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Don't Ask, Don't Tell: Beyond the Log Cabin Republicans Injunction and the Defense Authorization Act

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PANEL

DON'T ASK DON'T TELL: BEYOND THE *LOG CABIN REPUBLICANS* INJUNCTION AND THE DEFENSE AUTHORIZATION ACT*

This Article is an annotated transcript of a panel that occurred on November 10, 2010 at the American University Washington College of Law. The podcast of the event can be found on the American University Labor & Employment Law Forum's website at <http://aulaborlawforum.org/events/dont-ask-dont-tell/>. The event was co-sponsored by the Office of Diversity Services; Program on Law & Government; the American University National Security Law Brief; the American University Labor & Employment Law Forum; the American University Legislation & Policy Brief; The Modern American, the American University Lambda Law Society; Heath Law & Justice Initiative; AU Queers and Allies; and AU Vets.

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PANELIST BIOGRAPHIES

Stephen I. Vladeck is a Professor of Law at American University Washington College of Law, where his teaching and research focus on federal jurisdiction, national security law, constitutional law (especially the separation of powers), and international criminal law. A nationally recognized expert on the role of the federal courts in the war on terrorism,

* The AMERICAN UNIVERSITY LABOR & EMPLOYMENT LAW FORUM would like to thank all of the panelists who contributed their expertise and insights to this panel. We hope that this transcript provides an account of the historical, legal, political and social implications of this policy. Special thanks to those individuals that made this event possible, including: Clifford Clapp, Sean Shank, Jennifer Dabson, Denise Hussey-Richards, Amy Tenney, Sherry Weaver, Brittany Erickson, Matthew Mulling, Richael Faithful, Tonei Glavinic, Charlie Fowler and Dean Billie Jo Kaufman. Special thanks to Justin Shore for his assistance with this panel.

he was part of the legal team that successfully challenged the Bush Administration's use of military tribunals at Guantánamo Bay, Cuba in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) and has co-authored amicus briefs in a host of other lawsuits challenging the U.S. government's surveillance and detention of terrorism suspects. Professor Vladeck graduated from Yale Law School in 2004, after which he clerked for the Honorable Marsha S. Berzon on the U.S. Court of Appeals for the Ninth Circuit, and the Honorable Rosemary Barkett on the U.S. Court of Appeals for the Eleventh Circuit.

David Rittgers is a legal policy analyst for the Cato Institute who concentrates on civil liberties, counterterrorism, and criminal justice. Prior to joining Cato, Mr. Rittgers served in the United States Army as an Infantry and Special Forces officer, including three tours in Afghanistan. He has been awarded an Army Commendation Medal with a "V" Device for valorous action and two Bronze Star Medals, and continues to serve as a reserve Judge Advocate. Mr. Rittgers has published articles in the *Wall Street Journal*, the *Christian Science Monitor*, *National Review (Online)*, *FindLaw*, and *The First Amendment Law Review*. He has appeared on Fox's *The O'Reilly Factor*, CNN's *Lou Dobbs Tonight*, the BBC, and NPR's *Talk of the Nation*. In 2009, Mr. Rittgers was selected as one of the Center for a New American Security's Next Generation National Security Leaders Program. Mr. Rittgers earned his J.D. from the University of North Carolina and is a member of the Virginia Bar. Any views expressed by Mr. Rittgers are his own and do not necessarily reflect those of the Department of Defense ("DOD") or the U.S. Army.

Michelle M. Lindo McCluer has been the Executive Director of National Institute of Military Justice since September 2008. She is a 1994 *summa cum laude* graduate of the University of Oklahoma. She graduated from the University of Oklahoma School of Law with honors in 1997 and served on active duty as a judge advocate in the United States Air Force from 1997-2008, where she concentrated in military justice. She served as a prosecutor, base defense counsel, and senior defense counsel in courts-martial throughout the western United States and the Pacific Rim. In 2003, Ms. McCluer began a three-year assignment as an appellate counsel, writing briefs and arguing cases before the Air Force Court of Criminal Appeals and the U.S. Court of Appeals for the Armed Forces. She spent her final two years on active duty as Assistant Director of the legal office at Andrews Air Force Base in Maryland, home of Air Force One. Ms. McCluer has appeared as a military justice expert on *NBC Nightly News*, *CNN*, *Fox News*, and *C-SPAN*. The *New York Times*, the *Wall Street*

Journal, the *Washington Times*, *Stars and Stripes*, and regional newspapers have run her quotes. She has published editorials in *JURIST Legal News and Research*.

David McKean joined Servicemembers Legal Defense Network (“SLDN”) in 2009 as the organization’s Staff Attorney. Prior to joining SLDN, Mr. McKean served as a law clerk for the Honorable Steven G. Salant of the Circuit Court for Montgomery County, Maryland. He earned his B.S. in English Literature from the University of California, Berkeley and his J.D. from the American University, Washington College of Law. During law school he served as Executive Editor of the American University International Law Review, interned at Human Rights First, and served as a research assistant to Professors Herman Schwartz and Teemu Ruskola. While at Berkeley he interned for Senator Dianne Feinstein and worked as an editor for the Rotary World Peace Scholarship Fund. Prior to law school, Mr. McKean spent a year teaching English in southern China.

Ty Cobb serves as legislative counsel at the Human Rights Campaign. His work focuses on hate crimes, the military, veterans, the judiciary, political appointments, education, youth, immigration and international matters. Mr. Cobb joined HRC after serving as counsel to Sen. Edward M. Kennedy on the Health, Education, Labor and Pensions Committee of the U.S. Senate. As counsel to Sen. Kennedy, Cobb did extensive work in support of the passage of the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act. Prior to his work on the Hill, Mr. Cobb was an associate attorney at the law firms of Bracewell & Giuliani, LLP in Dallas, Texas, and Sidley Austin, LLP in Washington, D.C. Mr. Cobb received his bachelor's degree in Business and American Studies from the University of Texas at Austin and his law degree from the University of Texas School of Law.

Anthony E. Varona teaches Contracts, Administrative Law, Media Law, and Introduction to Public Law, and serves as Associate Dean for Academic and Faculty Affairs at the American University Washington College of Law. Before joining the WCL faculty, he was an associate professor of law at Pace Law School in New York. Before that, he served as general counsel and legal director for the Human Rights Campaign, the nation’s largest gay civil rights organization. He built HRC’s legal department, directed its legislative and regulatory lawyering and appellate amicus work, launched national law fellow and pro bono attorney programs, and served as counsel to HRC’s board of directors and the organization’s corporate, educational, and media initiatives. Professor

Varona taught as an adjunct law professor for three years at Georgetown University, and served as a Wasserstein Fellow at Harvard Law School. He serves on the board of directors of the Gay and Lesbian Alliance Against Defamation (“GLAAD”), and is a member of the Society of American Law Teachers and the Hispanic Bar Association of Washington. He has served on the boards of the Human Rights Campaign and the Alliance for Justice, was on the New York Advisory Board for the American Constitution Society, was founding chairperson of the AIDS Action Council's Legal Advisory Board, and served as a member of the Judicial Selection Steering Committee of the Leadership Conference on Civil Rights. Professor Varona practiced communications law at the Washington offices of Skadden, Arps, Slate, Meagher & Flom, LLP, and Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, PC. He began his legal career as an honors program attorney for the Federal Communications Commission. Professor Varona's scholarship has included articles concerning media and communications law, civil rights, employment discrimination, and hate crimes, published in a variety of notable law journals. He has lectured widely on these topics, and has appeared as a legal commentator on CNN, Headline News, Fox News Network, Court TV, MSNBC, and in a variety of major daily newspapers and legal periodicals. Professor Varona serves on the Faculty Review Board of the *Administrative Law Review*, and as faculty advisor to the Latino/a Law Students Association (“LaLSA”) and *The Modern American*. He was honored with the 2009 Hugh A. Johnson, Jr., Memorial Award by the Washington Hispanic Bar Association, was named the 2007–08 Washington College of Law Professor of the Year, and was profiled by the *National Law Journal* in May 2000.

ANNOTATED TRANSCRIPT

STEVE VLADECK: Good afternoon. I think we're going to get started. For those of you who don't know me, I'm Steve Vladeck, Professor of Law here at American University Washington College of Law ("WCL") and it's my pleasure to welcome you to this afternoon's program on Don't Ask, Don't Tell: Beyond the *Log Cabin Republicans* Injunction and the Defense Authorization Act.

