Harvard? Maybe, because I think Harvard has a good reputation for trying to create diverse classes, and I think having been a minor celebrity at the time, maybe I would have snuck in. But nonetheless, I'm here now, so . . . .

Another amusing caveat, again, just in this whole mix of events, is that while I was at UConn, I walked onto campus one day and saw a paper had been put up announcing the pending arrival of military recruiters who were going to be on campus to recruit for the JAG Corps. And I was frankly stunned that they were coming and said, "Why are we letting this happen?"

I got together with some of my classmates, and we decided to restart the Gay and Lesbian Law Students Association, which had been defunct in recent years, and we went to the Attorney General's Office next door, Dick Blumenthal, and basically said, "Hi, Mr. Blumenthal. We're law students, and we would really like you, as the representative of the law school, to prevent the military from coming on campus. And oh, by the way, we did some research, and here in Connecticut law there's a little clause that says, 'State facilities shall not be used in the furtherance of discriminatory recruiting practices.'" And we said, "This is

a state facility, and this is a discriminating recruiter. Would you please do something?" And he said, "No."

So with the full endorsement of the law school faculty, including the dean, Dean Hugh Macgill at the time, and the assistance of the Connecticut Chapter of the ACLU, we filed a lawsuit in Connecticut State Court, and we won, and the military was enjoined from coming onto campus.

The military appealed that decision to the Connecticut Supreme Court. I graduated from law school while the appeal was pending. Then my Federal case went up for review before the D.C. Circuit en banc. And the D.C. Circuit en banc led by, I think, Judge Silberman, issued a decision—and I don't recall the number; I think it was 5 to 4 or 5 to 3 or something like that—reversing the initial Appellate Court decision on a very tortured series of grounds that I've attempted to read on several occasions, but for intellectual and emotional reasons, I have never quite made it through.

But I think if you read that opinion in juxtaposition with the Mikva opinion, you will see how clear one is in comparison with how tortured the other is, but how they both talk about speech and about how—the Silberman opinion talks about the fact that in saying that I was gay, I created a rebuttable admission that I was engaged in sexual conduct, because that's what gay people do by definition, and that therefore the military could assume and the courts could conclude that I was engaged in the conduct for which I could otherwise have been discharged. The basic point, from my meager and unsophisticated perspective, is that they were talking very much about speech but in diametrically opposed ways. So we lost.

The question then sat before us of whether we should appeal to the Supreme Court. And I've never discussed these facts in public before, but I think, given this audience and the passing of time, I think it's important to note that I came under extraordinary pressure from my Lambda attorneys not to appeal the decision.

Marc Wolinsky from Wachtell, Lipton, who had been representing me as my primary counsel, and I argued vehemently that we should appeal for a variety of reasons and that in the good fight there come times when one must have the courage to take a step forward even if the potential risks are bad law. And obviously from my perspective personally, I was deeply and emotionally involved in the case and had been for the six years it was pending.

And we had quite an intense series of discussions over the ensuing weeks, which actually culminated in an unofficial but subtle threat that Lambda might attempt to withdraw from the case were I to seek an appeal.

Now, that was not a formal statement or a formal request on Lambda's part, but it was made, and at the end of the day I chose not to appeal. In retrospect I understand that the decision was correct, because it would have been dangerous to take an appeal on equal protection for gays to the Supreme Court for the first time in the military context, surrounded by all its traditions of deference, which turned out to be, I think, the correct legal decision, as *Romer v.*

Evans[5] ultimately played out in the civilian context, where the Court did conclude, I believe, that gays were entitled to equal protection. I believe technically that's the basis for the case.

It does, however, raise an interesting issue that again is outside the scope of my expertise, as to what is the ethical duty owed a public-interest plaintiff where the action is not in fact a class action but an individual action. Does the plaintiff give something up in terms of the ethical duty owed him or her by their attorneys in wanting to make a decision which is usually made by the plaintiff, but which may do harm to the broader issue?

Again, I have personal feelings about this. I have professional feelings about this as an attorney. And in raising this issue, I have no desire to bring any discredit on Lambda, because frankly they are passionate, wonderful people who are doing some of the most important work that has ever been done in gay and lesbian civil rights. And I think in some ways perhaps a plaintiff is giving up some of the latitude he or she might otherwise have as a private plaintiff. But I think it's a discussion worth having among lawyers as to what might be the parameters at all that may express a distinction in that context.

That said, it was the right decision. I realize in retrospect it was the right decision. I'm grateful that I made the decision. I regret that I felt pressured into the decision, but at the same time, I understand that the context is an unusual context. So we decided not to appeal, and my case, at least in federal court, was over. The Connecticut case on appeal to the Connecticut Supreme Court won, and it was really, I think, very much in reaction to that Connecticut Supreme Court decision that the Solomon Amendment was introduced. So I regret to, I think, admit responsibility in part both for "Don't Ask, Don't Tell" and the Solomon Amendment, which both of those cases I'm afraid may have caused.

Having gone through what I went through as a Lambda plaintiff and the way it ended left me deeply disappointed in a way that, even twenty years later, I still feel in a very fundamental and visceral way.

An important thing, I think, to keep in mind as we discuss this issue from the somewhat objective and erudite perspective as attorneys is that it is fundamentally a human issue. And I don't exaggerate when I say that I thought about being discharged from the Naval Academy every day for ten years after it happened, and I spent five years after that learning to ignore it. And really only in the past few years, now twenty years distant, have I come to view it with a certain degree of unemotional objectivity and even then only with some trying.

The reality of the legal process and the reality of the political process is that they overlie, almost like a biorhythm, a more fundamental, almost glacial process of social change, of the underlying advancement of social understanding.

As a student of human nature—and human nature has always fascinated me—I've thought really long and hard about my experience and tried to put it in context. There are a lot of things I've learned in the past twenty years about

5. 517 U.S. 620 (1996).

the sociopolitical dynamic as an expression of human psychology, and I think it's a very important way to look at these things.

I think so much of what occurs in our sociopolitical lives, the lives of our society, is a manifestation of characteristics of individual human psychology. I think our institutions are informed by who we are, physiologically and psychologically, which is why I'm not a proponent of the concept of natural law.

I think that law, as with any other institution, is a functional expression of human beings and their psycho-physiological characteristics. If we needed to survive by eating the brains of another species, it would be considered a fundamental right that we be allowed to do so. If we had twelve arms, something about our law and our government would express that reality of our nature. The law is a function and society is a function of who we are as a species, as individuals.

Much of what we face in terms of how the issue of gays in the military is rationalized is itself an expression of fundamental human psychology and importantly is a rationalization of more fundamental motivations and feelings.

I watched a very fascinating episode of *Frontline* on PBS, which is a superb documentary series, and they were talking about the modern science of marketing. And they were talking about how the leading experts in marketing took what people said about the products they wanted to buy and tried to get beneath them using psychological techniques to expose the more fundamental motivation that found its expression in what they were saying when people were asked, "Why do you want to buy this?"

One of the examples that was given was SUVs. "Why do you want to buy an SUV?" The answers they would give are things like, "Well, because it's safe," "Well, because," you know, whatever. "Well, you know, it would be safe in a roll-over." "I can fit my family in it," all these statements, all this speech.

And the leading marketing specialists take these people into a room and use psychological techniques to try to get them to express a key concept that underlies what they have said as their motivations. It's more fundamental than how they rationalize their motivations. And in the context of the SUV, the key, the fundamental statement that was elicited from this psychological analysis for the SUV was domination. The fundamental psychological motivation that found its expression in why people wanted to buy an SUV was in fact a desire to dominate, a fundamental instinctual feeling.

This is very much, I think, what we see when we encounter rationalizations in favor of the military's policies against gays: unit cohesion, contrary to good order, discipline, and morale. These are all expressions—they are all rationalizations of a more fundamental human instinctual reaction to the notion of homosexuality. If I've learned anything in my twenty years of moving away from the day-to-day dynamic of being involved in this issue, it's a more sanguine appreciation for the fact that all of this biorhythm of political and jurisprudential and other arguments, all of this logic, all of this rationalization, as elegant and beautiful as it can be, exists at one level higher than what's really happening. What's really happening is this glacial social acceptance of homosexuality. And what I find fascinating are the dynamics that inform that underlying social change.

Even people who are progressive may describe why they like gay people or why they're accepting of gay people in a way that I think is also somewhat a rationalization of their underlying motivation. We hear all kinds of issues floating around—Is it normal to be gay? Is it religiously appropriate to be gay? Is it innate to be gay?—these descriptions of what it means to be gay.

And many people, I think, define whether they are in favor or opposed to gay and lesbian civil rights movements in these contrary expressions. "Well, I think gay is innate, so therefore I'm okay with gay people." Or "I think homosexuality is not innate. Therefore I'm not in favor of gay people." "Well, I think religion favors gay people, so I'm against gay people." "Well, I think religion in this context is wrong."

There is something more fundamental going on. I believe profoundly that the most fundamental mechanism of social change in favor of understanding of gay people is the simple and often subtle act of coming out. It's in knowing someone who's gay that one gains an innate appreciation for why it's wrong to discriminate against gay people. And the nature of that innate appreciation is not tolerance; it's acceptance. And by "acceptance," I mean it's a recognition of the humanity of gay people. It's a recognition of the equivalency of gay people.

All of these arguments we express are overlying a potential social tipping point. Whether the statistics we're seeing today—interestingly, sixty percent in favor of overturning the gays in the military policy, and forty percent against—whether that will itself remain stable is a function of how solid this social mechanism is that underlies it. And as much as I might be inclined to predict that we're entering yet another opportunity and predict, as I did in 1990, that the policy would be overturned before decade's end, I have enough gray hair to know not to make that prediction today.

But in, I think, a deeper appreciation of that dynamic and the significance of how coming out affects that dynamic in a way that does not have to involve an exchange of rationalizations is the reality that, for gay people, coming out is more than speech. It's not what Judge Mikva said. It's not what Judge Silberman said. It's not about speech. It's about something more fundamental than speech. It's about the reality that homosexuality is an invisible characteristic. It cannot, despite stereotypes to the contrary, be appreciated unless someone admits it, unless someone verbalizes it.

This is a quintessential distinction of gay people from other minorities. Unless we are able to speak, unless we are able to identify ourselves, we do not, for sociopolitical purposes, exist. We cannot begin to counter stereotypes. We cannot begin to advocate for our civil rights.

This is why I believe that the act of coming out is not speech. It is not the right to speech. It is the right to existence. It is the right to acknowledge our existence and, in a way, is the most fundamental human right for gay people. Unless we can acknowledge our own existence, we have no place in the sociopolitical dynamic by which we might achieve equality.

Which leads me, of course, to "Don't Ask, Don't Tell." In retrospect, when "Don't Ask, Don't Tell" is overturned, and we all know it will be at some point, I think it will stand as a pristine expression of the psychological reaction of society to the desire of gay people to identify themselves.

"Don't Ask, Don't Tell" prevents people in the military whose act of coming out would be the most powerful statement, contrary to the military's policy, to identify themselves. And subtly but importantly it transforms the act of identification into an act which can be characterized as political. It politicizes the act of identification. "If only you hadn't come out, if only you hadn't engaged in that political act, if only you had not chosen to challenge, you would be allowed to stay in the military."

That is the fundamental dichotomy of this policy. It is not attempting to prevent a political act. It is attempting to deny a group of people existence—the ability to advocate for their existence.

It also is so beautifully an expression of the natural psychological tendency of individuals, when confronted with something challenging—"I don't want to hear it. Whatever. Just don't talk about it." We know it in our brains. We've all felt that feeling in our brains.

"Don't Ask, Don't Tell" is a manifestation of society saying, "We know. Just don't . . . ." Importantly, it is a critical acknowledgement, never before as clearly stated, that gay people do serve in the military, they always have served in the military, and they always will serve in the military. But it is "Whatever. Just—I don't want to hear about it." And if you say something, you're being political and disruptive, and we have to kick you out, because that's not what the military is about.

In so many ways it finds an interesting parallel in the current debate over marriage. Even progressive straight people bristle at the notion of homosexuals being allowed to use the term "marriage," because, although they are tolerant, there is something more fundamental that causes them discomfort about allowing a term to be used that would equate the nature and quality of a homosexual relationship with that of a heterosexual relationship.

This is really the crux. It's about tolerance versus acceptance. It's not about speech. It's about the innate acknowledgement of equivalency. It's about advocating for and the acceptance by society of the notion that homosexuality is equivalent to heterosexuality—that it is normal for some people to be gay.

And "Don't Ask, Don't Tell" and the debate over marriage is an expression of individuals' inability, manifested through social terms, to accept the fact that homosexuality is the same thing as heterosexuality. They're two sides of the same coin.

There is ultimately nothing that the law or politics can do beyond clarifying and documenting social consensus. The law cannot move society beyond where it's willing to go. The political process cannot move society beyond where it's willing to go. And if one attempts to, the other will compensate.

We're ultimately engaged in a process of trying to seek social consensus. The gay and lesbian civil rights movement is at a transition that the military policy of "Don't Ask, Don't Tell" expresses and which the marriage issue expresses as well. It is the transition from tolerance toward acceptance. And it's only at acceptance, where people are willing to believe that homosexuality is equivalent to heterosexuality, that both of these issues will find their resolution.

The work that you all are doing is very important, and I thank you for it. I thank you as a lawyer, because I'm very proud of my profession, and you make

me proud to be part of it. I thank you as a former plaintiff for picking up the torch where I left off to give me a chance to take a breather, and for all the important work you've done to keep that movement going.

But most importantly I thank you as a human being. I thank you for giving me the opportunity to live my life in a sphere of freedom in which I can be who I am.

And this is ultimately what we're fighting for. We're fighting for the acknowledgement of our fellow human beings that we are the same, we have the same hopes, we have the same fears, we have the same desires, ambitions and shortcomings. We love in the same way as they love. And the end of this road is that moment of acceptance when we reach out to another person and say, "I'm living the same life that you are. I'm on the same road, and I'm the same as you. We're the same."

[Applause.]

II. PANEL ONE: IS "DON'T ASK, DON'T TELL" GOOD PUBLIC POLICY?*

MODERATOR: ROBERT C. BORDONE**

PANELISTS: C. DIXON OSBURN, LAWRENCE J. KORB, AND DENNY MEYER***

MR. SORKIN:

Welcome. I would like to introduce our moderator, who will then introduce the panelists.

Bob Bordone is the Thaddeus Beal Assistant Clinical Professor of Law at the Harvard Law School. He is also director of the Harvard Negotiation and Mediation Clinical at the Law School and is a professional facilitator. As a professional conflict resolution consultant he has helped many companies, non-profits, and governmental entities with conflict resolution, and his research interests involve the ethics of ADR, and the design and implementation of dispute resolution systems. He is the coeditor of The Handbook of Dispute Resolution, which was the recent recipient of the 2005 Book Award from the National Institute of Advanced Conflict Resolution. And due to the timing constraints, he is also going to be good at negotiating our time a little bit.

So, without further ado, I am going to introduce Bob. Thank you for being here.

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* Friday, Mar. 2, 2007, 2:00 p.m.–3:30 p.m. EST, Austin Hall West Classroom, Austin Hall, Harvard Law School.

** Thaddeus R. Beal Assistant Professor of Law, Director of the Harvard Negotiation & Mediation Clinical Program, Harvard Law School.

Prof. Bordone was introduced by Harvard Law student Adam R. Sorkin.

*** The panelists are, respectively: Co-Founder and Executive Director of Servicemembers Legal Defense Network; Senior Fellow at the Center for American Progress and Senior Advisor to the Center for Defense Information; and Editor of *TheGayMilitaryTimes.com*, Military Equality Alliance Public Affairs Officer, and AVER Public Affairs and Veterans Affairs Officer.

PROF. BORDONE:

Thanks so much for the invitation, and welcome to all of you. I want to thank Lambda for organizing this and Adam for inviting me to moderate.

Our topic this afternoon is taking a look at the "Don't Ask, Don't Tell" policy, specifically whether it is good public policy for our country.

Let me briefly sort of say how our truncated afternoon is going to work. We have just about an hour, and we have three panelists. I'm going to ask each of the three panelists, after I introduce them, to speak to us for about fifteen minutes. And as those of you who are my students know, I am a bit of a stickler for punctuality, and you guys will soon learn how I can do that as well.

Maybe around the thirteenth minute or so I will give you a little warning, and then I'll buzz you at the fifteenth minute, just so that everyone gets the full fifteen minutes, and then we have fifteen minutes for some questions from all of you.

One note, we worked—Lambda worked very, very hard to bring a speaker here who would be prepared to defend the current "Don't Ask, Don't Tell" policy. I think they asked more than a dozen people. They were not successful in doing that. So my hope is that some of you, when we get to the questions and answers, will have some questions or remarks that would be more in defense of the current policy, so that we have varying viewpoints represented.

I don't want to spend a lot of time with me talking, especially given that we're behind. I am going to introduce our panelists. Our panelists are going to be speaking from right to left, and that's the order in which I will introduce them. I'll introduce all three, and then we'll begin.

So to the far right is Dixon Osburn. He is the co-founder and Executive Director of the Servicemembers Legal Defense Network. SLDN's mission is to end discrimination against and harassment of military personnel affected by the "Don't Ask, Don't Tell" policy. Under Dixon's leadership, SLDN has sought to repeal "Don't Ask, Don't Tell" through the federal courts and in Congress.

He is viewed nationally as a leading authority on government accountability and the gay ban. He's appeared on ABC, CBS, NBC, CNN, and National Public Radio. He's also published ten annual reports on the "Don't Ask, Don't Tell" policy, a Survival Guide (designed to assist service members with the rules of survival under the policy), and a number of journal articles and op-ed pieces as well.

To his right, and to your left, is Lawrence Korb. Lawrence Korb is a Senior Fellow at the Center for American Progress, and he's a Senior Adviser to the Center for Defense Information.

Prior to joining the Center, he was a Senior Fellow and Director of National Security Studies at the Council on Foreign Relations. He's also served as Director of the Center for Public Policy Education and as a Senior Fellow in the Foreign Policy Studies Program at the Brookings Institute.

He's a former Dean of the Graduate School of Public and International Affairs at the University of Pittsburgh, and he had a distinguished career in government and public service, serving as an Assistant Secretary of Defense from 1981 through 1985. He's written twenty books and more than one hundred articles on national security issues as well.

And then to my immediate right is Denny Meyer. Denny is the editor of *TheGayMilitaryTimes.com*, and he currently serves as the Military Equality Alliance Public Affairs Officer and was the founder of the New York Chapter of the American Veterans for Equal Rights. He has served in the Navy during the Vietnam era, and as a U.S. Army reserve administrator rose to the level of Sergeant First Class.

After serving for more than ten years in the military, Denny left, and he became active in the movement to secure LGBT veteran rights and full equality for LGBT people in our Armed Forces.

In 2004, while he was battling cancer, Denny and his chapter officers organized a grassroots 15-month effort, which resulted in the passage of the nation's first "Don't Ask, Don't Tell" repeal resolution by the New York City Council.

So we have a really distinguished panel today; please join me in welcoming them.

[Applause.]

I'll turn it over to you, Dixon.

MR. OSBURN:

Thank you, Bob. Thank you to Dean Kagan and the Harvard Law School and the Lambda Student Association for organizing this conference today. I think it's one of the most exciting symposia on "Don't Ask, Don't Tell" we have had since "Don't Ask, Don't Tell" was implemented thirteen years ago.

I want to first sort of bring an organizational perspective to "Don't Ask, Don't Tell," talk a little bit about what the law is and the purported goals of "Don't Ask, Don't Tell," and do a cost/benefit analysis, since the question before us is, is "Don't Ask, Don't Tell" a good policy?

At Servicemembers Legal Defense Network, we've directly assisted about 8000 service members under "Don't Ask, Don't Tell" since 1993. We probably have a better view of what's going on than any field commander, any Pentagon official, or any member of Congress. We know how this policy operates, and we're struck by three realities under this policy.

The first reality is that we talk to a number of clients who face the worst sort of situations possible. They find death threats lodged under the windshield of their car from anonymous sources. They have had their diaries taken and their e-mails taken. They are at the 19-½-year mark and are being discharged for being gay.[6] They lose their entire pensions that they have been working their entire life for. So we see some of the worst parts of how "Don't Ask, Don't Tell" can operate.

We also see a part of the policy where people serve as openly gay. A lot of our clients are serving as openly gay, with the full knowledge of their command, and it's not an issue. You have people like Sgt. Brian Fricke, who is going to be

6. Full retirement benefits vest after twenty years of military service.

talking on the service member panel tomorrow, who was openly gay in Iraq with his unit, and it just was not an issue.

This week Marty Meehan introduced legislation to repeal "Don't Ask, Don't Tell," and one of the people who spoke there was Sgt. Eric Alva, and he was also openly gay with a number of his buddies in the Marines. And he actually was one of the first, if not the first person to be injured in Iraq. He lost a leg as he stepped on a land mine. And what great irony it is that one of the first heroes is somebody who is gay.

And the third reality is that we, you know, are also in touch with so many service members who try to keep their head low and try to comply with the policy, and the sacrifices that they face in doing so.

One example is a client of ours who lost his civilian partner. He is over in Iraq right now. He lost his civilian partner. He could not attend the funeral. His command would not let him go, because for him to go, it had to be a spouse, and he couldn't come out and say how important this individual was to him. And the commander gave him twenty-four hours to sit in his tent and compose himself, and that's all the grief counseling he was able to get, was being by himself.

So at SLDN we are in a unique position to assess what "Don't Ask, Don't Tell" is and the faces that are behind this policy.

So what is "'Don't Ask, Don't Tell"? Well, it's a ban, it's a law that says that you're going to get kicked out if you say that you are gay—to anyone, anywhere, anytime—whether it's to your mom or to a chaplain or to a psychiatrist, best friend, commander—anyone. It's a ban on acts which the law defines not just as sex, but it can also be putting your hand on somebody's shoulder like this, if you're the same gender, or a peck on the cheek. It is a very broadly defined set of acts. You can also be kicked out for gay marriage.

Now, the government will argue that it needed this law for a couple of reasons. One is unit cohesion. It's about good order and discipline around the military, and you can't have people who are openly gay, because that's going to disrupt this unit cohesion.

The second argument that they are advancing today is that it's about sexual tension: We don't want people attracted to each other and having sex in the barracks.

And then the third argument that they are advancing afresh today is privacy, that heterosexual service members have a right to privacy, which means they want to be free from the stares in the showers.

So these are the three arguments about why this law is supposed to exist, and I think the question is whether or not the evidence actually supports the arguments that the government advances for it. So what are the true costs of this policy? Well, one reality under the policy is that there are 65,000 lesbian and gay people that are serving. And the cost of kicking out two people to three people a day by the Pentagon is anywhere from $350 million to $1.2 billion, depending on the estimate that you look at. So there's a financial cost to the taxpayer under this policy.

Another cost in the policy is just critical skills: We are not just losing people, but we are losing people that the Pentagon acknowledges have critical

skills that they need. You may have seen the story of Bleu Copas, who was an Arabic linguist and was discharged based on anonymous e-mails outing him to his command. You know, it takes just one person to be able to intercept a terrorist message and thwart a terrorist attack.

The Pentagon has kicked out more than fifty-five Arabic linguists for being gay since "Don't Ask, Don't Tell" was implemented, more than 300 language specialists since "Don't Ask, Don't Tell" was implemented. And the Pentagon acknowledges that it is kicking out people who are in intelligence, who are in the infantry, who are biochemical or nuclear specialists—people that we need for our military today.

So we're losing people; we're losing critical skills. And then there is a huge personal cost. The core values in the military and each of the services are essentially truth, honor, and integrity. And what is "Don't Ask, Don't Tell" about but lying, about having to keep something that is fundamentally important to yourself hidden from people that you value, from your command, from your colleagues, from your buddies. So there's a cost to the military's own core values.

And then there is this personal sacrifice. For the individual person who is gay, lesbian, or bisexual, you're having to hide, lie, and evade, twenty-four hours a day, seven days a week. And in the military you're faced with these sort of quotidian questions: "Are you dating anyone? Are you married? Who is giving you a call on the phone today? Who are you going to see the movie with?"

So there's this huge personal sacrifice, and it's not just in having to hide every day, but think of the gentleman that I just mentioned who can't even go home to bury his partner—cannot even go home to bury his partner. That is the kind of toll that "Don't Ask, Don't Tell" exacts.

Now, there are also occasions when this policy also leads to death and murder. PFC Barry Winchell was murdered back in 1999 because he was perceived to be gay. Alan Schindler was murdered back in 1992 also because he was perceived to be gay.

So this policy has an enormous cost, and the question is whether or not that cost is reasonable, as the government argues.

Now, is this cost reasonable? Is the discrimination reasonable? The government argues that it is. But if you look at the context of what the military itself is facing today, the military—Congress has called on the military to increase its end strength by, what is it, 90,000?

MR. KORB:

Ninety-two thousand.

MR. OSBURN:

Ninety-two thousand by the year 2012. Where are they going to get these people? The current troops are stretched beyond the pale right now. Our National Guard is called up, our reserves are being called up, and they are having to go on tour after tour, way beyond what their commitment is. And those on active duty, you have heard the stories in the paper, not just one tour

there, but they're on their fourth tour now. They are stretched beyond belief, and they need people, and yet they have kicked out 11,000 people for being gay.

So there's a cost on the military itself. The military forces, to try to meet this need, have been lowering their recruiting standards. They have lowered the educational requirements to join the military now. They have lowered the weight requirement, or I guess the weight limit is higher. They are waiving criminal backgrounds. They are letting in people who are skinheads. They have increased the enlistment age to forty-two.

If they got rid of "Don't Ask, Don't Tell," according to an analysis by Gary Gates of the Williams Center at UCLA, there would be about 41,000 gay Americans who might be willing to join the Armed Forces. So there is this enormous pool of people that could help with the military in meeting its own needs.

Unit cohesion, that's the big argument that the government puts forth for supporting "Don't Ask, Don't Tell." The government has never—never—put forth one shred of evidence to suggest that this policy actually does support unit cohesion—never. And in fact, in the courts they simply tell the courts, "You just have to accept our argument, and we don't have to prove anything else."

On our side we put forward piece of information after information after information about how this policy, if it doesn't hurt unit cohesion, that at least it does not affect it.

We argue that it hurts unit cohesion. In fact, when you take a skilled, able individual out of a well-functioning unit, somebody who is liked and respected, and you remove this person because they're gay, that hurts unit cohesion. So I don't think the government's argument stands up.

The government's also arguing that "Don't Ask, Don't Tell" is needed because it's going to create sexual tension in the barracks, that you don't want people of the same gender in the barracks becoming attracted to each other and having sex. There is no evidence to suggest that would be a tenable argument.

One, there are already criminal rules that govern sexual misconduct in the military. They are sexual-orientation neutral; they are gender neutral. Second, gay people are already there right now. Sixty-five thousand gay people are already serving, and it's not been an issue ever. So the evidence suggests that it would continue not being an issue.

Third, there are differences in how the military and society at large have traditionally treated men and women. People of the same gender, whether it is in, you know, your high school gymnasium, the tradition has been very different.

And lastly, I think that the argument about sexual tension really demeans the professionalism of those in our Armed Forces, claiming that they cannot perform at a professional level, and I think that that's actually an insult from the government.

The argument about privacy in showers, the worry is that heterosexuals would face some unwanted stares from gay people in the showers. Well, again, 65,000 gays, lesbians and bisexuals are already serving; they're already in the showers.

In fact, if you're so uncomfortable with a gay person in the military going into a shower, the argument really is that you want to know that they're there so you can schedule your shower at a different time.

So I ask, on the balance, is this a good policy or not? I think it's a bad policy, but I think it's also—I think the evidence stacks up time and time again that it is a bad policy, and even the rationales that the government purports for the policy don't stand up to reason.

PROF. BORDONE:

Perfect, under time. Outstanding. Thanks, Dixon, so much.

MR. OSBURN:

Thank you.

PROF. BORDONE:

Lawrence.

MR. KORB:

Thank you very much for inviting me. I've been dealing with this issue now for about twenty-five years or so, and as I try and grapple with our panel today, when I'm asked about it, I'm always reminded of the very religious man, who, before he went to meet his maker, decided he wanted to see the Grand Canyon. So he went out there and got a donkey to take him down to the bottom of the canyon. Unfortunately, the donkey lost his footing, and the poor man began to fall head over heels toward the bottom.

Fortunately, he reached out and grabbed onto a branch, and as you might expect, he began to pray. And pretty soon a voice came down from on high, and it said, "Son, do you have faith?" He said, "Oh, yes, I have faith." And the voice said, "Let go of the branch." He thought for a second, and he said, "Is there anybody else up there I can talk to?"

And of course the question is, is this good public policy? Well, you know, compared to what? And I think that's the question. Let me put it into context, how we got to where we are, and whether it's good, and where we're liable to go.

Remember, "Don't Ask, Don't Tell" was a compromise between the existing policy, which said homosexuality is incompatible with military service—when you went down to join, they asked you, and if you lied, then of course you had already committed a crime.

I might say, just as a footnote, since I worked for Ronald Reagan, everybody thinks he put that policy in. No, you owe it to one James Carter who put that policy in saying that homosexuality was incompatible with military service. And I really feel, had he not done that, we could have gotten Reagan to do the right thing, because whatever else you might think about him, he, I would say, had a very, very balanced opinion in this area.

So you had this existing policy, which said homosexuality is incompatible. So you either had to lie, and then of course they could go looking legally after you.

Now, you've got to remember that of all the people that you didn't want to try and change the policy, it was Bill Clinton. He was the worst person from a political point of view, given his own background. You know, he was going to go in the service, wasn't going into the service, he was for the war, and then—he was not the right person to do it.

I really feel that if in 1992 Bob Kerrey had been elected President, it would have been no problem, because Kerrey won the Medal of Honor, and if he would have said, "I want to change the policy," nobody in the Pentagon would have dared to challenge him.

Now, the other thing, and I think a little bit of history, a lot of people think—and I urged President Clinton to sign an executive order right away, as soon as he came in, much the same as Carter could have signed an executive order granting amnesty to people who had resisted the draft during Vietnam.

Now, he didn't do it, and I was somewhat disappointed at the time. But in doing further research and talking with people—I work at a place now that's run by John Podesta, who worked for Bill Clinton—and talking to a lot of people there, the reason he didn't do it is because he was told by Senator Nunn, "If you do it, we're going to put something on the next bill that comes up, you know, to overturn it." So, I think that is important.

Now, with that background, and given the facts that he probably had—and he was a good friend of mine, and God rest his soul, Les Aspin was probably the weakest manager I've ever seen in the Pentagon to try and do it. So you had all of these things that really made it difficult to happen.

And, you know, you've got to remember that it's not just being on the right side of the issue. This is a political process, and you have to know how to make things happen.

So having said that, "Don't Ask, Don't Tell" was probably about the best we could have expected in the 1990s. So if you judge it in terms—and Dixon is absolutely right, the question was, compared to what? So it was a step forward in the sense it moved the ball, because you did not have to lie. They couldn't ask you, and theoretically they shouldn't have gone after you.

Now, as we know, because a lot of people in the military resisted it, they did not stop the witch hunts to the extent that they should have, nor did they punish those commanders who undertook the witch hunts, which was also wrong. I always felt that all you had to do was just throw some colonel, commander, or something out of the service for violating that, and the message would have gotten out loud and clear, and it was not.

Now, another bad part of the way the thing was done is Congress put it into law. Previous to that it was just the Executive Branch. So if the President, the Secretary of Defense—in fact, the ban that said homosexuality is incompatible with military service was actually signed by Graham Claytor, who was the Deputy Secretary of Defense, in January of 1980. And when I showed up, they handed it to me and said, "Okay, you've got it here. You have to enforce this thing." But it was actually signed by the Deputy Secretary of Defense.

Now, with that, the question becomes, why is the military, you know, in light of this evidence, why are they resisting it? Well, I think it's important to

understand that the military is a very conservative institution in the sense that they don't like any changes, okay. They do not like any changes.

Now, Don Rumsfeld certainly was not a good Secretary of Defense from a lot of points of view, but one thing is he came in and tried to change. And people forget in his first eight months, before September 11th, here was a man who had been Secretary of Defense, a Congressman, White House Chief of Staff, a successful business executive, and he was trying to get the military to change, to go, if you will, to the information age.

On September 10, 2001, he gave a speech which nobody read on September 11th because we had other things on our mind when the paper reported, saying, "You people are worse than the Soviets. You're the real enemy of the United States in resisting the changes that I'm trying to bring about in the military."

So they are conservative. You go back and you take a look at when Harry Truman signed the executive order, okay, to say that African Americans shouldn't have to serve in separate units. General Bradley said, "This is terrible." Now, Bradley is one—we look up to him as one of our great military leaders. He was opposed to that. "You can't do that. This will cause too many problems for us."

