THE ROLE OF RESEARCH, LITIGATION AND COMPARATIVE INTERNATIONAL POLICY IN ENDING THE U.S. MILITARY'S "DON'T ASK, DON'T TELL" POLICY

*Nathaniel Frank**

INTRODUCTION

On September 9, 2010, Judge Virginia Phillips of the United States District Court for the Central District of California handed down a historic ruling in the case of *Log Cabin Republicans v. United States*.[1] At issue was the constitutionality of the U.S. military's practice of barring service by openly gay or lesbian personnel under its notorious "Don't Ask, Don't Tell" (DADT) policy,[2] which President Bill Clinton signed into law in 1993 after a bruising battle with the Pentagon and the Congress.[3]

The ruling by Judge Phillips, a Clinton appointee, struck down DADT as an unconstitutional infringement on the "fundamental rights" of American service members.[4] When Judge Phillips issued an injunction the following month banning enforcement of the policy, the Pentagon spent a frenzied week feverishly trying to maintain control of a policy that was quickly unraveling without regard for how military leaders hoped to see the policy end (to the extent that this was their hope at all).[5] The result of Judge Phillips' injunction was an immedi-

* Nathaniel Frank, director of the What We Know Project at Columbia Law School, is author of the 2017 book, *Awakening: How Gays and Lesbians Brought Marriage Equality to America*.

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

2. *See id.* at 888.

3. *See* 10 U.S.C. § 654 (repealed by Don't Ask Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, § 2, 124 Stat. 3515).

4. *Log Cabin Republicans*, 716 F. Supp. 2d at 923.

5. *See* Elisabeth Bumiller, *Varied Forces Pushing Obama to Drop 'Don't Ask, Don't Tell'*, N.Y. TIMES, Feb. 1, 2010, at A1.

ate, albeit temporary, lifting of the ban.[6] The world quickly saw that allowing openly gay service did not break the armed forces, lending crucial weight to an effort that was underway in Congress to repeal the ban—and by exerting pressure on the Pentagon to endorse that effort so as to salvage some control over the process by which the policy change might unfold. So when Congress passed a repeal bill that President Barack Obama signed on December 22, 2010,[7] Judge Phillips' ruling took its place in history as a critical contributor to ending more than two centuries of discrimination against lesbians, gays and bisexuals in the U.S. military.

As a scholar who spent a decade researching sexual minorities in the military prior to the Log Cabin Republicans (LCR) trial,[8] I was asked by White & Case, the law firm representing LCR in their suit against the government, to serve as an expert witness. What follows is a chronicle of the strategies that I and other research-centered advocates deployed in our efforts to build a factual record by publicizing relevant data on the topic of sexual minorities in the military in the U.S. and abroad. At the Palm Center,[9] an academic think tank where I was a research fellow, scholars and advocates placed a special emphasis on researching and publicizing the international experiences of military service by gays and lesbians in order to distill relevant lessons that could be applied in the American context. Our aim was to reach opinion leaders, policymakers, military officials, judges and the American public so that public opinion could evolve to reflect an understanding that restrictions on gay and lesbian service were rooted in bias and discomfort around sexual minorities rather than empirical evidence that they posed a genuine threat to military effectiveness.

The deployment of empirical research on sexual minorities in the military, particularly research on foreign militaries, helped end the military's anti-gay discrimination by influencing public opinion and, subsequently, decisions in litigation and legislative efforts that came to a head in 2010.[10] While the case at hand shows that data and evidence are crucial ingredients in changing public opinion and ultimately pol-

6. *See Log Cabin Republicans*, 716 F. Supp. 2d at 929 (issuing the worldwide injunction); Log Cabin Republicans v. United States, 658 F.3d 1162, 1168 (9th Cir. 2011) (vacating the injunction).

7. Don't Ask Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515 (2010).

8. Nathaniel Frank, *About Nathaniel*, http://www.nathanielfrank.com/about.php (last visited Oct. 13, 2016).

9. PALM CENTER, *About Us – Staff*, http://www.palmcenter.org/about/staff/ (last visited Oct. 13, 2016).

10. *See Log Cabin Republicans*, 716 F. Supp. 2d at 913, 915-16.

icy, it also shows us that facts are necessary, but not sufficient, for such a task. These efforts must be strategically deployed in order to infuse public dialogue in specific ways and to exert pressure on the right levers of policy. The aim is to hold advocates, opinion leaders and policymakers accountable and to undercut biases and rationalizations that help prop up failed or unjust policies. It is hoped that this account of how LGBT advocates deployed empirical research in this effort, especially on the experiences of international militaries that fully integrate sexual minorities into service, can provide valuable lessons in what I call "research advocacy," or the strategic use of scholarly data to advance effective and humane public policy goals.