We have a pretty jam-packed panel scheduled for you today so I'm going to be brief in my opening remarks but I think it's safe to say that Don't Ask, Don't Tell, ("DADT")¹ has a prominence and a significance today, perhaps that only rivals its . . . significan[ce] when it was first promulgated early in the Clinton Administration on two distinct fronts.² Then, last year, [we saw] a lot of movement on DADT with regard to a potential repeal by Congress or the [Obama] Administration.³ [In addition

1. National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, 107 Stat. 1670 (originally codified at 10 U.S.C. § 654 (2006)), *repealed by* Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515 (2010) (to be codified at 10 U.S.C. § 654). Attempts to repeal the 1993 policy began in 2005 with the Military Readiness Enhancement Act of 2005, H.R. 1059, 109th Cong. (2005) and was continued in 2007 through the Military Readiness Enhancement Act of 2007, H.R. 1246, 110th Cong. (2007), and again in 2009, Military Readiness Enhancement Act of 2009, H.R. 1283, 111th Cong. (2009). Then, on May 27, 2010 Representative Patrick J. Murphy of the 8th District of Pennsylvania, introduced H. Amdt. 672, 156 CONG. REC. H4055-56 (daily ed. May 27, 2010) (statement of Rep. P. Murphy) to amend the National Defense Authorization Act for Fiscal Year 2011, H.R. 5136, 111th Cong. (2010), in order to repeal Don't Ask Don't Tell after several conditions had been met, including: (1) Pentagon's Comprehensive Review Working Group would submit recommendations on how to implement a repeal of DADT by December 1, 2010, and (2) the Secretary of Defense, Chairman of the Joint Chiefs and President would certify that repealing DADT would be both consistent with military effectiveness, cohesiveness, and preparedness; and second, that the Department of Defense would prepare all policies and regulations necessary to institute a repeal. The Bill, including the Murphy Amendment, passed in the House on May 27, 2010 and was introduced in the Senate as S. 3454, 111th Cong. (2010). The bill was filibustered on September 21, 2010. 156 CONG. REC. S7246 (daily ed. Sept. 21, 2010). On December 9, 2010, the Act was filibustered during the lame duck session. 156 Cong. Rec. S8683 (daily ed. Dec. 9, 2010). After the second filibuster, a stand-alone resolution—the Don't Ask, Don't Tell Repeal Act of 2010—was introduced by Sens. Lieberman and Collins in the Senate. Don't Ask, Don't Tell Repeal Act of 2010, S. 4022, 111th Cong. (2010). And a simultaneous bill was introduced in the House. Don't Ask, Don't Tell Repeal Act of 2010, H.R. 2965, 111th Cong. (2010). The bill passed the House on December 15, 2010, with a vote of 250 to 175. 156 CONG. REC. H8410 (daily ed. Dec. 15, 2010). On December 18, 2010, in a special Saturday session, the Senate voted to end "Don't Ask, Don't Tell" with a vote of 65-31. 156 CONG. REC. S10666-67 (Dec. 18, 2010). President Obama signed the Act into law on December 22, 2010. 156 Cong. Rec. H8992-9002 (Dec. 29, 2010).

2. See Kenneth Williams, *Gays in the Military: The Legal Issues*, 28 U.S.F. L. REV. 919, 921 (1994) (detailing how President Clinton's campaign promise to "lift the ban on gays, lesbians and bisexuals serving in the military by executive order" became Don't Ask, Don't Tell, Don't Pursue).

3. See Military Readiness Enhancement Act of 2010, S. 3065 (2010) (introducing

to] the lawsuit by the Log Cabin Republicans culminating [in] the injunction of DADT by a federal district judge in California.⁴

That injunction of course is now on appeal to the Ninth Circuit.⁵ So one might actually wonder if the question with regard to DADT is not so much whether it will be repealed and/or struck down, but when. [In order] to try and answer that question, to get at the underlying basis for the policy, to talk a little about the history of it and where we are today, we [have] brought together four true experts to talk about these issues and so our format for today is going to be as follows:

I'm going to briefly introduce the four panelists. They're each going to give opening statements, then we're going to have some moderated back-and-forth among the panel and then we're going to turn it over for questions from you [all]. You may notice that at the ends of each row there are slips of paper. The student organizers have asked that if you have questions, please write them down . . . and they'll collect them at the end of the panel presentation and then we'll ask them of the panelists during the Q & A. Finally, Dean [Anthony] Varona . . . will give some closing remarks. So that's our plan. As I said, we have a great line-up. We have people who know of what they speak, and I'm going to get out of the way and turn it over to David Rittgers. Thank you.

DAVID RITTGERS: Thank you for coming here. I'm actually in the Reserves Judge Advocate, so I served as a Reserve Military Lawyer [and now] one weekend a month and a couple of weeks in the summer I do this stuff for a living.

So we heard about this controversy about DADT in the courts, and if I were to give a title to what [is going on] it would be *status quo ante*, the way things were before.

You may not have that impression from the news, but just to recap what the courts have done. On September 9, Judge Virginia Philips, a District Judge in the Central District of California, declared the policy of DADT to be unconstitutional, and then October 12, she granted a worldwide immediate injunction against the enforcement of the policy by the Department of the Defense. On October 19, the Military Recruiters were told [they could] openly accept gay applicants, and on October 20, Lieutenant Daniel Choi, an openly gay man who had previously been

an amendment to 10 U.S.C. § 654 in order to “enhance the readiness of the Armed Forces” by replacing the military’s policy of DADT with a nondiscrimination policy).

4. Log Cabin Republicans v. United States, 716 F. Supp. 2d 884 (C.D. Cal. 2010).

5. Log Cabin Republicans v. United States, No. 10-56634, 2010 WL 4136210, at *1 (9th Cir. Oct. 20, 2010).

discharged under DADT, re-enlisted.⁶ However, that lasted for a little more than a day—I think. Anyway, [as of] November 1 . . . there is a temporary stay on [the injunction], so now the recruiters have to go back to the old language. [On] November 1, the Ninth Circuit Court of Appeals . . . stayed the worldwide injunction and now the service chiefs have advised service members coming into the service [that] we're still working under DADT—so we're back where we started.

So a little bit of history: where did DADT come from? How did it come to be? What does it mean to servicemembers who are serving right now?

So [DADT] started in the beginning of the Clinton Administration. Right after Clinton came into office, he said we're going to repeal the prohibition on gays serving openly in the military. There was a lot of controversy about this and he compromised [and in] came . . . the National Defense Authorization Act of 1994,⁷ which codified the exclusion policy for the military, and it said that you can be kicked out of the service under three conditions: statements, acts, or marriage. It's actually acts, statements, and marriage in the order of the statute, but it's the military so we have to have a three letter acronym that we can just pronounce easily. So it's SAM: statements, acts, or marriage. If you were to tell someone in your chain of command or provide, somehow, evidence that you had engaged in homosexual acts or you had married or attempted to marry someone [of the same sex] while you were in the military, then you can be kicked out of the service.

Now when I say kicked out of the service, you may not have exposure to the military justice system. [Being kicked out of the service is] not actually a punishment at trial; this is an administrative separation.⁸ Sometimes what we call “ad-sep,” and actually, more commonly in the Army, it's called being “chaptered out”. There's a chapter for each kind of misconduct [for which] they can separate you from the service. This is Chapter 10, and this proceeding once again, it's not a criminal trial, it's not a court martial, but it's an administrative board.

They conduct a hearing. It's composed largely of non-attorneys, but will often have a legal advisor appointed who will rule on admissibility of evidence. However, the Military Rules of Evidence, which parallels the Federal Rules of Evidence, that you have or will learn about do not apply.

6. See *Troops Discharged for Being Gay Line up to Reenlist*, NATIONAL PUBLIC RADIO (October 20, 2010), <http://www.npr.org/templates/story/story.php?storyId=130704683>.

7. National Defense Authorization Act for Fiscal Year 1994, 10 U.S.C. § 654 (1993).

8. DEP'T OF DEF., DIRECTIVE 1332.14, ENLISTED ADMINISTRATIVE SEPARATIONS (Dec. 21, 1993).

So, [it is based on] very loose rules of evidence and the burden of proof is on the government, but it's only proven to a preponderance of the evidence. So . . . we're fifty-one percent sure we should kick this person out of the service is the bottom line.

There is an exception written in at the end of the statute and applied in the regulations that [if] the government finds that such acts are a departure from the soldier's usual behavior, [that] they are unlikely to recur, were not accompanied by a use of force, coercion or intimidation, . . . that retention is in the best interest of the Army and the soldier doesn't have a propensity to engage in any acts in the future—then they can keep you in the service. I don't know the number of applications of the policy where that happens. [It's] probably very, very rare.

[T]his is a really unique situation with this policy, because this is an instance where we're going to have all three branches of government weigh in on a policy within a span of about two months. This almost never happens on one issue. So you had a legislative action pushing to change the policy in September. I know that's going to get covered by some other folks on the panel. [Then] [t]he Executive Branch, in the form of the military, is currently conducting a review of the policy.⁹ The feedback from this review of policy is due to the Secretary of Defense by December 1st. [W]hile at the same time, Congress is going to be in a lame duck session, the Judiciary's waiting, as I mentioned before. So this is really [a] convergence of all three branches of government and yet the policy remains the same.