The same way when, you know, we wanted to advance the role of women in the service, the same type of thing. It was a resistance, because, "Well, we don't know what is going to happen." And I can remember dealing with issues like could we put a man and a woman in a missile silo together for twenty-four hours, you know, and the admirals telling me, "Well, you can't have women on ships because the wives of the men will be all upset." And, again, this was basically afraid of any type of change to the status quo.

Now, will it change? Yes, it's going to change. Now, why is it going to change? It's going to change for the same reason that African Americans were integrated and women have gotten more and more jobs open to them in the military—for military necessity. That's why it's going to change.

Dixon was talking about the fact that we're going to expand our forces by 92,000. But we're not expanding the Navy and the Air Force. It's the Army, primarily, and somewhat the Marines. The Army is having a hell of a time recruiting. People don't want to join the Army in the midst of an unpopular war.

Let me give you an example of somebody who is in the Army, and all you lawyers, this case is going to be coming up. Pvt. Stephen Green, this young man was taken into the Army in February of 2005 with three criminal convictions, was a high school dropout, and had a personality problem. He is the young man who was discharged for a personality problem, and now he's accused of having raped and then killed a young fourteen-year-old, and two of his colleagues have already pleaded guilty to it. So this is what they have had to do before they decided to expand.

And now the other thing—the other things, I think, that will make it easier is you do have a generation change. People in the military, you know, they are more accepting, to use the word that Joe used, they're more accepting, not just tolerant of this, because of the age difference and how they have grown up.

You've seen Gen. Shalikashvili's op-ed on this particular subject. And more than that, we have a great example. If you go back and you take a look at the

hearings back in 1993, and I don't know if "privilege" is the right word, but I testified one day, was there for five hours testifying on this issue. After a while, I didn't even remember what I was saying, you know, it was so long.

But what people were saying was—you would say, "Look at all the militaries in the world that allow gays to serve. They served with us in the first Persian Gulf war." They said, "Well, they're different from us. The one military that's like ours that doesn't allow gays to serve openly is the British."

Well, guess what? Because of the European Court of Human Rights, the British have had to let them come in, and they're on submarines together, okay. And the British are so pleased with it, they're building houses on their bases for gay couples to live.

So you can't say, if you do this, all these horrible things—because you have now got empirical data. And if you take a look at the people serving with us in Iraq and Afghanistan, the British, the Canadians, all of these militaries allow it. So if you go up and you use these hackneyed arguments, it's going to be very, very difficult.

Now, the question, I think, really is, you know, how does it happen? It's going to take somebody who has the background, kind of a Nixon to China thing. Back in the '68 campaign, which I'm old enough to remember, Nixon said, if he were elected, the last thing he would ever do was to go to Red China or recognize it.

Of course it was the last thing, but not for the reasons that we thought. But the fact of the matter is, had Hubert Humphrey won that election and done the same thing, they would have run him out of town.

It going to take some—and I don't know when all of these things are going to come together—a Chairman of Armed Services Committee, a President who has that standing, a Secretary of Defense who has that background who comes in and says, "This is ridiculous. We've got to change it."

I mean, that's really what you need, and so it's going to happen, and I would say within the next couple of years it will. I don't think it's going to happen in this Administration, and there are so many other things that the people on the Hill are worried about. But, you know, we're going for 7,000 this year for the Army, 7,000 next. I think the Army is going to come back and say, "Wait a second. We can't do it."

Let me leave you with this to show you how much things have changed. Elaine Donnelly, who I know was one of the people invited for this, because I saw her in the letter you guys sent to me, she went to the Congress about a year or so ago—and Republicans were still running it—and she said, "The Army is violating the law in Iraq. They're letting women get into combat."

Rep. Duncan Hunter, who was the Chairman of the Committee, said, "You're right. We're going to ask for a report or do something." And the Army said, "Get out of here. We can't win. Forget it." It was the Army that told them, and of course the thing died.

This is the same service who for years had been arguing, "You can't put women in the Army. We can't put them in direct combat. Okay. They said, no, they can't do it. And at some point they're going to go, some Chief of Staff of the

Service, of the Army, the Secretary of Defense, is going to say, "I can do it. You're going to have to let me," and then it will change. Thank you.

PROF. BORDONE:
Thank you so much.

[Applause.]

PROF. BORDONE:
Denny.

MR. MEYER:
I'm not an attorney. I'm an old gay veteran who showered with straight men for ten years in the Navy and the Army Reserve during and after the Vietnam era. I've been a professional trouble-maker—the polite word is "activist"—for the last forty-six years.

When I served, starting in 1968, homosexuals didn't exist, so we served in silence. We did so with ease, because at that time, before Stonewall, one lived in the closet as a civilian as well as in the military. So it wasn't that difficult to pass for straight. We were in the closet all the time.

In fact, while I was in the service, I was considered the straightest guy around, because I was terrified of participating in the normal sailors' horseplay, knowing that one mistake would get me killed and tossed overboard into the sea. And they mistook that reluctance, thinking that this guy is just so straight, he doesn't want to fool around. So that kind of saved me.

And after ten years of service, in the late '70s, as gay rights blossomed outside the base gates, I left in mid-career. I had a lover. I was a Sergeant First Class. I had a lot of responsibility and respect. And I just couldn't live a lie anymore; I wanted freedom. So I left with ten years of training, leadership, and experience. There were thousands and thousands like me before "Don't Ask, Don't Tell" and during "Don't Ask, Don't Tell" who left without a word. The cost of that hasn't been counted yet. They have calculated the cost of a lot of losses, but not that, because we didn't say anything.

I'm very proud to have served my country in uniform. And yet during that time I had to listen to the insults and fag jokes from friends who didn't know that they were offending me. I had to laugh along with their jokes. During that time, living in the closet, that was accepted by those of us who lived that way. That was normal.

Today it's very, very different. The kids coming back from Iraq and Afghanistan today never lived in the closet. I've interviewed dozens of them for *The Gay Military Times*.[7] They don't know how to be in the closet. They don't know how to serve in silence. They have been taught to assert their rights as Americans. These are young twenty-year-olds who were raised in the last twenty years or so. But at the same time there's a pervasive official government homophobia that causes everyone to be suspect. Straight, sensitive, intelligent service members are assumed to be queer.

7. For information on this publication, see http://www.thegaymilitarytimes.com/.

The Zogby poll released in December, which you will hear quoted over and over, of service members on their attitudes towards gays, revealed that fifty percent of service members polled who served in combat zones suspected that somebody in their unit was gay.

That's the damning proof that the "Don't Ask, Don't Tell" policy itself is detrimental to unit cohesion and morale. It's not just the removal of people who are gay which disrupts units; it's the suspicion, driven by the policy, which is disruptive and detrimental. Seventy-eight percent of the people in that survey said that they couldn't care less if the person they're serving with is gay.

At the airport coming up here yesterday, I met a young fellow, headed back to Iraq. I told him I was a veteran and ran a veterans' group. He asked for my card, and I said, "It's a gay group." He said, "Oh, I'm not gay."

I said, "It's okay, but since we're talking about it," I asked, "do you know any people that you are serving with who are gay?" He said, "Are you kidding? I feel like the odd man out sometimes." I said, "Does that bother you?" He says, "No." I said, "Would you go into combat with them?" He says, "I do every day. It's not a problem."

So it's the policy which requires reporting of anybody who you suspect to be gay that incites suspicion, incites distrust, incites dishonor. It forces gay and lesbian and bisexual service members and transgender service members to be dishonest, which is counter to the training, camaraderie, and spirit of the military.

So today's gay and lesbian service members disclose, because they're honest and don't know how to live in the closet. They tell their friends, "Listen, I'm gay," and their friends don't care. But then somebody reports them, nevertheless, inevitably. This is why Dixon has seen, what, 8000 cases?

MR. OSBURN:

Eight thousand.

MR. MEYER:[8]

Eight thousand, and that's the tip of the iceberg. So then they're denounced, and then they're dishonored, and then they're discharged, even though they patriotically volunteered.

I talk in terms of history here, because I lived it. In 1948, when Truman integrated blacks into the Armed Forces, as Lawrence Korb said, people told him, "You can't do that, because white people can't shower with a black man. They certainly can't take orders from a black man."

Now, this was before integration of public transportation, before school desegregation, before non-discrimination laws in hiring and housing were enacted. Truman led the military with equality in America. That was the first step. That led to all the other equality.

Now, the bigots at that time feared that black service members might rise to positions of leadership. Well, it took Colin Powell forty years from that time

8. Portions derived from RANDY SHILTS, CONDUCT UNBECOMING: GAYS AND LESBIANS IN THE U.S. MILITARY (1994).

when he was a child, to become Chairman of the Joint Chiefs and lead our armed forces.

Now, in the early '90s, when President Clinton was proposing or considering integrating gays into the military, the grandsons of those bigots said, "You can't do that. Straight people can't shower with a gay man, and we certainly can't take orders from a queer." And of course they feared that gays would have positions of leadership eventually.

Well, too late, we already have had gay generals and admirals, and we always have. The first one was Friedrich von Steuben in the American Revolution. Benjamin Franklin, at Washington's request, recruited him from Paris to come and train the Continental Army. Lt. Gen. von Steuben arrived that cold winter of 1778 at Valley Forge with his lover, a young French nobleman.

Von Steuben was not fluent in English, so Gen. Washington assigned two young lieutenant colonels who were inseparable and were lovers (their love letters still exist), who were fluent in French, to work with him to translate his training. They were twenty-year-old Alexander Hamilton and twenty-four-year-old John Laurens. John Laurens was the son of the President of the Continental Congress that year, Henry Laurens.

So these three queers worked together and were really responsible for the success of the American Revolution.

And interestingly, like Sen. Barack Obama, Hamilton was the child of an interracial bond, and he was a unique person in that time of slavery, to be a leader of troops. John Laurens later died in battle, so he is probably the first gay hero who died in battle in service of American freedom.

Now, Valley Forge was a huge encampment that cold winter of 1778. There were over 10,000 troops there. Lt. Enslin was caught in his cabin with Pvt. Monhart, both Europeans by the way, and he was prosecuted and literally drummed out of the service by Col. Aaron Burr. Thus, he bears the dubious distinction of being the very first known gay person to be discharged for homosexual conduct.

Twenty-six years later, as Vice-President, Aaron Burr murdered Alexander Hamilton in Weehawken, New Jersey, in a duel. I believe the history is that he didn't like his economic policies, rather than his race or his sexual identity, but who knows, there might be further research on that.

During the Civil War, we had gay officers and enlisted people serving in both the Confederate Army and the Union Army and quite a few transgendered women; that is to say, women who cross-dressed as men and lived as men in order to serve. Many of them continued to live their lives as men until, when they died, their biological gender was discovered. There was a recent revival of the memory of Jennie Hodges, a/k/a Albert Cashier, who has now been honored in Illinois, a hundred years later, for her service.

During World War II, young gay and lesbian people who left home for the first time from their small towns, members of the greatest generation, and their service away from home enabled them to begin to realize their sexual identity. And quite a few came out at that time, once they were away from Peoria, as it were.

During the Vietnam era, of course, anybody could avoid serving, and lots did try to, by saying two words, "I'm queer." But many of us didn't. In essence, we volunteered by not saying that. While others lied who were straight and said they were gay, and others went to Canada, thousands and thousands and thousands of gay people basically volunteered to serve, as I did.

One of those people, Leonard Matlovich, was a friend of mine. Lenny was a Vietnam hero. He served eighteen years, had a Purple Heart and a Bronze Star for valor. With the help of Frank Kameny, he wrote a letter to the Secretary of the Air Force in roughly 1974 and said "I'm gay." And as expected, he was promptly dishonorably discharged, and they sued, as planned. His case went on for ten years, and he was ordered reinstated. He won.

By that time the Air Force and he were quite sick of each other, and they gave him $175,000 to go away. The secret was, of course, by that time in '85, he already knew he had AIDS, but that didn't come out until later.

I met Lenny, oh, in the late '70s at the Castro Street Fair. He had come to San Francisco as a carpetbagger to run for Board of Supervisors, and this fellow was not the stereotypical homosexual. Far from it. He looked and was every bit the Air Force sergeant and Vietnam hero. In fact, he was Republican, and he didn't realize that no one would vote for a Republican in that city. He was welcomed by the gay community as a hero with open arms, but nobody would vote for him.

In any case, I saw him in a booth at the Castro Street Fair that said "Leonard Matlovich For Supervisor." I went up to him, and I said, "You're my hero," and he asked, "Why?" I said, "Because I served in silence, and you had the courage to speak out." And this tall, handsome sergeant bent down and kissed me, and I didn't wash my lips for weeks.

And we got to know each other, and over the years he learned to behave a little bit more gay, but very corny, since he was a Midwestern guy. He would say things like, "Oh, you know, I'm into S&M, sneakers, and makeup." It is a groaner. That's the point.

He was quite an interesting person. He knew that he was going to die of AIDS. So he wrote his own epitaph. He is buried in Washington, D.C., in the Congressional Cemetery. His tombstone, which he composed, reads, "A Vietnam veteran. When I was in the military, they gave me a medal for killing two men and a discharge for loving one."

Today, young, educated gay and lesbian Americans want the right to choose to volunteer without dishonesty, without deception, for the honor of serving their country, our nation. The policy of "Don't Ask, Don't Tell" serves only ideological bigotry. It doesn't serve American values.

I'll end there. I have a story about showers, but you can ask me about it. Thank you so much.

[Applause.]

PROF. BORDONE:

So why don't we throw it open to some questions. The questions can be directed to any—to the group or to individuals.

FROM THE AUDIENCE:

I wanted to ask a question about political dynamics and intermediate steps, because one of the interesting parallels we have here is between "'Don't Ask, Don't Tell" as the intermediate policy, a policy we don't like, and the original policy, the Carter policy. And there is an interesting parallel to civil unions and marriage on the one side.

What I'm curious to know is what you think, in a given political climate, where we were not, in the Clinton Administration, going to get what we wanted, whether "Don't Ask, Don't Tell" actually hindered the momentum, whether it split—in hindsight whether sort of we would have been better with the original Carter policy, whether it would be easier to move to the ideal state that we want to be in. Any of you, I'd be interested in your opinions.

MR. OSBURN:

I think we would have been better off having the Carter policy in place. Larry Korb, I think, is very prescient in saying that. "Don't Ask, Don't Tell" was put into law, as opposed to it just being a regulation. Had it just been left as a regulation, then a future Secretary of Defense could come in and change it or a future President could come in and change it with an executive order.

So I think, in that way, the fact that it's a law has made it a whole lot harder to change, because we now have to mobilize the entire Congress to get them to change their mind.

The one benefit, I think, of the horrible debates back in 1993 is that it did bring issues of gay, lesbian, and bisexual civil rights to the national forefront really for the first time in a big way. It's the first time that we were in people's dining rooms as the TV was going on, and it was debated day in and day out for six months.

I think that that debate has spurred advances in many other arenas that are out there. I think it has prompted the change at the local level and the state level for LGBT civil rights, and I don't think that would have happened but for something popping at the national level.

But with respect to gays and lesbians who are serving, it was a horrible event, and it has made it much harder.

My prediction back in 1993 when I co-founded SLDN with Michelle Benecke, who is a Harvard Law School alumna, was that it would take twenty years for us to change the policy again. We're now through thirteen years of it. I think that we're on track. I actually think we might be able to beat my twenty-year mark, but it shows how long it takes to change very slow-changing institutions.

MR. KORB:

Let me make a comment. I think the way to deal with Congress is you're going to have to put it onto another bill—a funding bill or something. I'll give you an example where we were able to get something changed that you wouldn't think you could get the votes.

When they set up the Department of Education, they mandated that, by 1983, the Department of Defense Dependent School System would move from

the DOD to the Department of Education. And at that time people were concerned. Reagan had said in his campaign he was going to eliminate the Department of Education, and so the commanders were asking me, "You've got to stop this."

And I went over and I talked to the Secretary of Education. He said, "I don't want it. This is bigger than the whole department, and you guys can actually run it better"—because, you know, we could get the soldiers to fix the school buildings, you know, just things like that.

Well, what happened was, I couldn't get anybody on the Hill—people who you would have thought would have supported us, okay, this is interesting, I went to [Sen. Samuel] Nunn; I went to [Sen. John] Tower. You know who supported us? [Then-Vice President] Dan Quayle, because everybody was afraid to take on the education lobby. But what he did is he put it on a defense bill, and it went through, and they signed it, you know, and it sort of stripped it out.

And you're right, it's harder to do, but I think the format, if you want to do it, is to put it onto the Department of Defense, you know, annual budget, because you've got to have a budget. And so if it's going to happen, I agree with Dixon, it's harder if you put it up just for stand-alone. Man, that would be tough. But I think if you put it on another bill, it can happen.

PROF. BORDONE:

Brad.

MR. ROSEN:

So, from the broader acceptance of gays and lesbians in society, we've seen other problems crop up, which is, in the college context, heterosexual couples have complained that they have been discriminated against because they can't live in housing together because most universities don't offer co-ed housing.

Assuming that, you know, we get everything that we want in terms of the elimination of "Don't Ask, Don't Tell" with gays openly serving in the military, what issues is the military then going to confront? So sort of stopping the parade of horribles argument that could come from the other side saying, "Don't allow 'Don't Ask, Don't Tell' to be repealed because we have all of these other issues"—how do we head those off?

MR. MEYER:

Just again from talking to people and interviewing them and so on, in the Black Civil Rights Movement, those arguments have been used because of Affirmative Action programs, which were needed to right wrongs and still are, and perhaps that's going to happen as well.

In the British Armed Forces and the Australian Armed Forces, there is on-base housing. It's part of a program that both countries, both militaries—particularly their navies—have put into place in order to entice gay people to join. They have an affirmative-action recruiting program in England and in Australia, and probably some other countries, and this is an inducement to recruitment.

It's basically affirmative action and righting wrongs and what's that term—for getting minorities to participate when they haven't in the first place. So this is a temporary situation, as it were, until it becomes normal.

MR. OSBURN:

I'll give a response to the legislation. Right now there's a bill pending in Congress called the Military Readiness Enhancement Act that would repeal "Don't Ask, Don't Tell" and replace it with a policy of nondiscrimination.

So let's assume that Congress has the wisdom to pass this immediately, and it gets done, then what? Well, the bill does not address everything. It does not address marriage. It does not address benefits. So there are a whole host of issues that the bill itself doesn't address. It's in part because you already have another law in place called the Defense of Marriage Act.[9] So Congress also has to address that to be able to move forward in a federal context for a number of those issues. So those are going to come up.

And I think there is also just sort of the reality of implementation of "Don't Ask, Don't Tell" that we're going to have to watch very carefully. If the experience of women in the military is any example and the experience of African Americans in the military is any example, you know that the prejudice continues and that there are commanders out there who are going to discriminate, and you need to be able to do what you can to try to prevent that and ameliorate that.

There will need to be training that goes on to try to educate people about, okay, we now are affirmatively allowing LGBT service members to serve openly. We need to have education that goes on so that the commanders have the tools that they need to know how to address the issues that come up.

There also needs to be vigilance towards harassment. I mean, harassment will go on, and people need to have the right avenues to be able to address it. So you're going to have to involve the Equal Opportunity system in the military, you're going to have to do a lot of training and a lot of education, and then you will also move forward on the benefits.

And I think that you see in England and in Australia and in other countries, that's exactly what they have done. They have eliminated the ban first, and then the other issues that have come up, and they've realized they need to address that discrimination as well.

MR. KORB:

You know, passing the bill or changing the law is going to be the easy part. Women, you look at what is happening in the Air Force Academy here all these years later.

So you're going to have to really make sure that it's implemented correctly, and that is the key thing, because passing the law or writing the directive is one thing. Making sure that it gets carried out is going to require, you know, people on the top.

9. *See* 1 U.S.C. § 7 (2000); 28 U.S.C. § 1738C (2000).

Let me give you one example of something I had to deal with. We were invading Grenada. The commanding officer wouldn't let two women get on the plane to parachute in. They were members of the 101st Airborne. They weren't in direct combat, but they were in support. He said, "You can't get on." Let me tell you to what happened to this person's career when I found out about it. You see what I mean? Those are things where somebody has to say, "Hey, wait a second," you see what I mean?

But as I say, all you young people here, you're going to have to work on, you know, when this thing—we take Dixon's twenty years, I hope it's shorter than that, but when it happens, to make sure that it does get carried out.

PROF. BORDONE:

Brad, I feel like you asked a different question, so maybe could I try to rephrase it.

MR. ROSEN:

Please do.

PROF. BORDONE:

I think the question was, let's imagine that we get everything we want. Assumedly it opens up a potential Pandora's box or a slippery slope of arguments where people in the military might say, "Wait a minute. If same-sex couples get to room together, why can't there be coed barracks?" Does that make sense? So it's sort of a slippery slope concern, and the question is, how would you respond to these kinds of concerns or arguments?

MR. KORB:

Let me put it this way: In a way it's a good thing it's in the military, because they are unequal, in the sense that if you're married, you make more money than somebody who's single. You get money for your dependents. So, I mean, I think, you know, that they would be able to handle that and just say, "That's the way it is, and these are the rules," and, you know—so I understand where somebody would complain.

When I was a naval flight officer, I was in a squadron of fifty-five officers. Only five of us were single. Who do you think always got the duty on Christmas Day? I'd say, "I'd like to go home." "Well, you're not married." You see what I mean? That's the way—so you have to—I think they would be able to handle it. I'm sure people would complain, but I think they would be able to handle it.

MR. OSBURN:

I think another way to look at it is the military is always assessing the current environment, trying to decide what policies they need to change. So, for example, the last two years there used to be a prohibition on tattoos, and now you can actually display a tattoo if you're serving in the military, because there is a demand, and they don't want to turn those people away.

There has been a huge pressure on the military because we now have so many more two-income families than we did even twenty years ago, so the military is trying to address that and trying to keep people stationed at one

place for much longer periods of time than they used to in order to address these family needs.

The showers issue, it used to be that they were all open bay showers, but the reality today is that almost all of them are not. The vast majority of them are private showers. And that's not—so the military is constantly assessing all the needs, and other questions will come up about barracks and benefits and other things, and the military will keep on assessing that as well.

MR. MEYER:

In 2003, there was a conference at Hofstra [University School of Law] about "Don't Ask, Don't Tell," and there were presenters from other countries, particularly one from England. And what they talked about is how they prepared their military, and they anticipated the European Union ruling, and so they spent two years preparing for the changeover, for the integration of gays in the military. And other countries have done the same. That's not really happening here. So your concern is real. The transition could be nasty, because they haven't prepared. They don't want to prepare. They want it to be a disaster. At least that's my ugly opinion.

MR. KORB:

I was at the Coast Guard Academy when they admitted women, and they were preparing for that like the Normandy invasion. It was a non-issue. I remember one of the things they said, that women—underclasswomen—couldn't dance with upperclassmen. That lasted the first dance—I mean, unless the Admiral is going to go over and separate them.

So I think a lot of times the anticipation is worse than the actual carrying it out.

FROM THE AUDIENCE:

I wanted to pick up on the theme of incrementalism. Supposing that the Military Readiness Enhancement Act goes down in flames, let's suppose, and I wondered what members of the panel might think of other incrementalist strategies. For example, a bill that would give the Secretary of Defense the ability to suspend "Don't Ask, Don't Tell" for specific commands, specific purposes, you know, "Henceforth translators will no longer be subject to 'Don't Ask, Don't Tell,'" or medical personnel, or you fill in the blank, but what you might think of a policy like that.

MR. MEYER:

It's well known that in times of war, World War II and all the current wars, that discharges go down in times of war because it's convenient to keep people, which of course proves that the policy is irrelevant. But nevertheless, that's what's happened. The "Don't Ask, Don't Tell" policy was an incremental compromise which was a disaster. If what you propose came true, it would just be legalizing what they're already doing. They do have stop-loss orders which are being interpreted in different ways in different commands.

Back in Vietnam when people were coming out, Perry Watkins and others were told, "Never mind, just go." People are coming out these days and are

being sent to Iraq and then discharged afterward if they survive. Incrementalism is just excuses to use people, basically.

MR. KORB:

Yes, I mean—but I do think you have a good point, because I can see something like that—"Notwithstanding any other provisions in this law, the Secretary of Defense, upon his or her authority, can waive this, okay?"

The other way I would think, if you're looking incrementally, if the Meehan-Shays bill [the Military Readiness Enhancement Act] doesn't pass this year, is a compromise would be, okay, this policy has been in existence for more than a decade. Let's appoint a group to take a look at it, you see, kind of a Baker-Hamilton [Iraq Study] Group, to assess it, take a look at what's happened to the rest of the military, our experience. Now we've fought a couple—we've been to Bosnia, we've been to Haiti, we've been to Kosovo, Iraq, and Afghanistan, and we've come back with a report. I think something like that would be a good way to begin it.

MR. OSBURN:

That's something we've actually thought about, your proposal, which is to add a linguist waiver to the bill. Currently we don't support that for a couple of reasons. One is that perhaps the most salient symbol of how absurd "Don't Ask, Don't Tell" is the fact that the Pentagon has discharged fifty-five Arabic linguists during the war on terror, and it's something that has actually riled members of Congress and they see the stupidity of that.

Given that we're only at the very beginning of the debate on "Don't Ask, Don't Tell"—this is only the second session that a bill has been reintroduced—I'm not ready to give up one of the most cogent symbols of how absurd this policy is, because I think members of Congress would go, "Well, we fixed that," and then they will ignore it for another decade. So I would rather use that as a strong argument in our favor.

I think the example also of women in the military is very potent. I mean, the challenge that women in the military have had is that it has been incrementalism to try to open up more and more and more positions. Discrimination still exists against women in the military for certain positions, and it has just been difficult to get finally full nondiscrimination in place.

So, using the military's own history, I would prefer going for a full policy of nondiscrimination and push as hard as we can and continue to assess to see what we can get.

PROF. BORDONE:

It's tempting to take more questions, but we're already a little bit over time, and I think we're trying to catch up with the appointed schedule. So I'm going to end it here and ask you to please join me in thanking our three panelists for being with us today.

[Applause.]

III. PANEL TWO: WHAT DOES *LAWRENCE V. TEXAS* MEAN FOR THE FUTURE OF "DON'T ASK, DON'T TELL"?*

MODERATOR: MARTHA MINOW**
PANELISTS: SUSAN SOMMER, JENNIFER GERARDA BROWN, STUART F. DELERY, AND TIM BAKKEN***

MR. CALOZA:

Good afternoon. My name is Alexis Caloza. I am one of the political co-chairs for HLS Lambda, and it is my pleasure to welcome you to the second panel of this weekend's conference. I know that there are some non-lawyers in the audience, so before I introduce the moderator for this panel, I would just like to give a brief overview of the panel topic.

In the years immediately following congressional enactment of the law colloquially known as "Don't Ask, Don't Tell," there was a flurry of activity challenging the constitutionality of the statute. Yet such litigation occurred in the shadow of *Bowers v. Hardwick*,[10] a Supreme Court case upholding the constitutionality of state laws criminalizing homosexual sodomy.

Bowers v. Hardwick was a fatal flaw in attempts to overturn the "Don't Ask, Don't Tell" statute. First, the case constituted a kind of legitimized homophobia, providing an important backdrop to judicial decision-making. Second and more important, the case precluded advocates from making constitutional claims based on deprivation of due process and infringement of fundamental rights.

As such, litigants were forced to seek redress through the First Amendment and the Equal Protection clause. Courts, however, were unreceptive to arguments based on either ground, and every constitutional challenge to "Don't Ask, Don't Tell" failed on the appellate level.

But in 2003, the Supreme Court handed down its opinion in *Lawrence v. Texas*.[11] Though it's hardly a model of judicial clarity, the opinion makes one point, at least, perfectly clear: *Bowers v. Hardwick* was wrongly decided. The opinion's language affirms the dignity and self-respect of gay and lesbian individuals, and its transcendent tone is certainly reminiscent of other cases discussing fundamental rights. Nevertheless, the test the Court used seemed to be a mere rational basis review, an inappropriately deferential test if fundamental rights were in fact at stake.

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* Friday, Mar. 2, 2007, 3:45 p.m.–5:15 p.m. EST, Austin Hall West Classroom, Austin Hall, Harvard Law School.

** Jeremiah Smith, Jr. Professor of Law, Harvard Law School.

Prof. Minow was introduced by Harvard Law student Alexis I. Caloza.

*** The panelists are, respectively: Senior Counsel at Lambda Legal; Professor of Law and Director of the Center on Dispute Resolution at Quinnipiac University Law School, and Senior Research Scholar and Director of Dispute Resolution Workshop at Yale Law School; Partner at Wilmer Cutler Pickering Hale and Dorr LLP; and Professor of Law at the United States Military Academy at West Point, and Visiting Scholar at the Columbia University School of Law and New York Law School.

10. 478 U.S. 186 (1986).

11. 539 U.S. 558 (2003).

In the end, *Bowers v. Hardwick* was overruled, but whether and to what extent the opinion did more is the subject of much debate and is what brings us here this afternoon: Did *Lawrence* announce a new fundamental right protecting the sexual expression of gay and lesbian individuals? And if so, does that fundamental right require courts to strike down the "Don't Ask, Don't Tell" statute?

Our moderator for today's panel is Martha Minow, a graduate of the University of Michigan, the Harvard Graduate School of Education, and Yale Law School. Prof. Minow clerked for Justice Thurgood Marshall before coming to teach at Harvard in 1981. Her scholarship includes research into equality and inequality, human rights in transitional societies, law and social change, religion and pluralism, civil rights, and the rule of law.

She has been a tremendous supporter of Lambda here on campus, and last year joined more than fifty members of the Harvard Law School faculty in an amicus brief challenging the government's interpretation of the Solomon Amendment in *FAIR v. Rumsfeld*. Please join me in welcoming Prof. Minow.

[Applause.]

PROF. MINOW:

It's great to be here, and it's totally important and timely that this event should be happening, not only because of some cases working through the courts, but frankly our own frustrations with the Solomon Amendment issue, I think, have led many of us to conclude, well, let's talk about what's really at issue, let's go behind the Solomon Amendment to the underlying questions.

So we're going to start here with Susan Sommer, and you have the biographies of the speakers in your brochure, and so I just get the chance to editorialize.

So I'm just going to say that Susan's been just a terrific and inspirational figure as one of the members of the team in *Lawrence v. Texas*, as well as all of her other work for Lambda, so Susan.

MS. SOMMER:

Well, thank you so much for having me here today.

The title of this panel discussion is "What Does *Lawrence v. Texas* Mean for 'Don't Ask, Don't Tell'"—but I think we have to start with the question, "What does *Lawrence v. Texas* mean, period?"

I wouldn't agree with the statement that it is not a model of clarity. I think the meaning is really crystal clear. Maybe there aren't the buzzwords that some of the opponents of antidiscrimination principles claim should be there, but the meaning is quite clear.

I'm going to juxtapose what I think *Lawrence* does say with what the trial courts in two pending cases now going up to the circuit courts, the *Cook* [*v. Gates*[12]] case about to be argued by Stuart Delery, on this panel, in the First

12. Cook v. Gates, No. 06-2313 (1st Cir. argued Mar. 7, 2007).

Circuit, and the *Witt*[13] case, which will be argued in the Ninth Circuit, claim *Lawrence* means. Those two trial court decisions really got profoundly wrong what *Lawrence v. Texas* means, in dismissing complaints alleging that "Don't Ask, Don't Tell" violates the right to substantive due process.

And the government, the Department of Justice, in its briefs in those cases also is getting it profoundly wrong, with horrible consequences for many gay and lesbian people in the military, and potentially for others in many other contexts, if these kinds of views of this very important decision take hold.

Lawrence confirmed that lesbian and gay individuals share the same fundamental right that all others have to enter into private intimate relationships, the autonomy to make profound personal choices about who one will form intimate bonds with, and what exactly one will do in those important relationships with another consenting adult.

This means that, for the government to burden one's ability to exercise this fundamental right, the government has to pass the standard of strict scrutiny, it must demonstrate a compelling government interest to burden the right, and that its burden is narrowly tailored to advance that interest.

It means that the government can't, without a compelling need, exact from an individual, as a price for government employment, for military service, that the individual completely sacrifice having a private, intimate sexual relationship with another adult of their choice. In the words of the *Lawrence* majority, this is a choice central to personal dignity and autonomy.

Lawrence also has an important equality component that requires the government to allow gay and lesbian adults to have the same freedom to exercise this autonomy as any other American or any other person who might serve in the military.

So let's run through what we can see from the text of the *Lawrence* opinion and what we should understand that those words mean. A lot of this comes down to close textual analysis of the opinion, and holding it up in comparison to what courts like the trial courts in *Cook* and *Witt* have to say about it. But a lot springs out from the opinion itself and is easy to describe without taking a magnifying glass to the text of the opinion.

First, *Lawrence* clearly is intended to have application beyond the criminal sphere. The *Lawrence* decision involved striking down Texas's criminal prohibition on sodomy between same-sex partners. But the Court very intentionally, very explicitly discussed the impact that this criminal sodomy prohibition has beyond the criminal sphere, and the stigma and state-sponsored condemnation that fuel discrimination in the public and private spheres, and the civil sphere as well.