I. Building a Record of Facts

In order to defend the constitutionality of DADT's encroachment of the rights of gays and lesbians, Judge Phillips wrote, the U.S. government had to show that DADT "was necessary to significantly further the government's important interests in military readiness and unit cohesion."[11] The defendants, she concluded, "failed to meet that burden."[12] The extensive evidence collected at trial, wrote Judge Phillips, "directly undermine[d] any contention that the Act further[ed] the Government's purpose of military readiness."[13] The policy not only failed to protect national security, Judge Phillips found, but it actively undermined it by making it more difficult for the military to build and maintain a first-rate fighting force.[14] The policy diverted energy and attention from the armed forces by requiring commanders to spend time rooting out fully capable troops (and thus wrenching apart cohesive units) for reasons having nothing to do with military prowess.[15] Judge Phillips found that the testimony of the plaintiffs' "lay and expert witnesses" convincingly demonstrated that the law "not only is unnecessary to further unit cohesion, but also harms the Government's interest" by "impeding the efforts to recruit and retain an all-volunteer military force" and "by causing the discharge of otherwise qualified servicemembers with critical skills."[16]

Judge Phillips' ruling was historic for several reasons. First, it was one of the only cases in which a federal district court held that DADT

11. *Id.* at 923.
12. *Id*.
13. *Id.* at 918.
14. *Id.* at 919.
15. *Id.* at 918-19.
16. *Id.* at 921, 923.

was unconstitutional on its face.[17] Second, the case was one of the most thorough efforts to put government-sanctioned prejudice on trial, and to find and share with the world that decades—centuries, in fact—of invidious distinctions made against sexual minorities by the federal government constituted nothing more than animus being masqueraded as a rational concern for national security. Third, although the court's injunction was eventually stayed by the Ninth Circuit, the timing and outcome of the case nevertheless played a critical role in ending DADT, one of the last remaining instances of federal anti-gay discrimination in the U.S.[18] It was a step that helped demolish the legal rationale for anti-gay discrimination in marriage over the subsequent five years.[19]

In the decade leading up to Judge Phillips' decision and the ultimate demise of DADT, I was one of a small number of researchers focused on gathering evidence about gay and lesbian military service, and sharing that data with the public. The idea was to build a factual record that would allow—in fact compel—those with the power to make sound and just policy to determine just what such a policy ought to look like when it came to the military service of sexual minorities; and further, to create policy that was rooted in evidence rather than emotion, bias or traditions whose rationale (if there ever was one) had long since passed.

Working with a team of colleagues and partners in the think tank, scholarly, military, LGBT advocacy and legal communities, I conducted and publicized research in a broad range of venues with an emphasis on evidence-based research so as to build credibility among opinion leaders and policymakers whose trust in the process was needed in order to make lasting policy change. It was equally necessary to attract media attention so that the record of facts would be disseminated and noticed by those in a position to act on them. Research on sexual minorities in the military was not exactly new in the 2000s. In fact, since the 1950s, the military itself, along with academic, independent and think tank researchers, had thoroughly studied the question of whether service by gays and lesbians had any appreciable

17. *See, e.g.,* Cook v. Gates 528 F.3d 42 (1st Cir. 2008) (affirming facial validity of DADT); Thomasson v. Perry, 80 F.3d 915, 919 (4th Cir. 1996) (affirming facial constitutionality of DADT); Richenberg v. Perry, 97 F.3d 256, 258 (8th Cir. 1996) (affirming that DADT passes rational basis scrutiny).

18. *See* Log Cabin Republicans v. United States, 658 F.3d 1162, 1168 (9th Cir. 2011); Jackie Gardina, '*Don't Ask, Don't Tell' Repeal: A Look Back*, HUFFINGTON POST (Feb. 2, 2016), http://www.huffingtonpost.com/jackie-gardina/dont-ask-dont-tell-repeal-a-look-back_b_1888988.html.

19. Obergefell v. Hodges, 135 S. Ct. 2584, 2596, 2605 (2015).

impact on the effectiveness of the U.S. military.[20] But the results (which were overwhelmingly favorable to inclusive policy) were repeatedly concealed, downplayed or ignored, and sometimes only saw the light of day as the result of a court order.[21]

Indeed, U.S. courts have a distinguished history of bringing to light facts that have made many people too uncomfortable, outraged or threatened to confront, particularly in the realm of sexuality, but also those involving race and gender equality. For gays and lesbians in pursuit of full equality, the courts have offered leverage for a hearing—the dignity of being taken seriously—at times when government officials, cultural leaders, institutions and popular culture frequently laughed gay people and their claims out of the proverbial room.