So there's been some proposals about changing the policy—of course, we've heard about the legislative [proposals] or will hear more about them. There's also a proposal of using an Executive Order to change the policy.¹⁰ So how would this happen? There are two laws that [are] in the Federal Code, Title 10, that pertains to the military; two portions of that law—one pertaining to enlisted separations, policy for promotion, and retirement; and then one for suspending officer personnel laws during a time of war or national emergency—that allow the President to stop [the separation of individuals from the service].¹¹ This is what we know colloquially as the

9. DEP'T OF DEF., REPORT OF THE COMPREHENSIVE REVIEW OF THE ISSUES ASSOCIATED WITH A REPEAL OF "DON'T ASK, DON'T TELL" (2010) [hereinafter DOD REPORT], *available at* [http://www.defense.gov/home/features/2010/0610_gatesdadt/DADTRReport_FINAL_20101130\(secure-hires\).pdf](http://www.defense.gov/home/features/2010/0610_gatesdadt/DADTRReport_FINAL_20101130(secure-hires).pdf).

10. See AARON BELKIN ET AL., PALM CTR., UNIV. OF CALI., SANTA BARBARA, HOW TO END "DON'T ASK, DON'T TELL": A ROADMAP OF POLITICAL, LEGAL, REGULATORY, AND ORGANIZATIONAL STEPS TO EQUAL TREATMENT 3 (2009), *available at* <http://www.palmcenter.org/files/active/0/Executive%20Order%20on%20Gay%20Troops%20-%20final.pdf>.

11. 10 U.S.C. § 12305 (2006).

“Stop Loss Policy.” While people are deploying to fight overseas or there’s a national emergency, . . . if we were invaded, then we wouldn’t let you out of the Army, because the country needs you. [A]nd the President conceivably could use this power, and I think along with a statement of the sort [that] retentionism in the best interest of the service—the part that’s written into the exception at the end of the policy—to stop administratively separating gay service members.

And I should also note that there are criminal charges for certain sexual acts in the Uniform Code of Military Justice (“UCMJ”), the criminal law for the Armed Forces[, that are] still on the books.¹² [A]rticle 125 of the UCMJ, continues to criminalize sodomy.¹³ [B]ut in light of the 2003 Supreme Court decision, *Lawrence v. Texas*,¹⁴ the Court of Appeals for the Armed Forces, that’s the highest court in the military, has reduced this to an as applied law.

So there’s a really good article in the January 2009 issue of *Army Lawyer* that talks about . . . the application of the sodomy article of the UCMJ.¹⁵ It . . . basically compares it to the statement of Miracle Max . . . Billy Crystal’s character in *The Princess Bride* when he says, “[y]our friend here is only mostly-dead. And there’s a big difference between being mostly-dead and all-dead. Now mostly dead, he’s still slightly-alive.”¹⁶

So when you conduct a survey of the prosecutions under this provision of the [UCMJ], most of them are bad fact patterns. [T]here hasn’t been [a case] where there’s something else going on. [A]dultery is still commonly prosecuted under the [UCMJ].¹⁷ [F]raternalization, [whether] it’s . . . sexual contact between a superior and a subordinate, which we view in the military as prejudicial to the good order and discipline of the force—and that’s a prosecutable offense—is barred by the fraternization policy and still prosecutable if it involves sodomy under this article of the UCMJ. Also to note in 2005, the Joint Services Committee on Military Justice recommended a complete revamping [of this Article].¹⁸ They recommended not doing anything to the sexual misconduct laws in the military, but Congress took the second option and revamped it all. And

12. 10 U.S.C. § 925 (2006).

13. *Id.*

14. 539 U.S. 558 (2003).

15. See generally, Maj. Joel P. Cummings, *Is Article 125, Sodomy a Dead Letter in Light of Lawrence v. Texas and the New Article 120?*, ARMY LAW., Jan. 2009, at 1.

16. *THE PRINCESS BRIDE* (20th Century Fox 1987).

17. 10 U.S.C. § 920 (2006).

18. See DEP’T OF DEF., ANNUAL REPORT OF THE CODE COMMITTEE ON MILITARY JUSTICE 2 (2005), available at <http://www.armfor.uscourts.gov/annual/FY05AnnualReport.pdf>.

then against the advice of the Joint Services Committee on Military Justice kept the sodomy law intact.

So it's really a mess, and so the bottom line is really if you're going to fix DADT you have to fix a lot of things. You're going to have to fix . . . the rest of the sexual misconduct laws within the [UCMJ], and so once again, where are we? Right where we started. Included in that story of right where we started, I'd like to talk about an anecdotal case—the case of Sergeant Darren Manzella.

Darren Manzella was a combat medic at Fort Hood. After a combat tour in Iraq he began to live as an openly gay service member. His chain of command knew about it. With another tour in Iraq pending, his chain of command . . . investigated the claim that he was gay. He provided them pictures and video with him and his boyfriend, and they said “Well, you're a good sergeant; you're a good combat medic and we just don't see any evidence of Homosexuality.” He had given them plenty of evidence, right. But, they had a deployment to Iraq coming up and so they said, “Yeah, we just don't see it, sorry.” So he wasn't discharged. Now his subsequent appearance on 60 Minutes telling [his] story gave the chain of command no choice, and he was discharged.¹⁹ But I think that [as] part of . . . where we are and where we have been traditionally, gay service members during times of conflict are generally allowed to serve.

And it isn't until the cessation of hostilities that these people get kicked out of the service *en masse*, and I think that . . . with cases like Sergeant Manzella and with the number of Arabic translators that have been kicked out, I think it continues to damage our services and I knew that the Servicemembers' Legal Defense Network has some more current numbers. I'd be interested in hearing what those numbers are.

So in short, I'd say that . . . it is damaging our combat readiness, and I'm persuaded by the experience of other militaries: including the British, and the Israelis, to maintain highly effective combat forces while allowing gays to serve openly. So I look forward to a change in the policy. Constitutionally, I'm of the firm belief that it has to come from Congress. I'm not a big fan of going the Executive Order route, but I'll go ahead and wrap it up there in case I forgot to say it earlier, my comments are mine only, and not those of the Army or the Department of Defense. All right, thank you.

STEVE VLADECK: Thank you, David. Michelle—

19. *60 Minutes: Is Military More Tolerant of Gay Members in Wartime?* (CBS Television Broadcast Dec. 16, 2007), available at <http://www.cbsnews.com/stories/2007/12/13/60minutes/main3615278.shtml>.

MICHELLE MCCLUER: Thank you. I'm going to give a few facts, some facts that may surprise some of you based on what you see in the media—I know it's shocking [that] the media doesn't always give you an accurate view of things. [I also want to] leave you with some food for thought as to when there is [a] repeal—and I believe there will be a repeal of DADT.

The first thing I wanted to point out is that at least in the Air Force, I don't know what it's like in the other services as much, but we never called it "DADT." Certainly not in the legal community.

It's not as simple as we're not going to ask if you're homosexual and you're not supposed to say if you're homosexual. It goes much beyond that; and as you heard David say, it's marriage [or an] attempt to marry. It is as simple as "I am a homosexual." [T]hat's enough to get you kicked out of the military—and you could be fired—but we never called it DADT because it was a much broader policy than simply if everyone stays quiet then you're going to be good because that's not in fact what the issue is.

How many folks can give a percentage of the numbers of females [that] were discharged for the homosexual conduct policy from the military in the last few years—what percentage would you say would be female? And I'll give you a little bit of a hint to help you out. The military itself overall has about fourteen percent female population—so [do] you think [the number of women discharged for homosexual conduct] would be higher or lower than [the amount of women in the military]?

AUDIENCE MEMBER: Higher?

MICHELLE MCCLUER: Higher, how much higher? I'm hearing over fifty. I see somebody saying lower. I'm hearing twice. It's actually more along the lines of forty-six to forty-eight percent of individual service members who are being kicked out of the military for homosexual conduct that have been female, and that's again with the population [overall] that [consists of] a third of [the total population of the military].²⁰

You also hear a lot about witch hunts . . . and I don't discount that there are some of these. We have, and the other panelists can certainly talk about this, [heard of] some horrendous cases of harassment, and abuse, and even death. [For example] the *Winchell* case,²¹ from a number of years ago. But what percentage—and we'll have, I'm sure, more definitive numbers,

20. *US Military Policy on Homosexuals Forces Kansas Women to be Discharged*, THE GUARDIAN, (Feb. 19, 2009), <http://www.guardian.co.uk/world/2009/feb/19/usa-military-policy-homosexuals>.

21. *See United States v. Fisher*, 58 M.J. 300 (2003).

although at the beginning the military didn't track specifically homosexual discharges [until] after the law changed in 1993—[is] simply estimates.

I think they've been refined somewhat over the years and they're somewhat accurate, but say you have 14,000 or so who have been discharged for homosexual conduct under the policy. The vast majority of those individuals are actually self-identifiers. I can talk about a few specific cases that I was involved in as the defense counsel or as the government representative on the other side of these cases.