The *Lawrence* the majority said, in effect, we see that there's an alternative grounds for decision based on the equal protection problem here, but we're not going to rule on equal protection grounds. We're going to rule on substantive due process grounds, because it's important to make clear that this is protected

13. Witt v. United States Air Force, 444 F. Supp. 2d 1138 (W.D. Wash. 2006), *appeal docketed*, No. 06-35644 (9th Cir.).

conduct. It's not just a problem in singling out gay people. The problem is we do not want sodomy laws that—whether they explicitly single out gay people or not—are generally used as a justification to condemn gay people.

The Court said, and this is a quote, "When homosexual conduct is made criminal by the laws of the state, that declaration in and of itself is an invitation to subject homosexual persons to discrimination, both in the public and the private spheres."[14]

The Court, then, meant for *Lawrence* to dismantle discrimination beyond the criminal context, certainly in the public sphere, quite potentially in the military context.

Second, *Lawrence* resoundingly overruled *Bowers*, and it could not be more explicit on that. The Court said, "*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers* v. *Hardwick* should be and now is overruled."[15] *Bowers* had been a prime jurisprudential underpinning of many cases upholding government discrimination against gay and lesbian people, including the "Don't Ask, Don't Tell" challenges of the 1990s.

Lawrence didn't just overrule *Bowers*, but also said that *Bowers* was wrong at the time it was decided, not just wrong because of some change in jurisprudence or society, or statutory law. The Court called into question a whole generation of "Don't Ask, Don't Tell" precedents upholding that policy that had used *Bowers* as an important leg.

Third, I can agree on at least one point made by the trial courts in the *Cook* and *Witt* cases, and by the Department of Justice, and that is that I do agree *Lawrence* did not announce a new fundamental right to engage in same-sex sodomy. But after that is where I part company.

The reason that I don't think *Lawrence* announced a new fundamental right and didn't use a bunch of bells and whistles that one might find in an opinion saying, "We now proclaim a new fundamental right that had never been identified before," is because the Court was simply confirming that gay and lesbian people share the same fundamental right that had already been well identified and defined in a string of Supreme Court precedents. This fundamental right or liberty entails personal autonomy and choice in making decisions about sexual intimacy and bonds one forms with another person. This is evident from many sources in the decision. I'll just give you some examples.

First, the majority expressly quoted the following language from the discredited *Bowers* opinion and said that that quoted statement discloses the *Bowers* Court's "own failure to appreciate the extent of the liberty at stake."[16] This is the phrase from *Bowers*: "The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy."[17] The majority then goes on to explain the profound significance to the

14. *Lawrence*, 539 U.S. at 575.
15. *Id.* at 578.
16. *Id.* at 567.
17. *Id.* at 566 (quoting Bowers v. Hardwick, 478 U.S. 186, 190 (1986)).

individual, to all individuals, to make decisions about the most private human contact, decisions within the liberty of all persons to choose.

So what the *Lawrence* Court was saying was that the *Bowers* Court had claimed, "Well, we can't say that there's a new fundamental right to homosexual sodomy." The *Lawrence* Court said that's not really the question. The question is that we note that there *already* is a fundamental right to choose to enter into this kind of conduct, and we can't diminish that right for gay and lesbian people.

The majority then went on to say that Justice Stevens' analysis in *Bowers*—his dissent in *Bowers*—should have been controlling and will control here. Justice Stevens' dissent explicitly said that gay and lesbian people are sheltered by the same fundamental right as non-gay people.

The *Lawrence* majority even quoted a big block quote from Justice Stevens' dissent, including this sentence: "[i]ndividual decisions by married persons concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of liberty protected by the due process clause of the 14th Amendment. Moreover, this protection extends to intimate choices by unmarried as well as married persons."[18]

The majority also very tellingly grounds the right to autonomy to make these kinds of intimate choices in a string of landmark precedents saying that the most pertinent beginning point is *Griswold v. Connecticut*,[19] and adding *Lawrence* as another bead on a string of cases from *Griswold* through *Eisenstadt* [*v. Baird*],[20] *Roe v. Wade*,[21] and [*Planned Parenthood v.*] *Casey*,[22] all addressing the right to engage in personal, intimate sexual conduct and to form bonds with others.

Thus the Court didn't announce that it had discerned some new fundamental right to engage in homosexual conduct, because it was saying, "We see this as the same conduct that we've already protected. We are not going to diminish or demean the humanity and the dignity of gay people by saying that they don't share the same liberty interest and fundamental right to engage in the very same conduct."

So what's the consequence of the fact that *Lawrence* articulates a fundamental right here? Why is there so much quibbling over this? What it means is this: once a fundamental right is at stake and being impinged, the government has a very heavy burden to justify that discrimination, that burdening.

The government, generally, when a fundamental right is being intruded upon, has to satisfy strict scrutiny by demonstrating a compelling government interest and that the restriction on the right is narrowly tailored. That is, quite bluntly, why the government is fighting tooth and nail to act as though *Lawrence* means far less than it does. If *Lawrence* is a case triggering only the lowest level

18. *Id.* at 578 (quoting *Bowers*, 478 U.S. at 216 (Stevens, J., dissenting)).
19. 318 U.S. 479 (1965).
20. 405 U.S. 438 (1972).
21. 410 U.S. 113 (1973).
22. 405 U.S. 833 (1992).

of scrutiny, then the government has an easier job of trying to justify the "Don't Ask, Don't Tell" policy.

And here again is another area in which the trial courts and the government are deliberately or crudely misreading the *Lawrence* decision when they say, "Here's another reason we think that it's not a fundamental rights case and that rational review is all we have to do in these 'Don't Ask, Don't Tell' situations." That is their claim: that *Lawrence* really only applied rational review. Again, you can go back and read the case, and put it in the context of constitutional jurisprudence, and you see that that just isn't true, that can't be right.

First, it should be noted that the State of Texas, in defending its sodomy law, had already, in the litigation, conceded that it could not satisfy the compelling government interest, strict scrutiny standard. This was an admission it made in the litigation.

So at the time that the Supreme Court was presented with the *Lawrence* case, all Texas came in saying is, "This should only be tested under rational review. That's a test that we claim we can meet, because we're justifying the statute based on moral disapproval. But we concede that if you're going to set the bar higher, if you're going to identify a fundamental right, we're going to lose"—and they did.

But in any event, the pivotal sentence in which the Court ultimately applies the test was: "The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."[23]

Contrary to what the trial courts in the *Witt* and *Cook* cases say, and what the DOJ says, these are not telltale words of rational review. They claim that just means rational review, but it really does not.

And we know this because, first, the government claims that when you talk about what's a legitimate state interest, that's rational review terminology, but in fact any government burden or discrimination or action has to be done for a legitimate reason. That is just a bedrock principle.

The government must demonstrate a legitimate government interest even when it's faced with strict scrutiny or any other level of scrutiny. And there are a number of cases applying higher than rational review scrutiny in which the Supreme Court has said, "We have to decide whether there's a legitimate interest here."

Second, that sentence reflects a balancing terminology that is very different from what rational review requires, which is simply that a legitimate government interest be rationally furthered. Instead the Court is saying, "Well, there has to be a state interest which justifies the intrusion into the personal and private life of the individual." This is far more a kind of balancing terminology that you see when higher scrutiny is involved.

If you go look at the trial court opinions and the Department of Justice briefs, quite ironically their prime support seems to be the dissent of Justice Scalia. In the face of the *Lawrence* opinion's transcendent language—the really

23. *Lawrence*, 539 U.S. at 578.

powerful message that's clear on the face of the opinion that the Supreme Court is sending that this is an extraordinarily important, fundamental liberty interest at stake here—the trial courts and the Department of Justice rely instead on what the dissent says, what Justice Scalia says.

We could do a close textual analysis and see all kinds of flaws in Justice Scalia's claims about what the majority and concurrence said and meant, but we can also wash it away pretty simply: Scalia was the dissent. This is the military context, so this expression is particularly apt: to the victor goes the spoils. It's what the majority has to say that counts, not what Scalia claims the majority did or did not say. We must look to the majority opinion itself.

There's a lot more that we could say also about what *Lawrence* means for the application of higher levels of scrutiny in the equal-protection context, but in the interests of time, I won't address that now. But there too, the trial courts and the Department of Justice, unfortunately, are being untrue to the *Lawrence* majority, to the concurrence in *Lawrence*, and to a lot of other jurisprudence that's quite important.

In conclusion, *Lawrence* undeniably means that gay and lesbian people share the same constitutionally protected liberty to make their own choices about their intimate lives and the personal bonds they forge with other people. This liberty is no different from the same liberty all Americans have and cherish.

Lawrence in its very opening passage says "Liberty presumes an autonomy of self that includes the freedom of thought, belief, expression, and certain intimate conduct."[24] The Court extolled the liberty at stake here as "an integral part of human freedom . . . ."[25]

When our nation goes to war, and we send our men and women into battle, into danger, and we go into other countries and sometimes wreak havoc on civilian populations, we do so in the name of freedom and of liberty to protect the values that we cherish, to individual autonomy, to human freedom.

It's vital that we acknowledge as a people, that Congress acknowledge, and that the courts acknowledge the hypocrisy of fighting for a liberty that we don't live up to within our borders, within our military and here at home. That I believe is another very powerful message of *Lawrence* for "Don't Ask, Don't Tell."

PROF. MINOW:

Thank you.

Well, I'm going to take a moment just to speak a little bit personally. I had not taught constitutional law ever in my life, and when the *Lawrence* opinion came down, I said, "I have to teach constitutional law." And I have to teach constitutional law for two reasons.

One, I cried whenever when I read the opinion. I thought, okay, I can spend time getting my head into the heads of these Justices; otherwise I hadn't really wanted to. The second reason was that it's going to take a long time to sort out what this case means. So I really appreciate this very clear presentation.

24. *Id.* at 562.
25. *Id.* at 577.

We're really lucky to have Jennifer Brown here. She is one of the leading academic commentators on sexual orientation and the law. In fact, I remember one of her first articles that looked at issues in conflicts of law. Really, you made conflicts of law an interesting subject.

PROF. BROWN:

Scary.

PROF. MINOW:

As well as her very path-breaking symposium on extraterritorial recognition of same-sex marriage and her wonderful book, *Straightforward: How to Mobilize Heterosexual Support for Gay Rights*.[26] So thinking politically and legally, I'm also very happy to announce that Jennifer will be a visiting professor here at Harvard a year from now.

PROF. BROWN:

Thank you, Martha.

Today I will elaborate upon a couple of themes that Susan has already talked about. There are three main points I would like to make. First, the way that *Lawrence* spotlights lesbian and gay people, not alone, not individually, but fundamentally in relationships; second, that deploying *Lawrence* in "Don't Ask, Don't Tell" cases consequently changes in some important ways the presentation of a lesbian or gay service member. It's no longer, as Andrew Sullivan has written, "alone again, naturally,"[27] but in a relationship, as part of a couple, a family, an intimate bond. And third, I'll address implications for strategy flowing from this new presentation of gay and lesbian service members, particularly with respect to the judges who hear these cases.

So, first, the way *Lawrence* shifts or broadens the focus. Susan, you have already wonderfully touched on some of the language that I wanted to talk about. In *Lawrence*, Justice Kennedy is placing same-sex couples very much in the tradition with different-sex couples. The citations to *Griswold*, to *Eisenstadt*, and to *Roe* are all doing that. Kennedy's reasoning and citation to authority are putting same-sex couples into the tradition of family and of procreation in interesting ways.

This is why, despite Scalia's badgering, the majority does not talk about a fundamental right to same-sex sexual activity as if it were some wholly distinct, new thing that the Court is supposed to create; instead the Court sees the right to same-sex sexual activity in the same category with the preexisting and already recognized rights of different-sex couples.

I think this resonates with what we hear from marriage-equality advocates, who don't want to argue for "gay marriage" or for "same-sex marriage," but

26. IAN AYRES & JENNIFER GARARDA BROWN, STRAIGHTFORWARD: HOW TO MOBILIZE HETEROSEXUAL SUPPORT FOR GAY RIGHTS (2005).

27. Andrew Sullivan, *Alone Again, Naturally*, NEW REPUBLIC, Nov. 28, 1994, at 47.

want to argue for marriage, equally available to different-sex and same-sex couples.[28]

So it's *Lawrence*'s focus on lesbian and gay people in connection with one another, their location in relationships, that is so dramatic. And the Court goes even further, because that placement of same-sex couples within the larger category of intimate bonds gives the Court an opportunity to draw a further connection between same-sex couples and different-sex couples. Kennedy develops language of equivalency here that is very important.

So, for example, the Court reminds the reader, "To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, *just as it would demean a married couple* were it to be said marriage is simply about the right to have sexual intercourse."[29] Similarly, the Court says, "When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice."[30]

In this way, the Court is describing something that a non-gay reader would identify with and say, "Oh, yes, this is part of what I expect for myself," and then the Court is reminding the reader that gay and lesbian persons are as much a part of that as the presumptively non-gay reader.

Then, just as the Court places this desired freedom in the same category with heterosexual sex, different-sex couples, and traditional notions of family decision-making—and I mean that to be a reference again to *Griswold* and to *Eisenstadt*—so also when the Court discusses restriction on that freedom, the Court again subtly reminds the non-gay reader to see his or her own potential sexual activity as historically aligned with the gay sex that is at issue.

So how does the Court do that? Consider this assertion: "The longstanding criminal prohibition of homosexual sodomy upon which the *Bowers* decision placed such reliance is as consistent with a general condemnation of nonprocreative sex as it is with an established tradition of prosecuting acts because of their homosexual character."[31] This statement suggests to readers who have engaged in, hoped to engage in, or tolerated non-procreative sex that they now have a reason to start connecting their own sexuality with the sexuality that is at stake in *Lawrence*. Rhetorically this is very important.

The Court's discussion of *Casey* sets up yet another point of alignment between gay and non-gay people. Kennedy quotes *Casey*'s language about autonomy that Susan noted earlier—"At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery

28. *See, e.g.*, EVAN WOLFSON, WHY MARRIAGE MATTERS: AMERICA, EQUALITY, AND GAY PEOPLE'S RIGHT TO MARRY (2004).

29. *Lawrence*, 539 U.S. at 566 (emphasis added).

30. *Id.* at 567.

31. *Id.* at 570.

of human life"[32]—and then says, "Persons in a homosexual relationship may seek autonomy for these purposes, *just as heterosexual persons do*."[33]

So why is this theme of connection—between lesbian and gay people and their partners of the same sex, between same-sex couples and different-sex couples, and ultimately between gay and non-gay people—why is that theme of connection so important?

Well, there are lots of reasons why, but one of the reasons that interests me the most is how this sense of connection affects judges who are going to be hearing the cases that come in the wake of *Lawrence*, including the "Don't Ask, Don't Tell" cases. In an article I wrote about judicial bias on the basis of sexual orientation, I discussed the way that judges' findings of fact and application of law can be distorted, often to the detriment of lesbian and gay litigants.[34]

Judges' decision-making can be distorted when judges feel an artificial sense of disconnection from the litigants who come before them. Amy Ronner[35] and Kenneth Karst[36] have explored this in helpful ways.

Karst particularly has explained how, when judges are faced with the task of recognizing an identity group and a litigant's membership within the group, whether the judge realizes it or not, these tasks tap into the judge's own sense of self and social status.

And Amy Ronner, borrowing from Gregory Herek's "Social Psychology of Homophobia,"[37] argues that bias can result when a judge perceives similarities between himself and a gay or lesbian party, and then defensively projects onto the party qualities of "otherness" in an attempt to separate himself from the party before him. Ronner argues, and I agree with her, that judges have to address the anxiety that's occasioned by some sense of similarity to gay or lesbian litigants—they have to accept their own connection to gay and lesbian people.

Now, this is a really different sort of approach to judicial impartiality. We tend to think of judicial impartiality as coming from detachment and objectivity. But what Ronner is saying, and what I've also argued, is that sometimes judges achieve greater impartiality when they acknowledge their own sense of connection and similarity with a litigant. That actually helps to avoid some of the distortion that can otherwise occur.[38]

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32. *Id.* at 574 (quoting Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992)).

33. *Id.* (emphasis added).

34. *See* Jennifer Gerarda Brown, *Sweeping Reform from Small Rules? Anti-Bias Canons as a Substitute for Heightened Scrutiny*, 85 MINN. L. REV. 363 (2000).

35. *See* Amy D. Ronner, Bottoms v. Bottoms*: The Lesbian Mother and the Judicial Perpetuation of Damaging Stereotypes*, 7 YALE J.L. & FEMINISM 341 (1995).

36. *See* Kenneth L. Karst, *Myths of Identity: Individual and Group Portraits of Race and Sexual Orientation*, 43 UCLA L. REV. 263 (1995).

37. *See* Gregory Herek, *The Social Psychology of Homophobia: Toward a Practical Theory*, 14 REV. L. & SOC. CHANGE 923 (1986).

38. Toni Massaro, Lynn Henderson, and Martha Minow have noted, however, how difficult it can be for judges to empathize with people who are different from them. *See* Toni Massaro, *Gay Rights, Thick and Thin*, 49 STAN. L. REV. 45, 108 (1996) ("[A]ccounts should highlight the ordinariness and the orderliness of many gay and lesbian existences and make vivid the harms of denying,

All of this leads me to notice, particularly, the language in Justice Kennedy's opinion that I've highlighted. I believe that *Lawrence* invites readers into a less threatening space for making new connections between gay and non-gay people. And I hope we will see, as *Lawrence* is deployed in the military context, that this new way of presenting gay and lesbian litigants may somehow create greater receptivity in the judges who hear the cases.

The final point I want to make is just that I do think that this line of reasoning and rhetoric in *Lawrence* and the way it may be deployed in the military cases actually shows some very nice seamlessness between issues in lesbian and gay rights advocacy. This runs counter to strategies that can at times become rather territorial. We sometimes hear people suggesting, for example, that marriage equality advocates ought to pay more attention to persistent problems of employment discrimination. Others will complain that we ought to spend less time on employment discrimination in private sectors, and more on governmental discrimination, including that in the military.

What we start to see in opinions like *Lawrence* is how a victory in one place starts to yield amazing benefits in another. Deployment of *Lawrence*, including the language I've highlighted, illustrates the kind of public discourse that can occur when we start thinking about lesbian and gay couples as families. Thinking in this way may yield benefits in unpredicted places, including the military.

PROF. MINOW:

That's terrific.

One further relationship that we might think about is how military and nonmilitary people might understand their relationship with one another. And it's interesting to me to think about the time when "Don't Ask, Don't Tell" was enacted, of course, we were not at war in the same way that we are right now. And I think that there might be ways in which the relationship between civilians and the military are better understood in this country now than they were then, and that might be a resource as well.

Again, we're delighted that Stuart Delery is here. I would be interested from Stuart to understand precisely how your insights into Enron and WorldCom also may pertain to some of the issues here, but also your leadership in defending the University of Michigan and its law school in its admissions policies.

But I think everybody here knows that Stuart is representing a group of discharged service members in the case that will be argued this coming week in the First Circuit, and we are all eager to hear what you have to say.

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stigmatizing, or criminalizing these existences."); Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1576–77 (1987) (maintaining that legality and empathy are not "mutually exclusive concepts" and that empathy can be an important element of legal discourse); Martha Minow, *The Supreme Court, 1986 Term—Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 57–60 (1987) (discussing the difficulty judges have in empathizing with people who are different from them).

MR. DELERY:

Thank you very much, and I really appreciate the invitation from Lambda and the Law School to come and talk.

I don't know about the Enron and WorldCom aspect, that's another side of my practice. But as has been said, I do have the real honor to be representing, with a great team of lawyers, a tremendous group of service members who served in all branches of the military honorably, during our current conflicts and before, and who were discharged under one or another aspect of this policy. I've also had the great pleasure to litigate this case with SLDN as co-counsel, working with Dixon Osburn, who spoke earlier; Sharon Alexander, who will be speaking tomorrow; and others. And it is really a wonderful experience.

I do come at it, frankly, from an advocate's perspective, particularly when the argument is five days away, so you have to take that into account in evaluating what I have to say, although I do believe that I'm right on all of these points.

The origin of the *Cook* case goes back really to the summer of 2003, after *Lawrence*, when SLDN and a group of lawyers at Wilmer started thinking about what the consequences might be for "Don't Ask, Don't Tell" in light of the Supreme Court's recent decision. And eventually, as a group of plaintiffs, ours and others, expressed desire to mount a new challenge to the law, the recent round of litigation resulted.

I think that *Lawrence* has at least four significant consequences for how we present the challenges to "Don't Ask, Don't Tell." Others on the panel have spoken about some of them at length, but I have some additional points to make.

First, by overruling *Bowers*, *Lawrence* removed the precedent that had been central to the earlier round of circuit court cases upholding "Don't Ask, Don't Tell" in the 1990s. In fact, every one of the prior Court of Appeals decisions relied on *Bowers* or some circuit precedent that itself had been based on *Bowers*. And the argument was powerful, as Alexis suggested in his introduction. To the extent that sexual activity by gay people can be criminalized, then many lesser sanctions could follow pretty easily under the law. And that was a really powerful aspect of the first round of litigation.

But as Jennifer was suggesting, *Lawrence* did not simply remove an impediment by making clear that the service members we're talking about are entitled to a presumption of legality but also made an affirmative statement that the relationships that they have—including the sexual component of intimate relationships—are affirmatively protected by the Constitution. And it provides a frame of reference for what we're talking about when we deny gay people the opportunity to serve in this way and impose these restrictions on them.

The second consequence for legal challenges to "Don't Ask, Don't Tell" as a result of *Lawrence* is what Susan discussed, which is that *Lawrence* established that restrictions on the right all adults, including gay and lesbian adults, to engage in private sexual relationships and activity without the intervention of the government is fundamental, and burdens on the right or restrictions on the right require heightened judicial scrutiny before they can be sustained.

Susan has already been through the reasons, the arguments from the text of the opinion that are central to our litigation and likely to figure prominently in the argument on Wednesday. But the bottom line from my perspective is that in concluding that *Lawrence* reflected only the lowest form of rational basis review, both the District Court in our case and the government failed in its briefs to give appropriate effect to what the Supreme Court said.

Ordinary rational basis review, as Susan suggested before, does not involve a balancing of government interests on the one hand against restrictions on the constitutional rights of individuals on the other. And ordinary rational basis cases do not cite case after case after case from fundamental rights lines of cases in order to describe the right at stake.

In some sense, to deny the full effect of the Supreme Court's decision in *Lawrence* is to repeat the same error that the *Lawrence* Court found in *Bowers*, which is to underestimate or fail to fully recognize the right that all Americans, including gay and lesbian service members, enjoy in this area.

Just a couple of other notes in addition to what Susan said on this topic. The District Court in our case did refer to Justice Scalia's dissent in a fairly interesting way. The District Court expressed its view that this question of the level of scrutiny that *Lawrence* applied had only minimal rational basis because that's what Justice Scalia said it was doing.

Justice Scalia said that the majority had not recognized a fundamental right to homosexual sodomy, and because the majority was silent in the face of Justice Scalia's point and could have responded, in the District Court's view, that fact was sort of a tiebreaker and tipped the scales towards concluding that this was a lowest form of rational basis case. Again, putting aside the question of whether looking to the dissent's characterization of the majority is the right way to interpret it, the fact is, the majority did respond in detail to Justice Scalia by making the crucial critique of *Bowers*—which is that it had, by defining the right so narrowly, failed to give effect to the then already clearly established right to engage in intimate relationships.

The government in our case adds two other points that might be interesting on this subject. One is a contention that *Lawrence*, in fact, overruled only one of two holdings in *Bowers*. It argues that the only proposition *Lawrence* established was that moral disapproval of homosexuality and same-sex relationships was not a legitimate basis for government action standing alone, but that it left in place, as Justice Scalia said, the holding from *Bowers* that there was no fundamental right to homosexual sodomy. We, of course, think that this argument does not take into account the fairly blanket statement in *Lawrence* that *Bowers* was overruled and that it was wrong when it was decided and it is wrong today.

Second, the government argues that *Lawrence* is inapplicable in the military. Susan already talked about the argument that *Lawrence* is inapplicable outside of the criminal context, but the government has argued that *Lawrence* is inapplicable to the military as well. And that brings me to talk about another case that we rely on and that sheds some light in this area: a decision by the

Court of Appeals for the Armed Forces in a case called *United States v. Marcum*,[39] decided in 2004.

In the wake of *Lawrence*, the fact is, the District Court in our case is not an outlier. Most courts asking the question of what level of scrutiny *Lawrence* requires have come out at the rational-basis level, basically making the same arguments that we've been talking about.

Marcum is striking because it's different, and it's different even though the court making the decision is the one most familiar and most directly associated with the military. I was not particularly familiar with this court before the *Marcum* case. It turns out that the Court of Appeals for the Armed Forces is an Article I court, but established by statute with civilian judges, that sits in review of all criminal cases coming out of the military.

The issue in the *Marcum* was a prosecution under the military's version of the sodomy statute that was in issue in *Lawrence*, called Article 125 of the Uniform Code of Military Justice.[40] A noncommissioned officer had been charged with forcible sodomy, essentially rape, acquitted of that, but convicted of the lesser offense of consensual sodomy. After *Lawrence* was decided, the defendant added as an issue on appeal whether Article 125 constitutionally could be applied in that context. The United States argued in *Marcum* that *Lawrence* did not apply at all to the military and that sodomy per se could be criminalized in light of unit cohesion, the same rationale that is advanced in support of "Don't Ask, Don't Tell."

The *Marcum* court did the following: It first held, over the government's opposition, that *Lawrence* applies to the military. Second, it recognized that the Court in *Lawrence* had placed the right at issue squarely in the line of cases from *Griswold* through *Roe* and *Casey* on down. Third, it said it would not presume that the Court had articulated a fundamental right in *Lawrence*, because of what it perceived to be ambiguous language. But fourth, it held that *Lawrence* requires a searching constitutional inquiry examining the fit between asserted government interests and the burden on the right recognized in *Lawrence* in order to decide whether a particular conviction is constitutional.[41] The court said that it would do that inquiry on an as-applied, case-by-case basis.

The *Marcum* court therefore recognized what most others have not in the wake of *Lawrence*: that the Court required something substantially more, at the very least, than the lowest form of rational basis review. And so we have argued that, at the very least, in our case the same form of "searching constitutional inquiry" is required, although the better reading of *Lawrence* recognizes the fundamental rights analysis that we discussed earlier. So that's the heightened scrutiny effect of *Lawrence* on our case.

The third consequence of *Lawrence* for "Don't Ask, Don't Tell" challenges is one to which Susan alluded: that *Lawrence* has equal protection significance as well. The *Lawrence* majority said that Justice O'Connor's reasoning under equal protection in her concurrence was "tenable," although in the majority's view

39. 60 M.J. 198 (C.A.A.F. 2004).
40. *See* 10 U.S.C. § 925 (2000).
41. 60 M.J. at 205.

that analysis did not go far enough. But it further discussed the due-process right using equal-protection-type concepts—equal dignity and the like. So in our case we have used *Lawrence* to argue that, as to our equal-protection claim, the Supreme Court confirmed arguments which could have been made under *Romer v. Evans* as well: that equal protection principles prohibit discrimination against gay people.

Lawrence's final legal effect on "Don't Ask, Don't Tell" is that it undermines the distinction between status and conduct that was really at the root of the so-called compromise in the statute. The statute reflects a fiction that the government will not prohibit gay people from serving in the military, but instead will only target certain categories of prohibited conduct. And I think there are many arguments why, even without respect to *Lawrence*, that's a little bit too cute. But *Lawrence* makes clear, as one of your earlier panelists pointed out, that by criminalizing homosexual conduct, you are essentially discriminating against homosexual persons, and there is a sentence in the opinion that links those two concepts together.

The "Don't Ask, Don't Tell" compromise came against the backdrop of court cases, particularly in the Ninth Circuit, that had questioned whether the military constitutionally could have a prohibition against service based on orientation, hence this compromise, and I think there are several ways in which *Lawrence* really unravels that.

To the extent that "Don't Ask, Don't Tell" is examined under some form of heightened scrutiny, as opposed to the lowest form of rational basis review, then obviously the challenge to it becomes more potent. But we have argued and believe that we can establish that the law cannot be justified even under the rational basis test applied in the earlier cases in the 1990s, because of the now extensive record of experience that we have under the statute in the last fourteen years. There are studies that show that gay service members are serving openly with no effect—no negative effects—on unit cohesion and morale; evidence from other militaries and in particular on interaction between U.S. forces serving alongside integrated militaries; and finally, the military's own practice of applying this statute in times of war. Discharges dropped precipitously under "Don't Ask, Don't Tell" after 9/11. And if what the military is doing is retaining gay service members who are known to be gay because of other needs, it undermines the basic argument for unit cohesion that the government advances, because it's presumably at this time of open hostilities that those interests—if they were ever really threatened by openly gay service members—would be most at risk. All of those types of arguments, which can be made under rational basis, are certainly easier under heightened scrutiny, which is why what *Lawrence* means is such a feature of these cases. I'll stop there.

PROF. MINOW:

Super.

Stuart and our next speaker will both be doing double duty; they will both be on a panel tomorrow morning, and so we're especially grateful for that.

And I want to say that, Tim Bakken, we are very, very grateful that you're here. When Justice Breyer wrote in his opinion in the Solomon Amendment case that what law schools should do is have more speech, well, that's what we're

doing: We're having more speech, and it wouldn't be a really genuine speech if we didn't have someone to help us understand the perspective of the military, so we're especially grateful that you're here.

PROF. BAKKEN:

Thank you, Prof. Minow, and thank you to Harvard Lambda and Harvard Law School for the opportunity to participate in this important conference. I cannot speak for the government, and I am unwilling to defend the "Don't Ask, Don't Tell Policy," but I will try to make the legal argument for the Congressional Act authorizing the policy in light of the decision in *Lawrence v. Texas*, at least for the purposes of discussion.

The military and government focus on at least three factors in determining whether they need or want the "Don't Ask, Don't Tell" policy. The first factor is an emotional consideration. Some would call it values. Others would call it prejudice. Others would call it a way of life. To some in the military, what the "Don't Ask, Don't Tell" policy does, or what the repeal of it would do, is to affect the very essence of their values.

The "Don't Ask, Don't Tell" policy exacerbates what already exists in the military—the relative absence of diverse perspectives, itself a result of the authoritarian nature of the military and the homogeneity of the corps of officers. Almost paternalistic, the policy protects some in the military from the diversity that the rest of the United States enjoys, but for a reason—to ensure, according to the military, good order and discipline. The policy does protect some individuals in the military from threats or affronts to their religious beliefs, which the military recognizes as a powerful motivator of soldiers, especially during combat. Indeed, courts consider state-sponsored religion in the military (such as chaplains serving as officers, expenditures for places of worship, and promotions for religious services) a compelling national need. Such governmental support for religion in any other place in society would be unconstitutional.

The military would consider banning any activity or person that might impede a majority of soldiers from serving or fighting to the utmost. In *Parker v. Levy*,[42] *Goldman v. Weinberger*,[43] and *Greer v. Spock*,[44] respectively, the Supreme Court approved military bans on service members' political speech, service members' religious symbols, and even civilians' political speech on a public road on a military base. Outside the military, each of these bans would be unconstitutional in most circumstances. Of course, the nation loses a significant number of service members by continuing the "Don't Ask, Don't Tell" policy and offends a large number who must serve anxiously in silence.

The second factor the military would assert in justifying the policy is that it protects individual privacy in a public occupation. That is, the policy minimizes sexual tension in close and crowded living quarters and work environments. The third factor behind the policy is that it serves operational needs in that the

42. 417 U.S. 733 (1974).
43. 475 U.S. 503 (1986).
44. 424 U.S. 828 (1976).

absence of emotional and sexual relationships in combat units, which are all male, will ensure that each individual soldier will place the unit's success over that of any favored individual.

In discussing the constitutionality of the "Don't Ask, Don't Tell" policy, one might suggest that some of the most relevant, important cases that preceded *Lawrence v. Texas* are not the traditional due process cases, such as *Meyer v. Nebraska*,[45] *Griswold v. Connecticut*,[46] *Roe v. Wade*,[47] *Cruzan v. Director, Mo. Dep't of Health*,[48] *Planned Parenthood v. Casey*,[49] and *Washington v. Glucksberg*.[50] Those cases concerned privacy and individual interests in a civilian context. The individuals' interests in those cases did not threaten any other person's privacy concerns, such as those of adult soldiers, and those cases did not implicate any national security concern.