Of course, courts have also been guilty of doing the same. In 1972, the Supreme Court dismissed a marriage equality claim "for want of a substantial federal question,"[22] and in 1986, it infamously referred to a gay man's claim of a right to personal intimacy as "facetious."[23] In the case of the military, in particular, courts have a longstanding tradition of "judicial deference" to the military's claims of national security, a doctrine that allowed the Pentagon's anti-gay discrimination to persist without adequate judicial review for far too long.[24] In *Thomasson v. Perry*,[25] one of the first cases to test the constitutionality of DADT, the Fourth Circuit upheld the policy, concluding that protecting unit cohesion and military readiness by restricting service by open gays served a "legitimate purpose" and that the military is owed extra "deference" when matters of national security are at issue.[26] Over the course of the 1990s, four U.S. Circuit courts upheld the constitutionality of DADT,[27] often citing the special "deference" that the courts owed to the judgment of the military, which the courts described as a "specialized community" with its own set of rules.[28]

20. NATHANIEL FRANK, UNFRIENDLY FIRE: HOW THE GAY BAN UNDERMINES THE MILITARY AND WEAKENS AMERICA 118 (2009) [hereinafter FRANK, UNFRIENDLY FIRE].

21. *Id.*

22. Baker v. Nelson, 409 U.S. 810 (1972).

23. Bowers v. Hardwick, 478 U.S. 193, 194 (1986).

24. *See* DIANE MAZUR, A MORE PERFECT MILITARY: HOW THE CONSTITUTION CAN MAKE OUR MILITARY STRONGER 191-95 (2010).

25. Thomasson v. Perry, 80 F.3d 915 (4th Cir. 1996).

26. *See id.* at 925, 928-29.

27. *See* Holmes v. California National Guard, 124 F.3d 1126 (9th Cir. 1997); Thomasson v. Perry, 80 F.3d 915 (4th Cir. 1996); Richenberg v. Perry, 97 F.3d 256 (8th Cir. 1996); Able v. United States, 88 F.3d 1280 (2d Cir. 1996).

28. *Thomasson*, 80 F.3d at 925; JODY FEDER, CONG. RESEARCH SERV., R40795, "DON'T ASK, DON'T TELL": A LEGAL ANALYSIS 6 (2013).

Across the 1990s, gay rights advocates felt increasingly frustrated with the terms of public debate over the place of gays and lesbians in American society. The refusal of the federal court system to provide an avenue to critically evaluate the rationale for barring openly gay military service added to this frustration. In 1999, Professor Aaron Belkin, a political scientist, founded the Palm Center, a think tank based at the University of California, Santa Barbara.[29] Belkin had been discouraged by the public dialogue about gay and lesbian military service in 1992 and 1993—which resulted in the DADT compromise. He found the political debate to be largely fact-free, informed more by heat than by light.

While President Bill Clinton fought the battle for openly gay service with good intentions, it resulted in an expenditure of considerable political capital,[30] ultimately setting back both his presidency and the cause of gay rights. Not only was the far-right wing opposed to Clinton's effort to achieve equal treatment in the military, but leaders of the president's own Democratic Party were in opposition as well. Sen. Sam Nunn, the powerful chairman of the Senate Armed Services Committee, was a particularly vociferous opponent of gay service.[31] During the political debate over whether to end the existing ban in 1993, Sen. Nunn led hearings on the subject that included a highly choreographed media field trip to the bowels of Navy ships and nuclear attack submarines.[32] The message, conveyed by stark photos of anxious young sailors crammed into their bunks, was clear: quarters were close and feelings were pitched; there could be no place for open gays in military service.[33]

Belkin wanted facts and data to drive public dialogue, not fear and emotions being whipped up by politicians. He believed that regardless of whether the attainment of equal rights was more likely through legislative action or litigation, it was cultural understandings of sexuality that must lay the groundwork for change. And he thought that research, particularly empirical findings from the international context of gay military service, was a key piece of that work. The aim of the Palm Center was to conduct research that would have the credibility of a major research university and would showcase the facts on

29. PALM CENTER, *About Us – Staff*, http://www.palmcenter.org/about/staff/ (last visited Oct. 13, 2016).

30. Robert Pear, *President Admits 'Don't Ask' Policy Has Been Failure*, N.Y. TIMES, Dec. 12, 1999, at A1.

31. *See* FRANK, UNFRIENDLY FIRE, *supra* note 20, at 74-75.

32. *Id.* at 99-100.