And often what happened was that these were individuals were wonderful performers, [who] never had a speck of any sort of misconduct on their record. Oftentimes they were [non-combat officers,] had been serving for ten or more years, [and had] great careers in front of them—no indications of any future issues. But, they simply had reached a point, and they would write[,] a very short statement usually saying: "I've been wrestling with this for some time and I love my military career, but I've realized that I need to, as part of being honest with myself, acknowledge that I am homosexual. I want to be able to act on that and I realize that that's incompatible with me staying in the military." And so rather than continuing to try to hide their sexuality or have somebody out them later, [they left not under] their own terms. Oftentimes and [in] the vast majority of cases, that's what has happened, these are individuals who have reached that point where they say "I just can't live this double life anymore and always be in fear of what if somebody sees me?" or "What if somebody finds something out?" Or, a lot of the cases that you see, that are not the self-admissions, are the spurned lover or ex-lover. Or in the case of one individual who is quite familiar to those of us who worked in this area, Major Margaret Witt, [where] the husband of her love interest wrote a scathing E-mail and sent it all the way . . . to the Chief of Staff of the Air Force [and said:] "Hey, I just wanted to let you know here's what the Major's doing and you need to kick [Witt] out."²² Those two instances—the self-admission and the spurned individuals outing others—are probably the vast majority of individuals.

But we also have, even though the military doesn't protect as far as being able to keep your job, homosexual conduct. There are policies that, with varying degrees of ability, combat potential bad acts that are in place to prevent harassment. I've seen some things that say it should be "Don't Ask, Don't Tell, Don't Harass" or that type of thing.

And I would argue [that] there is [a] "Don't Harass" already on the books, partly because we have so many civilians who work with the military, oftentimes deploying with the military. And these individuals

22. See *Witt v. Dep't of the Air Force*, 527 F.3d 806 (9th Cir. 2008).

don't have the same restrictions that military members do when they're in combat zones or even [in] daily life around the base. And in order to keep a polite atmosphere, in order to keep an atmosphere that isn't sexually harassing no matter what you're sexual orientation is, there are ways that [harassment] can be punished under the Uniform Code of Military Justice.

The services have individual policies on this that can be punished under Article 92,²³ which is failure . . . to obey a lawful general regulation as well as under Article 93,²⁴ depending on what the level of the individual's position is. So there are some things in place already and for the most part, I'll leave the rest of my remarks for questions. I find that's usually the most useful thing for the audience. Thank you.

STEVE VLADECK: Thanks Michelle. Next we'll hear from David McKean.

DAVID MCKEAN: Thank you very much. Well I have a couple of things that I wanted to talk about. I'd like to start by just responding or elaborating on a couple of things that the previous speakers have said. Just so we know what we're talking about here, when David said there's three types of conduct, the SAM acronym—statements, acts, and marriage. A statement is a statement of your sexual orientation or words to that effect. Anytime, anywhere, to anyone, before you were in the military, after you were in the military, if you're still serving, once you joined and it includes things . . . to a friend, in confidence, [such as,] "I'm gay."

If that friend turns that information over, that can constitute a statement under the regulation. [S]o it's not just "Don't Tell," as Michelle was saying, don't tell us and we won't bother you. It's really a "Don't Tell Anyone." [I] speak to a lot of people who aren't out to their families or aren't out to anyone they're close to, out of fear that this will have a negative impact on their job. Secondly, with respect to [acts]—that's defined very broadly, so that investigations can be opened on the basis of holding hands, hugging. We had two hugging cases in a couple of years so these things are very, very broad.

One case was started—one investigation at least—when a photo of a service member in his locker depicted him with his arm around another guy. [T]hat other guy turned out to be his cousin—he was not gay—there was nothing there, but nonetheless he endured a couple of months of questioning and scrutiny of his life.

And so I think it's important to recognize that it's not just a "Don't Ask"

23. 10 U.S.C. § 892 (2006).

24. 10 U.S.C. § 893 (2006).

provision. In fact, if you look at the law, there's nothing in the law itself, the Statute, 10 U.S.C. § 654 (2006), that says "Don't Ask". At the end of the law there's something that's called a "sense of Congress" provision that says, it's our sense that Congress or that the military should not be asking people when they join whether or not they are in fact gay, but that doesn't mean people aren't asked in the course of their daily lives, between friends: "What did you do this weekend?", "What are you going to do for Thanksgiving?"—things like that. That people have to make a decision; whether or not they're going to just not answer questions that are totally legitimate, and not from a bad place at all or whether they're going to make up an elaborate story about what in fact they're doing this weekend and who they went and saw a movie with.

The other things I would like to mention are the statistics that Michelle referenced, in terms of women, mirrors our numbers as well. It should also be pointed out that of that percentage of women, women of color make up the largest percentage of that, and so I think it's definitely fair to say that women of color are some of the most disproportionately impacted people with respect to DADT.

Finally, I would just like to comment on the statement that Michelle made about harassment. I think that is true. There are very stringent harassment policies put in place so that people in the military don't face harassment on a number of issues. Part of the issue with that, we find, is that it's very difficult to report the harassment on the basis of sexual orientation when you can't tell anyone that you're gay.

So going into your supervisor—your commanding officer—and saying "Hey, listen, there's a couple of guys in the unit who are always giving me a really hard time because I'm gay." There's your statement under DADT and, more likely than not, that will result not in the reprimanding of the people in the unit, [a]lthough it might, but it will also lead to your discharge—or a potential discharge—under DADT.

So you have to walk people through having them go into their commanding officer and to their supervisor and saying, "I believe that I'm being harassed on the basis of my perceived sexual orientation. I am not making the statement one way or the other regarding my sexual orientation." And that can be a lot but if somebody's nervous and especially if they're an 18 year-old. [Y]ou want to . . . keep that straight in their mind while they're speaking to their supervisor about something that can lead to the end of their job.

In terms of the litigation update, I think everybody's very well familiar with the court cases that are happening now; Major Witt, who Michelle touched on earlier . . . was basically the case that laid the foundation for the *Log Cabin Republicans* case. I'm sure everyone in the room is familiar

with it.

Major Witt's case was in the Ninth Circuit; [i]t is [now] in the [United States District Court of the Western District of Washington]. [O]riginally her case was dismissed because the judge found that she was properly discharged. When Major Witt's attorneys appealed that decision, it went up to the Ninth Circuit, and the Ninth Circuit articulated a standard that said, [they] believed that the burden should be on the military to demonstrate that Major Witt was in fact becoming a problem for unit cohesion, good moral, good order and discipline and things like this—justifications for this law—and if you can't show that she was in fact deserving of this discharge on the basis of your justifications for the law, th[en] DADT was unconstitutionally applied to her.

There was a trial, after the standard was articulated. It was remanded back to the court. There was a trial, and a number of people testified as to [how] . . . excellent [of a] nurse that she was . . . [and] [t]he good impact that she had on her unit, and in fact, the District Court judge, under the standard articulated by the Ninth Circuit, really had no choice but to order her reinstatement.

Currently, what's happening with that is the judge issued an order for her reinstatement to take place as soon as practicable. The Justice Department has sixty days from the date of that order to file a notice of appeal.²⁵ That deadline is approaching on November 24th, just a couple of weeks away. If they do nothing, that's the end of the case and Major Witt will be reinstated. If they do file a Notice of Appeal, they can either decide to file a Notice of Appeal by itself, in which case Major Witt will be reinstated, pending the appeal of the case, or they can file a Notice of Appeal and a petition for a stay of the order . . . if they prevail on that stay, [Major Witt will] not be reinstated pending appeal.

So we're waiting to see what the Justice Department decides to do with that. It's partially on the basis of th[e] standard articulated by the Ninth Circuit that the judge in the *Log Cabin Republicans* case, Judge Virginia Philips, was able to rule the way she did. It's not exactly that she was bound by the Ninth Circuit Court's decision, because the Ninth Circuit Court's decision was in reference to an as applied challenge.

Whereas the *Log Cabin Republicans* case was a successful facial challenge, but the judge in the District Court in the *Log Cabin* case used the standard that the Ninth Circuit had articulated for an as applied challenge to rule on her facial challenge. We think that's phenomenal. We hope that the Ninth Circuit, when it hears [the] pending appeal of the *Log Cabin* case,

25. The Department of Justice filed an appeal on this case on November 29, 2010 in the Ninth Circuit Court of Appeals, *Witt v. Dep't of Air Force*, No. 10-36079 (9th Cir. filed Nov. 29, 2010).

adopts a standard for the facial challenge as well. We think the judge was correct to do so, but that's also pending appeal.

Many of you people have been familiar with the stay that's going on: the Log Cabin [Republicans] last week filed a petition . . . to the Supreme Court to lift the Ninth Circuit's stay pending appeal.²⁶ Justice Kennedy has asked the government to provide a response [and] that deadline is today. Either way, whether or not the stay is lifted or the stay stays firm, the merits of the case will be moving forward on appeal—I believe sometime early this spring. I'm not sure that the date has been set on the calendar, so that's the litigation update.