The Supreme Court's military commission cases of *Ex Parte Quirin*[51] (decided in 1942), *Rasul v. Bush*[52] and *Hamdi v. Rumsfeld*[53] (decided in 2004), and *Hamdan v. Rumsfeld*[54] (decided in 2006) might be more analogous to circumstances where soldiers must confront the "Don't Ask, Don't Tell" policy. In *Quirin*, the Court approved the capture (within the United States), military trial, and execution of an American citizen (presumably) who claimed that the military was violating his fundamental right to a fair trial. In *Rasul*, *Hamdi*, and *Hamdan*, the Court rejected the President's claims that the President, alone, under his Article II authority, could provide for the detention and trial before a military commission of either a U.S. citizen or non-citizen. However, the Court rejected the President's assertion of Article II authority because Congress had not concurred with his actions or, in *Hamdan*, because an existing statute regulating military commissions provided the authority to create commissions and try detainees. In each case—*Quirin*, *Rasul*, *Hamdi*, and *Hamdan*—the Court concluded or implied that, when the President and Congress concur on a law or policy created under their express Article I and II authority to regulate military affairs, the Court has little authority to intervene.

The Court's decision in *Hamdi* is particularly illustrative. In *Hamdi*, the petitioner held American and Saudi citizenship. The military captured him on the battlefield in Afghanistan and held him at a military prison in Guantanamo Bay, Cuba. He alleged that his detention violated his Fifth Amendment Due Process rights and that, at a minimum, he was entitled to a trial. Rejecting Hamdi's due-process claim, the Supreme Court concluded that Congress's Authorization for Use of Military Force, adopted on September 18, 2001, along

45. 262 U.S. 390 (1923).
46. 381 U.S. 479 (1965).
47. 410 U.S. 113 (1973).
48. 497 U.S. 261 (1990).
49. 505 U.S. 833 (1992).
50. 521 U.S. 702 (1997).
51. 317 U.S. 1 (1942).
52. 542 U.S. 466 (2004).
53. 542 U.S. 507 (2004).
54. 126 S. Ct. 2749 (2006).

with the President's decision not to grant some detainees prisoner-of-war status, provided adequate constitutional authority to detain Hamdi. The Court did conclude that Hamdi had a right to contest whether he was an "unlawful combatant" who fought outside the laws of war and, thus, could be tried before a military commission—as opposed, presumably, to being held as a prisoner of war under the Third Geneva Convention or tried in a federal district court. As the Court held in *Quirin* and held or implied in *Rasul*, *Hamdi*, and *Hamdan*, plaintiffs who attack government actions that Congress and the President approved by virtue of their express constitutional authority to regulate the military will find an absence of judicial review, or, at a minimum, significant judicial deference toward the military.

Even protections normally available under the Bill of Rights can be unavailable in a military context. Prominent due-process cases such as *Griswold*, *Roe*, *Planned Parenthood* [*Casey*], and *Cruzan* concern birth control, abortion, and the right to refuse medical treatment. None of those cases contains what the military would claim is a countervailing adult privacy interest, such as what a soldier in the military would assert. In all the due-process privacy cases, the state interests asserted do not involve what most would consider the preeminent interest of national security. It might be argued whether the "Don't Ask, Don't Tell" policy promotes national security in the first place, but the more relevant issue is whether the Supreme Court could ever be competent to conclude that the policy does not promote national security when the military concludes it does.

Without even reaching a claim that a military rule is necessary to promote national security, the Supreme Court has concluded that the military's simple assertion of "good order and discipline" is sufficient to allow it to restrict speech and religious practices. In *Parker v. Levy*, the Court held that neither the Due Process Clause of the Fifth Amendment nor the First Amendment prohibits the military from prosecuting and imprisoning an officer for making disparaging comments about special-forces soldiers and the Vietnam War. The military, concluded the Court, is a "specialized and separate society" in which constitutional protections apply differently. Similarly, in *Goldman v. Weinberger*, the Court found that the military did not violate the First Amendment's Free Exercise guarantee by prohibiting soldiers from wearing religious symbols outside their uniforms. In both *Parker* and *Goldman*, the Court upheld military rules designed to ensure order and discipline. Those cases, like the due-process privacy cases, did not involve extensive congressional fact-finding, a statute ordering the policy, military rules implementing the policy, or government assertions of national security interests, all of which occurred in the "Don't Ask, Don't Tell" context.

The holding in and implications of *Lawrence v. Texas* are unlikely to provide a basis on which to alter the Court's military jurisprudence. In *Lawrence*, the police arrested two men for engaging each other in sexual acts in their bedroom. The Court seemed to emphasize that its conclusion that sodomy statutes violated individual Due Process protections was limited to private sexual behavior. Since its decision in *Lawrence* in 2003, the Court in *Hamdi* (2004) rejected a military detainee's (a U.S. citizen) claim that the due process clause

provided him with certain trial protections. The Court based its decision on Congress's Authorization for Use of Military Force (from 2001). The congressional authority to detain Hamdi was greater than that provided by the military rules at issue in *Parker v. Levy* and *Goldman v. Weinberger*, where the Court upheld limitations on political speech and religious practices, respectively. The authority behind the "Don't Ask, Don't Tell" policy is greater than that at issue in *Parker* and *Goldman* and similar to that in *Hamdi*—cases in which the Court rejected individual rights' claims.

The Court in *Lawrence* did not indicate that sexual behavior between two persons of the same sex is a fundamental right. Still, even a fundamental Due Process right or a protection under the Bill of Rights in a civilian context might not exist within a military context, as illustrated by *Parker* (speech), *Goldman* (religion), and *Hamdi* (detention/trial). In circumstances where a governmental action does not burden a fundamental right, the Court will not examine the action with strict scrutiny and will not require the government to have a compelling interest to undertake the action. Thus, to justify the "Don't Ask, Don't Tell" policy, the government will have to assert only a rational basis, a relatively easy test to satisfy. The Court would simply examine whether there could be any conceivable basis for the policy. Given Congress's findings of fact within the statute authorizing the policy, it seems unlikely that any court would fail to find a conceivable basis.

The most recent challenge to the "Don't Ask, Don't Tell" policy is *Cook v. Gates*, brought by former service members. In *Cook*, the district court dismissed the plaintiffs' complaint, presumably concluding as a matter of law that no set of facts could justify holding the policy unconstitutional. However, even if the plaintiffs could present evidence to a court, they would have to show that there is no conceivable basis for Congress's findings of fact or that circumstances have changed so significantly since Congress approved the policy in 1993 that a court would be justified in now holding the statute unconstitutional. Either scenario would represent significant judicial oversight of Congress's regulatory powers over the military, an authority that seems to lack support in the Constitution given its express provisions granting authority to the Congress and the President over military affairs.

Under either scenario—the plaintiffs' trying to prove the policy is irrational or that circumstances have changed—a court's collection of facts would require extensive hearings that could intrude on military operations. Senior military leaders would have to testify why they continue to support and how they are implementing the "Don't Ask, Don't Tell" policy. The court would need active-duty soldiers to testify about how the policy affects soldiers in combat and non-combat situations. Some testimony on how the policy affects troops in certain battle locations or situations might compromise ongoing combat operations. Expert witnesses would have to testify about the policy's sociological affects on the different branches of the military (Army, Navy, Air Force, and Marines) and the psychological affects of the policy on individual soldiers. To some extent, every appearance by a member of the military at a judicial hearing would detract from the war effort.

Perhaps the Constitution's drafters understood the difficulty any court would have in regulating military affairs. The Constitution provides express and comprehensive authority to the Congress and President to regulate and command the military. It provides little or no role for any court. Regardless of how unwise the decision of Congress and the President to adopt the "Don't Ask, Don't Tell" policy, even under the authority of *Lawrence*, a court today will be unlikely to invalidate the policy.

PROF. MINOW:

Well, this is a perfect panel, everyone kept to their time, and people also identified procedural issues, which warms the heart of this procedure teacher, and structural constitutional issues like separation of powers as well.

I can't resist commenting on this last point that the Supreme Court hasn't found it difficult to overturn findings of Congress in other contexts. Granted the military context is special.

I wonder if anyone on the panel wants to comment on what anyone else has said before we open it up for comment.

MR. DELERY:

On the last point about getting to fact-finding, it probably makes sense to clarify for people, to the extent that we didn't before, the posture of the *Cook* case. It was dismissed on the government's 12(b)(6) motion to dismiss, and so what we are seeking from the First Circuit is exactly the opportunity that Professor Bakken described, which is the chance to make the case, because I agree with you that the more you learn about this, the more compelling it is.

We focused in drafting the complaint on the extent to which the military's actions don't line up with the words that were used in 1993 during the debate over the bill and the congressional findings.

And I think in terms of getting the opportunity to present a case, I think the deference cases don't go as far as sometimes people commonly say. In fact, many of the deference cases were actually decided on the basis a of factual record in one form or another. And in fact, the "Don't Ask, Don't Tell" cases in the 1990s, all of which invoked this line of deference cases that you're talking about, were decided on the basis of either a trial record or summary judgment record after discovery. As near as we can tell, the government has cited no case for the proposition that it's appropriate to, under the guise of deference, dismiss and prevent the plaintiffs from putting on the kind of case that we hope we'll be able to do.

PROF. MINOW:

So, audience questions, comments? Again, it's a perfect panel. Could you identify yourself, also?

MR. ROSEN:

My name is Brad. I'm a 2L.

One of the things I think someone touched upon earlier was unit cohesion and the idea of, you know, the sort of invisible costs of introducing gays into the military. And I'm asking the question which wasn't touched upon, which is,

don't we have to perform that rational analysis, is it cheaper, then, to kick all the gays out or kick all the straight people with problems with it out?

And I am asking the question because, if that's a line that's being advanced, doesn't it have to then—don't we have to do the full analysis, which is, if X percent of the service has no problem with gays in the military and X percent of the military—we would gain this many people by allowing gays in the military, don't we then at that point have to make a decision between which is more cost effective, or are we not required to do that analysis?

PROF. MINOW:

I take it this is not only a question to Tim, so anyone who wants to answer this or address it.

PROF. BROWN:

Ian Ayres and I published a piece in the Michigan Law Review called *The Inclusive Command*,[55] and some people have read it more as a thought experiment than anything else.

But what we propose is another incremental strategy—where is my incremental guy out there—in which we actually would allow people to volunteer for commands where "Don't Ask, Don't Tell" would not apply, where people could be openly gay. This would allow for some demonstration of just the point that you're making: how do those commands perform compared to commands where "Don't Ask, Don't Tell" is in place?

What we were really trying to envision was a way of shifting the center of gravity, so that you then pathologize the people who simply cannot serve with openly gay people rather than the other way around. But you might just be interested in that piece to explore that idea more.

PROF. MINOW:

I would ask a follow-up, which is that Stuart makes the point about the reduction in discharges since 9/11, and there have been some efforts actually to study the cost to the military from discharges of people with linguistic capacities and other kinds of specialties. And I wonder how that kind of evidence might pertain even to the national security justifications, as well as other kinds of factual issues about unit cohesion. So I just put that on the table as well.

PROF. HILLMAN:

I have three short questions on different pieces of this. I found the discussion very interesting.

The first one is the point about the emotional piece of this—the values/prejudice part of this. And I just wondered if you think that's out of line or a part of the sentiment expressed by the brief in the Michigan case, by the twenty-nine retired generals and admirals, about the critical nature of diversity

55. Jennifer Gerarda Brown & Ian Ayres, *The Inclusive Command: Voluntary Integration of Sexual Minorities Into the U.S. Military*, 103 MICH. L. REV. 150 (2004).

for military forces today, which was cited prominently in [Justice] O'Connor's opinion for the Court.[56]

The second question is about the pregnancy cases.[57] Where do the pregnancy cases, that is, that forced the military to discontinue discharge policies for servicewomen who are pregnant, where do they fit into this sort of framework?

And then the third one is, on the question of combat, if a large percentage of the military is not engaged in what we think of as traditional direct ground combat missions, and if in fact that's long been true—even in World War II it was maybe twenty-five percent were engaged in that sort of combat operations, and as today it was hardest for us to replace those troops, and that was a very difficult problem during World War II, as it is now for the Army—why do we make military policy—why do we say what's military based on what a tiny fraction of our service members are actually doing?

PROF. MINOW:

Could you, for the transcript, just identify yourself?

PROF. HILLMAN:

I'm Beth Hillman from Rutgers Law School.

PROF. BAKKEN:

First, with regard to combat, I think it is a great point. The military would argue that it must exert a tremendous effort to get those soldiers into combat. I do not necessarily agree that the focus should be on combat, because it seems to me, and I think you might have more experience with this than I do, that the military is tremendously holistic and interchangeable, so that the focus on combat probably need not be as intense as it has been.

With regard to affirmative action in the military it is interesting to note that Gen. Norman Schwarzkopf, who led the first Iraq invasion, supported affirmative action but opposed allowing gays and lesbians to serve openly in the military. He said that that creates a special difficulty with unit cohesion.

On the pregnancy cases, I'm not sure what you are asking. Maybe you could just talk a second more about that.

PROF. HILLMAN:

The courts have not always been reluctant to step in when rights were derogated by military policies, and pregnancy restrictions were specifically a personnel policy that regards separation similar to this policy about the status of individuals. If an individual was pregnant, she could not stay in the service. So that seems, if you put service members in—if we put gay people in pairs, in families, rather than look at them individually, if that's what *Lawrence* is doing, then that seems to make this an especially relevant precedent.

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56. *See* Consolidated Brief of Lt. Gen. Julius W. Becton, Jr., et al. as Amici Curiae Supporting Respondents, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241), 2003 WL 1787554, *cited in* Grutter v. Bollinger, 539 U.S. 306, 331 (2003).

57. *See, e.g.*, Crawford v. Cushman, 531 F.2d 1114 (2d Cir. 1976).

PROF. BAKKEN:

I think I will just rely on my previous comments.

PROF. MINOW:

Other questions or comments? Please say who you are.

MR. GINN:

My name is David Ginn. I'm a 2L here. Maybe Susan and Stuart, I was just curious if you could talk a little bit more about what you think the chances of success under rational basis review are. I know, Stuart, you touched on that a little bit.

MR. DELERY:

I think the answer is that it's a harder case to make under rational basis than under any form of heightened scrutiny and certainly than under strict scrutiny, as I said before. The prior cases that upheld "Don't Ask, Don't Tell" in the 1990s applied rational basis.

One difference that we have here, as I said before, is that much more is known now about the operation of the policy, how it has been implemented by the military. For example, of particular relevance to the First Amendment issues would be information on how the so-called rebuttable presumption is applied. That was a factual question in the earlier round of cases. Some courts concluded that it was possible to rebut the presumption in favor of discharge that flowed from a statement by a service member that he or she was gay, at least in some particular situations, and therefore stay in the military. I think it's clear now on a longer track record that it is functionally impossible for a person who is actually gay who has made a statement that he or she is gay to rebut the presumption and stay in. So that's a situation that goes to the same legal question on rational basis that was being applied before, and we think we have a good basis on that and other questions to show that the landscape has changed.

MS. SOMMER:

I'll add in that it clearly would make this a much more difficult case in which to prevail, but it's also important not just to think of rational review as a rubber stamp, especially in a context like this. This speaks to what Justice O'Connor wrote in her concurrence in *Lawrence*, that particularly in the situations in which historically disadvantaged, discriminated-against groups—certainly gay and lesbian people fit that bill—and where important personal family relationships are implicated, even if not held to the standard of a fundamental right, the Court has historically, in the past—and there are a number of precedents that do support this—applied, in Justice O'Connor's words, a more searching rational review.

Then put that together with a comment that Tim made, which is the importance of getting before a fact-finder, of getting your foot in the door. The implication there is that the evidence is really that any kind of rational justification for "Don't Ask, Don't Tell" has been dissolving away.

When you put the facts and the evidence before a fact-finder, particularly with a more searching form of rational review, you may well be able actually to prove that "Don't Ask, Don't Tell" doesn't even satisfy that standard. Part of the

challenge is to make sure that a court doesn't simply say, "Well, I'm just going to apply rational review, and I don't need to do a finding of fact, because I can see on the face of the complaint you don't meet that."

PROF. MINOW:

Just as an academic kind of comment, I think *Lawrence* itself can be understood as part of an effort by several members of the Court to dissolve the separate tiers of review. And many people on the Court, off the Court, have been arguing for that anyway and arguing for a single equal protection clause, a single due process clause.

I think this is very related to Jennifer's point that it's because of the recognition that all people are situated the same vis-à-vis the government, that there shouldn't be separate forms of scrutiny. And under that theory, there would have to be some kind of a balancing test. You can't just have some kind of governmental action that's excluded from judicial review.

MS. CHALAK:

Lindsey Chalak, Columbia Law School. My question goes to prohibiting status versus prohibiting actions, and how, from what I understand—and I guess this is a little bit more directed to Prof. Bakken—if the "Don't Ask, Don't Tell" policy was removed, you still have many rules under the UCMJ that prohibit fraternization and those actions, and that would still presumably stand, so I wonder how the unit cohesion argument stands up with those issues.

PROF. BAKKEN:

I think the plaintiffs in these cases would argue that fraternization rules are fine. They would say, "I'm willing to accept the prohibitions in fraternization rules because they apply to everyone." I presume that as long as there were heterosexual and homosexual unions allowed in the military that those kinds of issues would not arise because the fraternization rules would apply to every service member.

The combat situation is unique and difficult to understand. The way one might think of it is to look at notions of mental states in American law, such as intent, knowledge, recklessness, or negligence. In a combat situation, my sense is that people's emotions change, and what is negligence in a non-combat situation might not be negligence in a combat situation. Thus, the military might need special rules to deal with the stress and tension of combat. The military argues that in combat we need to do everything possible to minimize sexual behavior in a forward operating base, for example. I have heard the argument that if the military allows gay males in forward operating bases then sexual activity will increase simply because some human beings will have sex regardless of any fraternization rule prohibiting it. Because combat units consist of only males, sexual activity will increase if gay males serve in combat units. That is the argument, and I am not saying I agree with it. However, the military is concerned with any circumstance—including sexual activity—that would affect combat readiness and ability. Military leaders seem to be saying that any kind of sexual behavior, or any increase in sexual behavior—at least in combat zones—is an impediment to defeating the enemy.

PROF. MINOW:

Let's take one more. I think we're at the end of our time, but, sure, go ahead.

FROM THE AUDIENCE:

I was wondering if, post-*Goodridge*, if the status of marriage as a fundamental right would change the inquiry if a service member were to be married in Massachusetts and then discharged under "Don't Ask, Don't Tell."

PROF. MINOW:

There's one other hand. Why don't we get yours too, and then we'll get both of those on the table.

MR. CALOZA:

Alexis Caloza, Harvard Law School. I wanted to ask about the *Glucksberg* analysis that seems to be missing in *Lawrence*. Prior to *Lawrence*, *Glucksberg* was the most, I guess, most case on point in terms of fundamental rights.

That case talked about the need to have a careful exposition of fundamental rights in order to avoid, I guess, like, black holes of activity that the government could not regulate. And part of the problem is that you just don't want the judiciary to create ever-expanding rights just by fiat.

So I guess my question is, why does *Lawrence* not talk about and really describe the boundaries of the fundamental right in question, if it is talking about a fundamental right? And I think that this is one—in addition to the use of the actual test of rational basis review in *Lawrence*, I think some of the subsequent cases have looked at the lack of this *Glucksberg* analysis as a problem in looking at it as a fundamental rights case. So I guess this is one more for Susan and Stuart.

PROF. MINOW:

Unless anyone is urging me to end, I'm going to give you a chance to respond, panel, to *Goodridge* and *Glucksberg*.

MS. SOMMER:

I'll take the first one, and then we'll move to Stuart with the second one.

The *Goodridge* decision was a state court interpretation of the state constitution. And while I think that the *Goodridge* rights analysis should apply to federal cases as well, it's a separate question. It doesn't speak to whether there's a federal constitutional violation because Congress, the federal government, passed "Don't Ask, Don't Tell."

PROF. MINOW:

And DOMA.

MS. SOMMER:

Yes, and DOMA. It does drive home the hypocrisy and failure to really tap into and acknowledge the importance of the relationships and the autonomy to enter into those relationships that are being thwarted by the military's policies.

MR. DELERY:

The *Glucksberg* question is a good bookend to the way you started, because I think the answer to that is that it wasn't necessary for the Court in *Lawrence* to apply *Glucksberg*, because *Lawrence* was not recognizing a new fundamental right. What it was doing was overruling *Bowers* precisely because it had failed to apply a then-existing and already established fundamental right.

I think *Glucksberg* by its own terms, including as you described it, relates to identification of new rights in the substantive due process space, and the fundamental error of *Bowers* was that it ignored the existing right, not that it failed to identify a new one.

PROF. MINOW:

Well, terrific panel, terrific conference. We thank you all.

IV. PANEL THREE: THE CONTOURS OF JUDICIAL DEFERENCE TO MILITARY PERSONNEL POLICIES*

MODERATOR: ELENA KAGAN**
PANELISTS: TIM BAKKEN, STUART F. DELERY, DIANE H. MAZUR, AND LAURENCE H. TRIBE***

MR. CALOZA:

Good morning, and welcome again to this year's Gay and Lesbian Legal Advocacy Conference.

Our moderator this morning is Elena Kagan, Dean of Harvard Law School. A graduate of Princeton, Oxford, and Harvard Law School, Dean Kagan is one of the nation's leading scholars of administrative law. Before coming to teach at Harvard, she served the Clinton Administration as Associate Counsel to the President, Deputy Assistant to the President for Domestic Policy, and Deputy Director of the Domestic Policy Council, where she played a key role in the Executive Branch's formulation, advocacy, and implementation of law and policy in areas ranging from education to crime to public health.

On a more personal note, I would like to thank Dean Kagan for her continuing support for the lesbian, gay, bisexual, and transgendered community here at Harvard. She has been a staunch critic of the Solomon Amendment, and in the months leading up to and following the Supreme Court's decision in *FAIR v. Rumsfeld*,[58] she met regularly with students to discuss ways in which the Law

* Saturday, Mar. 3, 2007, 10:30 a.m.–12:00 p.m. EST, The Vorenberg Room, Langdell Hall North, Harvard Law School.

** Charles Hamilton Houston Professor of Law and Dean of Harvard Law School.

Dean Kagan was introduced by Harvard Law student Alexis I. Caloza.

*** The panelists are, respectively: Professor of Law at the United States Military Academy at West Point, and Visiting Scholar at the Columbia University School of Law and New York Law School; Partner and Vice Chair of the Securities Department at Wilmer Cutler Pickering Hale and Dorr LLP; Professor of Law at the University of Florida College of Law; and Carl M. Loeb University Professor at Harvard University.

58. Forum for Academic and Institutional Rights, Inc. (FAIR) v. Rumsfeld, 547 U.S. 47 (2006).

School could help to ameliorate the harmful discriminatory effects of the Solomon Amendment and "Don't Ask, Don't Tell" generally.

This conference would not have been possible without the tremendous support HLS Lambda received from Dean Kagan and her office. Please join me in welcoming Dean Elena Kagan.

DEAN KAGAN:

Thank you so much, Alexis. That means an enormous amount to me. I thank you, Alexis, also for all the work that you've done putting together this wonderful conference. I looked over the list of participants and the list of panels. It's really hard work to put together a conference like this one that's so well thought out and where the participants are really such experts in the field. You've gotten all the best people talking about all the right subjects, and that's a great accomplishment, which I'm sure a lot of hard work went into. So I want to thank you, Alexis, and also Brian Schroeder and Adam Sorkin for all the great work that went into this conference.

My job here today is just to introduce the panel of experts that you see before you. Is there an order that you want to talk in? Have you figured this one out?

MR. DELERY:

Alphabetically, starting with Tim.

DEAN KAGAN:

Tim Bakken is a Professor of Law at the U.S. Military Academy at West Point and a visiting scholar at the Columbia University School of Law and New York Law School. He has served as a homicide prosecutor in the office of the Brooklyn District Attorney and worked in a commercial litigation practice in New York as well.

Prof. Bakken has helped develop legal programs in Bosnia and Herzegovina, Russia, and Afghanistan, from where he returned last week after working to create a department of law for the National Military Academy of Afghanistan.

Prof. Bakken, we're delighted to have you today.

Stuart Delery is a partner of the law firm Wilmer Cutler Pickering Hale and Dorr. He serves as a vice-chair of the firm's Securities Department and is a member of the Litigation Department of that firm. He joined the firm in 1995 following clerkships with Chief Judge Gerald Tjoflat of the U.S. Court of Appeals for the Eleventh Circuit and Justices Byron White and Sandra Day O'Connor of the U.S. Supreme Court.

Mr. Delery currently represents a group of discharged service members challenging the "Don't Ask, Don't Tell" law in *Cook v. Gates*,[59] scheduled to be argued in just a few days before the First Circuit. He also argued *U.S. v. Marcum*,[60] an appeal challenging the constitutionality of the military's criminal

59. Cook v. Gates, No. 06-2313 (1st Cir. argued Mar. 7, 2007).

60. 60 M.J. 198 (C.A.A.F. 2004).

sodomy statute under *Lawrence v. Texas*[61] before the Court of Appeals for the Armed Forces.

Thanks so much for being here.

Diane Mazur is a Professor of Law at the University of Florida College of Law. She teaches courses in evidence, professional responsibility, and civil-military relations, and her research focuses on the constitutional, legal, and cultural relationship of the military to civilian society. She also serves on the Board of Advisers of the National Institute of Military Justice.

Her recent publications related to law in the military include *A Blueprint for Law School Engagement with the Military*;[62] *The Bullying of America: A Cautionary Tale about Military Voting and Civil–Military Relations*;[63] *Is "Don't Ask, Don't Tell" Unconstitutional After* Lawrence*?*;[64] and *Why Progressives Lost the War When They Lost the Draft*.[65]

Prof. Mazur is a former aircraft and munitions maintenance officer in the U.S. Air Force, and before entering law teaching, she practiced in Albuquerque, New Mexico.

And finally, Laurence Tribe, the Carl Loeb University Professor at Harvard, has taught here at Harvard Law School since 1968. A University Professorship is the highest honor that Harvard University can give to one of its professors, and Laurence Tribe is, as I said, a University Professor here, one of only nineteen in the university.

Prof. Tribe has written 115 books and articles, by my count, including his great treatise, American Constitutional Law, cited more often than any other legal text since 1950. At the same time he has argued thirty-four cases before the Supreme Court. He is the great constitutional scholar and advocate of our or perhaps any time. Laurence Tribe.

So, what a great panel, and I'll turn it over to you, Prof. Bakken.

PROF. BAKKEN:

Thank you, Dean Kagan, and thank you to Harvard Lambda and to Harvard Law School. I cannot represent any component of the United States Government, and I am not willing to defend the "Don't Ask, Don't Tell" policy. However, I am willing to try to make the arguments that I think the government and the military will make and have made in defending the policy and why I think the government is probably likely to prevail in litigation in this area.

In the "Don't Ask, Don't Tell" litigation, most recently *Cook v. Gates*, the plaintiffs cast the issue around due process and fundamental rights. This is the plaintiffs' strongest argument because Congress enacted provisions

61. 539 U.S. 558 (2003).

62. Diane H. Mazur, *A Blueprint for Law School Engagement With the Military*, 1 J. NAT'L SECURITY L. & POL'Y 473 (2005).

63. Diane H. Mazur, *The Bullying of America: A Cautionary Tale about Military Voting and Civil–Military Relations*, 4 ELECTION L.J. 105 (2005).

64. Diane H. Mazur, *Is "Don't Ask, Don't Tell" Unconstitutional After* Lawrence*?: What It Will Take to Overturn the Policy*, 15 U. FLA. J.L. & PUB. POL'Y 423 (2004).

65. Diane H. Mazur, *Why Progressives Lost the War When They Lost the Draft*, 32 HOFSTRA L. REV. 553 (2003).

intentionally to treat heterosexual and homosexual persons differently. In contrast, I would like to frame the issue as one that concerns the separation of powers and national security and suggest that the Supreme Court's military-commission jurisprudence is more applicable to the "Don't Ask, Don't Tell" policy than its due-process jurisprudence. I will suggest that, ultimately, the Court bases its deference toward the military on relatively uncontroversial doctrines, which in isolation might not prevent the plaintiffs from prevailing. However, in combination, the doctrines provide the Congress and President with great authority to regulate military affairs, including the selection of soldiers.

In the recent military commissions cases (*Rasul v. Bush*[66] and *Hamdi v. Rumsfeld*[67] from 2004, and *Hamdan v. Rumsfeld*[68] from 2006), the Court concluded that the President lacked the authority to create and operate military commissions where a pre-existing statute created regulations for commissions or Congress was silent on the particular matter pursued by the President. Indeed, the Court, in *Ex parte Quirin*,[69] concluded that the government could arrest, try, convict, and execute a U.S. citizen for (presumably) committing war crimes, where Congress had assented to military commissions through its support of World War II. In *Hamdi*, the Court found that Congress's Authorization for Use of Force, adopted on September 18, 2001, was sufficient authority for the President and military to arrest a U.S. citizen on a battlefield in Afghanistan and detain him as an unlawful combatant—despite his claim that the government violated his due process rights.

The Supreme Court's deference toward the military is comprised of five doctrines that apply to the "Don't Ask, Don't Tell" policy. First, Article I of the Constitution provides express authority to Congress to call, regulate, and discipline the armed forces. Article II makes the President the Commander-in-Chief. Second, under the doctrine established in *Youngstown Sheet & Tube v. Sawyer*,[70] the government's authority is at its zenith when Congress and the President agree on a matter, such as the "Don't Ask, Don't Tell" policy. Third, in the statute establishing the "Don't Ask, Don't Tell" policy—10 U.S.C. § 654 (1993)—Congress made findings of fact based on congressional hearings. Fourth, the military has supported the policy. Fifth, in assessing the policy, the Court will question only whether there is any conceivable basis for the policy. Congress's factual findings would seem to provide numerous, significant reasons for the policy, even if a court were to conclude that it was competent to inquire into Congress's reasoning.

To illustrate these doctrines, assume that a court decides to inquire into whether the "Don't Ask, Don't Tell" policy is rational. Assume further that a military contractor claims the military discriminated against him in selecting a competitor's helicopters rather than the contractor's fixed-wing planes for

66. 542 U.S. 466 (2004).
67. 542 U.S. 507 (2004).
68. 126 S. Ct. 2749 (2006).
69. 317 U.S. 1 (1942).
70. 343 U.S. 579 (1952).

combat operations in the mountains of Afghanistan. At trial, to help prove discrimination, the contractor introduces evidence that his fixed-wing planes are better than the competitor's helicopters. Despite congressional findings, Presidential concurrence with Congress, and the testimony from the leaders of the military to the contrary, the judge sides with the contractor and concludes that fixed-wing planes are better than helicopters for combat operations. The judge then orders the military to use fixed-wing planes in addition to helicopters.

The judge's ability or competency even to arrive at a decision about the efficacy of aircraft in combat would be suspect given the limitations of judicial hearings. No witness, video, or evidence could convey in a courtroom the reality and horror of combat. The judge's remedy would have to include restrictions on the use of helicopters while mandating the use of fixed-wing aircraft. However, no judicial order could provide for the adjustments needed in combat. Most important in the constitutional context, the judge's conclusion that fixed-wing aircraft are better than helicopters would contravene Congress's findings. The judge's order to use different aircraft would be based on a conclusion that the due process clause, never before protecting in a military context the kind of discrimination the contractor is claiming, superseded Congress's and the President's express authority in Articles I and II to oversee and command the military.

The Supreme Court has recognized courts' inability and absence of authority in military affairs. Aside from the illustration above, judges have little or no practical ability to regulate military operations. Article III provides no authority to review congressional or presidential decisions on military matters.[71] Indeed, in *Parker v. Levy*,[72] *Brown v. Glines*,[73] and *Goldman v. Weinberger*,[74] the Court concluded that the military existed as a "separate society" and that its need to ensure order and discipline allowed it to establish rules that in civilian society would be an unconstitutional infringement on individual rights. In *Parker*, *Brown*, and *Goldman*, the Court approved military rules limiting the political expression, petitioning, and religious clothing of service members. In *Rostker v. Goldberg*,[75] the Court rejected a due process claim by males who demanded that females, like males, should be subject to draft registration. In *Hamdi*, the 2004 military commission case, the Court rejected the plaintiff's due process claim to certain procedural protections because Congress had authorized the kind of detention the President implemented for detainees.

The plaintiffs (former service members) in *Cook v. Gates*[76] base their claim on *Lawrence v. Texas* and the due process clause of the Fifth Amendment. However,

71. The military commission cases—*Rasul*, *Hamdi*, and *Hamdan*—do show that the Court will intervene in some military matters where congressional intent is unclear, Congress is silent, or the President is acting contrary to a statute.

72. 417 U.S. 733 (1974).

73. 444 U.S. 348 (1980).

74. 475 U.S. 503 (1986).

75. 453 U.S. 57 (1981).