33. *Id.*

the ground to the public. The next part of the strategy was to get these data points covered by the media to help repudiate the demagoguery that had taken over the dialogue in the lead-up to DADT.[34]

II. Applying Lessons from the International Context

The Palm Center's first task was to conduct research on foreign militaries that allowed openly gay service so that empirical findings could be used to inform the debate. Through its commissioning of scholars with expertise in military personnel policies and gender politics, Palm sponsored four major studies on the experiences of Britain, Canada, Australia and Israel, all of which had policies of open service.[35] In 2000, Palm released four studies, investigating the experiences of each of those allied military forces with open gay service. The studies showed that when those countries lifted their gay bans their militaries suffered no harm.[36] The study on the British military declared the shift to open service "an unqualified success," and cited the British military's own classified, internal assessment in which the new policy was "hailed as a solid achievement."[37] The Palm study did not find any evidence of decline in recruitment, mass resignations, increase in reports of harassment or effect on morale, unit cohesion or operational effectiveness.[38]

34. *See generally* Aaron Belkin, How We Won: Progressive Lessons from the Repeal of 'Don't Ask, Don't Tell' §2 Strategy (The Huffington Post Media Group, 2011) (outlining the strategic deployment of empirical research and data through the media to spark a public debate about the "merits" of DADT).

35. Aaron Belkin & R. L. Evans, Center for the Study of Sexual Minorities in the Military, The Effects of Including Gay and Lesbian Soldiers in the British Armed Forces: Appraising the Evidence 2 (2000), http://archive.palmcenter.org/files/active/0/Britain1.pdf [hereinafter British Military Report]; Aaron Belkin & Jason McNichol, Center for the Study of Sexual Minorities in the Military, Effects of the 1992 Lifting of Restrictions on Gay and Lesbian Service in the Canadian Forces: Appraising the Evidence 2 (2010), http://archive.palmcenter.org/files/active/0/Canada5.pdf [hereinafter Canadian Military Report]; Aaron Belkin & Jason McNichol, Center for the Study of Sexual Minorities in the Military, The Effects of Including Gay and Lesbian Soldiers in the Australian Defence Forces: Appraising the Evidence 2 (2000), http://archive.palmcenter.org/files/active/0/Australia_Final_Report.pdf [hereinafter Australian Military Report]; Aaron Belkin & Melissa Levitt, *Homosexuality and the Israeli Defense Forces: Did Lifting the Gay Ban Undermine Military Performance?*, 27 Armed Forces & Soc'y 541, 541 (2001), http://archive.palmcenter.org/files/Homsexuality%20and%20Israel%20Defense%20Forces_0.pdf [hereinafter *Israeli Military Report*].

36. British Military Report, *supra* note 35, at 2; Canadian Military Report, *supra* note 35, at 2; Australian Military Report, *supra* note 35, at 2-3; *Israeli Military Report*, *supra* note 35, at 542.

37. British Military Report, *supra* note 35, at 2.

38. *Id.*

The results elsewhere were the same. A study of the Australian military found that the "lifting of the ban on gay service ha[d] not led to any identifiable negative effects on troop morale, combat effectiveness, recruitment and retention, or other measures of military performance."[39] It also identified some evidence that the inclusive policy "may have contributed to improvements in productivity and working environments for service members."[40] A study of the Canadian military found that "lifting of restrictions on gay and lesbian service in the Canadian Forces ha[d] not led to any change in military performance" and also noted that sexual harassment actually dropped significantly after the policy change.[41]

The study's authors noted the relevance of the international context to the debate over openly gay service in the U.S. A 2001 study of the Israel Defense Forces published in *Armed Forces and Society* concluded:

> Despite the facts that the majority of gay combat soldiers do not disclose their sexual orientation to peers, that some gay soldiers receive special treatment, and that important organizational and cultural differences distinguish the Israeli and American cases, we believe that the Israeli experience supports the claim that American military effectiveness would not decline if known homosexuals were allowed to serve.[42]

Indeed, it was not sufficient to simply study and report the experiences of allied nations. Making an explicit case for the relevance of lessons learned from foreign militaries was a critical part of the Palm Center's informational strategy because the belief in "American exceptionalism" often led military officials and their political champions to claim that the experiences of other countries would not apply in the U.S. The American military was the most powerful in the world and had unique obligations around the globe, as some of the ban's defenders noted. Besides, American culture was also unique, with a heavily conservative military population. No matter what European or Canadian forces might allow, they concluded, there was no telling what might happen in the U.S. if gays were permitted to serve openly.

This conservative principle, of course, has a counterpart in constitutional philosophy. It is well crystalized in a dissent by the late Justice Antonin Scalia in the 2003 case, *Lawrence v. Texas*.[43] The holding in

39. AUSTRALIAN MILITARY REPORT, *supra* note 35, at 2.

40. *Id*.