[T]here's also there's other litigation pending.²⁷ One of our clients, Victor Fehrenbach, is a nineteen-year Air Force aviator. He's been decorated too many times to count and his performance evaluations . . . use the word, "the best airman that I have ever seen," and "this person is an eleven out of ten." He's just an incredible, incredible servicemember and we can get into the facts of this case if you ask questions. [B]ut in order to maintain, he's at nineteen years, if people don't know—at twenty [years] you're entitled to full pension benefits and things like that with retirement. We filed a suit to enjoin his discharge from moving forward, because it was eminent and so now he's just kind of waiting in limbo while his case moves forward.

I would be happy to take any questions about the litigation after Ty speaks about what we can expect from the Congress.

STEVE VLADECK: Our last panelist is Ty Cobb.

TY COBB: My name is Ty Cobb. [I] work for the Human Rights Campaign. We're the largest LGBT civil rights organization in the U.S. with over 750,000 members and supporters. We work on LGBT equality issues at the state level and at the federal level, and, although we do not do direct litigation, we are involved in filing amicus briefs and tracking litigation occurring in the courts. I'm going to take a bit of a different direction and talk about the legislative process . . . what's going on in Congress, the administration, and the Pentagon . . . and talk about what's happened this year . . . and leave some time for us to discuss where we're going from here.

I'm going to start with the State of the Union where the President said he

26. First Amended Complaint for Declaratory Judgment and Injunctive Relief, *Log Cabin Republicans v. United States*, 716 F.Supp. 2d 884 (C.D. Cal. 2010) (No. CV04-8425), 2006 WL 2314141.

27. Complaint, *Fehrenbach v. Dep't Air Force*, 2010 WL 3292505 (2010) (No. 2010cv00402).

was going to work with Congress to repeal DADT this year.²⁸ So, that's how the year started out. We then moved into Senate hearings where both the Secretary of Defense and the Chairman of the Joint Chiefs of Staff made statements that they agree with the President that it's time to repeal DADT.

I brought one of the quotes from the Chairman of the Joint Chiefs of Staff because I liked the quote. And, I think it's something that was great to have put into the record of a Senate hearing . . . from the person that chairs the [four] branches of the military. Admiral Mullens said, "No matter how I look at this issue I can't escape being troubled by the fact we have in place a policy which forces young men and women to lie about who they are in order to defend their fellow citizens."²⁹ Then he said, "For me, it comes down to integrity, theirs as individuals and ours as an institution."³⁰ This is a great quote that describes what this policy is, what it does, and what it says about our military to have such a policy in place.

At these hearings, the Secretary [of] Defense announced that he was going to put together a Pentagon working group to study DADT . . . and, not [so] long after that, he announced a Pentagon working group, tasked with looking at how to implement a repeal of DADT. The directive from the Secretary to the working group often gets mischaracterized as a review of whether or not to repeal DADT, but the working group was instructed to review how to implement repeal. The directive asks the working group to look at what needs to be changed, what policies need to be revised, how to extend benefits to the partners of same-sex couples, and what barriers exist that block open service. And, that study, which began in the earlier part of this year, is due on the Secretary's desk in less than two weeks.³¹ And, on December 1st, when it lands on his desk, he will have a complete review of how to implement a repeal of the law and what needs to be done once [the] law is repealed.

At the same time as the Pentagon working group was formed in the spring, there was a bill introduced in Congress called the Military Readiness and Enhancement Act. Later in the spring, the Defense Authorization Bill, which authorizes funds for the Defense Department,

28. President Barack Obama stated during the State of the Union Address that "[t]his year, I will work with Congress and our military to finally repeal the law that denies gay Americans the right to serve the country they love because of who they are." President Barack Obama, State of the Union Address (Jan. 27, 2010), *available at* <http://www.whitehouse.gov/the-press-office/remarks-president-state-union-address>.

29. Anne Flaherty, *Mike Mullen Calls for Repealing "Don't Ask, Don't Tell," "Right Thing to Do,"* HUFFINGTON POST (Feb. 2, 2010), http://www.huffingtonpost.com/2010/02/02/mike-mullen-calls-for-rep_n_446067.html.

30. *Id.*

31. DOD REPORT, *supra* note 9.

was amended in both the House and in the Senate Arms Services Committee to include repeal legislation. So, the repeal legislation was attached to a larger bill that was moving forward. The House passed the Authorization Bill in May—they did their part to move forward on repeal. The Senate, however, did not act on the Defense Authorization Bill until September. In September, the Authorization Bill moved forward in the Senate, but was blocked by filibuster led by Senator McCain.

Right now, we are at a point where the President has said that he's committed to signing repeal legislation. There's no reason to doubt that the President will sign repeal legislation. The House has passed repeal legislation and we're waiting on the Senate. The Senate goes back in session on Monday for the lame duck session . . . and it will be in session for a week before they leave for Thanksgiving. Then, it will be in session for at least two more weeks in December. That's where we are. This is our window of opportunity for legislative action in the Senate.

During all this legislative action, we had, as my other colleagues on the panel were talking about, the *Witt* case and the *Log Cabin* case moving forward in the courts. There was a temporary time where the military was enjoined from enforcing DADT. This created an up-and-down ride where the policy was enjoined from enforcement one day and then back in place another day.

I believe the issues we haven't addressed, but should address, is whether it would be better for the courts to find DADT unconstitutional; or whether it would be better for there to be an administrative action prohibiting the enforcement of DADT. Or whether it would be better for Congress to repeal the law. While it would be important for the courts to articulate that DADT is unconstitutional, I think the answer to that question is to get the law off the books now. I think the best way to do that is through Congressional action, and our last chance to do this in 2010 is during the lame duck session in the Senate.

STEVE VLADECK: So we're going to turn to [the] moderated Q & A part of the program. Ty, you sort of stole my thunder there at the end, because my first question to all of our panelists is, I suspect that we can all agree that Congress has the Constitutional authority to repeal a statute as enacted, right?

And so it's certainly true that Congress could repeal DADT. It's certainly true that the court could strike down DADT. At this point, I'm curious for each of you, if you would be willing to speculate what do you think is most likely to happen in light of the election—in light of the way the litigation stands? [I]f you had to predict the future, what would the Giants do at the Super Bowl? No, that's [not my] question. [L]eaving aside

what you think should happen, where do you think things actually will go from here?

DAVID RITTGERS: I don't know, I'll be honest, and I think that at the other end of the panel, you [all] are a lot more in tune [to] what's going on in the halls of Congress. I thought it was a done deal and then I started reading the papers this morning, and . . . I guess the[re is a lot of] pressure [on] Senator Carl Levin . . . both one way and the other . . . to repeal, [or] not to repeal.³²

[F]or forty-eight years the Congress has consistently passed the Defense Authorization [Act]. It's . . . the core task of Congress to do that, and so there's a lot of pressure . . . from both sides to pass [it] the way each side wants it. I've already stated what I think should happen. I think it should be repealed, but I think that it should be Congress that does it. Constitutionally, it's placed within . . . Congress' powers. I would like to think there's a better than fifty-fifty chance that Congress does it, and we don't end up with this being fought out in the courts ad nauseam for . . . the next year and a half or so.

MICHELLE MCCLUER: I agree with all the other panelists that it should be Congress who does the overturning. I'm just not sure that that's going to happen and, to take a little step back, the National Defense Authorization Act is *the* defense spending bill. It is what keeps the military running. It [totals] trillions of dollars, or at least a trillion. And if you don't pass it—there is no budget and there is no money for the military except through these things that they call continuing resolutions, which is what we . . . find ourselves under [every year at this time of year] because the fiscal year started about a month and a half ago and we can never pass the budget by then.

So th[e] National Defense Authorization Act is extraordinarily important for everyone in Congress to make sure that we can still fund our military, especially given the wars that are being fought right now. But I don't think that there's that much political will in Congress. Well, I won't say "that much," because there is quite a bit of political will in Congress to overturn the policy, but I'm [not] sure that there's enough, particularly with the procedural rules that you can use in the Senate to prevent certain things from being passed.

Maybe this is my pessimism coming through. Unfortunately I think [that it will probably] be this very piecemeal, interim court-decided repeal that's

32. See Scott Wong, *Sen. Carl Levin Pressured on "Don't Ask, Don't Tell,"* THE POLITICO (Nov. 9, 2010, 8:37 am), <http://www.politico.com/news/stories/1110/44913.html>.

going to ricochet back and forth for quite some time. I hope that's not the case but[,] aside from the Constitutional reasons, it should be Congress that does the change in the law. It was Congress that passed it in the first place, it wasn't the military. So it should be Congress that does the repeal. That would also allow an orderly [transition and] it would give a timetable. There would be guidelines [that] would come out of Congress if it happens that way.