76. No. 06-2313 (1st Cir. argued Mar. 7, 2007).

their claim might not be as strong as the claims of the military service members in *Parker*, *Brown*, *Goldman*, and *Hamdi*. In those cases, the service members relied on what are protections under the Bill of Rights—speech, petitioning, religious exercise, and trial rights—in a civilian context. However, the Court in *Lawrence v. Texas*,[77] where the police arrested two men for having sex in their bedroom, did not conclude that sexual relations between persons of the same sex were a fundamental right—that is, a right similar to the right to have an abortion under *Roe v. Wade*[78] or equivalent to protections under the Bill of Rights.

The military might not see a distinction between choosing helicopters over fixed-wing aircraft and heterosexual persons over homosexual persons. For each decision—favoring helicopters and heterosexuals—its expressed motivation might be operational necessity. However, the military's conclusions might be very wrong. The conclusions could be the result of prejudice toward the contractor of fixed-wing aircraft and gays and lesbians. Nonetheless, in *Parker v. Levy*, *Brown v. Glines*, and *Goldman v. Weinberger*, the Supreme Court seems to conclude that a judge can almost never be a more effective decision-maker than a military leader when military matters are at issue, even where the military is restricting what is in the civilian context a First Amendment right.

In the military commission cases (*Quirin*, *Rasul*, *Hamdi*, and *Hamdan*), the Court recognized the great authority that Congress has over military matters. Congressional authority exists to an even higher level when the President concurs with Congress and they act within their express constitutional authority. However unwisely, Congress, the President, and the military created and implemented the "Don't Ask, Don't Tell" policy when acting at the apex of their competency and constitutional authority. The Supreme Court is unlikely to substitute its competency and authority for that of the other branches of government and is likely to sustain the "Don't Ask, Don't Tell" policy.

MR. DELERY:

Dean Kagan, thank you very much, and again thank you to Lambda and the Law School. It's really a pleasure to participate in such a great event here.

I approach these issues and concepts from a litigator's perspective, in particular from the perspective of how this concept of judicial deference affects our clients' constitutional challenges to "Don't Ask, Don't Tell." And, it will not surprise you to hear, this set of issues has been a large feature of our case, as it was earlier cases in the 1990s challenging the law.

The government's brief in *Cook v. Gates* begins with several pages of quotes from various Supreme Court decisions concerning the grants of authority to Congress and the President in the areas of military affairs and the caution that courts should exercise, along the lines of what Professor Bakken described. And the District Court, in granting the government's motion under [Federal Rules of

77. 539 U.S. 558 (2003).
78. 410 U.S. 113 (1973).

Civil Procedure] Rule 12(b)(6) and dismissing our action, relied in significant part on those cases.[79]

But I contend that, even accepting some appropriate role for judicial deference in this area, the doctrine will not bear the weight that the government and the District Court in our case put on it. The military does not get a free pass to discriminate under "Don't Ask, Don't Tell" simply because it is the military. Courts afford appropriate deference to the political branches' determinations in this area, but the Supreme Court has made clear that this principle does not mean that the courts should use the guise of military deference to abdicate their duty to adjudicate constitutional claims. Deference to military judgments does not mean that constitutional standards are abandoned or that there is no role for scrutiny of so-called legislative facts. I would like to talk a little bit about the cases and why I believe they so hold.

The Supreme Court has said repeatedly, and in many of the same cases that Prof. Bakken discussed, that deference does not mean abdication. So in *United States v. Robel*,[80] which dealt with employment at defense facilities by people affiliated with Communist organizations, the Court said, "[t]he phrase 'war power' cannot be invoked as a talismanic incantation to support any exercise of Congressional power which can be brought within its ambit;"[81] in *Rostker v. Goldberg*, deference does not mean that "Congress is free to disregard the Constitution when it acts in the area of military affairs;"[82] in *Chappell v. Wallace*,[83] "Citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes;"[84] and in *Hamdi* the Court said, "it does not infringe on the core role of the military for the courts to exercise their own time-honored and constitutionally mandated roles of reviewing and resolving claims,"[85] in that case the ability of enemy combatants or so-called enemy combatants to challenge their designations.

So the government is wrong to use the concept of deference to say effectively that there should be no judicial review at all for "Don't Ask, Don't Tell" or similar types of restrictions. I would like to talk a little bit in more detail about why.

The first issue, and an important one for our case, is procedural. As I said, we come to the First Circuit on the grant of the government's motion to dismiss under Rule 12(b)(6). The government has argued that this deference doctrine justifies and indeed requires dismissal, that regardless of whether the allegations in the complaint could be proved—and those allegations include that the presence of openly gay and lesbian service members, for example, does not

79. *See generally* Cook v. Rumsfeld, 429 F. Supp. 2d 385 (D. Mass. 2006) (granting government's motion to dismiss), *reh'g denied*, 2006 WL 2559766, No. 04-12546-GAO, slip op. at *1 (D. Mass. Sept. 5, 2006), *appeal argued sub nom*, Cook v. Gates, No. 06-2313 (1st Cir. Mar. 7, 2007).

80. 389 U.S. 258 (1967).

81. *Id.* at 263.

82. 453 U.S. 57, 67 (1981).

83. 462 U.S. 296 (1983).

84. *Id.* at 304.

85. Hamdi v. Rumsfeld, 542 U.S. 507, 535 (2004).

affect or harm unit cohesion; that what's going on here is either prejudice or at least discomfort on the part of straight service members with their gay colleagues; and that indeed, since 9/11, when presumably the interest in unit cohesion would be the strongest, the government has often looked the other way in enforcement of its policy, given the needs of manpower in the current conflict—all of that is irrelevant, regardless of what could be proved consistent with those allegations. And the District Court essentially agreed.

But the government has not cited a single case in which deference is held to justify dismissal, denial of the day in court, or denial of any opportunity to undermine the asserted government rationales. And just in the context of consideration of the military's ban on gay service members, there are at least two cases that squarely have rejected that proposition.

One was *Pruitt v. Cheney*[86] from the Ninth Circuit, which considered the constitutionality of the policy in place before "Don't Ask, Don't Tell." The District Court in that case had granted a motion under Rule 12(b)(6), and the Court of Appeals reversed, holding that the plaintiff had stated an equal protection claim, and the court further rejected the government's contention that it would be improper to remand for further proceedings. The court in *Pruitt* said, "If we now deferred on this appeal to the military judgment by affirming the dismissal of the action in the absence of any supporting factual record, we would come close to denying reviewability at all," which is what the Supreme Court had cautioned against by way of abdication.

Similarly, in the *Able v. United States*[87] litigation, which was an early case challenging "Don't Ask, Don't Tell," the Second Circuit—on an appeal related to the grant of a preliminary injunction—again rejected the government's argument that further proceedings would be improper and remanded for consideration of additional evidence on a trial on a permanent injunction.

So on the question whether there is a role for the courts in receiving evidence from plaintiffs challenging a policy like this, in testing the government's assertions to see whether there is a basis for them under whatever standard of scrutiny, the cases do not support the government's position that there is no role for the courts at all.

Beyond the procedural point, though, there is a substantive component here as well: deference under the Supreme Court's cases operates within the structure of the constitutional inquiry and not as a replacement for it. It is important to focus on what deference does and doesn't do in the inquiry. The government in our case never advances a theory other than saying that it would be wrong for the Court to invalidate the policy. It never goes further to advance a theory for what deference means in this context. I think deference means several things. First, deference does not alter the structure of the constitutional inquiry.

In other words, familiar tests under the due process clause, the equal protection clause, and the First Amendment still apply. And *Rostker v. Goldberg*,

86. 963 F.2d 1160 (9th Cir. 1991), *cert. denied sub nom.*, Cheney v. Pruitt, 506 U.S. 1020 (1992).
87. 88 F.3d 1280 (2d Cir. 1996).

often cited (as it was by Prof. Bakken) as one of the leading cases in this area, is a good example. The Supreme Court in that case refused the government's suggestion to change or "refine" the existing standard for intermediate scrutiny that would ordinarily be applied to gender-based classifications. The government had argued that deference should mean a lowering of the standard of scrutiny from intermediate scrutiny down to the lowest form of rational basis. The Court rejected that position. In several equal-protection cases, the Court similarly has said that there is no need to alter the equal protection test, including *Schlesinger v. Ballard*[88] and *Frontiero* [*v. Richardson*].[89] And most recently in *FAIR v. Rumsfeld*,[90] the Court talked about deference early on in the opinion but then proceeded to apply the standard First Amendment test that would otherwise be applicable.

So if deference does not change the constitutional test, what does it do? Well, picking up on something that Prof. Bakken was talking about, the courts have said that they ordinarily should give deference to military judgments about the importance of an interest. So in the context of "Don't Ask, Don't Tell," when the government says "It's very important for an effective fighting force to have unit cohesion," that kind of judgment is something that the Court should be loathe to second guess, although it would not be off the table completely. But the flip side is that when the Court moves on to the tailoring inquiry, particularly under some form of heightened scrutiny—examining the fit between this interest in unit cohesion, for example, and the restriction on some other constitutional right—that that kind of inquiry is a quintessentially judicial function that courts should be willing to continue to pursue.

The last point I'll make on this before turning it over to the other panelists is that there is no case of which I'm aware and no case that the government has cited in *Cook* that defers to the exclusion of a class of people from service completely, which is in effect what "Don't Ask, Don't Tell" does. None of the cases that Prof. Bakken talked about reviewed a policy that was discriminatory, that was based on animus or even that targeted a particular group. And indeed, in a number of these same cases, the Court went out of its way to say that it was upholding the challenged policy because it was evenhanded.

So, in *Rostker*, which dealt with a male-only registration—in other words, women were not required to register for the Selective Service—the Court emphasized that the reason asserted by the government to support the policy was not hostility towards women, but basically an administrative reason, which was that the purpose of the registration process was to provide a basis for a draft should one become necessary. A draft was designed to fill combat force positions, and because at the time women were excluded from combat positions, there was no need for women to be included in registration. The Court went out of its way, though, to make clear that the ultimate question about women in combat was not on the table in *Rostker*, and that therefore this registration provision could not be construed as reflecting hostility towards a particular

88. 419 U.S. 498 (1975).
89. 411 U.S. 667 (1973).
90. 547 U.S. 47 (2006).

group. It went on to say that no amount of deference would have permitted Congress to establish an all-black or an all-white or an all-Catholic or an all-Lutheran or an all-Republican or an all-Democratic registration, because no military interest could be asserted to support those classifications. Again, that kind of statement is inconsistent with the proposition that any incantation of a military need would take a particular personnel policy out of the realm for judicial review.

Goldman v. Weinberger, a later case, is the case that dealt with yarmulkes being worn while in uniform. The Court there emphasized that the dress code was neutral. It applied across the board. It did not target yarmulkes or any other form of religious expression and was applied evenhandedly. But Justice Stevens, who provided the fifth vote in the controlling concurrence embellished on what the majority said on that point and said that the rule that is challenged in this case is based on a neutral, completely objective standard: visibility. It was not motivated by hostility against or any special respect for any religious belief, suggesting that if there had been a sense that a particular group was targeted then the inquiry would have been different.

Finally, in *Brown v. Glines*,[91] one of the petition cases to which Prof. Bakken referred, the Court upheld a regulation that required approval by the commanding officer before a petition could be circulated on a military facility. And, again, the Court emphasized that this was applied evenhandedly and was not content based, but then specifically said, "Commanders sometimes may apply these regulations irrationally, invidiously or arbitrarily, thus giving rise to legitimate claims under the First Amendment."

So under these and other cases, the Supreme Court makes clear that, where the military is targeting a particular group that is protected against discrimination or is burdening an individual right that enjoys constitutional protection, a claim by the military that there is some military necessity for the action will not insulate that kind of policy from judicial review; but the appropriate result is for the Court to hear the plaintiff's case, see what the record will show, and then make a judgment, giving due regard to the judgment of the political branches but not abdicating its judicial role.

PROF. MAZUR:

It is an honor and a pleasure to be here. Thank you, Dean Kagan, and thank you, Harvard Lambda.

As you've heard from both of the speakers who have gone before me, it is clear that judicial deference in matters related to the military has been a tremendous burden in challenging "Don't Ask, Don't Tell." What is unusual is that this doctrine is treated as longstanding and beyond question, even though the case most often cited for the doctrine, *Rostker v. Goldberg*, was decided in 1981, and even though *Rostker* today is obsolete both on its facts and on its law. Yet there is something about *Rostker* that persists in a way that is out of proportion to any validity it still has.

91. 444 U.S. 348 (1980).

The facts of *Rostker* are completely obsolete today. Congress has repealed the federal statutes that barred women from combat service at sea and in the air. The Defense Department's definition of combat service on the ground has changed so completely that today, even in the Army and the Marine Corps, a majority of positions can be filled by women. It would be very difficult for a court today to rule, as *Rostker* did, that women would be of little use to the military in time of war.

Much of the law of *Rostker* is also obsolete today. In *United States v. Virginia*,[92] the Court held that classifications on the basis of sex must be supported by an exceedingly persuasive justification. It would be very difficult for a court today to slide by, as did *Rostker*, an enhanced standard of scrutiny in an equal-protection case.

The only thing that survives from *Rostker* is its statement about the doctrine of judicial deference in matters concerning the military. This aspect of *Rostker*—this one lingering aspect of *Rostker*—has been absolutely tenacious in its effect on the law in this area. Twenty-six years later we're still arguing the platitudes of *Rostker*, even though those platitudes have been completely divorced from facts and divorced from law. Yet the platitudes live on.

You have already heard some of them in the talks before mine. "Congress is not free to disregard the Constitution." And then the opposing side will argue, "Judges are not given the task of running the Army."

I believe that this is the problem: Courts follow the *culture* of *Rostker* much more than the *law* of *Rostker*. Judicial deference to the military is primarily a cultural phenomenon, not a legal one, and that is why it is so difficult to displace. That is why it's so difficult to argue against, because you're no longer arguing law, you're arguing culture.

The traditional form of judicial deference in cases involving the military, going back to the Civil War, only applied to jurisdictional questions of whether a civilian federal court could review or overturn the judgment of a court-martial. That's it.

It is only in the post-Vietnam era that judicial deference has been used to uphold policies that affect, as Stuart explained, entire groups of people rather than individual determinations that are made on specific facts and specific situations with specific people.

Rostker resonates so strongly today because it is an accurate statement about the way we view the military today. It's not an accurate statement about judicial deference or about constitutional structure or about anything else. It is a statement of the way we as Americans understand our relationship to our military. And these themes have completely replaced any consideration of the history of deference, the purpose of deference, and the consequences of deference.

We usually discuss deference in terms of the effect that it has on gay service members or on women or on other people who are challenging military policy, but today I would like to talk about the effect that deference has on the military.

92. 518 U.S. 515 (1996).

And my argument today will be that deference is very much inconsistent with the military's own institutional values, and over the last generation, judicial deference has done a great deal of harm to the military's sense of professional ethics.

Judicial deference as a general matter, not just confined to the military but as a general matter, is usually justified on the basis of several factors: greater expertise, greater accountability, and some sort of enhanced benefit to the institution to which we defer.

Unlike other situations in which courts defer, though, the doctrine of judicial deference involving the military sometimes fails to respect the military's own expertise. Judicial deference is this infinitely flexible doctrine. It can apply to decisions made by the military. It can apply to decisions made by the Department of Defense. It can apply to decisions made by Congress.

Interestingly, though, it is not necessarily related to military expertise. Most people assume that in *Rostker* the military was resisting drafting women, because that's the way the case came out. In *Rostker*, however, the military very much wanted to draft women, because they said that is the way we will know where the qualified people are if we need them.

Congress disagreed, and the doctrine of judicial deference, oddly enough, was used to overrule what the military thought was the best thing to do as a matter of military expertise.

Professional military expertise is a factor in judicial deference only when the military happens to agree, as it did with "Don't Ask, Don't Tell."

Second, the doctrine of deference works best when there's an appropriate level of accountability for the decisions that are made. And of course defenders of deference point to the democratic accountability of Congress and the President when they deny courts a role in these cases.

In the context of constitutional equality, though, reliance on democratic accountability is going to be inherently ineffective, and our reliance today on an all-volunteer military only makes the problem worse.

The Court, when it makes rulings in cases like *Rostker* and on "Don't Ask, Don't Tell," is able to confine the impact of deference to the very small segment of America who serves in the military. As a matter of accountability, deference would make a whole lot more sense if we had a draft military, because unconstitutional policies would affect citizens much more broadly than they do today.

Third, and I think the most important point, is deference should apply in a way that doesn't harm the institution to which we're supposedly deferring. And my argument today is that deference has done great damage to the military over the last generation. It has taught service members and also civilians—it has taught all of us—some very bad lessons over the last generation.

The first bad lesson is that the military is a separate society, as you have heard before. It is distant from and it is inaccessible to civilians, and therefore civilians cannot understand it (at least when those civilians are judges, I suppose).

The second bad lesson: The law does not apply to the military the same way it applies to everyone else. Third bad lesson: Military values are morally

superior to constitutional values. Constitutional values are inconsistent with military effectiveness.

Fourth bad lesson: Civilians should be reluctant to question military policy, and service members should be resentful when they do. Military service involves a sense of duty and discipline that is beyond the capability of the average American, and so military policy need not be justified to the average American in the same way that other government policies are.

And last, and perhaps the worst lesson of them all, is that political partisanship sometimes works better for the military than its traditional professional ethic of political neutrality, because the military now understands that its expertise receives the most respect when it happens to be politically useful to the majority. I don't need to remind you of some recent instances in which that bad lesson has been illustrated.

All of these lessons, all of these bad lessons, are inconsistent with ethical traditions of military service.

In conclusion, it will be difficult to dislodge the doctrine of judicial deference until we change the culture of our civil-military relations—until we change the culture of how view the military in this country.

Deference is a convenient mechanism for expressing our cultural reluctance to engage military issues and our reluctance to actively participate in civilian control of the military. And this is why I think it is so important for law schools and other institutions of law to actively engage the military and actively engage issues of military law, and not only issues related to "Don't Ask, Don't Tell." That kind of active engagement is the only way that we're going to dislodge a doctrine like judicial deference in matters involving the military.

Thank you.

PROF. TRIBE:

Well, I'm delighted to be here. It's an honor and a pleasure, and I am particularly grateful to Harvard Lambda and to Dean Kagan for making this possible.

I'll try to be brief. Let me begin by raising some questions about Professor Mazur's approach to the subject. I think it's illuminating, but I worry that attacking the almost impermeable boundary between military and civilian life as a matter of law and culture can lead not to the incorporation of constitutional values in our relations-with-the-military realm, but rather to the incorporation of military and hierarchical values in the civilian realm, particularly at a time when we are ostensibly engaged in the potentially never-ending war on global terrorism, when we are told by the Administration—that happily has only 688 days, 12 hours, 34 minutes and 54 seconds left to go—that the entire nation, the entire world is now a battlefield.

I worry that saying that what holds in the military is really not so different from what holds elsewhere might simply lead to a greater degree of abdication in the name of deference, when courts are asked to evaluate government action, action particularly where, as Prof. Bakken points out, both of the political branches are in concurrence.

When those two branches decide that, in the name of the war, we must take Step A or Step B—silence certain views, detain certain persons, suspend or dilute certain rights—a notion that the degree of deference ought to be the same within and without military enclaves might have precisely the opposite effect from the one that I think Professor Mazur hopes for.

That said, I wanted to turn to the sequence in which Stuart Delery approached the subject and express my very strong agreement with virtually everything he said. I think it's of particular importance, because Wednesday he's going to be arguing the case of *Cook v. Gates*, which is probably the most hopeful vehicle for challenging the "Don't Ask, Don't Tell" policy.

He begins by noting, and I think it's important, that opinions of the Supreme Court, at least in terms of their language if not always in terms of their outcome, purport to reject the idea that the incantation of words like "war power" or "the military's judgment" can somehow serve talismanically to rearrange the whole structure of constitutional discourse, in cases like *Chappell v. Wallace*,[93] *Goldman v. Weinberger*,[94] *U.S. v. Robel*,[95] *Rostker*[96] and *Hamdi*.[97] They are cases in which the Court has repeatedly affirmed that it is not prepared to be completely dealt out of the process.

Now, its motives in insisting that some meaningful measure of judicial review be available may not be the most noble. It may be more a matter of self-regarding turf protection and a reluctance to let go of a judicial role than a matter of reverence for constitutional values. But I think we shouldn't look a gift horse in the mouth. We should accept, whatever its motives, the Court's reluctance to be excluded from the process of applying constitutional judgment to matters that have a military spin.

The second main theme that I hear in Stuart Delery's presentation is to stress the procedural posture of the particular case and the sweep of what the government argues and the relative modesty of the position that is being argued against "Don't Ask, Don't Tell." This was a dismissal under Rule 12(b)(6). It was a dismissal that said, "Even if we assume every factual claim you make is true, you're out of court."

And not only did *Pruitt* in the Ninth Circuit and *Able* in the Second Circuit reject that kind of out-of-hand judicial kiss-off in these cases, but the U.S. Supreme Court's more recent decisions in the *Hamdi* and *Hamdan* cases did as well.

And I predict that Court, by a five-to-four vote, will reject the constitutionality of the Military Commissions Act of 2006 insofar as it suspends the writ of habeas corpus in the absence of the conditions put forth in Article I, Section 9, for such suspension. I think Justice Kennedy will cast the decisive vote, though it will be about a year from now, in rejecting that suspension. And

93. 462 U.S. 296 (1983).
94. 475 U.S. 503 (1986).
95. 389 U.S. 258 (1967).
96. 453 U.S. 57 (1981).
97. 542 U.S. 507 (2004).

it will be in part because the Justices, though not entirely of one mind, are at least of a mind that is inclined to say there is a role for judicial review.

In that respect I think it's important not to emphasize—and I hate to disagree with Diane Mazur again, but I will, because I think what's critical here isn't how sweet we are to each other but whether we win—I would not emphasize that the traditional doctrine of deference is all about jurisdiction. It's true that the earlier cases involved a refusal to engage in civilian review over the results of courts martial.

But if there is anything in the history of deference that the current Court might revisit, it's precisely that. The idea the civilian courts can be utterly excluded from any review of the results of procedurally regular action within the military enclave will not sit well with a Court that protects its own turf from both Congress and the Executive.

I think in fact that the strongest arguments available to us are the arguments that say there is no jurisdictional enclave of military life that is wholly immune to civilian judicial supervision and intervention, subject to appropriate deference.

Now, that said, I do want to stress that one of the strongest things we have going in support of the challenge to "Don't Ask, Don't Tell" is that this doctrine is not limited to military enclaves. In the amicus brief that I wrote together with Professors Akhil Amar of Yale, Erwin Chemerinsky of Duke, Owen Fiss of Yale, Kathleen Sullivan of Stanford, Pam Karlan of Stanford, and Tobias Wolff of Davis, we stressed that the "Don't Ask, Don't Tell" policy—as enacted by Congress—is not a rule about how people may conduct themselves in military enclaves or how they may conduct themselves in relation to the hierarchy within the military.

It's a rule that applies throughout civilian life. And it's a rule that applies not only to silence members of the military when they are acting in civilian life, off the base, and not in uniform—even in one case when they are acting as members of a state legislature debating some of these issues—it's a rule that goes across the board. It's viewpoint-based. It requires people to deny their own fundamental sexual identity and to pretend, when everyone assumes they are straight rather than gay, that the assumption is right, because if they reveal that the assumption is wrong, they are in violation of "Don't Ask, Don't Tell." It's a rule that applies to gay men and lesbians, not to straight men or women.

It's a rule that cuts across all of those boundaries, which is one of the reasons that I believe its greatest vulnerability is under the First Amendment, where there is deference but not complete abdication.

That said, I do think it's important to recognize that, when the Supreme Court has affirmed practices and policies on the basis of military deference in the last twenty or thirty years, it has done so by stressing that the nature of life in the military, particularly for those who volunteer for the military in an era without the draft, is going to form a part of the cultural backdrop for the Court's rulings. The assumption will be, you volunteer for this special life and you accept different rules, not the same rules that apply throughout civilian life.

You do not, however, volunteer for a constitutional black hole, for an area where the normal jurisdictional rules are waived, where Rule 12(b)(6) doesn't

mean what it says about assuming the factual accuracy of the pleadings in a well-pleaded complaint. You do not volunteer for a world in which the Constitution is utterly suspended.

Now, on the question of what is suspended and what isn't, it seems to me that the point that Stuart Delery then makes—that deference operates within the constitutional structure and doesn't replace it (see *Schlesinger v. Ballard*,[98] *FAIR v. Rumsfeld*,[99] and *Frontiero v. Richardson*[100])—is crucial. And indeed I would stress that there are cases, *Frontiero v. Richardson* being probably the paramount example, in which no deference at all is even discussed by any member of the Court simply because a matter is military.

In *Frontiero*, decided in 1973, the Supreme Court invalidated—in opinions by Justice Brennan for a plurality invoking strict scrutiny and by Justice Powell for another group of Justices invoking a kind of intermediate scrutiny, resulting in an eight to one decision—invalidated a gender-specific, rebuttable presumption used to determine spousal dependence on a military base.

Now that's about as close as we're going to get to the current context. It's on a military base, making the case for deference stronger than with "Don't Ask, Don't Tell." It's a rebuttable presumption, which is exactly the kind of thing that is created by "Don't Ask, Don't Tell." It creates a frame of reference in which the fact that someone has not been closeted is used to create a rebuttable presumption that the person has committed some offense or has a proclivity to commit an offense against the rules applicable in the military—rules whose validity may be in question after *Lawrence v. Texas*[101] but for purposes of this case needn't be questioned.

So *Frontiero* is a case that illustrates how one doesn't automatically even get deference simply because one is dealing with military personnel-related policies on a military base.

The difficulty that I think one must keep in mind (in dealing with the idea that the ordinary constitutional structure has a somewhat different meaning but isn't completely tossed overboard when you're dealing with the military) is the strength of the dissents in *Goldman v. Weinberger*,[102] the case of the yarmulke. When the military was trying to come up with some hypotheticals as to why it might actually be problematic to have an Air Force guy wear a yarmulke, the testimony was laughable. They had these guys saying, "Well, maybe the yarmulke will fly off and get into a jet engine."

That created an opening for Justices as centrist as Sandra Day O'Connor to dissent from the Court's decision upholding that policy. And in dissenting she made an important distinction—exactly the distinction that Stuart Delery makes. "We defer," she said, "to the military's judgment about how important a certain value is in the military, the value of *esprit de corps*, of uniformity, of unit cohesion. We're not going to second guess their judgment. To have an effective

98. 419 U.S. 498 (1975), *reh'g denied*, 420 U.S. 966 (1975).
99. 547 U.S. 47 (2006).
100. 411 U.S. 677 (1973).
101. 539 U.S. 558 (2003).
102. 475 U.S. 503 (1986).

fighting force, you have got to have people marching to the same drummer when it's a military drum."

"But," she said, "when it comes to the issue of fit"—and I don't mean the fit of the yarmulke, I mean the fit of the regulation to the alleged purpose—"there it's important not to simply toss up our hands. It's important to at least take seriously the allegations that are made as to why this regulation is not reasonably necessary to achieve the alleged value, and especially"—and I would stress the combination of that point with the procedural posture of this case—"especially with a dismissal under Rule 12(b)(6), it's important not to defer by saying that we don't care what the truth is in this context." The difficulty is that O'Connor was dissenting, and her dissent, as well as the dissent by Justice Stevens, and the other dissents in that case, effectively said, "The majority has overturned the ordinary structure of constitutional discourse. The majority gives lip service," she said in dissent, "to the fact that the free exercise clause protecting religious freedom still has some application in the military and that you still need an important interest on which we defer. But you need a close fit between that interest and the regulation." And on that point she effectively said that, despite protestations, the majority has exerted no review at all over the judgment that's being made about military necessity.

Justice Brennan, in his dissent, characterized the majority's rule as one of subrational review, not rationality review. So my word of caution is, the Court has sometimes said that it is obeying the overall structure of constitutional discourse, but if you look not at the way they talk the talk, but the way they walk the walk, it really looks like sometimes they have marched in lock-step, while denying it.

I do think an important point, however, about *Goldman* in particular and about the Stevens concurrence in *Goldman* is the notion that a content-neutral objective test like visibility, the visibility of headgear, does not entail the same concerns about excluding an entire group from participation in an important aspect of American life that is certainly entailed by "Don't Ask, Don't Tell."

And in *Rostker v. Goldberg*,[103] it's important that the Court purported to leave to one side the constitutionality of the combat exclusion of women that, as Diane Mazur points out, is now temporally obsolete, resting purely on the idea that, if we take as given the exclusion of women from combat duty, administrative concerns of a neutral character purportedly justify having a completely combat-ready force registered, and that meant all males and no females.

The absence of neutrality here could hardly be clearer; that is, the underlying theory is that of unit cohesion—and the reason unit cohesion, whose importance I wouldn't question in this litigation, the reason unit cohesion ostensibly justifies drumming out of the military anyone who is open about being gay is a discomfort with gay people, is hostility to them.

And the Court has repeatedly said, in decisions that gain enormous salience from the recent opinion in *Lawrence v. Texas*, that if there is one thing we

103. 453 U.S. 57 (1981).

cannot use as a justification for different rules for people who are gay or lesbian or bisexual than for those who are straight, it is the discomfort with them, the hostility against them. That was central in *Lawrence v. Texas.*

In a case like *Palmore v. Sidoti*,[104] where the decision was made by the Florida courts to take a child away from an interracial couple—ostensibly not on the basis of judicial racism but on the basis of community hostility to such mixed-race families—it wasn't going to be in the best interests of the child to be raised by a white woman and a black man—the Court unanimously, in an opinion by then-Chief Justice Warren Burger, said that even though we cannot extirpate social hostility based on race, we also cannot use such hostility to legitimate a rule, even when the rule serves as important a purpose as the best interests of the child.

So it seems to me that that's an important theme. It's important, too, because focusing on the ultimate fate of this litigation, you need the vote of Justice Kennedy. Justice Kennedy is the one that I would count on ultimately as the fifth vote to invalidate certain aspects of the Military Commission Act. Justice Kennedy is the author, after all, of *Romer v. Evans*,[105] in which he said you can't make gay people strangers to the law. He's the author of *Lawrence v. Texas.*

And he is also the author of opinions in other areas in which there is less than complete deference to the fact-findings of Congress, cases that I think ought not to be forgotten in this context, like *City of Boerne v. Flores*,[106] in which Congress made various determinations in order to overturn the Religious Freedom Restoration Act. And on separation of powers grounds, essentially, the Court struck down that Act. And Kennedy, in a number of cases, has made clear that he sees that as a precedent for saying that, when Congress says something is true, we don't have to assume it's automatically true.

In the [*United States v.*] *Morrison*[107] case involving the question whether Congress had authority under the Commerce Clause to create a federal cause of action for women to sue men who rape them, Congress found that this kind of conduct had a serious economic impact, because women who are violated in this way are likely to be economically disenfranchised. Although I don't like what the Court did in overturning that factual finding and saying that it was irrelevant, it's important to note that Congress, notwithstanding the breadth of its commerce power and the breadth of its fact-finding power, was not able to withstand the Court's insistence on making an independent determination there to preserve what it saw as the tacit postulates of federalism.

It seems to me here, too, it's important to recognize that what the government is asking for is utter abdication to a rule that totally excludes gay people who have exercised a certain First Amendment right, and does so, if the decision below granting dismissal under Rule 12(b)(6) is to be affirmed, notwithstanding what the facts might be about the need or lack of need for this Draconian rule to achieve the value of unit cohesion.

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104. 466 U.S.429 (1984).
105. 517 U.S. 620 (1996).
106. 521 U.S. 501 (1997).
107. 529 U.S. 598 (2000).

So it seems to me that this case is an ideal opportunity, while remaining quite modest in one's aspirations and without challenging the broad framework of *Rostker*, to achieve victory.

One final, final point. I would resist making the point that *Rostker* is obsolete because, among other things, Congress has changed the law. That backfires. You know what the justices or the judges in this case are going to say if one makes the argument that Congress changed the law about the exclusion of women. They're going to say, "Why don't you wait for Congress to change this law as well? Marty Meehan has introduced a statute that would get rid of 'Don't Ask, Don't Tell.' Why do you ask us to jump the gun?"

I think the only way you can get the Court to bite the bullet in this military context is not to emphasize how free Congress is to improve the situation. Thanks.

DEAN KAGAN:

Thanks to everybody.

Does anyone want to comment very briefly on anything that any of the other panelists said?

[No response.]

Or we can open it up to questions right away if nobody has a sudden urge.

FROM THE AUDIENCE:

I don't know if this is as much a question as an observation, but based on the panel discussion yesterday, it seems as if a lot of the government's position is based on the Scalia dissent in *Lawrence v. Texas*. I think that's what you all were saying; is that correct? There's a lot of its argument that's based on the dissent; is that correct?

MR. DELERY:

Picks up on arguments Justice Scalia made.

FROM THE AUDIENCE:

So I'm wondering if, in view of Professor Tribe's citing of the Sandra Day O'Connor dissent in the religious yarmulke case—

PROF. TRIBE:

Goldman.