41. CANADIAN MILITARY REPORT, *supra* note 35, at 2.

42. *Israeli Military Report*, *supra* note 35, at 558.

43. Lawrence v. Texas, 539 U.S. 558, 586 (2003) (Scalia, J., dissenting).

Lawrence, which struck down state sodomy bans, overruled that of *Bowers v. Hardwick*,[44] just seventeen years earlier.[45] The *Lawrence* court's decision, written by Justice Anthony Kennedy, noted that the European Court of Human Rights departed from the *Bowers* holding in decriminalizing homosexuality: "To the extent *Bowers* relied on values we share with a wider civilization, it should be noted that the reasoning and holding in *Bowers* have been rejected elsewhere."[46] As noted by Justice Kennedy, the right to consensual intimate relations "has been accepted as an integral part of human freedom in many other countries."[47] Justice Kennedy added a line specifically addressing—and rejecting—the prospect that the international context did not apply to the U.S., stating that "[t]here has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent."[48]

The notion that U.S. law should, in any way, reference the laws of other nations infuriated Scalia. "Constitutional entitlements," he wrote in dissent, "do not spring into existence . . . as the Court seems to believe, because *foreign nations* decriminalize conduct."[49] The *Bowers* holding, he insisted "*never* relied" on values the U.S. shared with a wider civilization, but rather relied on the ground that the claimed right was not "deeply rooted in *this Nation's* history and tradition."[50] Indeed, Scalia declared, even discussing "these foreign views" is nothing more than "meaningless dicta."[51] For good measure, he added that it was "dangerous dicta" since "this Court . . . should not impose foreign moods, fads, or fashions on Americans."[52]

Like Justice Kennedy, who not only made comparisons to foreign contexts but also made the case for why such comparisons were appropriate and relevant, the Palm Center made a point of conducting and publicizing research that would respond to the charge that the international context was irrelevant to the U.S. To take one example, Palm research showed that even the nations that allowed for openly gay service had cultures that were not completely tolerant of homo-

44. Bowers v. Hardwick, 478 U.S. 193, 196 (1986) *overruled by Lawrence*, 539 U.S. at 578.

45. *Id.*

46. *Lawrence*, 539 U.S. at 576.

47. *Id.* at 577.

48. *Id.*

49. *Id.* at 598 (emphasis added).

50. *Id* (emphasis added).

51. *Id.*

52. *Id.*

sexuality.[53] As concluded by one Palm study, "tolerant national climates are not necessary for maintaining cohesion, readiness, morale, and performance after the integration of a minority group into the military."[54] Palm also studied American police and fire departments, which do not ban openly gay service.[55] Researchers noted that those institutions functioned effectively despite the persistence in many pockets of cultural norms that opposed homosexuality, stating that "[i]t would not be possible for the numerous American police and fire departments that include known homosexuals to continue to function smoothly if a fully tolerant national climate were necessary for the maintenance of organizational effectiveness."[56]

It was important that the data collected and shared be as specific as possible so that it could be used to hold officials and politicians accountable when they made broad generalizations about foreign militaries being irrelevant in the American context. So Palm shared data showing that the very same concerns that American officials aired as a reason not to let gays serve openly had been also been raised in foreign contexts, but were found to be groundless. Defenders of the U.S. ban claimed that because such large numbers of service members opposed openly gay service, allowing it could create a mass exodus of needed troops and could harm efforts to recruit service members.[57] In the context of dismissing the relevance of foreign military experiences, the message was that American culture was unique—uniquely anti-gay—and thus inclusive policy in other nations had no bearing on the ability to implement a similar policy in the U.S. Yet this claim would only hold water if those other countries proved to be more tolerant than the U.S. In fact, while debates over gay rights were more fierce and politicized in the U.S. than elsewhere (largely due to a mobilized and vocal contingent of religious conservatives), data showed that military tolerance of homosexuality was not significantly greater in the countries that allowed openly gay service.[58] Palm's study of Canada, for example, noted that before the country lifted its ban, a large survey of its troops found that 62 percent claimed that they would refuse

53. Jeanne Scheper et al., "*The Importance of Objective Analysis" on Gays in the Military: A Response to Elaine Donnelly's Constructing the Co-Ed Military*, 15 DUKE J. GENDER L. & POL'Y 419, 429 (2008).

54. *Id.*

55. *Id.* at 429-30.

56. *Id.*

57. *Id.* at 425.