If it comes from the courts and they just say, "policy unconstitutional; change it," there isn't the guidance. There isn't the opportunity for making incremental changes or whatever adjustments that need to be made.

TY COBB: I'm going to go back to the National Defense Authorization Bill as well. The bill is huge. As Michelle said, it authorizes around a trillion dollars in funds. DADT repeal is such a small piece of it. If Congress does not pass the National Defense Authorization Act this year, it will be the first time in I believe forty-eight years they have not passed that. So there is pressure on Senator Levin to get this bill through the Senate for reasons beyond repealing DADT.

As to the original question, Congress is in the position to make the most immediate change to DADT. They could make that change next week when they go back into session. They could make that change in three weeks when they get back in session after Thanksgiving. Litigation in the courts is going to be an up-and-down battle, as we've seen play out this year. This kind of pattern could continue all the way up to the Supreme Court. I certainly would welcome a favorable verdict from the Supreme Court, a decision from the Supreme Court on the unconstitutionality of DADT, but I think right now, the Senate is poised in the position to make the most immediate change to the law.

And, as a caveat to this conversation, the legislative repeal language in the Defense Authorization Act does not immediately strip DADT off the books. The way the legislation works is that three things must happen before DADT is stripped off the books. First, the Pentagon working group report I talked about, which is due on December 1st, must be received and considered by the President, Secretary of Defense, and Chairman of the Joint Chiefs of Staff. Second, the President, Secretary of Defense, and Chairman of the Joint Chiefs of Staff must provide the Senate Armed Services Committee and the House Armed Services Committee with a certified letter saying that repealing DADT will not hurt military effectiveness and the policies and regulations to implement repeal are prepared. Sixty days after certification, the law is repealed.

STEVE VLADECK: I would echo [and] agree with everything Ty just said. The group that can most readily and most quickly repeal DADT is the people who put it in place in the beginning [in] [19]93, which is the Senate and the Congress in general. They're basically almost there . . . the Senate should vote in this [I]ame [d]uck [session] to repeal. Barring that, it's going to be out in the courts; the courts don't go on a Congressional or a political time table and they'll continue to act in accordance with whatever they judge the law to be, and that's not necessarily where political branches, especially the military, like to find themselves subject to the whim of a judge's decision.

And it's not . . . a decision that they'll be making lightly. They'll be reviewing it in the context of the Constitution, but that level of uncertainty for the military is not where they want to find themselves and we saw that when the injunction was put in place. The military is excellent at figuring out how to implement something and doing it. [T]here's a reason we have the best military in the world, but doing things that quickly and pushing it down the bureaucracy that fast poses some challenges.

So I don't think they want to see that happen again on a bigger scale. So that begs a related question, and maybe that's the answer, which is—[where] is the Obama administration, in all of this? President Obama, in his first State of the Union sa[id] [that] repeal [of] DADT is a priority. At least it indicates [that] the administration has been proactive on that front. At the same time, it's the same administration [that the] Justice Department is aggressively [litigating the appeals.]

Judge [Phillips] ruled on the *Log Cabin Republicans* case [and the Justice Department] is aggressively appealing the *Witt* case. [O]ne way to slice that is the [that] Attorney General has a constitutional obligation to defend the constitutionality of [a] [f]ederal [l]aw, but there's defending it and [then] there's defending it. I'm curious if you [all] think there's any inconsistency in what we see in different parts of the administration dealing [with] this issue.

DAVID RITTGERS: [I] think that the Attorney General does have the obligation to defend the constitutionality of laws, and I think that if the President wants to speak in that matter then he needs to go the Executive Order route. If he's going to speak then speak but otherwise I think . . . defending the law . . . is part of the role of the Attorney General and something they have to do. So I'm going to hand it off to the next speaker.

MICHELLE MCCLUER: I actually heard . . . Neil Cattell, the acting Solicitor General, speak about his office and the role of his office on a day where he had to jet out of the room, because the injunction had just come

down, and he needed to go chat with the White House. And it was interesting. The things that we've heard before—"It's their job as the Solicitor's Office to defend whatever . . . has not been deemed unconstitutional up to that point"—whether it's popular, [a]nd . . . whatever . . . political whims are brewing including that of the current administration. I thought this was really interesting because my view of the Solicitor's Office had been more . . . of "Hey, you're working for the President so you follow what he has to say."

And so that was an interesting insight to me, a very timely one, but I have heard though that the Solicitor General's Office doesn't always . . . knee-jerk defend every provision of the U.S. Code, so there's some discretion but . . . it's definitely a muddled message.

TY COBB: I would say the administration has been very consistent at being inconsistent. They continuously rely on their duty to defend all laws whether or not they agree with them. They're consistent in the sense that they continue to defend the constitutionality of DADT and the Defense of Marriage Act while opposing the laws.³³ In 2009 the President explained that DADT weakens national security, which is the basis for which Congress actually enacted the law, and one of the basis that Justice Department continues to use as a defense to challenges against the constitutionality of DADT. There was no rational basis for enacting DADT, the President has spoken to this point, but the Justice Department continues to defend the law. There's precedent that the Justice Department does not have to defend an unconstitutional law, but the Administration has been very consistent in defending laws that the Administration opposes.

DAVID RITTGERS: I would just add a couple of points, not to confuse Ty's argument but the Justice Department did not appeal the *Witt* decision from the Ninth Circuit, which is . . . I think, directly on point here. When the Ninth Circuit articulated its standard and basically said that there's going to be a burden shift in DADT cases in the Ninth Circuit, at least with respect to as applied challenges. That case was not appealed to the Supreme Court and that's why that rule, I think, still stands today.

That's why . . . people are thinking about bringing cases in the Ninth Circuit, because the law there is just simply better. And with respect to the Executive Order issue that was brought up, I think there's some—it would be great if it can be done in an Executive Order and done tomorrow—legitimate constitutional questions as to whether or not the President has

33. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (codified as amended in scattered titles of U.S.C.).

authority under “Stop Loss” to issue an Executive Order. I think it would also raise a host of other potentially unexpected consequences with respect to divisions of government.

STEVE VLADECK: I have one more question for the panel before we turn it over to questions. I come at this from a different perspective, I think, than the four of you, which is sort of the top down perspective. This is sort of a piece of a larger puzzle and the larger puzzle that I see in teaching Constitutional Law is lots of different areas where laws that discriminate on the basis of sexual orientation are at the forefront of policy and legal debates—[such as] the Prop 8 lawsuits in California and the challenges for the constitutionality of DOMA.

[S]ome of you may know [that] on Tuesday, Iowa voted out three of their state’s Supreme Court Justices, almost entirely in response to a unanimous decision by their Supreme Court that same sex marriage is protected by the Iowa Constitution.³⁴ [S]o I’m curious [to know] if you all see DADT as a unique variation on this theme or as part of a much larger growing national conversation and whether there are ways in which DADT is either a poorer or better vehicle for those who are interested in moving ahead on questions of sexual equality in the 21st century.

DAVID RITTGERS: I’ll go ahead and say I think that it’s a terrible vehicle for moving this discussion forward. In 2003, the Supreme Court in *Lawrence v. Texas* declared unconstitutional all of these [state] laws . . . [criminalizing] consensual sodomy between two adults in the comfort of their bedroom. That was once again applied by the Court of Appeals for the Armed Forces to . . . knock out some of the prosecutions this conduct.

But the same article that I was talking about—that it was mostly dead, but still partly-alive said that the loophole that’s been left by the Court of Appeals in the Armed Forces makes the military exception that’s created by that case means that the sodomy article of the UCMJ is still mostly-alive, not totally dead. I think that the strong policy considerations in favor of discipline of the force just make this a tougher area if you’re going to litigate. This is a tougher area than other areas.

I think it was the same week, actually, Judge Philips came down, you had a defense of marriage statute partially overruled in Massachusetts. I think there was a federal employee who wanted to get benefits for their

34. See Krissah Thompson, *Gay Marriage Fight Targeted Iowa Judges, Politicizing Rule on Issue*, WASH. POST (Nov. 3, 2010, 6:39 AM), <http://www.washingtonpost.com/wp-dyn/content/article/2010/11/03/AR2010110307058.html>.

partner, is that correct?³⁵

STEVE VLADECK: Yeah.

DAVID RITTGERS: So, you see the difference. When you have those federal agencies but one military, one non-military, this is clearly swimming upstream to get things done on DADT.

MICHELE MCCLUER: Maybe because I came from a military background—I would say in many ways it’s a tougher sell with the military—but there may be a silver lining that makes it a little bit better, and so I’ll talk about both. [F]ollowing along with what David said, he’s referring to the *United States v. Marcum* case, which if you want to look it up and read it, it’s at 60 M.J. 198—it’s a 2004 case.