FROM THE AUDIENCE:

Goldman, if the dual-sided argument could be, you know, the government is basically basing a lot of their position or certainly a strong amount of their position on a dissent, they shouldn't, but if they do, then we can cite the dissent of Sandra Day O'Connor in including these concepts.

PROF. TRIBE:

No, no. First of all, the government won't admit that it's relying on a Scalia dissent. It's just that the spirit, the culture of the government, is to channel the Scalia dissent but not rely on it.

And second, that kind of argument doesn't get you very far. It's kind of tit-for-tat, you know, "Nyah, nyah. They're citing a dissent. We can too." The Court thinks of itself at least as trying to get to the right answer and not, "Well, you violated one rule. We'll give you one preemptory as well."

FROM THE AUDIENCE:

You are citing all of the other things, but in addition—so, okay.

PROF. TRIBE:

I don't think that the fact that—well, I think I've said my piece on it.

MR. DELERY:

I agree.

FROM THE AUDIENCE:

Do any of you feel there is any applicability to what happened with Blacks back in the 1940s when President Truman said, "We're not going to allow any more segregated units to be in the military"? Does that apply to this situation?

DEAN KAGAN:

Stuart, do you want to take that one first?

MR. DELERY:

As you point out, it arose in a different situation. It was not through the Court process but as a result of the action of the President.

I do think one relevant lesson, though, is that certainly there were real unit-cohesion fears expressed, as was discussed a little bit yesterday, to the effect of, "You can't do this. What will then happen?" And the answer was that through the ordinary leadership and disciplinary process, the military said what it expected people to do by way of behavior with their colleagues and enforced those expectations as appropriate.

To the extent that we get into factual findings, factual development as a further stage of this case, what we'll see is that gay and lesbian service members are often serving openly with no effect on unit cohesion. There certainly remains misconduct by some bad actors, but there are ample features of the Uniform Code of Military Justice and other tools to deal with that. It is hard to see how a few bad apples alone would justify imposition of the kind of burden that we have here on a substantial constitutional right.

PROF. TRIBE:

Just one thing I would add to that. If you think about this world-historically, rather than just in terms of this litigation, there is very little doubt in my mind that it's just a matter of time until attitudes on sexual orientation that now explain some of these rules will seem as outrageous and outmoded and unrealistic as attitudes about racial exclusion and hostility do now. But it's very hard to go "back to the future" in quite that way and absorb that into the current context.

I do think—one point this makes me think about, and I haven't figured out which way it cuts or what to do with it, but the recent decision in *Johnson v. California*[108]—about segregation based on race in a different kind of enclave, not the military, but in prisons, where there's a body of constitutional jurisprudence that's in some ways parallel to the military stuff. The idea is we defer to prison authorities on issues of order, discipline, what it takes to avoid a riot.

Now, as I recall in that case, the Court said, notwithstanding that deference, we still have a rule that there is strict scrutiny when you use race. The Constitution's application doesn't change. I mean, its application may differ insofar as there are factual variables in the formula, but the formula doesn't change just because we've gone into a realm which is in some ways autonomous and set aside from ordinary civilian life.

It is, however, worth noting that Justices Scalia and Thomas dissented in that case and said, "Notwithstanding the virtually absolute rule that discrimination based on race against certain individuals gets strict scrutiny"—in the recent school integration case, when argued in the Supreme Court, Scalia said from the bench, "Haven't we said that there's an absolute rule that you don't use race to classify people?" Well, he had said just a year earlier that, notwithstanding that, the absolute of deference to prison authority trumps the absolute of suspicion of racial classification.

So I would imagine what that suggests is there are going to be some members of the Court who, no matter what you argue here, are going to say, "Military means don't touch." But that was a dissent. And again I'm not making the point that some people can cite dissents and others can't, but I'm just saying the majority position was that the constitutional structure isn't suspended just because we're talking about life within a separate enclave, where discipline is all-important.

PROF. BAKKEN:

However, the military is an enclave separate from even prisons because it deals with national security. Even in the newspaper today, we saw a court dismiss a case where a plaintiff sued the Central Intelligence Agency for its rendition policy or activity. There is an area, recognized by the Supreme Court, that civilian courts will not touch if it deals with national security. The "Don't Ask, Don't Tell" policy and the issues in *Cook v. Gates* involve not only individual interests but also national security, a factor that makes other cases different, whether they arise in prisons or some place tantamount to prisons.

We have made comparisons to indicate that the military might be similar to civilian institutions and that therefore judges can engage in fact-finding and decision-making that would supersede that of generals. My example concerned generals in the mountains of Afghanistan. At some point, we might have to concede that there is some area outside judicial review. Maybe it is not in this case, and maybe it should not be in this case. But it would be very hard to say that we are going to find facts about weapons of mass destruction and therefore judges will tell the military how to deal with a particular weapons system, how

108. 543 U.S. 499 (2005).

to make one, how to attack one. My question might be for the other panelists or anybody in the audience. Would you concede that there is some area within the military context and within national security that should be beyond judicial review?

PROF. TRIBE:

Well, of course, but there's a fundamental difference between whether you use helicopters—whether you're going to review the use of helicopters versus fixed-wing aircraft and whether you're going to review the suspension of First Amendment rules simply because somebody is in the military.

National security has never been that talismanic. Truman invoked national security for seizing the steel mills, and the Court expeditiously enjoined that seizure. And he wasn't citing national security facetiously; there was a threat of wildcat strikes that would stop the flow of steel and weapons made from steel to our troops in Korea. But the Supreme Court said, "No. The separation of powers applies, and it is only the Legislative Branch that can take property."

Likewise, in the Pentagon Papers case the Nixon Administration invoked national security. "Release these papers and all kinds of secrets will leak out." The Court, again not unanimously, but emphatically and quickly lifted the injunction on the publication of the Pentagon Papers.

If anything, these examples of which hill you take, which aircraft you use, whether a particular weapon did or did not come from Iran, all illustrate the fundamental difference. And it's a difference not only based on expertise—I agree that's one dimension; the military knows which hill it can take better than any judge can decide—but also based on a kind of political question doctrine. It's a little like *Chevron* [*USA, Inc. v. Natural Resources Defense Council, Inc.*[109]]. It's a little like the idea that certain matters are delegated to the military for its decision, matters of tactics, matters of which troops you send here rather than there, which kind of aircraft you use.

But "Don't Ask, Don't Tell" isn't a matter of tactics. It's a matter of violating the most fundamental constitutional norms across the board just because the people involved are in the military.

In one case in 1965 called *Carrington v. Rash*,[110] the State of Texas, admittedly not Congress, decided that because the military is a unique society with hierarchical rules, everyone who moves to Texas under military orders will be assumed, as long as they live there, not to be bona fide residents and therefore not to be able to participate in the political process of Texas.

And the Supreme Court, over I think the sole dissent of Justice Harlan, in an opinion by a moderate, Justice Stewart, invalidated that statute, saying that, when it comes to the fundamental rules of our political life, the fact that somebody is in the military can't make the difference.

And we're dealing here with a fundamental rule of our political life. That's why I stress that this applies not only to muzzle certain members of the military, it also affects the rights of listeners. Everybody, straight or gay, is told, "You

109. 467 U.S. 837 (1984).

110. 380 U.S. 89 (1965).

cannot hear from those people who are in the military, even when they're at a bar, off the base at night, or talking to a spouse—either a same-sex spouse or an opposite-sex spouse—if they are married but gay. You can't hear what they have to say about the impact of this policy on their lives, because they have to hide the fact that they're gay when they speak about it." So how can informed political decisions be made?

Look at the debate on Marty Meehan's bill, which would get rid of "Don't Ask, Don't Tell." No gay person in the military, without risking discharge, can speak about the impact of that rule on his or her life. Doesn't that deprive members of Congress of the ability to hear from those who know the most?

The Court has said over and over again that the First Amendment is there not just to protect the rights of speakers—it's there to protect the systemic value of free expression. That's why the Court said in *First National Bank of Boston v. Bellotti*[111] that, even if corporations don't have First Amendment rights, the state can't selectively silence some corporations on matters affecting the political universe in a given state.

If a spaceship from an asteroid landed here, and the government said, "Oh, they're talking about what it's like to be gay. We'd better silence them," that attempt to silence them would violate the First Amendment, which says that the Congress may not abridge the freedom of speech. And you wouldn't have to say that gay aliens from an asteroid have First Amendment rights in order to reach that conclusion.

I'm sorry to get worked up over this, but it seems to me to be very important to recognize the First Amendment flavor of this case and how little it has to do with fixed-wing aircraft versus helicopters or which hill you take.

PROF. HILLMAN:

This is fascinating, and I appreciate everybody's contribution there.

I just want to push a little more on the military and prison connection and then draw attention to a broader context.

I think that this isn't the only time that the Court, if we continue down the road that we're on, will be asked to make decisions about whether or not military policies are constitutional. I think the stop-loss policies, if they continue, which are not allowing people to exit the military according to their contractual obligations may eventually get to this sort of point that we're at right now.

My question for you then is about really the bone of contention here, about whether we need to worry about society being more militarized, or whether we need to point out that our distinction between civilian and military is no longer sustained with a new military and new sorts of missions that we have.

And I wonder about something that we didn't mention at all here. What about the fact that we're at war? You can't always tell that we're at war, it doesn't feel that way a lot of the time, but we certainly are. And we're fighting with this all-volunteer force and an equally large—I think it's 1-to-1 now actually—number of contractors in theater right now compared to the number

111. 435 U.S. 765 (1978).

of service members. It's incredibly high, and that's something we're really not reckoning with very well as a country.

But how does that context cut in terms of the Court's review here and specifically in terms of what you're talking about, this deference? Courts take on questions of military separations and accessions all the time in an administrative way. I mean, the Court of Claims hears questions about whether the discharge was proper, whether the person was really on active duty because they were too young when they signed the enlistment papers.

That's hundreds of hundreds of cases that we have that courts are making decisions about military personnel policies effectively; is the military accurately, you know, applying its own policies, not is the policy wrong necessarily, but is the military applying its policies correctly.

The fact that we are at war right now, does that—isn't it frightening to think the Court would say our constitutional framework doesn't apply, that deference is a shield here?

PROF. TRIBE:

Remember that Sandra Day O'Connor did write in one of the detainee cases that the fact that we are at war—and she took that for granted—the fact that we are at war does not give the President, as Commander-in-Chief, a blank check to disregard the Constitution. The fact that it's a war not declared by Congress, a war not likely to end any time soon, not objectively discernible, without a definite theater, makes it even less likely that the Court would ever say, "Because we're, quote, 'at war,' unquote, all bets are off."

And one other thing. I didn't mean to say, when I worried about the dark underside of blurring the distinction, I didn't mean to disregard the great importance of the point that the fact that something is on the military side of the line doesn't in itself invariably mean even that the normal principles apply in a different way. See *Frontiero*[112] and see some of the cases that you cite.

DEAN KAGAN:

Anyone else on this?

PROF. BAKKEN:

But even in the military commissions case, what was before the Supreme Court was the question of the authority of the Administration, not the authority of the Administration plus Congress.

PROF. TRIBE:

No, I meant in the pending case. The case—

PROF. BAKKEN:

In the pending case. Even in the *Youngstown*[113] case, the issue is not whether the President and the Congress had combined to exercise a policy and try to take over the steel mills. It was the President trying to do it himself in the face of the

112. 411 U.S. 677 (1973).
113. 343 U.S. 579 (1952).

appearance that Congress had not approved his action, or had specifically disapproved the action. This, the "Don't Ask, Don't Tell" policy, is a different instance, where the President administered the policy, and Congress has decided on the policy and engaged in specific fact-finding about the policy. That kind of fact-finding did not exist in the First Amendment cases that Professor Tribe mentioned, whether they're *Brown v. Glines*[114] or *Parker v. Levy*.[115] Those cases involved petitioning and speech within the military. *Greer v. Spock*[116] was a case brought by civilian persons who wanted to petition on a military base—I think it was even on a public road that went through military property. The Supreme Court said that there was no right to do that.

In this case, in the "Don't Ask, Don't Tell" policy instance, and I'm not saying that it's a good policy, but the process that Congress is engaged in has been much more extensive than any of the other processes in the cases where the Supreme Court has approved the right of the military to infringe on what would be constitutional fundamental rights—due process rights or free speech rights in the civilian world. All I was trying to say is that in this particular instance Congress and the President are acting at the very height of their powers, and to overturn this Act would require probably something, I think, that Professor Tribe alluded to, a new rule. And that new rule might be the one that we see in the decision with regard to the Military Commissions Act of 2006, where Congress did suspend the right of habeas corpus for detainees in Guantanamo Bay. It might be a five-to-four decision. In addition, I agree that Justice Kennedy would be the deciding vote on that. However, we're not there. Insofar as I read the Military Commissions cases, the Supreme Court has not indicated that it is yet ready to intervene when the Congress and the President engage in action with regard to national security.

PROF. TRIBE:

Well, I certainly agree that that makes this far more challenging than many other cases. But it is not the case that the Court has always deferred when the two branches are in agreement that it's a military matter. The counterexamples that occur to me are *Shachter v. United States*,[117] *Frontiero v. Richardson*,[118] *United States v. O'Brien*,[119] the latter dealing with military property.

And it's also the case that in these recent decisions at least two Justices, the unlikely pair of Scalia and Stevens, decided that even when Congress and the President are in agreement that unlawful detainees who are American citizens can be taken outside of the normal process of federal criminal trial, that was not enough because the writ of habeas corpus had not been suspended in accord with Article I, Section 9—Congress had merely enacted a statutory restriction.

114. 444 U.S. 348 (1980).
115. 417 U.S. 733 (1974).
116. 424 U.S. 828 (1976).
117. 295 U.S. 495 (1935).
118. 411 U.S. 677 (1973).
119. 391 U.S. 367 (1968).

And, true, that was not the controlling opinion, but it went further than the controlling opinion.

But if the bottom line is that the propositions that Prof. Bakken is adducing make this a very hard case, a difficult case, an uphill case, I couldn't agree more. Very difficult, very challenging, I just think not impossible.

DEAN KAGAN:

Diane or Stuart, any final thoughts?

MR. DELERY:

No, thank you.

PROF. MAZUR:

Beth, if I understood your question right, I would say that it really shouldn't make any difference as a matter of military expertise for this reason: Either you're fighting wars or you're preparing to fight wars. And so the idea that some personnel policy would somehow become more important just because you were fighting a war prompts the question that, oh, so it wasn't important when you were preparing to fight a war?

In policies like "Don't Ask, Don't Tell" or policies affecting the assignment of women, there shouldn't be any distinction between whether one is formally or informally at war or not, because the military's mission doesn't change. So that would be my answer to your question.

DEAN KAGAN:

Okay. I think that's all we have time for. Thanks to the panelists.

[Applause.]

V. PANEL FOUR: SERVICE MEMBER EXPERIENCES*

MODERATOR: SHARON E. DEBBAGE ALEXANDER**
PANELISTS: JOAN E. DARRAH, ELIZABETH L. HILLMAN, JOE LOPEZ, AND BRIAN FRICKE ***

MR. SCHROEDER:

It's certainly a pleasure to have this panel on service member experiences. A number of our panelists have been involved in the military in one form or fashion, but it's helpful to address head-on the service members' experiences within the military under "Don't Ask, Don't Tell" and previous bans on LGBT service.

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* Saturday, Mar. 3, 2007, 10:30 a.m.–12:00 p.m. EST, The Vorenberg Room, Langdell Hall North, Harvard Law School.

** Deputy Director for Policy, Servicemembers Legal Defense Network.

Ms. Alexander was introduced by Harvard Law student Brian A. Schroeder.

*** The panelists are, respectively: Capt., U.S. Navy (Ret.);; Professor of Law and Director of Faculty Development at Rutgers School of Law–Camden, and former Captain, U.S. Air Force; Capt., U.S. Army (Ret.); and Sgt., U.S. Marines (Ret.).

I'm pleased to introduce Sharon Alexander, who is the Deputy Director of Policy for Servicemembers Legal Defense Network [SLDN], which advocates on many aspects of "Don't Ask, Don't Tell."

She has been on the staff of SLDN since 2003, and she has served as an attorney in SLDN's legal services and litigation programs. She has also served as staff counsel with the Human Rights Campaign and holds a J.D. and M.A. in anthropology from the University of Colorado and a B.A. in political science and anthropology from the University of Pittsburgh.

She also is an Army veteran and was commissioned as a Second Lieutenant in 1993 and served as a medical platoon leader in the Third Infantry Division in Vilseck, Germany, and the Southern European Task Force Infantry Brigade (Airborne) in Vicenza, Italy, among other assignments.

On a more personal note, she's been a great, great help in assembling this conference and advising us. We're thrilled to be able to have her here and moderating this panel.

[Applause.]

MS. ALEXANDER:

Thank you very much, Brian, and thanks to everybody at Harvard Law School, and especially Harvard Lambda, for all the work you've done putting together this symposium.

About a year ago was the last GALLA symposium, and I was fortunate enough to come and to be on a panel here. At the end of the panel we were talking about things Harvard could do to help move the ball forward in the debate about "Don't Ask, Don't Tell." And I said, "Maybe you should have a symposium or a conference or something. You guys are really good at such things. You could get lots of smart people here to talk about 'Don't Ask, Don't Tell,' and it would be really great." Dean Kagan said, "That's not a bad idea."

The next thing I knew, poor Brian and a bunch of other students had a whole lot of work on their plates putting together this wonderful symposium. I just want to commend them for the fantastic job they've done putting it together.

So my job today is to moderate this panel, and I've also been asked to talk a little bit about how a straight service member can experience "Don't Ask, Don't Tell," and to give a little bit of a sense of what a typical "Don't Ask, Don't Tell" discharge looks like.

Only one of our four panelists today has actually experienced a "Don't Ask, Don't Tell" discharge, but I think just for context, understanding what happens if and when the fateful day comes when you're investigated and discharged, what it looks like, how it's supposed to work in theory, and how it sometimes works in practice, that that will be my role today.

I want to begin by introducing all of our panelists for today's discussion. I'll start at my far left with Capt. Joan Darrah, who grew up in Mattapoisett, Massachusetts, and graduated from Hartwick College in 1973 and joined the Navy. She retired from the Navy in May 2002.

During her career she served as an intelligence officer, and her career highlights include her service as a submarine analyst. She attended the Naval

War College, where she received her master's degree. She had assignments as an Aide and Flag Secretary to the President of the Naval War College and Deputy Director of the Human Resources Directorate at the Office of Naval Intelligence.

As a captain, she served as the Intelligence Community Manager and the first female Chief of Staff and Deputy Commander of the Office of Naval Intelligence.

Capt. Darrah's personal decorations include the Legion of Merit, three times; the Meritorious Service Medal, three awards, again; the Navy Commendation Medal, also three times.

Since retiring, Capt. Darrah has been a leading advocate in the fight to repeal "Don't Ask, Don't Tell," working very closely with my organization, Servicemembers Legal Defense Network.

Her partner of sixteen years, Lynne Kennedy, is here, along with her brother William, her niece Jen, and other family members, who I believe are all here today and who I want to personally thank for coming and being part of this special day and for being so supportive of Joan through the years.

Next to Joan is Prof. Beth Hillman, and Beth Hillman is a Professor of Law and Director of Faculty Development at Rutgers School of Law in Camden. She's an Air Force veteran and taught history at the United States Air Force Academy and Yale University and now teaches military law, constitutional law, legal history, and estates and trusts.

Her writings examine the history of military law and the prosecution of military crimes, the status and treatment of women in the American military, and the impact of race, gender, and sexuality on military culture. She's the author of *Defending America: Military Culture and the Cold War Court-Martial*[120] and the co-author of a forthcoming casebook on military justice with Gene Fidell and Dwight Sullivan.

Next closest to me, coming from that direction, is Joe Lopez, who is a fellow former Army Captain, which, by the way, for those of you who are not ex-military, an Army Captain is nothing like a Navy Captain. I just wanted to point that out.

Joe graduated from the United States Military Academy at West Point in 2000 as a Second Lieutenant, which makes me feel very old, by the way, because I graduated a lot earlier than that.

Subsequently he attended flight school at the Aviation Officer Basic Course in Ft. Rucker, Alabama, and he earned three distinct helicopter qualifications and finished second in his class there. He was promoted to the rank of First Lieutenant after flight school.

Joe started as a platoon leader, an executive officer and a company commander. He led a platoon of Black Hawk helicopters that flew over 300 successful missions in Iraq. He has been awarded two Army Commendation Medals and an Air Medal, and as I said was promoted to the rank of captain prior to being discharged in November of 2004.

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120. ELIZABETH L. HILLMAN, DEFENDING AMERICA: MILITARY CULTURE AND THE COLD WAR COURT-MARTIAL (2005).

After the Army, Joe taught Spanish for a year in inner-city Atlanta, Georgia, and then he decided to go to law school, and he is currently a 1L here at Harvard Law School.

Finally, Sgt. Brian Fricke, closest to me, from Knoxville, Tennessee. He joined the Marine Corps in July of 2000. He served out of Marine Corps Air Station Miramar in San Diego—tough assignment. From 2002 to 2003 he deployed to Okinawa, Japan, where he first came out to some of his fellow Marines. The Marines' response, which was, and I quote, "No big deal," encouraged Brian to continue coming out and explore this issue with his colleagues.

Post-deployment back in California he met Brad Catoe, who is now his partner of three-and-a-half years. He left the service with an honorable discharge of his own accord, decided against reenlistment, and against working under "Don't Ask, Don't Tell" for any more of his life than he already had.

Since he got out of the Marine Corps, he's been a very active advocate for repealing "Don't Ask, Don't Tell" and has worked very closely with our organization, Servicemembers Legal Defense Network.

We're really happy to have all four of these wonderful people here with us today.

So although I objected at the beginning, I guess I can understand why some people might be interested in this. So I'll explain how I, as a straight, Catholic, married mother, came to be a full-time advocate for repealing "Don't Ask, Don't Tell."

I was an ROTC cadet in 1989. That's when I joined up. And in 1992 and 1993, the University of Pittsburgh was experiencing great pressure from the lesbian, gay, and bisexual student group on campus to remove ROTC from campus because of the gay ban. And this was about a year before "Don't Ask, Don't Tell."

At the time I was our cadet battalion commander, and I thought to myself, "This must just be a matter of misunderstanding. I'm sure that if the gay students understood that we weren't such a bad bunch of people, they wouldn't want us to be kicked out."

So I made an appointment to have lunch with the leader of the lesbian, gay, and bisexual alliance on our campus, so we could talk about it and I could understand maybe better where she was coming from, and she could understand why we so badly didn't want to be removed from campus.

So we had a very nice lunch, a lot of small talk. We were both political science majors and knew some of the same people. Toward the end of it I said, "Listen, we're not such a bad group of people here in the cadet battalion. We're actually a lot of nice folks. And if you get us kicked off campus, most of us will not be in college anymore, because a lot of us are here because of our scholarships, and if there is no program here, we can't continue going to school here. And, gosh, I really like going to school here, and I couldn't do it without a scholarship. Maybe you guys could ease up."

And she said, "That very scholarship that's putting you through college right now is unavailable to me because of my sexual orientation." My first

response was, "No, you must be mistaken. There are lots of lesbians in my battalion, I'm sure. That's not right."

And she reminded me that when I joined up in 1989 that I must have signed some paperwork indicating that I was not a homosexual and did not intend to engage in homosexual conduct. I thought for a while, and I guessed that I had. I signed a lot of papers that day. I didn't think that much about that one, because I was straight; it didn't really occur to me.

But she was right, and there was this prohibition, and it wasn't the right thing. And it opened my eyes to why people might be concerned about the presence of ROTC on campus, given that discrimination. And it opened my eyes to the fact that the discrimination really even existed, because it was rather invisible to me from my perspective as a straight cadet in 1992 at the time. And it was the beginning of a journey for me to understand the issue better.

In '93, "Don't Ask, Don't Tell" became the law, and that was the year I commissioned. So I remember the first book I read on active duty was Randy Shilts's book *Conduct Unbecoming*,[121] and I was trying to educate myself on this issue and to understand it better.

I was fairly certain that I was going to be one of the first officers who would preside over or eventually command an integrated Army that did not discriminate based on sexual orientation. I thought that "Don't Ask, Don't Tell" was going to be a stepping-stone and that a couple of years later they would do away with it altogether.

My experience in the Army in the 1990s really belied that, and in fact the controversy that surrounded "Don't Ask, Don't Tell" in the early '90s really raised the visibility of gays in the military and made it much harder, I think, for a lot of gay people in the military to serve under the radar, as they had for a long while prior to that time.

In fact, antigay harassment and antigay epithets and real antigay sentiment was actually widely accepted, I found in my experience, which was mostly in support of infantry units, but also in the medical field. I sort of worked between the two spheres. And I really came to feel that this was really wrong-headed and something had to be done.

Things kind of came to a head for me in 1997 when I lost a soldier to "Don't Ask, Don't Tell." And I think that for me was a turning point, because as a very young, idealistic officer, a lieutenant at the time, the prospect of having to discharge one of my soldiers, under a law that I knew was wrong and had no good moral justification and violated everything I believed in with respect to the Constitution I had sworn to defend, was really repugnant to me, really difficult for me.

And I think that a lot of straight service members feel that way, and I think a lot of straight officers find it to be a very difficult and unappealing policy to have to implement. So that opened my eyes. I ended up going to law school and getting involved in this work.

121. RANDY SHILTS, CONDUCT UNBECOMING: LESBIANS AND GAYS IN THE US MILITARY FROM VIETNAM TO THE PERSIAN GULF WAR (1994).

The point of the story is that I think that many people in the military think that there's sort of a monolithic straight perspective that this is a necessary evil, this policy; it's something that has to happen. And I don't think that it's at all true to believe that most straight people even in the military anymore support this.

I think that most straight people in the military are pretty blind to it, like I was, because unless you happen to have some experience that brings you face to face with it, you don't have any reason to question it. It's one of a million other rules, many of which seem stupid, but that you have to live under when you're in the military and you don't think all that hard about it.

So maybe there's a lot of hope that as more and more service members today, gay service members today, do serve openly, and more and more are indeed serving openly, I think that there is an education process that's going to happen that is really going to help change the straight majority's view inside the military on this issue, and I think it's happening very rapidly today, which is good news.

The one other piece of context that I want to give for you now is sort of what does a "Don't Ask, Don't Tell" discharge look like. We've had enough panels, but there are enough new faces in here that I'm going to take a minute to just quickly review what "Don't Ask, Don't Tell" requires.

"Don't Ask, Don't Tell" is a federal statute that requires that anybody who either states he or she is gay, or engages in a broadly defined homosexual act, or marries or attempts to marry someone of the same sex, shall be discharged from the military. So statements, acts, and marriages are the three categories of things that get people discharged.

"Statements" is not a simple matter of, you know, just statements that involve walking into your commander's office, for example, and raising your hand and saying, "Sir, I'm gay." That is indeed a statement. But lots of things that fall far short of that are also encompassed in the concept of statement.

Statement is the broadest category for which people are discharged. The greatest number of discharges under "Don't Ask, Don't Tell" is for statements. So a statement to a friend—you know, if you come out to a friend—that could be grounds for discharge. A statement to a doctor—perhaps in the course of receiving some sort of treatment or counseling—if it's reported, that would be grounds for discharge.

We have unfortunately seen some cases where people have confided even in chaplains because maybe they're struggling with their sexual orientation, trying to come to grips with it. We've even had a few cases unfortunately where chaplains outed people, and the statement to the chaplain was grounds for discharge.

I don't mean to indicate that all chaplains do that. There are many wonderful and very trustworthy chaplains out there, but there are others who have not been so kind to our clients at SLDN.

So it's a very broad category of things. It's not just a matter of keeping it to yourself when you're at work, but any statement any time, if it comes to the attention of the wrong person, can be ground for your discharge.

"Acts" is another very misunderstood concept. Too many people think that a homosexual act is specifically some sort of a sexual act, and that's not true. Sexual acts between two people of the same sex are indeed acts under the statute, but much more innocuous forms of physical contact are also considered acts and can be grounds for discharge.

We had people discharged for hand-holding, for giving someone a kiss, a person of the same sex, a kiss or a hug, slow dancing, lots of things that fall far short of actually engaging in sex but are some sort of physical manifestation of affection between two people of the same sex. Those are grounds for discharge if they come to the attention of the military and the military chooses to act on it.

The third category is marriage or attempted marriage, which is one of my favorite legal terms. (I have this vision of two people at the altar, trying and trying, attempting to marry, and something intervening to make it not happen.) But attempted marriage has actually been construed to include things like civil unions or domestic partnerships, so other sorts of officiations of a same-sex relationship have fallen into this attempted marriage category.

Very few people are discharged for this reason, primarily because very few people have the right to be married. If you live in Massachusetts, you're in good shape. If you go to Canada, you can get married, but in most of the United States you can't. And same thing with civil unions and domestic partnerships; there are not a lot of places where you can do that.

That's not usually the thing that gets a person discharged. Those are pretty rare. But if a person were lucky enough to live in Massachusetts and want to marry his or her same-sex partner and have a legal spouse, that would be a very dicey thing to do if you were still in the military, because if that record came to the attention of the military, it would be grounds for your discharge.

We've had a number of very sad cases out of Massachusetts of reservists in particular. There is not a very large active component here in Massachusetts anywhere from what I can tell, but there are lots of reservists and some active duty people.

We have had a number of reservists who married under Massachusetts law because their civilian partners, their full-time civilian partners, now spouses, provide their healthcare through their employment. And many Massachusetts companies were no longer offering domestic partnership benefits or just same-sex partner benefits. If you wished to have health insurance benefits, you had to go ahead and tie the knot and get married.

So people have been forced into a situation where they need to marry in order to preserve their access to healthcare benefits through their partners—now spouses—but if that record comes to the attention of the military, they will be discharged for it.

Most of the clients we have had in that position have luckily been in long enough that they just retired and finished their time in the military and were still able to draw pensions, but they would still be serving today were it not for this paradox.

So knowing that statements, acts and marriages are your grounds for discharges, let's talk about how a discharge would proceed. Under "Don't Ask, Don't Tell," in order to begin an investigation, a commander is supposed to

have credible information from a reliable source that a violation of the homosexual conduct policy, i.e., a statement, an act or a marriage, has occurred.

One of the few improvements that the "Don't Ask, Don't Tell" regulations make over the prior regulations that addressed gay people in the military is that you do have an evidentiary threshold now, in theory at least, before you can begin an investigation; whereas prior to 1993, you could absolutely begin an investigation based on an allegation, a rumor, somebody saying, "Hey, I think so-and-so is gay."

Under today's law, when it's applied correctly—and I won't lie to you and make you think that it's always done by the letter—but if you're following the letter of the law, you do have to have some credible information about an actual violation. So an allegation that so-and-so is gay will not cut it. You need an allegation that "I saw so-and-so kiss a person of the same sex at a bar on Friday night," and I saw it, and I'm a credible person, let's say.

So that much information sort of has to come to a commander, as an allegation that someone made a statement, engaged in an act, or married somebody. So that's the threshold.

Once a commander believes that he or she has that credible information from a reliable source, he or she is authorized to begin what's called a "limited inquiry" under the statute—or under the regulation, more accurately.

The limited inquiry is an inquiry specifically into whether that particular alleged violation occurred, i.e., did so-and-so kiss another female on the night of such-and-such at this bar, and you may only question that service member, the service member's chain of command, and anyone the service member suggests that they speak to. So it's very circumscribed in terms of whom you can speak with.

That's a huge difference from the prior regulations, in which literally it was a free-for-all. You could haul in whomever you wished and ask them whatever you wanted and probe as deep as you felt you should. You could use criminal investigators under the prior regulations. So it's a much tighter sphere of inquiry now under the law.

Now, again, I don't mean to make you think that it's always adhered to so closely. We have seen over the years, especially in the early years after this law was passed, when people hadn't really gotten the new regulations and hadn't really processed them and figured them out and learned them and begun to use them yet—we still saw some broad-based witch hunts where lots of people were hauled in and questioned very inappropriately.

Even as late as 2003–2004, during my time doing legal services for SLDN, I had cases where the investigations went far beyond that, with terribly probing questions about people's sex lives and who they may or may not have had relationships with.

But the good news is, when those happen now, if there is a good lawyer around, you have the regulatory grounds to stop them now, and that was not the case prior to the '93–'94 regulations.

So once a commander has finished this limited inquiry, he or she theoretically has two options under the regulations. If he or she finds that the violation did indeed occur, you're supposed to discharge, supposed to initiate

discharge proceedings, and we'll talk about what that means in a moment. Or if you find that there's just not enough evidence there, you don't believe it, you don't think it really happened, you can drop the whole thing. Those are really your only two options under the regulations.