58. *Id.* at 429.

to share housing or bathing facilities with gay peers.[59] Yet after the ban was lifted, follow-up studies found no follow-through on threats to leave the force. There was "no increase in disciplinary, performance, recruitment, sexual misconduct, or resignation problems."[60]

Palm also conducted a study on the status of openly gay troops in multinational military units.[61] NATO, North American Aerospace Defense Command (NORAD),[62] Supreme Headquarters Allied Powers Europe (SHAPE),[63] and several other multinational forces, all of which expanded operations with the increase in global terrorism after 2001, routinely included U.S. service members along with allied troops who were openly gay.[64] Evaluating these units, researchers found that no problems were reported as a result of the presence of openly gay troops, even in close proximity to U.S. service members.[65] These facts on the ground, described in academic research, undercut assertions that American troops could not serve effectively with open gays since empirical contexts showed that they already were. No evidence or expert suggested that any problems had occurred as a result.

To show just how disingenuous and contradictory it was for military leaders to dismiss the lessons of foreign militaries when it came to openly gay service, Palm included a section in a major study on foreign militaries that detailed the routine reliance of the U.S. military on the learned experiences from foreign forces—at least when it pertained to issues besides openly gay service. "The U.S. military has a long tradition of considering the experiences of other militaries to be relevant to its own lessons learned," said a 2010 report.[66] "While there is no doubt that the U.S. military is different from other militaries, such distinctions have not prevented the U.S. military from comparing itself to and learning from foreign armed forces."[67] Palm pointed out that the Pentagon even created a Foreign Military Studies Office in 1986 to research lessons from foreign militaries on technological, stra-

59. CANADIAN MILITARY REPORT, *supra* note 35, at 6.

60. *Id.* at 2.

61. GEOFFREY BATEMAN & SAMEERA DALVI, CENTER FOR THE STUDY OF SEXUAL MINORITIES IN THE MILITARY, MULTINATIONAL MILITARY UNITS AND HOMOSEXUAL PERSONNEL (2004), http://archive.palmcenter.org/files/active/0/2004_02_BatemanSameera.pdf.

62. *Id.* at 7.

63. *Id.* at 7-8.

64. *Id.* at 11-13.

65. *Id.* at 24.

66. *See* NATHANIEL FRANK ET AL., PALM CENTER, GAYS IN FOREIGN MILITARIES 2010: A GLOBAL PRIMER 4 (2010), http://archive.palmcenter.org/files/FOREIGNMILITARIESPRIMER2010FINAL.pdf [hereinafter FRANK, GLOBAL PRIMER].

67. *Id.*

tegic and tactical operations, as well as cultural aspects of service including housing, healthcare and personnel policy.[68]

III. Deploying the Media

In line with Palm's strategy of publicizing its research and message about openly gay service, we successfully pitched a major story on the 2010 study to the *New York Times,* which ran just three weeks after Adm. Mike Mullen, then Chairman of the Joint Chiefs of Staff, expressed his support for ending the gay ban in the first congressional hearings on the issue in seventeen years.[69] "A comprehensive new study on foreign militaries that have made transitions to allowing openly gay service members," read the story, "concludes that a speedy implementation of the change is not disruptive. The finding is in direct opposition to the stated views of Pentagon leaders, who say repealing a ban on openly gay men and women in the United States armed forces should take a year or more."[70] The article succinctly described the 151-page study's conclusion that, "in foreign militaries, openly gay service members did not undermine morale, cause large resignations," increase harassment or otherwise harm military effectiveness.[71]

This moment in 2010 was a critical step towards creating the momentum for ending DADT. It was the product of years of researching gays in the military, publicizing its findings, reaching out to national media, working with service members and allied groups like Servicemembers Legal Defense Network (SLDN), and building relationships with political leaders and foreign and U.S. military officials. As the dialogue about whether to end the ban heated up that year, the messages that Palm and others had worked so hard to publicize were finally heard: that, as shown by the experiences of over two dozen foreign militaries, many with similar cultures to our own, service by open gays and lesbians does not conflict with the necessities of military effectiveness, and that discrimination and forced dishonesty, not equal treatment, are the actual threat to military cohesion and performance.

The *New York Times* piece[72] was just one of hundreds of press hits over a decade that helped keep anti-gay military discrimination—

68. *Id.* at 108.