My boss argued it. I was there when it was argued; [it was] very, very interesting. Most of us, I think, thought, “Hmm, *Lawrence v. Texas*, that pretty much means the end of Article 125 unless you can be quite clever with the argument,” and I guess she was or . . . they bought it regardless of the argument, because you always hear that argument doesn’t matter as much as the briefs. But . . . the military has always gotten traditionally very high deference from the courts in particular, which is another reason that the courts in my opinion are not the best branch of government to be deciding the issue.

We keep talking about the Ninth Circuit case, the Ninth Circuit case gives a little less deference to the military than what you traditionally see—and you see some of that with the cases involving the detainees. You’re seeing less deference to the military in the Supreme Court. That sort of swimming upstream, traditional “Hey, is the Defense of Marriage Act constitutional,” or “Should partners get benefits,” that sort of [argument]. You don’t have the issues that you have in the military where military members have always given up some of their rights.

I mean, military members are not allowed to say things like “I hate the President” and “The President’s the stupidest person on the planet,” “[H]e’s got the dumbest decisions and makes the stupidest arguments” . . . and writing a letter to the editor and sign your name: “General So-and-So.” The same as a lot of other things that we give up the right [to do]. [W]e give up the right to refuse immunizations. So that makes it a tougher sell.

On the other side, you have the history of the military. Because the military is used to following orders, if and when policies change, people—whether they agree with the policy or not—have been taught and [we] saw

35. Gill v. Office Pers. Mgmt., 688 F. Supp. 2d 374 (D. Mass 2010).

this with integration [of] the races as well as the sexes. If individuals are told, “[H]ere’s the new policy, here’s what you need to do,” people are going to salute smartly and they’re going to go [to it].

TY COBB: Not to belabor the point, but the courts deal with the military as a different type of animal than society-at-large. The way the courts apply the law and constitutional principles to the military aren’t necessarily applicable outside of that small space. So, I don’t know that a favorable court decision on DADT would necessarily be a vehicle to advance LGBT equality generally in the courts. But like I said, I would certainly welcome a favorable decision.

DAVID MCKEAN: Like I said, I don’t think that any ruling favorable to DADT would necessarily be translatable to a broader LGBT agenda because like Ty said, those things are dealt with by the courts separately. The one thing I would like to point out though is that they do seem to be dealt with by the public at large somewhat differently in that approval for repealing DADT is upwards of seventy-five percent and that’s across parties—that’s across weekly church-goers. [I]t is very high—it’s not seventy-five percent of all those groups—but on average.³⁶

TY COBB: Yeah, it is a very, very high number of people. I don’t think the same thing can be said for other aspects of the LGBT agenda, unfortunately.

STEVE VLADECK: [A] question?

AUDIENCE MEMBER: Regarding the filibuster, one of the main questions was—were there any other express reasons for the filibuster? And we say this in terms of it seemed like the main talking point for the filibuster was that the military’s report had not come out yet, and yet it seems that as Ty and David stated, that [it] in fact did not necessarily have anything to do with eventual passage of the Authorization Bill.

So I guess [this is] a multi-part question. Were there any express reasons for the filibuster? Do we expect those reasons to come up again, and if and when we see the report, do we feel that the filibuster is still the biggest structural obstacle to the repeal of DADT?

36. Aubrey Sarvis, *Don’t Ask Don’t Tell: Getting Repeal Right this Time*, HUFFINGTON POST (Nov. 23, 2008, 07:12 PM), http://www.huffingtonpost.com/aubrey-sarvis/dadt-getting-repeal-right_b_145874.html.

TY COBB: Definitely. Looking back at September . . . when the National Defense Authorization Act did not survive a filibuster, people like to think it was because of DADT repeal, but like Michelle said, DADT repeal is only [a] small, little piece of the National Defense Authorization Act. The failed cloture vote had to do with a lot of things going on in Congress at the time, including the upcoming mid-term elections and other amendments, including the [Development, Relief and Education for Alien Minors (“DREAM”)] Act.³⁷

DAVID MCKEAN: And jet engines as well.

TY COBB: Yes, jet engines.

DAVID MCKEAN: I mean, The [DREAM] Act happened, if I recall correctly, at least publicly right. Senator Reid—and he’s still Senator Reid—had attached the [DREAM] Act. The [DREAM] Act is an immigration reform measure and he attached it rather late, which is not to say that Republicans hadn’t attached things late, but that there was sort of a process objection in applying the filibuster.

TY COBB: Right, he wanted to vote on the DREAM Act and other senators had opposing views. There were many issues being debated when the Defense Authorization Bill failed to move forward. It wasn’t just DADT repeal.

AUDIENCE MEMBER: Do you feel that a filibuster could come up again after December 1st?

TY COBB: There’s a reticence to moving forward with DADT repeal until the December 1st report comes out. As I said earlier, the report does not talk about whether we should repeal DADT. It looks at what policy changes need to be made to implement a repeal. There were several people that opposed the moving forward on the Defense Bill, in some part, because they did not want to move until this December 1st report comes out.

So obviously once the December 1st report comes out, that talking point is gone. I am sure there will be a new talking point, as there always is, but that talking point does disappear December 1st, and, going forward, I would expect a filibuster, because the Senate has probably filibustered

37. Development, Relief and Education for Alien Minors Act of 2010, S. 3827, 111th Cong. (2010).

almost every bill that had gone through this year. You don't see much movement in the Senate without a filibuster.

STEVE VLADECK: Ty—and this is just thinking out loud—but don't you also suspect that if it looks close, there's going to be a process objection that Senators should not be moving ahead with legislation that their replacements probably would not be in support of?

TY COBB: I don't think so. There is this expectation that the National Defense Authorization Act is passed every year, and I don't think that a process issue is what is going to stop the National Defense Authorization Act from going forward.

DAVID MCKEAN: So it might affect other legislation but not this?

TY COBB: I think so. Passage of the National Defense Authorization Act is something that we expect every year. It is something that has happened for almost fifty years at this point. And so it would be strange if it was not passed after the midterm elections.

STEVE VLADECK: Which has been done before?

TY COBB: Yes, yes.

AUDIENCE MEMBER: Moving more toward the report itself. It was mentioned earlier that the United Kingdom and Israel do allow openly gay servicemembers. One: is the DOD in this report trying to study these [countries] and other international examples? Then two: along those same lines, could you speak about how the military will have to change its internal policies, if and when, servicemembers are allowed to serve as openly gay service members? And specifically, how will this deal with issues such as incentivizing marriage? Will they be allowed the same marriage benefits as current heterosexual couples?

DAVID RITTGERS: I'll take that because I mentioned the other militaries. So let me just tease it out, there were like three questions, like how will this affect combat readiness. How are we going to . . . implement this and I think the second one was the broader legal scope of family law or whatever you want to call it. And the third one, which I'm just going to disregard right now, is the homophobic nature of the military.

Of the folks that are listening right now, I think Colin Powell was right,

seventeen years ago this was a tougher sell. But I think times have changed and kids coming into the military now do not have the hang-ups that were in place seventeen years ago.³⁸ [There's] a generational change in the folks that are . . . coming in and enlisting right now. So back to the first [question], the British and Israelis have done it.

I'm certain that they're looking at this. It's actually been done before; this has been studied before by the Rand Corporation,³⁹ and other folks have already looked at this, and have looked at the personnel policies of these other militaries . . . I'm certain that whatever they're going to produce is going to, in large part, mirror whatever the Brits and Israelis do.

The reason I focus on the British and Israelis is because they have real militaries that really fight. I don't care what Luxembourg does. Great, if they let people serve gay openly, good for them. But we should focus on . . . what the question says: "[W]hat [are] the folks who have top notch combat units doing?" And then I think it's actually the second part of . . . "[H]ow does this fit in the broader legal scheme," that gets back to what Steve was saying about . . . "[W]here does this fit into sort of the broader discussion," and I think that the . . . marriage piece of it—I don't think you can address all of . . . "[D]o service members get to marry, have same sex marriages, and have them honored," until Congress revisits DOMA.

DAVID MCKEAN: To pick it up on the back of that, first I do want to reemphasize that the first point you made which is the lack of homophobia in the military especially with regards to the younger recruit. The *Military Times*—where its readership is widely considered to be kind of an older, more conservative readership—for the first time this year found that . . . just over fifty percent of [its] readers . . . were in favor of, or didn't care whether or not DADT was repealed.⁴⁰

And those numbers just climb as you get down to people who are younger and I mean it's really a generational issue. The people who are serving, who are signing up now haven't lived in a world without DADT. This is a seventeen year-old law and the kids signing up right before they graduate from high school are often that age, believe it or not, which gives

38. See Karen DeYoung, *Colin Powell Now Says Gays Should be able to Serve Openly in the Military*, WASH. POST, Feb. 4, 2010, at A4, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/02/03/AR2010020302292.html>.

39. BERNARD D. ROSTKER ET AL., RAND CORP., SEXUAL ORIENTATION AND U.S. MILITARY POLICY (1993), available at http://www.rand.org/pubs/monograph_reports/2009/RAND_MR323.pdf.