Interestingly, in practice, we see, especially in the last few years, a couple of other options that sometimes happen. We'll see a commander conduct an inquiry, find that, yes, the violation occurred, bring that service member in, read them the riot act and tell them, "Never let me see this again. Don't do this again. Be more careful. I don't want to have to discharge you. Go away now, and I'm going to forget this ever happened," which is completely extra-regulatory, but admirable, and certainly a sign that more and more commanders are reluctant to enforce this unless they really have some other good reason to enforce it, which is good and heartening, and I think it's a sign of change.

Another thing that we are seeing that's along the same lines, but almost more forward in some ways, is the administration of non-judicial punishment in response to an affirmative finding in the limited inquiry.

So the commander conducts the limited inquiry, finds that so-and-so did indeed kiss a person of the same sex on Friday night at such and such a bar, and brings them in and punishes them, gives them what we call in the Army an Article 15—or in the Marine Corps a Page 11—where you actually issue a punishment, that "You have done something very wrong, don't do it again, and here is your penance. You will have to have X number of days on restriction or extra duty," or "I'll dock your pay," or what have you.

The reason that's more forward is because it involves an acknowledgement that the conduct occurred in the first place, but rather than proceed with a discharge and lose somebody that maybe the commander feels is fairly valuable, he will just execute a punishment and say, "Don't do it again," which is really funny. It belies the idea that if you have engaged in this conduct, you're somehow a long-term threat to unit cohesion, because if that were the case, you would think the commander would do what the regulation says, and go ahead and discharge the person. There are very interesting things that we're seeing in practice.

If the commander does decide to initiate discharge proceedings, it starts with a notification of the initiation of discharge proceedings, which is just paperwork that tells you, "You're being processed. Here's what we have against you. Would you like to go to a board and fight this, or do you just want to take it and go?"

When we have clients in this situation, normally they take one of two options. If they have a good service record and they're not deeply attached to staying, or this whole situation has put them off enough that they're ready to just say, "Enough, I'm out of the military," what we will sometimes advise them to do is a conditional waiver of their right to a board on the condition that they receive an honorable discharge. Many of our cases will track that way. They won't go to a board to fight; they will go ahead and take the honorable discharge and move on with their lives.

Alternatively, you can fight. You can go to what's called an administrative separation board for enlisted personnel or a board of inquiry for officers. And

that board is non-judicial, so I don't want you to think that it's sort of like a courtroom type proceeding. It's actually much less formal and much less bound by evidentiary rules or procedural rules.

It is made up of some officers usually, and sometimes noncommissioned officers, who will look at the inquiry that's been conducted against you and make their own determination as to three things. First of all, if indeed you should be discharged or not, that's the first question.

Second of all, if you are to be discharged, based on your service record, what should your discharge characterization be; should it be honorable or general. Other-than-honorable is only appropriate in very limited cases under "Don't Ask, Don't Tell."

And then third, if you are a person who perhaps has gone through ROTC or has gone through West Point or has flight school on their record or medical school or something else for which the military had paid a good deal of money, then is there any money to be gotten back now—do they need to "recoup" the money that they invested in you now that you've been discharged?

That recoupment determination is mostly applicable in "statements" cases, but you will sometimes see it in "acts" cases, although there is pretty good defense to recoupment if you see it in an "acts" case.

So a group of people with no legal training and with any number of different views on whether gay people should be serving in the military will look at those questions and make a determination, and that determination is forwarded to the command, and almost always the command will go with the board's recommendation.

You will see sometimes in boards, a jury nullification effectively, for those of you who are law students. The facts will all be very clear that the alleged violation occurred, and the board will say, "We don't care; we're going to retain them."

That's kind of the beauty of a board. Sometimes you can have a bad set of facts, but a very sympathetic service member, so it goes very well. Other times, you know, things will go in an entirely opposite direction, and what you see is really low levels of evidence, and they will go ahead and choose to discharge.

About eighty percent of the discharges under "Don't Ask, Don't Tell" are honorable. About eighteen or nineteen percent then are general. Other-than-honorable is very, very exceptional. It requires, under the regulation, that you have also done something else wrong, in addition to having violated the homosexual conduct policy.

For example, if you violated the homosexual conduct policy by having a relationship with someone who was your subordinate, that would also be fraternization, so you could have an other-than-honorable discharge. If you were accused of and the board found that you engaged in sex in public, for example, that would be very untoward, you would get an other-than-honorable discharge.

So those are very rare, and there are particular regulatory hurdles that have to be met before you can give other-than-honorable under "Don't Ask, Don't Tell."

So that's kind of what this process looks like. A typical timeline is probably two to three months. The fastest I have ever seen it happen was seventy-two hours. The longest I ever saw it happen was I had a client once who was discharged nine years after her statement. She was a reservist, and reserve cases sometimes take forever, just because they get bounced around from person to person, and people are only working one weekend a month anyway.

So with all of that as background, I'm going to pass on to the much more interesting part, the stories of these four service members. We'll start with Joan.

CAPT. DARRAH:

Thank you. I'm honored to be here and most appreciative of Harvard Law School Lambda for taking the time to look at this seriously outdated, counterproductive, and discriminatory law.

I'd like to add a special thanks to Brian Schroeder, who answered all my e-mails, all my phone calls, and ultimately was very pleasant about accommodating a mini family reunion at lunch.

We have each been given ten minutes. That was actually my idea, so that we would have more time for questions and answers. But as Sharon mentioned, I've spent almost thirty years in the Navy. That gives me twenty seconds a year. I will just pick a few highlights and save the rest for questions and answers.

Sharon also said I grew up Mattapoisett, which is about forty-five minutes from here. I have to say I find it somewhat ironic that I grew up in Massachusetts, the state that's ultimately become the most gay friendly, and I now live in Virginia, which is at the opposite end of the spectrum. I went to Hartwick College, as Sharon also mentioned. I was studying to be an English teacher. Between my junior and senior year, which was the summer of 1972, my career plans took a dramatic change. I would like to say it's because I met some great wise leader or I read an inspirational book. But in fact it's because I believe *PARADE Magazine* had a cover story on women in the Army.

I've since looked back at this article, thanks to my partner who worked at the Library of Congress who was able to get me a copy of the June 1972 *PARADE Magazine*. I looked through it to try and figure out what it might have been that sparked my interest. The article talks about a $288 per month salary. That's about $10 a day. Since at the time, I was teaching sailing and mowing lawns and making a lot more than that, it probably wasn't the pay that caught my interest. I suspect that it was the talk of leadership challenge, adventure, travel, camaraderie, and the chance to do something for my country.

So, in January of 1972, I reported to Newport, Rhode Island, for Officer Candidate School. I might add, that was one of the coldest winters on record. As I was talking to someone on the way over here, interestingly, to give you a small example of how things have changed. Back in 1972 women only had skirts, we didn't have slacks. So we marched around Newport, Rhode Island, in the snow and in the sleet in skirts and heels. Fortunately, that's changed.

Anyway, the good news was, in May of '73, I was commissioned an ensign and headed off to warm Hawai'i. In truth, when I first joined the Navy, I didn't know I was gay. I dated guys. I was engaged to a male officer from the Naval Academy. And as I say, other people may have known I was gay, but certainly I didn't. It was probably the early '80s that I came to accept the fact that I was gay.

Interestingly, though, during the early parts of my career, my biggest challenge in the Navy was as a woman. Women had been in support jobs but were trying to expand to be more fully involved in operational assignments. For example, when I joined the Navy, women couldn't be intelligence officers.

Interestingly, the same arguments that were being used in the '70s and the '80s as reasons why women couldn't be fully integrated are being used today as why gays shouldn't be allowed to serve openly. We would be bad for morale and unit cohesion, bad for good order and discipline.

Of course, the big difference is that women could and ultimately did prove these stereotypes wrong. For most of the assignments I had, for example, I was the first woman. But I would go in, and if I was properly trained, over time I obviously demonstrated, as did many of my classmates, that women could do most of the jobs.

While there are still some challenges today, most came to accept that it was a real positive to have women serving in both support and operational assignments.

Ironically, just as people in the military were finally accepting women as equals, attention was being refocused on gays in the military.

In 1993, one of my most vivid encounters with the reality of being gay and in the military was when Clinton came into office and said that he wanted to let gays serve openly, and then we started working toward "Don't Ask, Don't Tell." All of a sudden everybody was talking about gays in the military. And needless to say, for a gay person in the military, it was not the most comfortable situation.

It was March of '93, and a group of us that had gone to what's called an all-officers meeting. I had just been promoted to Captain, which as Sharon mentioned, is the equivalent of Colonel in all the other services.

Before we all got together as an organized group, the senior admiral in the intelligence community who was going to run the meeting called me aside and said, "Joan, I'm just so pleased you made captain. I was on your selection board, and it was an honor, and it's just so great to have you in the community. You have done so many good things." Needless to say, I was on Cloud Nine.

Not five minutes later this same admiral stood up in front of the entire group of officers and told us all that we needed to go and contact our Representatives, call them, write them letters—we didn't have e-mails back then—and let them know that we had no room for gays in the military.

As those of you who know me know, I'm not usually one to sit by or stand by and watch a wrong go unrighted, but I knew that I was caught in quite possibly the perfect Catch-22. I said nothing and came home. When I got home my partner asked me what was wrong, and it just took me a while to even begin to try to explain what had just happened to me. Anyway, I did stay in, and I preferred to focus on the admiral's comments to me as an individual and not his comments to the group as a whole.

One thing I will say that made it possible for me to stay in and to keep persevering was I was very fortunate to have the support of my family. As I mentioned, my brother, Bill, is here today, and my niece, Jen. And that made all the difference to me. I also had a group of friends, mostly gay, mostly military, that I spent my free time with.

Finally, I was incredibly fortunate to have the support of my partner, Lynne Kennedy, whom I have been with since 1990. Although she was totally out at the Library of Congress, she was amazingly supportive of this crazy charade that "Don't Ask, Don't Tell" was forcing me and ultimately forcing us to be part of.

Anyway, I stayed in. As a captain I had some great assignments. In most jobs I continued to be the first woman ever to have the assignment. Like so many gay people, I survived by ensuring that my work and personal lives were kept completely separate. Yet each day I went to work, each time the admiral would call me into his office, I wondered, "Gee, is he calling me in to talk about something operational, or is he calling me in to tell me that I had been outed and I was fired?"

In 2001, I was assigned as the community manager for the entire naval intelligence community. My duty station was at the Navy Annex just up the hill from the Pentagon.

On Tuesday, September 11, I went down to the Pentagon to attend the weekly 8:30 a.m. intelligence briefing. During the briefing we watched the Twin Towers get hit. Finally at 9:30 a.m. we agreed to adjourn the meeting. When American Flight 77 slammed into the Pentagon at 9:37 a.m., I was at the Pentagon bus stop. We started running away from the building. I borrowed some stranger's cell phone, got a quick phone call in to Lynne, said "Hey, I'm okay. No idea when I'll be home, but I'm okay." And then the phone went dead.

It turned out that the space I had been in seven minutes earlier was completely destroyed. Seven of my co-workers were killed. That evening, the admiral asked me if I would go in and stand the mid-watch, and I did. I did very little intelligence work that night. Most of my evening I was on the phone talking to people who had lost loved ones and were trying to figure out if they were missing or had been killed.

In the next several weeks I went to numerous funerals and memorial services. One thing about the military, it is amazingly supportive of people in a time of need. We pull together. They talk about the military family, and it's true. It's just a giant extended family, especially during a time of need. Unfortunately, gay people usually miss out on this, as our partners or significant others can't officially exist.

Not knowing what other attacks might be coming in the weeks or months ahead, and realizing that if I were killed, Lynne would be the last to know, because her name was nowhere in my records—I was obviously very careful to make sure that she was not listed on any official paperwork. So I wrote a letter for Lynne to have, just in case something did happen to me. It was a letter that she could give to another Navy captain I worked with if something happened to me. We put it in a safe deposit box. I pulled it out earlier this week as I was thinking about what I might say here today. It read in part:

> September 24, 2001
>
> Dear Steve,
>
> I am writing to you because I know I can count on you to help me. I am gay, a fact that, as you can imagine, has brought its share of challenges with regard to

> the Navy. Lynne Kennedy has been my partner since 1990. My brother Bill knows all about our relationship. We are a close and loving family, and Lynne is as much a part of our family as anyone could be.
>
> With regard to next-of-kin notification, Bill, who is in Hawai'i, will be the person contacted. But until he can get to the East Coast, I need your help in ensuring Lynne is given any information or support that would be afforded a spouse of a Navy Captain.
>
> If I am still on a missing status, I would appreciate your keeping my life-style as closely held as possible and introducing Lynne as my best friend. If I am deceased, then there is no reason to keep my relationship with Lynne secret.
>
> Thanks so much for your support.
>
> Warm regards,
>
> Joan

I'm pleased to say that Lynne never needed that letter, and on June, 1, 2002, one year earlier than we had originally planned, we both retired.

Although I have given two examples of the challenges of living under "Don't Ask, Don't Tell," and there were many, overall my experience in the Navy was incredibly positive. I met wonderful people, had tons of adventure and travel and a great deal of responsibility and satisfaction.

In fact, it's because I love the Navy so much that I want to fix something that is so wrong. Since I retired, I have met hundreds of gay vets and active duty service members who have all experienced the challenges and endured the sacrifices of living under "Don't Ask, Don't Tell." Twenty-six other countries allow gays to serve openly, including Israel, Canada, England, Australia, and France.

I know we can do better than "Don't Ask, Don't Tell," and I know our military and our country will be stronger when the ban is lifted.

Thank you all for your part in trying to right this wrong and repeal this terrible law.

[Applause.]

PROF. HILLMAN:

I'm moved and I'm humbled and honored to be on this panel. This is a change of pace for me. My bio sounded like an academic's, and that's appropriate, because that's what I am. But it wasn't always so, and that's what I'm going to talk to you about today.

Almost two years ago, NPR resuscitated a 1951 project of Edward R. Murrow and issued a call to the public for "the personal philosophies of thoughtful men and women in all walks of life." During a time when the United States was a few years into what promised to be a long and costly ideological struggle against communism and was in the midst of a "police action" in Korea that would force the conscription of 1.5 million American men and involve nearly 6 million troops altogether, Murrow evoked the fog of fear—not of war—

of "physical fear," "mental fear," and "fear of doubt," and sought perspective on that through the beliefs of others.

While I have listened to quite a few "This I Believe" statements on the air over the past months, I have not been moved to write my own—until now. Because my experience as a lesbian in the Air Force so profoundly affected what I believe, I thought I'd try to write my own "This I Believe"—however imperfect and incomplete those beliefs might be. In the interests of keeping on track in terms of time, since there are many people here whose voices should be heard, I'm going to first give you a little background on my path to and through the military and then read you my own, "This I Believe."

I applied for an Air Force ROTC scholarship as a way to pay for the expensive college that I wanted to attend. I knew little about military service or war—I was too young to witness the Vietnam War firsthand—and my family, including three older brothers, and friends included no one with lengthy military service. I chose the Air Force over the other services because my father had flown over the hump[122] in the China-Burma-India theater as a radio operator in the Army Air Forces of World War II. He rarely talked about that experience but it made me mildly inclined toward the Air Force. I was so unprepared for the interview that was part of the scholarship application that I couldn't even answer when the interviewer asked what rank my father had held in the service. The interviewer took matters into his own hands and recorded that he was a captain, which greatly amused my dad, a proud enlistee.

I plunged into ROTC, entirely seduced by the conscious focus on leadership, the camaraderie, the shared purpose and sacrifice, and the clear track to success. I was such a shoo-in for corps commander by the time I was a senior that no one else even bothered to apply.

I started at the Pentagon in the Strategic Defense Initiative Organization (Star Wars) then trained as a space operations officer at Lowry AFB in Denver and was assigned to Cheyenne Mountain AFB to work as an orbital and space control analyst. Then I sought out Air Force sponsorship to study history, and after a transformative year at Penn [University of Pennsylvania], I taught history at the Air Force Academy before separating from the military.

The service academies are not for the faint of heart. Each is forbidding in its own fashion, and there I found an inspired and inspiring group of young people motivated to use their talents in service. I also found cadets frightened by the possibility of being outed and subjected to discharge and disgrace under "Don't Ask, Don't Tell," which I remember debating during midnight shifts inside Cheyenne Mountain. The academies are notorious "fish bowls";" students' lives are subjected to intense scrutiny, and peer pressure can be overwhelming. It was there, confronted every day by posters that shouted "Core Values: Integrity first, service before self, and excellence in all we do," that I first grasped the impossibility of reconciling my sexual orientation with the military's policy.

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122. The phrase "flying the hump" was used during World War II to describe the act of flying over the Himalayas between Burma and China. *See* C.V. Glines, *Flying the Hump*, AIR FORCE MAG. (online ed.), Mar. 1991, *available at* http://www.afa.org/magazine/1991/0391hump.asp.

So, I separated and resigned my commission. On the way to law and graduate school I told my commander that I was leaving for "personal, professional, and moral reasons," but that was as close as I came to making a cognizable statement about being a lesbian. I still don't know if leaving quietly was the right decision.

So . . . this I believe:

I believe that "Don't Ask, Don't Tell" is silly, wrong, and costly. I believe that thirty years of having an all-volunteer force, combined with arms races and wars, has made women, people of color, and the LGBT community essential resources for the military. I believe the military needs us, and it knows that. But because it relies on a culture and structure rooted, in part, in hierarchy and exclusiveness, I believe it is anxious about its diversity, and that this anxiety creates fear and fragility. That fear is exploited by those who join the military in hopes of confirming their own superiority and separateness from what they view as a debased civil society; hence the evangelical proselytizers at the Air Force Academy and the explosions of violence against service members thought to be gay.

I believe the military is fearful, too, about the tremendous burdens we place on it now—to defend the Constitution by not only fighting wars but creating and maintaining stability at home and around the world, increasingly by itself, with little support from other countries or from non-military civic institutions. It is fearful about how to manage the private contractors who now train service members, protect key officials, and do God knows what else in theaters of war.

I believe those fears of difference, of incapacity, undermine the sense of community, purpose, and service to others that is one of the military's greatest strengths. I believe our own fear of disrespecting the sacrifices that service members make prevents us from having a genuine debate about the utility of war and other military solutions. And I believe that, while "Don't Ask, Don't Tell" makes us all afraid, impoverishes the military, and deserves a speedy demise, we must also face the questions of state violence, accountability, and distributive justice that underlie military personnel policies and military operations.

Thank you.

[Applause.]

MR. LOPEZ:

Hi. I'm Joe Lopez, and I would just like to talk to you today about why it's difficult to be gay in the military. This is sort of a nervous speech for me to give, because I'm not very comfortable with the topic still. I think it's a product of all those years that I had to live two lives in the military.

I think a lot of people that I'm in class with here at Harvard still do not know, I'm not very open as a person, and I just would like to just give you a sense of how difficult that is for some people like me and people that I know that are still serving in the military.

I guess I'm just going to respond to several questions I often get from friends. The first is, why did you join the military under the current policy if you knew you were gay?

I think, like Joan, I joined at a time when I was very young. I didn't know that I was gay. I was seventeen and looking at various universities, and I chose West Point because I thought it was a great opportunity to become a leader. I really liked the fact that people were doing more than just academic work. They were going out, they were leading units, they were active, and I was really excited about the opportunity.

So, when I signed on the dotted line, I was basically signing up for a nine-year commitment at the young age of seventeen, not knowing that "Don't Ask, Don't Tell" would affect me in such a serious and profound way. And I guess what that entails is four years of schooling and five years of active duty service afterwards.

So a second question that people always ask is, what was it like being gay in the military? And for me it was extremely difficult, because I was always living a double life. I decided or realized that I was gay as a senior at West Point and had hidden it for many years beforehand. I denied it. I came up in a very Catholic conservative family, and it was very hard for me to come to grips with that fact myself.

Once I left West Point, I wasn't in such an intense environment with close friends, so I felt more free to, I guess, start having relations with other people. And while I was in Fort Rucker, Alabama, I dated a gentleman in Atlanta. So basically what my life consisted of was working during the week and then leaving on the weekend to sort of separate myself from my military life and go off to Atlanta and live a very separate life.

That was very hard. Every weekend I felt like I had to get away, and it was difficult mostly because I had very good friends from West Point that were stationed at Fort Rucker who I could no longer engage with or no longer be true to.

And in hindsight, when I tell them now, I mean, we're still very good friends, and they say, "Why didn't you tell me back then? Why didn't you just let me know?"—it's because you sort of live in this climate of fear in the military that you can't tell people, because even though they're your very good friends, you never know who you can trust and who is going to then turn their back on you and tell your commander and then get you discharged.

Another question is, why didn't you just leave the military, why didn't you just say you're gay? And I guess that's very difficult, because while there are established policies, like Sharon said earlier, they're not always put into practice in a uniform way. So you don't really know what's going to happen to you if you say you're gay and you tell your commander.

What happened, I guess, to a lot of people that I know is that they engaged in witch hunts and basically said, "Okay. Well, I'm gay," and then they looked for specific acts to then prosecute them for. And it's not necessarily a smooth process, and you fear that you might be discharged dishonorably or other than honorably, which could then affect future career decisions.

So it was very difficult to then think about that as an option, and it's not really something that you could just say, "I'm gay. I would like to just pay back whatever I owe," or "I would like to relinquish my commitment and move on." You're sort of trapped in this environment where you have to hide yourself and

you have to lie to others and you have to continue to do, I guess, your commitment as best you can.

I had a lot of great assignments. I was a helicopter pilot, a Black Hawk pilot in the Army. I was in flight school for a year and a half. Then I was stationed in Germany.

While in Germany, half my unit was deployed to Iraq, and I was sort of disappointed because I wanted to go with them. But there were only two officers, so my commander deployed, and I was left behind as the rear detachment company commander, which was a great strength, but I told my battalion commander, who was my senior officer at the time, that I wanted to deploy, I wanted to be transferred to a unit in Italy that was deploying at the time and assume a platoon leader role to go to Iraq. I felt like all my classmates were going, and I wanted to go too.

So I guess one question I get a lot is, while I was in Iraq, what was it like being gay in combat? And I would say it was very difficult. It was easier to separate your life while you're living in a civilian environment, because you could maybe leave the base, go off to a different city, and sort of have your own relationships with other people.

But while you're in Iraq, you're really in a close environment with a lot of other soldiers and people, and it's very difficult to then separate that and to lie to other people on a day-to-day basis, because what do you do? What do you do when there are bombs going off around you, when you're getting shot at and you need people to talk to? You talk about your personal relationships, and you talk about all the things that you care about. And quite frankly, you can't share those things with other people when you're in a deployment situation because of the fear that they're going to then tell and out you.

So while other people get to talk about how much they miss their loved ones or their wife or their family, I mean, I can talk about some of those things too, but at the time I was in a relationship with a very wonderful man, who is sitting here today, who used to write me letters every day, and who really helped me get through the experience, but I couldn't share that with other people.

And it all hit me one night, because, you know, we had standard drills, when you get attacked. I was at an Army Airfield in Northern Iraq, north of Baghdad, and we had a mortar attack. And the standard drill is to then don your gear, your helmet and everything else, and head to the bunker that was established for your unit to go to for cover.

And while everybody else—it was about twelve o'clock at night, we were getting attacked by mortars—everybody else was donning their gear, running out to the bunker, I was more concerned about securing these letters that my boyfriend had written me and making sure that they weren't maybe possibly blown up in the mortar attack and spread all over the place so that I would be outed.

After that situation I just felt like I really grasped how ridiculous the situation is for certain people. And you really feel like there is nothing—no other option for you. And I don't want to sound like I'm whining, because I'm really

not trying to. I feel like I've served my country very well, and I was very proud of my service.

So I finished my year in Iraq, and I didn't tell my commander then. I made sure that I didn't let my soldiers down, because I felt like it was very important for them to have a confident platoon leader and not have a transition in leadership during that time.

We redeployed back to Italy, and when we were not scheduled to deploy anymore, I told my commander that I was gay. For me the process went very smoothly, and I was very lucky, but it was a very nervous decision for me to make, because I didn't know how he would respond. Like Sharon said, you don't know if they're going to go on a witch hunt or if they're going to just come after you for further charges. For me luckily the transition was very smooth, and I got out six months later.

Since then I've told all my friends that I went to West Point with who are now still serving in combat. I have many friends that are still over in Iraq, and I pray every day that they will be safe. And I feel often badly, because they still have to serve and I don't. I'm lucky enough to be here at Harvard Law School getting a great education. And I can't go help them, and it's because of a policy that discriminated against people like me that still want to be in the military and still want to serve with them.

I guess what I'm trying to say, if there is one message I get across, is that there are many gay soldiers serving in the military today, many of whom I've known, and they are serving their country proudly. And I feel like the "Don't Ask, Don't Tell" policy degrades these soldiers in their service, and it in turn degrades all of us to allow the policy to remain in effect. Thank you.

[Applause.]

MR. FRICKE:

You really hit the nail on the head describing the type of environment you work in when you're in Iraq and when you're under that type of extra stress at all times. Similarly, when mortars would attack the base, you were concerned about what you had left out or what you had been working on. Maybe you were going to send a letter home. That was the first thought, instead of your own safety or the safety of those you might be around. So that shows how "Don't Ask, Don't Tell" affects you in a very negative way while in theater.

My name is Brian Fricke. I joined the Marine Corps in July of 2000. I had signed up for a five-year contract—active duty. I had a year of school with some other additional follow-on schools. I was in a technical area. I worked on helicopters. I was an avionicsman on the CH53 Model aircraft, which is a different model than he flew, but still the air wing.

I'm currently in my individual ready reserve time. Everyone signs up for eight years. I was enlisted, and again I had five-year active and three-year individual ready reserve contract, so I'm still in that reserve status.

I remember when I was still seventeen, I was in high school, I had signed up, and I wanted follow in my grandfather's footsteps. I wanted to really follow that family lineage of having been a Marine and also to serve my country. Public service was always tugging at my heart. I wanted to be a police officer, I

thought, at first, but you've got to be twenty-one to carry a gun, so I thought maybe I could go another avenue.

I joined the Marine Corps, learned what carrying a gun meant. It was an eight-pound rifle, not a small sidearm. And it was a tool you don't want to use, a tool that you learn to be mature about. After boot camp and follow-on schools, I went to Camp LeJune. Being gay was not so much on my mind. I knew that I was gay before I joined, but I wasn't going to let that to stop me from serving my country. I knew there was a greater cause than myself, you know. I wanted to serve.

And I remember all the paperwork, like she indicated. You get all these papers, and you're just signing your name and signing your name. And the next thing, "Aye, sir," "Yes, sir," and you're just signing. I remember the "Don't Ask, Don't Tell" paper came up, and I was, "Aye, sir." You know, you didn't have time to read it. It was just, "You're not gay, right? Okay, next," and I was moved right along.

So I think that was the first time that "Don't Ask, Don't Tell" actually passed through my mind. And again, I thought, "Well, we'll see how it goes." I wasn't going to back down now. I had already committed to going.

I was lucky. I got to go to San Diego. That's the location of my parent command. And in San Diego it's easier to live the double life. It's not easy by any means, but you're not in a place like Fort Rucker, Alabama, that is very isolated from a larger city, and so I was lucky in that regard. There was a huge Navy and Marine Corps presence still.

That's where I really started understanding what being gay was about. There was a whole different culture, I made new friends, began to relate to other people—like in high school I was very closeted, and you start to really understand it's okay to be who you are, it's okay to be gay.

You just get to really enjoy being alive—that other side of you gets to develop, and you realize that I'm no less a person than anybody I serve with. I'm a gay American, but I'm still just as capable. I can still serve just as honorably. I'm going to do the best I can in everything I do. So I did. I always strived to do the best I could.

I actually was transferred from the Avionics Division over to the Quality Assurance Division of our unit while deployed to Okinawa, Japan. We were there for a year. After about a month I went on the Internet, and I was looking to see if there was any kind of a gay club or guy culture there in Okinawa. I found out there was a club called S&B, which was this little hole in the wall, not really a club—more like a bar that the locals and military went to.

Getting there was very secretive. I first met with this straight female who was on one of our bases. She was a mother of two, and she was a stark advocate of gay culture and letting us be who we are and having friends. She was on a website, so I contacted her.

I was very scared. I thought this was like, they're dangling the bait out, and as soon as you go, "Oh, I'm gay. Where's the party?" they were going to throw the book at you. So it was very unnerving, but I thought, you know, this is not how I want to live. I don't want to always be unable to communicate with my troops and the people I work with, so I was just going to do it.

So I went to the base, and I met her, and I got into her vehicle. We drove around. She was the nicest person, and I came to know her as a "guardian," because she introduced lots of military personnel to the gay culture there. I had lunch with her. I also spoke met another gentleman as part of the screening.

Finally, after several weeks, I was allowed to actually go to this club. And it wasn't anything major—nothing debaucherous. It was just a place where everyone could go and feel safe, have a drink, talk about what's on their minds, and have fun, and of course Karaoke if you were so inebriated and thought you could sing.

But I remember the first night I actually got to go. I met a guy who was on the same base as I was. He was in the Navy; he was with the medical personnel there. And he said, "Oh"—I named my unit—he said, "Your friend was just here last night." "What!?" I was like, "Who? What's his name?" And he didn't recall, and he said, "He has a big smile," and describing all the traits. I didn't know him. He finally said, "Oh, I think his name is Leo."

And in that moment I recalled sitting in the work center working on something, and somebody mentioned, "Oh, I didn't know his name was Leonardo," and all that was going through my head. I thought, "I have to go." I had just arrived, sat at a table, had a drink, and I left. I went back to the base, and I got out the roster for our unit, and I was looking through all the first names, and there he was, Leonardo P.

He became one of my best platonic friends in the whole world. We still talk to this day. He's still in San Diego. He left the Marines before I did. But we became roommates, and we were really able to be each other's other side, like that double life that we talk about. And this is Okinawa. The stress wasn't there of the war. It was very much carefree. We didn't realize how good we had it.

So we returned to San Diego. He got out of the military, which was sad. I had to then be again in the closet. I didn't have any friends again. The people you do make friends with, you have a great time at work, but, again, you can't hang out after work a whole lot, because you want to go and be a part of the people you really can relate with. You want to go and hang out with them.

So that continues the double life, and that unit cohesion didn't necessarily break down because of "Don't Ask, Don't Tell." I mean, I was still able to interact with them and play my role, my leadership role, and the work that I contributed to accomplishing the different missions and audits and things that we did.

So at this time—that's actually where I met Brad. His father was an O-4, a Mustang officer in the Navy, and he is actually now a dean in Charleston of one of the nuke schools. But he and his family—his sister, his mother, his father, they all accepted me right away, and they fell in love with me, they were my second family.

My family didn't accept my "lifestyle," and I knew they wouldn't, and I hadn't come out to them at that point. But just from the talk, I knew that that wasn't the direction I wanted to go just yet.

I would go on the base, and I would have dinner with [Brad's] family, and it was very interesting to have that kind of support group and have that family

aspect to it. So we started becoming very close, and we were inseparable, right up to when I had to go to Iraq.

I remember the night before, I was getting all my gear ready. It was very difficult to know if I was going to return, all the things that go through your head. And we went down—[Brad] drove me down to the base. He had a military dependent ID, so he could go on and off the base. And to kind of back up, he would come and pick me up sometimes on the base, on the Marine Corps base, and I would jump in the car, and we would go out, go to his family, etc.

So he drops me off, and I'm unloading my gear. It's very dark—it's about four in the morning. We were assembling our gear to get ready to load on the plane and go off to Kuwait, which was our first destination. I remember, this could be the last time I would see him, and I thought at this moment if I were to maybe kiss him or hug him, I could also be outed and be dishonorably discharged.

They say that most, eighty percent, get honorable discharges, but "we" don't know that. Young troops don't know that you can get an honorable discharge, not that we would want to be discharged. But we still think that that's a dishonorable discharge, you lose all your benefits, they strip you of your "honor," even though you were willing to lay your life down for strangers.

So that sticks in your mind, and I thought, "Well, damn it all," and I reached in, and I kissed him one last time, which I thought it could be, and I left. And I saw everybody else, though, with their wives and their babies, and they were able to stay with them until about noon or one when we finally boarded and left.

But all these little things that you see as a gay troop, you see others and the kind of—like the family departing, you see all these things that you are deprived of, and you feel kind of like this outcast, even though you are part of the unit.

There's again that unit cohesion. You are still a part of that unit, but you feel like kind of the outsider, like the spy. Again, you feel you're dishonorably serving. It's a very strange mentality to be under, especially when all you're trying to do is serve your country. You're trying to do what you think—what I think is the best thing for the whole.

So, in Iraq, in our first thirty days we had mortar attacks. I was at Marine Corps Station Al-Asad, which is 180 miles northwest of Baghdad. So we were in Anbar Province, a fairly violent area, and that started ringing home too.

There were several conversations which were always quiet, and mortars would go off, and they would shut down the phone section, and so there was no more communication, which obviously when you're talking to a loved one overseas, and all of a sudden, boom, and there is no line, the next time I would speak to him again, he would express how hard that is.