69. Elisabeth Bumiller, *Study Backs Fast Repeal of Gay Ban in Military*, N.Y. Times, Feb. 22, 2010, at A7.

70. *Id.*

71. *Id.*

72. Bumiller, *supra* note 69.

and the research on the effectiveness of equal treatment—in the public discourse. The terrorist attacks of 2001 came two years after Palm began its work, and suddenly, the U.S. was at war, making the international context of our issue paramount. Service members with mission-critical skills (i.e. language proficiency in Arabic) and other expertise, suddenly became essential. So did the need to retain and replenish competent and skilled troops of all stripes as sustained military operations began to weigh on the armed forces. Yet advocacy groups quickly noticed that highly skilled linguists and other mission-critical specialists who happened to be gay or lesbian were being caught in the clenches of DADT.[73] No longer was the policy just an issue—if it ever was—of gay rights or a matter of social justice or fairness. It was now also a matter of military readiness and national security. The military was reeling under the weight of multiple wars and endless deployments, and yet it was kicking out exactly the people we needed to fight these wars for reasons that had nothing to do with their ability, but instead, for reasons that had everything to do with bias. In fact, the military was removing capable gay and lesbian service members and replacing them with individuals with lower educational and physical fitness capabilities, and even granting so-called "moral waivers" to applicants with criminal and substance abuse histories who would not have otherwise qualified for service.[74]

Each of these facts casts in stark relief the irrationality of DADT. The Palm Center worked to publicize every instance of prejudice masqueraded as military necessity. Using research, data and studies we produced; articles and reports written by independent scholars and major research groups like the RAND Corporation,[75] and the military's own research arms; statistics obtained through the Freedom of Information Act[76] and Government Accountability Office;[77] discharge figures and personal stories collected by allied advocacy groups such as SLDN[78]—we pitched story after story to anyone who would

73. NATHANIEL FRANK, PALM CENTER, DON'T ASK, DON'T TELL: DETAILING THE DAMAGE, 2-4 (2010), http://archive.palmcenter.org/files/DetailingCostofDADT.pdf [hereinafter FRANK, DETAILING THE DAMAGE].

74. *Id.* at 3.

75. *See* FRANK, GLOBAL PRIMER, *supra* note 66, at 25-28.

76. *See, e.g.,* PALM CENTER, MISSION-CRITICAL SPECIALISTS DISCHARGED FOR HOMOSEXUALITY (June 21, 2004), http://archive.palmcenter.org/files/active/0/MissionCriticalSpecsDischargedForHomosexuality6-21-04.pdf.

77. *See* FRANK, GLOBAL PRIMER, *supra* note 66, at 26-27.

78. *See generally* FRANK, DETAILING THE DAMAGE, *supra* note 73 (providing an extensive collection of discharge statistics and personal stories collected by the SLDN and other advocacy groups).

listen, creating a steady drumbeat of embarrassing stories for the Pentagon and, over time, drew the public's attention to those political leaders who defended this irrational policy. This was not always easy. What seems in retrospect like an obvious instance of newsworthy egregiousness—groundless prejudice forcing the military to waste its best talent in the name of a misconceived notion of national security—was for many people and for many years a dull, predictable piece of common sense, not a news story. We therefore used research and data, which themselves can be dull, combined with the stories, faces, and voices of actual service members affected by the policy, in order to find dozens of different ways to keep telling the same maddening story and get it into the news.

IV. FROM THE COURT OF OPINION TO A COURT OF LAW

By 2008, the years of building a factual record were beginning to pay off. Key to the pay-off was making the compelling case that the effect of the law was to unnecessarily and unconstitutionally punish gay and lesbian service members for reasons that not only failed to serve a government interest, but which actually undercut its interests in protecting the nation through its armed forces. Making this case in the public discourse was critical in helping win support for repeal from military leaders and helping to double public support for open service from roughly 40 percent to nearly 80 percent of the American public between 1993 and 2010.[79] Stories about fired gay linguists, the hiring of ex-convicts to replace them, the high financial costs of firing badly needed troops, and more, were also critical to getting political candidates, and eventually the President, to a point where they forcefully argued, with factual points at the ready, that this policy was not only unfair, but that it was also harming rather than helping the important government interest of protecting national security.

It was also critical to making the case against the gay ban in federal court. Although there was much evidence from the legislative proceedings leading to the enactment of DADT that the law was based on anti-gay animus, courts are understandably reluctant to infer a "unified legislative 'motive' underlying any given enactment."[80] Yet there is another way to demonstrate that a statute, on its face, is unconstitutional, which requires showing that the law's effect is both discriminatory and unnecessary.

79. *See* FRANK, UNFRIENDLY FIRE, *supra* note 20, at 270-71.

80. Log Cabin Republicans v. United States, 716 F. Supp. 2d 884, 896 (C.D. Cal. 2010) (quoting United States v. O'Brien, 391 U.S. 367, 384 (1968)).