40. See Lisa Leff, *Appeals Court: Gay Ban can Stay, for Now*, MILITARY TIMES (Oct. 22, 2010, 5:55pm), <http://www.militarytimes.com/news/2010/10/ap-military-dont-ask-dont-tell-case-moves-to-appellate-court-102010/>.

them a birthday of like [19]92. So it's just not as much of an issue. That's not to say that homophobia doesn't exist in the military, as it does lots of places, but the military is a very, very capable and disciplined organization and that doesn't change in this case.

With respect to the laws or regulations that may need to be changed, I'll be brief here. For a lot of the benefits issues, there may be a DOMA issue there as much as anything else. That's not to say that there aren't some potential work-arounds, but that's exactly what the comprehensive working group is doing right now, which is figuring out exactly what regulations would need to be changed.

The one thing that would not need to be changed, or very little of it would need to be changed, is a regulation based on conduct. Most of the regulations based on conduct, whether sexual misconduct or other misconduct, are sexual-orientation neutral. They don't deal with whether or not a man assaults a woman or a straight man assaults a straight woman, it's not how they are written and nor would it probably occur to anybody to write them that way.

If there's an assault, it's dealt with whether or not one person sexually assaults another person and, in fact, I believe there's some historical research to find that when some of the sexual assault provisions were written, it was before . . . women were widely serving in the military—it was in order to prevent same-sex male-on-male sexual assaults. I think these are totally applicable and capable of providing any sort of discipline that the military needs to enforce and the rest will have to be visited after repeal.

AUDIENCE MEMBER: Will there be support at all levels?

TY COBB: I think that it's kind of premature to make that determination now, because we're going to find out what the Pentagon working group discovers in about nine days. On December 1st we'll get an idea of where service members and their families—where the military—stands on this issue. But something to think about, strong leadership will be required to implement a change like this.

You also talked about looking at foreign armies. The working group is looking at foreign armies, they're updating the old RAND report, which was made back in the 1990's that evaluated how other militaries made a change to open service. And one of the key ways this was done was by making the change quickly and exhibiting leadership from the top. It's a clear, quick change where the leadership says this is how it's going to be. I assume that the report coming out December 1st will find that the military is ready for this, and I expect that the leadership within the military will be

assertive in implementing these new policies, because the RAND report will likely show that this is how other countries have dealt with such a change.

DAVID MCKEAN: I think the leadership component cannot be understated. Maybe David or Michelle would like to speak on how much of a difference leadership, especially within the context of a chain of command, really does influence the way people behave in the service.

DAVID RITTGERS: I would just say that there's been some different views coming from the Service Chiefs and I think just as late as last week or maybe this week, [the] Chief of the Marine Corps was saying there's an exception policy for the Marines where the Navy would have . . . a certain amount of space that each person is supposed to have, and the Marine Corps has an expressed exemption to that and they live in austere conditions, and so he opposes the change of the policy based on that service.

Requirements with the bottom line, that once the military is told do something, and the leadership gets involved[,], makes an order effective, then they're going to execute the order.

DAVID MCKEAN: It should also just be noted very quickly that there are currently—it's not that there are no gay and lesbian service people today because obviously we can't ask them to tell us who they are—an estimated 66,000 [LGBT] servicemembers, which is not the vast majority of the services by any stretch, but there are people. You rarely speak to somebody who served any length of time who can credibly say that they have never served with [or] known somebody in the military who was gay.

STEVE VLADECK: So I guess this leads to my next question which is: so what is life after DADT? [P]resumably there's still going to be concerns about, as you mentioned in your remarks, the . . . anti-harassment policies. And I guess the question is . . . how to adequately balance respect for equality with the particular needs of the military? Would you counsel leaders in the Pentagon and in the Congress to construct a sort of viable, non-discriminatory policy that accounts for . . . the parts of DADT [that are] actually . . . sensible—the parts of DADT have come from a place that . . . are justified?

MICHELLE MCCLUER: [T]here . . . are a lot of things that we'll have to deal with under new policies. What do you do about [the Lieutenant Choi's] and the Margaret Witt's who have been discharged

already? How do you reintegrate them and get them back to where they would have been or where . . . they haven't lost all this time, and stature, and all that?

Post-homosexual conduct [and what it] means for discharge in the military is going to be mainly depend on the leadership. My dad used to repeat the phrase, "Beat on the bosses, beat on the gang". [I] know from just thinking about my last duty station, even when we had a case where there was an allegation of homosexual assault, we dealt very gingerly with the individual who was accused, because it is a very sensitive area.

And this is under the policy where homosexual conduct is not compatible with military service, but once the policy is changed, you're going to see even more of an emphasis. [W]e already, on a yearly basis, in some services—in others twice yearly—do things like . . . anti-fraternization briefings, and briefings on "[H]ere's what sexual harassment is," . . . because like the others have said, you already have homosexuals in the military whether they're civilians, whether they're contractors, or whether they're other service members.

Disrespect for your fellow service members detracts from the mission if you've got individuals who are harassing others. I'm not sure that there would be other new policies. There just might be new emphasis on "[T]his includes homosexual bashing." But I really think that for a large number of individuals, at least at the beginning, even under a new policy, they're still going to think, "[O]kay. Well if I do come out, am I going to have some sort of ramifications against me, whether it's subconsciously, whether it's in my performance report, or the assignments that I get." I think the policy . . . change may be rapid but it may not be as rapid as we think it will be.

DAVID MCKEAN: If I can just add a couple of things to that. I think there's two broad issues after DADT that I think are worth thinking about. The first is an easy one and much easier than the second one. The first is what to do inter-military with personnel policies and things like that. That can be dealt with. There's a mechanism for dealing with it. There's a working group . . . considering it, there are groups like ours who are dedicating an enormous amount of time to it. [T]hat's a solvable problem, in a fairly straight forward manner.

The second is what to do with people who are discharged and who have been out of the service for some time now, or even just a little bit of time, who want to go back in? There's a few issues that are very important there. Do you give credit to the people who were discharged for all the time that they would have had? Do they go in at the rank that they were or the rank that they would have been?

Do you, if there are no spots open for . . . radar technicians in a certain

unit where the person was discharged, . . . create one for them? [I]t will be a potentially complicated issue to deal with. That doesn't mean that it's not worth doing and it doesn't mean that fairness and justice don't require that of us. It just means that it might take a little longer. The other thing I wanted to point out is that a lot of people, when we're discussing these things, have the assumption . . . that when DADT is repealed, gay and lesbian service members will be known to their counterparts, which may be true but it may not be.

Nobody has to come out on [the] day after DADT is repealed, and if you think about the way life works, most people probably won't. People don't come out until they are safe and comfortable and think that they won't be subject to any sort of reprimand or harassment. It might be the case that the policy changes and that [the] actual practical matter of the policy is not being implemented as quickly, but that won't impact somebody necessarily unless they made the determination that they're going to be coming out—that they think that they're in a safe environment.

STEVE VLADECK: Great. Well thank you to our panelists. We have one last closing . . . treat before we leave today. He[re] to give us some closing remarks is Tony Varona, who's [a] Professor of Law and the Associate Dean for Faculty and Academic Affairs here at WCL.

TONY VARONA: Thank you so much Steve. I will be very brief because I was not able to attend the panel and hear your presentations and so I wouldn't want to retread ground that you have already covered. I will share with you that I had the privilege of working on [the] DADT repeal efforts some years back and I can tell you that my experience has been over the last few years that nothing much has changed.

This is a policy problem, a political problem, a legal problem that is of a very interesting sort. It seems to us, and by "us" I mean the LGBT civil rights movement, that trusted polls indicate that the American public is on the side of repeal. The Congress by and large is on the side of repeal. The President has told us that he is in favor of repeal, and the courts are telling us that they are in favor of repeal.

So where's the repeal? The question, really, becomes one of tactics and strategy and repealing in the right way according to the right sequencing, whatever that might be. And so the theoretical question of whether repeal is the right way to go becomes how to repeal and when. I am certain that that's the complicated question that you struggled with the most during this panel. So I bring you greetings and thanks from Dean Grossman who is very happy that this panel took place and would have been here had the Committee Against Torture at the UN had . . . scheduled their proceedings

for another time. He offers you his thanks and his greetings.

I thank my colleague, Professor Vladeck for doing what I am sure was a fantastic job as he always does moderating and I thank Michelle McClure, David McKean, Ty Cobb. [H]e's still at the Human Rights Campaign. I'm a former General Counsel Legal Director there and I don't think our paths have crossed. [A]nd David Rittgers, thank you very much. . . . I also thank everybody who put the program together from the [Office of Diversity Services], [the] Program on Law and Government, the National Security Law Brief, the Labor and Employment Law Forum, [the LAMBDA] Law Society, the Legislation Policy Brief, the Modern American, [the] Veterans of American University, the Health Law and Justice Initiative and AU Queers and Allies.

Thank you all very much, thank you for a job well done and have a great rest of the week.