I was like, "Everyone is going through that. It's going to be okay, we're going to be okay." But I started thinking, my parents don't know about him, my parents don't know I'm gay. None of my family and friends knows who I am. I have been keeping this all balled up because of the fear of being, who knows, judged or the fear of loss, and the fear of all these things.

That's when I wrote a fairly concise letter, and I wrote it to my parents and my friends, and I e-mailed it out. I wasn't concerned about them plucking that e-

mail and reading it then, "Oh, there's a gay troop in such and such a unit. Let's kick him out." I was almost in indignation. I was kind of over it.

So I sent that letter out, and I had great variations—I had acceptance and denial among my family. All of my friends were accepting, and I just wanted to let them that know if I died, that Brad, if he shows at my funeral, that he is the one that I fell in love with, and you should treat him with respect. And if all my friends show up, that's why, that's who I am, because you never knew me. And that's a hard thing to bear your whole life.

So after that, I started coming out to some friends there in Iraq who were part of my unit. You start to get kind of a gauge of who is okay with things and who is not. And so I came out, and they would always be surprised.

In Okinawa, I kind of missed this story, I came out. I was working night crew with one of my troops. I was a Corporal and he was a lance corporal. He kept talking about females and going, you know. And they would talk about the Okinawans or the locals or the ones back home or whatever.

I was kind of, again, over it, and I was like, "You know I don't like women." He was shocked, and I was kind of shocked I even said it, and I was kind of like—I have used this analogy for this—I was waiting for the aircraft to start falling apart and blades to fall off and be kicked out. It was a very strange feeling. And finally he said, "Oh, no big deal. No big deal." In my head I was, "Wow. I guess you understand. No big deal." So we continued working.

Again in Iraq, when I would come out to people, they were always, "Really?" They were shocked, and I think that helps break the stereotypes a lot of times, not that it was intentional to weave my way into being their friend and then come out, you know. But you be as much as yourself as you can be, and when you are finally able to bridge that, then you say, "I'm gay," and they say "Okay, whatever, it's not a big deal."

So I had a lot of positive experiences in that regard. I came out to a few—my commanding officer, I never told him, never told anybody that was directly in charge of me, but there was a letter that—I also worked with a lesbian in Iraq, and her partner was in another unit that was stationed on the same base, so they had the ability to see each other while in theater. There were also straight couples that had similar effects, where their wife was in another unit there.

But somebody attempted to out her to our commanding officer. The story goes that a letter was given to the commanding officer outing her, and the very next—I just remember seeing there was a little post of like a letter, and it was his outline of the nondiscriminatory policy that he was going to enforce in his unit.

It was shocking. It didn't say—I don't recall if it said sexual orientation *per se*, but it was just, "Here is our policy. There is no discrimination." And although sexual orientation was not on there, I knew that there were still good officers in command, there are still good people in charge, and they know and understand the value of every one of their troops, whether they're gay or straight. And they know that they don't want to lose any of their people, especially at a time of war, when every skill and every body is necessary.

So that just kind of shows the progression of how the "Don't Ask, Don't Tell"—there's always a time, every few months, maybe every day there are stories that come up or things that happen, and you're reminded, you're gay,

you're in the midst of a "Don't Ask, Don't Tell" policy, you are still under that. And that stress, I think, it not necessarily ages you, but you get mentally worn down from constantly hiding that about yourself.

I think one of the most stark recognitions of this was when we returned. I was in Iraq for nine months, and we left, we came back to the United States. We landed on—it was in September. We pulled into the—I'm trying to recall. I'm visualizing how it came up.

There are hangars on the left-hand side all down, and they're all strung with flags, "Welcome home, welcome home, welcome home." And there was a huge crowd of people, and I knew that Brad wasn't in that crowd, and you realize that I'm home and they're welcoming me home, but, you know, the one that really waited for you and wrote you letters and sent you stuff, he couldn't be there, and there's just this energy that is there, but it's empty.

So I gathered my things and I took my sea bags and I got a taxi and I went home, and I met him there. The reunion was just as sweet. I was home, I was with him, but seeing all these wives and babies, all the families, it was just such a—you just felt so outcast from that, you know.

I don't know if you can kind of understand that, but it hurts real deep, and you realize that you believe in something so great, you know, and they don't believe in you so much.

Anyway, so I decided to get out. I didn't want to hide it anymore. So I talked to Brad about it, and the end of my five-year tour was up, and I decided that, you know, I'm going to get out, I am going to do more. The Marine Corps needs me more than I need the Marine Corps.

But I learned a lot, and it was very symbiotic. I have a clearance. I had a lot of intangible skills learned like leadership and discipline that you take with you. I'm probably going over, I apologize.

So all of these things that we do for our country, we do selflessly, and that's all we want, to be equal—you know, we don't want anything more. We just want to serve; www.dontaskdonttell.info has more.

That's all. That's my story.

MS. ALEXANDER:

There should have been a note in the program reminding you to bring tissues before you came to this panel. So does anybody have any questions in our remaining time? Everybody is just too taken aback.

FROM THE AUDIENCE:

I had a question about the process of discharging somebody for "Don't Ask, Don't Tell." You had said that if the limited inquiry doesn't or they decide the limited inquiry ends with no, this wasn't credible evidence, will they prosecute again, or can they—is it just sort of that you just sit there and wait, and then somebody else could come up later and say, "Okay, I saw this other act"?

MS. ALEXANDER:

It's non-judicial, so you don't have true double-jeopardy prohibitions or anything like that. But generally, if you make it through, and the commander

decides to drop it, it's dropped. Only the commander can begin that investigation, nobody else. But if people knew about the inquiry, are they maybe looking at you a little harder now and waiting for you to do something that they can come after? Yes, maybe. I think it definitely—if the fact that the inquiry was going on and the fact of the allegation is widely known, you're certainly going to be under scrutiny, maybe, if people care enough.

I think one of the neat things about today's panel is it just illustrates the diversity of experiences that you can have under "Don't Ask, Don't Tell." We have a panelist who served relatively openly—a decent number of people knew—and somebody who served in the same era, Joe, who absolutely did not share that information about himself. So even in recent experience there's a lot of diversity.

I think sometimes it depends how the command shuts it down, if they do shut it down. If they do their inquiry and decide not to go any further, some commanders will send a message at the same time that "I'm not interested in these kinds of allegations. Don't bring them to me anymore, because I won't do anything with them." That can set a tone that, well, there is not much point in scrutinizing the person, I imagine. It varies so greatly.

There was another question over this way.

FROM THE AUDIENCE:

For Joe Lopez, what role did your ethnicity play?

MR. LOPEZ:

I don't think it played much of a role at all for me. I think people more often just asked how I got the last name Lopez, because I guess I don't really look like a Lopez so much. For me it was not much a problem.

MS. ALEXANDER:

There was a question right here.

FROM THE AUDIENCE:

I just wanted to know, you mentioned some cases in which commanders, as you just said, say, you know, "Don't bring this kind of allegation before me." If it comes to light again that someone is accused of being gay, and it's found out that the commander dismissed it, is the commander then—

MS. ALEXANDER:

That's a very good question. I'll just repeat the question so everybody heard. Say you have a commander who puts the kibosh on an investigation and just refuses to act or makes it clear that he or she is not interested in pursuing allegations of homosexual conduct policy violations. What if that comes to someone's attention? Could that commander then be in some trouble?

And I think the answer depends who the commander is. All of this, again—it's all so variable because it just depends on the characters involved. But I think that there are at least some commanders who have gone ahead and executed discharges purely for fear of, if I don't, and it comes to the boss's attention, the boss is going to have a heart attack over this, and I'm going to either go down or be in some trouble, you know.

So I think that there are commanders who feel pressured to do it, even though, probably, left to their own devices, they wouldn't. And I think there are other commanders who are either willing to take the hit or who believe their bosses would back them up. It just varies so much.

Denny Meyer.

MR. MEYER:

I'm just struck listening to all these recent stories of the pain that every last one of these people feels, felt in being denied the rights, and comparing that to what I went through forty years ago, where I just didn't expect any rights at all, and then when I crashed into the birth of gay rights, I quit.

And that is just an observation that, back then, we just didn't expect anything, and the pain was a lot deeper and a lot more buried. So it seems like "Don't Ask, Don't Tell" is making it much worse in a sense.

FROM THE AUDIENCE:

First I want to commend all of you for being here. It's a real honor to listen to your stories. I lived in North Carolina before I came here to Harvard for grad school. There is a lot of military in the South, specifically in North Carolina, because of the military bases.

There is an LGBT newspaper down there that's been around for a long time, and I still get it here, because I've enjoyed so much of the stories. And the front page always had a report from Iraq, and it was a soldier who always signed the letters, "Your friend in Charlotte reporting from Iraq." I knew him and his partner, and everyone in Charlotte knew who it was if you were in the community, but he couldn't be out. And you would see a large military presence and a lot of military friends in Charlotte, North Carolina.

I think that reminded me every week when that newspaper would come—this was a weekly newspaper—you would see the article, and this guy would talk about how he misses his partner and what he sees and the bombs and the devastation overseas. You would see that as a constant reminder, every week when I would get it. He has come back now, but they always had that constant reminder.

So I think your stories were especially powerful especially when you're around a lot of people who deal with this on a regular basis.

So my question is: where are we? Have we seen movement? I know the Bush Administration doesn't seem to be moving at all. Do you think—are there other presidential candidates who seem to be more liberal on this? Do we see movement within or outside the military?

MS. ALEXANDER:

A lot of questions were mentioned in there, so we'll start with the easy ones first. Are we seeing movement? Yes, there is growing momentum to repeal "Don't Ask, Don't Tell," both in Congress and in the public at large. Polling at this point is very strong. Most Americans, about three quarters of Americans, believe that gay people ought to be able to serve openly in the military.

Congress is way behind that, but people are rapidly coming to the conclusion that this is a law that has to go. And I think that people inside the

military are beginning to change too. I don't—some of the polls show a slight majority of people in the military ready to repeal "Don't Ask, Don't Tell."

But I think probably one of the most encouraging numbers we saw was in a December Zogby poll that said about three quarters of military people coming back from Iraq—and the segment was like eighteen-to-twenty-five-year-olds; they were specifically looking at young people coming back from Iraq and Afghanistan—about seventy-five percent of them said they were comfortable around gay people. It didn't go so far as to say they felt "Don't Ask, Don't Tell" should be repealed, but they said, "I'm comfortable around gay people," and that's a good sign.

Is the military moving as an official matter? I would say yes, insofar as the rhetoric around this issue has changed a lot. Ten years ago, when a reporter at the Pentagon would ask, "Are you guys going to repeal 'Don't Ask, Don't Tell?' What about letting gay people serve in the military openly?" the answer was always, you know, a resounding, "Absolutely not. We need this law for the preservation of unit cohesion, morale, discipline," et cetera.

For the last couple of years, and actually most interestingly we had the most recent iteration of this today, a couple of hours ago I got an e-mail with the newest DOD statement that we have seen on this. DOD was asked, "What do you think about the introduction of this legislation last week to repeal 'Don't Ask, Don't Tell?'"

They gave the same answer that they have been giving for the last couple of years, which is, "DOD policy is written in accordance with federal law. Congress passed a statute in 1993, 10 U.S.C. § 664, that prohibits open service by gay people in the military. Until that law is changed, we cannot do any different. We are just following the law." That's a far cry from the justifications, the ardent justifications of the law that were given in the 1990s.

So do I think the Pentagon is on the verge of urging Congress to repeal "Don't Ask, Don't Tell"? No, but I think they're going as far as this generation of military leaders is ever going to go by saying, "Well, it's the law. Congress can change the law if it wants to," (wink, wink).

With respect to where we are in Congress, we had the introduction last week, the reintroduction in the House of Representatives of the Military Readiness Enhancement Act, the bill to repeal "Don't Ask, Don't Tell." We introduced with one-hundred-ten members of Congress, which is almost double what we introduced with two years ago, a very good start. I'm very confident that we'll move that number significantly over the course of the year, with the goal of eventually getting ourselves to the point where we have enough votes to pass it.

The Democratic leadership has been very clear with the LGBT community on where it is with respect to LGBT legislation, and that is they said, "Use the committee process, have hearings"—which the lead sponsor, Marty Meehan, intends to do this year—"and when you have the votes to pass this, tell us, and it will go to the floor."

So our job, as a community, if we want to see this law go away, is to get the votes in Congress to do it, and we are getting closer every day to doing that.

Ms. Kennedy.

MS. KENNEDY:

What has happened in the Senate?

MS. ALEXANDER:

On the Senate side—in the last Congress, you know, last Congress was the first Congress we had seen any legislation on "Don't Ask, Don't Tell" repeal in quite some time. And we never had a Senate bill last Congress for one simple reason. That was that all of those of us who advocate for repeal wanted very much, particularly in the political environment of last Congress, to have a bipartisan introduction of any repeal legislation. And that goal unfortunately proved elusive, and we finished the Congress, the last Congress, without a Senate bill.

The tables are turned, and the Democrats are in charge of both chambers now, so I think that that sort of mandate that there be a Republican on the original introduction at this point is less mandatory, less important than it once was.

So my belief is that sometime in the next few months we'll see a Senate introduction. I can't promise it will have a Republican on it, but as I said, I think that's a little less important now. But I think it won't be more than a few more months until we've got a bill in the Senate. I think it's just a question of which Democrat.

There are a number of Democrats who are interested, but you know how politics is. You want to get the person who is the right person to be the leader on this issue. There are many who would like to be. We are working with a lot of folks to figure out who is best to launch it in the Senate.

You should be asking questions of them. It's much more interesting. No other questions? One more.

FROM THE AUDIENCE:

I work with a lot of LGBT youth, and one of the things that was becoming clear, very clear, was the pain that you guys were dealing with, feeling—wanting to serve, but yet feeling so much of an outsider in those experiences.

Knowing what you know now, knowing the experiences that you have gone through, how would you speak and how do you speak to LGBT youth that are still in the early stages of high school and stuff like that and are thinking about the military? What advice do you have for them?

MR. FRICKE:

I would say that the military experience that you have will be what you make it. If you're where you're supposed to be when you're supposed to be there, and you do your best in everything you do that you're tasked with, you're going to have a very good experience.

If you are gay, like these youth are, they should know their risks, they should understand what they are getting into, but understand there is hope, understand that there is change on the horizon and that we fight for them. It's the next generations that we fight for. So as the torch is passed, they should be there to receive it. So they're very essential to the progression of our military.

CAPT. DARRAH:

I would say they're essential, and my experience obviously is the Navy. In the Navy I've watched so many young kids who had no direction whatsoever come into the Navy, and a three- or four-year commitment gets them direction, not make it into a career, but then go on taking all the good things they've learned in the military, which is why one of my arguments that we have to get rid of this.

If I had somebody come up to me and say, "I'm gay and I'm thinking about joining the Navy," I would probably—and I love the Navy—but I would really probably tell them not to, because it's such an incredible sacrifice to go to work every day, try to do your best, and then in the back of your mind say, "Gee, maybe I'm going to be outed; maybe I'm going to be fired."

Brian was very fortunate, I think, to be in a very supportive environment, and apparently some environments are more supportive. But I'll tell you, the environment I was in, you would have been thrown out.

And I think it's interesting. You notice the group of people that were fighting this cause. None of us, except Brian, I guess, had a technical commitment. We're all out of the military.

This is the difference between my example of women in the military. Women in the military could fight and by example open doors for other women. Now the people that are in the military now that are gay really can't fight this. This is, as I said before, the perfect Catch-22.

So I don't know, but anybody—I mean, the military is great, and for a lot of people it has great opportunity for good educational benefits, it teaches you great skills and whatever. But somehow, before a gay person joins the military, they need to understand that it's not easy to every day go to work and have to basically live two lives.

FROM THE AUDIENCE:

I just wondered what you would say to somebody who was thinking about going to the Academy who knew they were gay.

MR. LOPEZ:

I think to go into the Academy is a different story. I think for young people looking to become an enlisted soldier, it is, I guess, feasible. They just have to be very comfortable with themselves first and then also have a very clear understanding of what they are getting themselves into.

I actually served in a unit where I knew several soldiers were gay, but they were sort of the type that were very confident and sort of didn't really care what other people thought, because you're going to get a lot of name calling and things, but they were able to just handle it. And I think, you know, when push came to shove, nobody really cared that they were gay, because they were doing their job, and they very effective at what they did.

So I think it is possible to serve, but at the same time, I think it does—it is a challenge for you to meet other people and to live, I guess, what I would consider a normal life.

For somebody thinking of going to an academy, signing up for a very long commitment, I would question whether or not they are ready to do that. You're signing up at seventeen for what's usually like a nine-year or longer commitment, and also you have to be a leader.

And I think being in a leadership position—I mean, excuse me, I don't mean to mischaracterize it, you're a leader as an enlisted soldier too, but I think it was very difficult as an officer, having to deal with certain situations where you maybe knew a soldier was gay, and you didn't really know how you were supposed to respond based on the policy. So I think it poses more challenges.

PROF. HILLMAN:

I'll just add that there's a reason why there's an officers' wives' club. It's an important part of—your family becomes an increasingly important part and a harder part to neglect, I think, as you progress in service.

MS. ALEXANDER:

Mr. Osburn.

MR. OSBURN:

What steps can people in the audience take to further the cause?

MS. ALEXANDER:

My boss gives me a big old plant. There are lots of things that you can do to get involved in this fight. We would welcome every one of you to get involved in this fight with us.

There are simple things that you can do from back here in Massachusetts. If you are a registered voter somewhere other than Massachusetts, that's better, because the entire House of Representatives delegation here, the House delegation is on the Bill as a co-sponsor already, which is great, and Senator Kennedy and Senator Kerry are both very supportive on this issue.

But if you are registered elsewhere, you can be more helpful by writing to your members of Congress in other places who are not supporters of this legislation, urging them to do so. You can do that through our Website if you don't want to have to go find all the info on your own. It's www.sldn.org.

Regardless of where you are registered, if you are at all available at the end of March to come to Washington, D.C., this is one of the most exciting things that you can do to be a part of this movement, and I really think there aren't too many more years left of this movement before we're going to be finished. So if you want to be a part of history, you should come soon.

At the end of March, SLDN will be hosting its national dinner on the 24th of March in Washington, D.C., at the National Building Museum. It's going to be a fabulous event. We're honoring the cast of *The L Word*, for any Showtime fans in here, for their work this year on a new storyline, which I understand involves a gay military character, probably a pretty female gay military character, if I had to make a guess.

Then immediately following, on the 25th of March, we'll begin our next annual lobby days, which is really an exiting time. If you can stay for a three-day commitment, we'll train you on Sunday, the 25th, on the 26th put you on

what we're referring to as our "ground force" day. We're literally going to try to have hundreds of bodies on the Hill on the 26th of March urging Congress to repeal "Don't Ask, Don't Tell." And on the 27th of March, we're going to have some targeted meetings with key members of Congress who need to support this issue for us to win.

But if you can't afford that many days, just come for one day. Or if you have friends in the Washington, D.C., area who could come down for one day, the 26th of March is the big day we're going to be up on Capitol Hill. It will be our first ever rally on Capitol Hill on this issue.

If you are a law student and you're interested in being involved in this, I'm going to point to a gentleman a few rows up by the name of David Steib, who is helping to organize law students around the country to come in for this event and hosting lunch for the law students who come in. So, David, if you have any words of wisdom that you just want to—

MR. STEIB:

I would just love for people to sign up on this list, if you have any interest at all in receiving information about the law student component of lobby day. Even if you can't come yourself, if you think someone at your school might be able to come, please put your name down on here. We have housing for people that come in from out of town, and there will be the law student lobby lunch, as you mentioned. So we're in partnership with SLDN. It's a consortium of law schools in D.C.

MS. ALEXANDER:

And if you are a law students and you don't envision being able to come down to D.C., I know that BC [Boston College] is very active right now in encouraging law students around the country to get involved in letter-writing campaigns. It's wonderful work. It can really make a big difference. We would love to have you there, working with the BC law students. I think there is a link from our website to their new website as well.

MR. STEIB:

Actually Kevin is here.

MS. ALEXANDER:

Oh, great. Are you from BC?

MR. WALKER:

Yes.

MS. ALEXANDER:

Thank you for what you guys are doing. It's a great website, by the way.

MR. WALKER:

The student organization at Boston College is called The Coalition For Equality, and our Website is www.coalitionforequality.org, and that has all this information about letter-writing that we're doing. We have over twenty-eight other law schools signed up right now partnering with us, and we're collecting

letters at BC, and we're going to take them down with us, and we're going to go for lobby days and hand them to the Senators and Representatives personally.

MS. ALEXANDER:

That's great, and we're grateful for all the help. People around the country are really coming together on this.

I know that Harvard Law School's spring break is the week of the 26th of March, but I have this to say: Washington, D.C., is a very easy stop en route to Florida. It's about halfway. So you could come, spend a day with us on the 26th, stay over, and drive the rest of the way to Florida on Tuesday.

MS. KENNEDY:

Are non-law-school students welcome?

MS. ALEXANDER:

Of course. Of course.

FROM THE AUDIENCE:

People from Massachusetts too?

MS. ALEXANDER:

We need bodies on the 26th of March. We don't care where you're from.

MR. STEIB:

We're trying to incentivize the law students, but the rally obviously is for anyone and everyone.

MS. ALEXANDER:

Absolutely. Law students have gotten really involved in this in the last year in response to the Supreme Court loss in *FAIR v. Rumsfeld*.[123] A lot of law students have been looking for new ways to get at this problem, and we've seen a lot of great organizing by law students. I can't commend you all enough.

MR. LOPEZ:

Just one more thing I'd like to say. When you are out there fighting the fight, make sure you have the right target in mind. There are a lot of great soldiers out there serving who don't have a position of discrimination. Make sure you support them, because it's not them who are making the discriminatory decisions, it's the leadership. So always remember to support your soldiers, because they're really going through a lot in Iraq.

[Applause.]

VI. GALLA LEADERSHIP AWARD: PRESENTED TO C. DIXON OSBURN ON BEHALF OF SERVICEMEMBERS LEGAL DEFENSE NETWORK*

WHAT DOES IT MEAN TO BE A CITIZEN?

123. 547 U.S. 47 (2006).

* Saturday, Mar. 3, 2007, 7:00 p.m.–8:30 p.m. EST, Harvard Faculty Club Library.

C. DIXON OSBURN**

MR. OSBURN:

I would like to thank NYU Law Professor Sylvia Law, from whose scholarship I base my remarks this evening.

I was asked to talk about why I co-founded Servicemembers Legal Defense Network (SLDN) and why repeal of "Don't Ask, Don't Tell" is significant to me. There are many answers. I believe "Don't Ask, Don't Tell" raises fundamental questions about equality, freedom, and identity. I believe that any civil rights struggle must end federal discrimination before equality can fully take root in our cities, our states, and our corporations. I believe that, when there is great need and great pain, civilized society must respond.

Tonight, though, I would like to focus on one aspect of "Don't Ask, Don't Tell"—citizenship.

"Don't Ask, Don't Tell," I would submit to you, denies every lesbian, gay, and bisexual American their full citizenship.

Citizenship entails both rights and obligations.

Merriam-Webster's defines "citizen" as "a native or naturalized individual who owes allegiance to a government . . . and is entitled to the enjoyment of governmental protection and to the exercise of civil rights."[124]

The Fourteenth Amendment states: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside."[125] Interestingly, the same Amendment that defines citizenship also provides that no state shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[126]

Historically, citizenship has been tied directly to military service. When our country was founded, only white males had the right to vote, own property, and serve in elected office. Those rights and responsibilities were very explicitly tied to military service. In 1792, Congress enacted a statute that required every "free, able-bodied white male citizen" to join the militia.[127] African Americans were not considered citizens and were not allowed to join the militia.

In the infamous *Dred Scott* case in 1857, Justice Taney ruled that slaves could not be citizens, even those who had been freed and lived in free states.[128] The first reason Justice Taney gave was the 1792 statute that defined citizenship as requiring only "free able-bodied white male citizen[s]" to join the militia.

Civil war ensued. At first, even the Union Armies refused the service of freed African American slaves. As the need for more men to fight grew, the

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124. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (10th ed. 2002).

125. U.S. CONST. amend. XIV, § 1.

126. *Id.*

127. Uniform Militia Act of 1792, ch. 33, § 1, 1 Stat. 271, 271 (1792) (repealed by Dick Act, ch. 196, 32 Stat. 775 (1903)).

128. Scott v. Sandford, 60 U.S. 393, 420 (1857).

Union reconsidered its position and permitted African American men to join the Army, though only in segregated units. In 1863, the Emancipation Proclamation not only freed the slaves, it also expressly granted the right to African American men to serve in the Union Army and Navy. By the end of the war, almost 200,000 African American soldiers and sailors had fought for the Union. In *Black Reconstruction in America*, W.E.B. DuBois said, "Nothing else made Negro citizenship conceivable, but the record of the Negro soldier as a fighter."[129]

The Fourteenth Amendment, ratified in 1868, repudiated *Dred Scott*'s decision that declared that African Americans were not and could not become citizens of the United States or enjoy any of the privileges and immunities of citizenship. Hence, the Fourteenth Amendment's guarantee of equal protection and due process is firmly rooted in a history that connects military service to citizenship.

Today, gay soldiers, sailors, airmen, and marines are arguing in federal court that "Don't Ask, Don't Tell" denies them their due process and equal protection rights under the Constitution. Next Wednesday, [March 7, 2007,] twelve service members take their case to the First Circuit Court of Appeals here in Boston in *Cook v. Gates*.[130] They have more than sixty-five years of service to our country, and scores of medals and decorations. All served during the current war on terror—three in direct support of operations in the Middle East. One was one of the Army's top recruiters. One served in the infantry. Two were discharged, accused of holding hands for five seconds in the PX[131]—charges they denied. The allegations, though, were sufficient to uphold the dismissal. Another was discharged when she requested a deferment of her report date in order to care for her partner of fourteen years who had terminal brain cancer.

These men and women are brave, patriotic Americans who are willing to fight and defend our freedom. President Theodore Roosevelt once said, "A man who is good enough to shed his blood for the country is good enough to be given a square deal afterwards. More than that no man is entitled to, and less than that no man shall have." One hopes that the First Circuit Court will fully appreciate the historical context that connects the duty, obligations, and privilege of military service to the rights and benefits of citizenship, life, liberty, and happiness.

Flash forward to World War II. African Americans continued to distinguish themselves. The Tuskegee Airmen were among the bravest of fighter pilots in our nation's history. But, official military policy continued to require that our African American patriots serve in segregated units. In 1948, President Truman issued Executive Order 9981 requiring the integration of African Americans into the armed forces.[132]

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129. W.E.B. DUBOIS, BLACK RECONSTRUCTION IN AMERICA 104 (1935).

130. Cook v. Gates, No. 06-2313 (1st Cir. argued Mar. 7, 2007).

131. A PX, or post exchange, is a large department store-like shop that operates on United States military installations worldwide.

132. Exec. Order No. 9981, 13 Fed. Reg. 4313 (July 26, 1948).

> It is hereby declared to be the policy of the President that there shall be equality of treatment and opportunity for all persons in the armed services without regard to race,

This was before *Brown v. Board of Education*.[133] It was before the desegregation of busses and water fountains and swimming pools and hotels. The military led the way. The incomparable Dorothy Height once said that integration of the armed forces was a pivotal event in the civil rights for African Americans.[134]

I am not arguing that the civil rights struggle for African Americans is the same as the fight for LGBT civil rights. There are important differences. Nor am I arguing that the central issue involved in the *Dred Scott* case is fully the same as the one in our lawsuit challenging the constitutionality of "Don't Ask, Don't Tell." But, I do think that both histories raise profound questions about the connection of military service, citizenship, and equality.

At Servicemembers Legal Defense Network, we have received 8000 requests for assistance since 1993. We understand how "Don't Ask, Don't Tell" operates better than any field commander, Joint Chief, or senior enlisted leader. A few of the cases with which we have been involved illustrate how "Don't Ask, Don't Tell" interferes with our duties as citizens.

"Don't Ask, Don't Tell" threatens the functioning of our government by muzzling elected leaders who are gay and serve in the National Guard or Reserves. The Army tried to discharge Steve May, an openly gay Republican state legislator from Arizona, for comments he made opposing an anti-gay marriage bill before the legislature. The Army had recalled May, a biochemical warfare specialist, to the active reserves shortly thereafter and discovered to its chagrin that May was very out. Ultimately, the Army dropped its discharge action, not because it believed its actions were wrong, but because May's two-year stint had ended and the Army did not want to keep him on duty while inevitable legal action ensued.

"Don't Ask, Don't Tell" also forbids having conversations with your government officials if you come out as an LGB service member. One of SLDN's clients applied for a White House Fellowship, a highly desirable fellowship available to only twenty-plus individuals every year. In her application, she sought to distinguish herself and her leadership attributes by describing her life as a lesbian in the military. An Admiral sitting on the review committee turned her into her command. SLDN succeeded in preventing the discharge, not because it violates "Don't Ask, Don't Tell," but because we are good at threatening black eyes in the press.

"Don't Ask, Don't Tell" also interferes with important law enforcement functions, because the police documents may become public and available to the command or because law enforcement officials may turn documents directly over to the command. Clients have obtained restraining orders against abusive

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> color, religion or national origin. This policy shall be put into effect as rapidly as possible, having due regard to the time required to effectuate any necessary changes without impairing efficiency or morale.

Id.

133. 347 U.S. 483 (1954).

134. *See* DOROTHY HEIGHT, OPEN WIDE THE FREEDOM GATES: A MEMOIR 135 (2003) ("President Harry Truman's order to desegregate the armed forces was the first major step toward the dissolution of segregationist policy at the national level.").

partners, only to have them threaten to turn that in as evidence to their commands that they are gay. We have had clients who have faced nasty divorce or child custody proceedings when one spouse has come out as gay and the other has threatened to turn them in to their commands using the public record as supporting evidence only to gain leverage in the proceedings. Today, in Massachusetts, some military members are opting to leave the service and marry their partners, because the official marriage certificate could be used as a basis for discharge in our armed forces.

Our duties as citizens require us to cooperate with law enforcement and speak forthrightly with our government officials. We expect our elected officials to speak honestly in carrying out their duties without fear of legal repercussions. "Don't Ask, Don't Tell" interferes with these basic aspects of citizenship.

I submit to you that, when the military lowers its recruiting standards, allowing in skinheads, waiving criminal backgrounds, and reducing educational requirements, but it won't allow the LGBT patriots to serve openly, the government sends a message about which groups are valued and which are not. When our federal government denies gay service members college benefits and pensions once discharged, it is thumbing its nose at our honorable service and sacrifice. When the military ignores, covers up, or trivializes the harassment we face—where we have anonymous death threats left under the windshield wipers of our car, or are taunted daily with "Die Faggot" epithets—the government sends a message that we are second-class and that we deserve to be treated that way.

In an amicus brief in our lawsuit, *Cook v. Gates*, Lawrence Tribe, Tobias Wolff, and others made this observation: "There is no other law in America today that regulates a group of citizens and then prohibits those very citizens from identifying themselves as the regulated population and speaking up on their own behalf."[135]

The most insidious aspect of "Don't Ask, Don't Tell" is "Don't Tell." We cannot be honest about who we are. We are invisible. And, as a result, commanders do not know who we are. Pentagon officials do not know who we are. Members of Congress do not know we exist. If citizenship means anything, it means that we have an opportunity to speak up for ourselves, openly and honestly. "Don't Ask, Don't Tell" denies us that right.

I predict that the repeal of "Don't Ask, Don't Tell" will be a watershed moment for the lesbian, gay, bisexual, and transgendered community, just as racial integration in our armed forces was crucial to the civil rights battles that followed. In short, repeal of "Don't Ask, Don't Tell" will validate gay Americans as full citizens.

I am full of hope that the time is near when "Don't Ask, Don't Tell" shall be relegated to the dustbin of history. Gen. Shalikashvili's change of opinion and calling for repeal gives me hope. Brig. Gen. Kerr, Brig. Gen. Richards, and Adm. Steinman coming out as gay gives me hope. Our returning Iraq vets who were

135. Brief of Constitutional Law Professors as Amici Curiae Supporting Appellants, Cook v. Gates, No. 06-2313 (1st Cir. argued Mar. 7, 2007), *available at* http://www.sldn.org/binary-data/SLDN_ARTICLES/pdf_file/3309.pdf.

out to their units without incident gives me hope. The fact that four in five Americans support gays serving openly gives me hope. The fact that seventy-three percent of returning Iraq and Afghan veterans say that they are comfortable with gays and lesbians gives me tremendous hope that equality is near. I leave you with this quote from the conclusion of *Angels in America*: "The world only spins forward. We will be citizens. The time has come."[136]

136. TONY KUSHNER, ANGELS IN AMERICA, PARTS ONE AND TWO 284 (1st ed. 1995).