As Judge Phillips wrote in her decision, "a court deciding a facial challenge can and should consider evidence beyond the legislative history, including evidence regarding the effect of the challenged statute."[81] That effect, as Judge Phillips found, was clear. The testimony introduced at trial "demonstrates that the Act adversely affects the Government's interests in military readiness and unit cohesion."[82] The decline in discharges when the U.S. is at war, and documentation of sending known gays to war despite the dictates of the ban, showed that even the military did not believe that open gays undermined effectiveness. As Judge Phillips put it, "Far from furthering the military's readiness, the discharge of these service men and women had a direct and deleterious effect on this governmental interest."[83] Indeed, she continued, "It defies logic that the purposes of the Act could be served by suspending the investigation during overseas deployments, only to discharge a servicemember upon his or her return to a non-combat station."[84] Judge Phillips concluded, "Taken as a whole, the evidence introduced at trial shows that the effect of the Act has been, not to advance the Government's interests of military readiness and unit cohesion, much less to do so significantly, but to harm that interest."[85]

Starting even before Judge Phillips handed down her decision, the case was critical to spurring repeal. As soon as President Obama took office, he began high-level meetings in the Oval Office to discuss how to respond both politically and legally to the build-up of court pressure against the policy.[86] The President did not want to place himself in the vulnerable position of having to publicly defend a policy that he had strongly condemned in his campaign. In fact, he had not only called the policy unfair, but had specifically called it harmful to national security, which undercut any legal claim his administration might make in stating that the policy was necessary for national security.[87]

By 2010, the pending trial and looming decision of the *LCR* case was alarming not only to the President, but to the Pentagon as well, whose leaders had initially been more hesitant to endorse a lifting of

81. *Id.* at 897.

82. *Id.* at 915.

83. *Id.* at 916.

84. *Id.* at 919.

85. *Id.*

86. *See* Elisabeth Bumiller, *Varied Forces Pushing Obama to Drop 'Don't Ask, Don't Tell'*, N.Y. TIMES, Feb. 1, 2010, at A1.

87. *Id*. at A3.

the ban.[88] Now, the threat of a federal court taking over the process by ordering an immediate halt to enforcement worried top brass who preferred to control the timing themselves. Their fears came true with Judge Phillips' decision and her subsequent injunction that prevented the Pentagon from enforcing the policy. The Defense Department's general counsel, Jeh Johnson, told the Senate in fall of 2010 of the Pentagon's wariness of losing control of the process. "This legal uncertainty is not going away anytime soon,"[89] he said referring to the continued threat of litigation. Johnson later said the court case had thrown military leaders into "panic" and that the case "had a real impact on Secretary Gates," who only explicitly backed legislative repeal of DADT just weeks after Judge Phillips issued her injunction.[90] The next month, the Senate followed the House in passing repeal legislation, providing for the ban's end the following year.[91]

V. Conclusion: Court Matters and Social Change

This chronicle of the efforts to inform the gay military service debate with empirical evidence has sought to make clear the important role of both the *LCR* case,[92] and the international legal context in ending anti-gay discrimination in the U.S. military. Both sources—that of the court case and that of international policy comparisons—were indirect factors in ending DADT. The Phillips decision was not ultimately the cause of ending DADT. The ruling did not rely heavily on the research on foreign military law or policy for its legal grounding, but its indirect role made it easier to miss it and, in that sense, all the more important for advocates of evidence-based policy to understand. The looming threat of court interference with Pentagon policy put pressure on political and military leaders to get behind the DADT repeal. Furthermore, more than a decade of empirical research into, among other things, the international experiences of military forces with service by gays and lesbians contributed to a much greater understanding by military, political and other opinion leaders about the effi-

88. *Id.* at A1.

89. Due to the continued threat of legal action, the Pentagon faced much uncertainty regarding enforcement of DADT. In the course of eight days, the Pentagon had to shift course on its enforcement twice. In the span of a month, it potentially had to shift course four different times. *See* Elisabeth Bumiller, *For Pentagon Lawyer Who Co-Wrote Report on Gays, Military Bias Hits Home*, N.Y. Times, Dec. 5, 2010, at N32.

90. *See id.*

91. *See* Don't Ask Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, § 2, 124 Stat. 3515 (repealing 10 U.S.C. § 654).

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

cacy of inclusive service and about the tendency to exaggerate the risks of expanding inclusivity.

These indirect contributors to the advancement of the debate over gay military service are sometimes underappreciated, but taking note of them can help put the role of the courts in matters of social change into perspective. On the one hand, courts have proven to be a critical element in expanding inclusion, often before public opinion and representative political bodies embrace it. On the other hand, however, even courts, which can be so forward-thinking, are subject to biases and blinders that can often only be overcome by the grinding groundwork of pushing public opinion. "Times can blind us to certain truths," wrote Justice Kennedy in his *Lawrence* opinion, "and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom."[93] As the story of DADT repeal shows, research advocacy, litigation and strategic deployment of the media to share messages about disenfranchised populations were all critical ingredients in advancing the cause of freedom and equality for LGBT people.

93. Lawrence v. Texas, 539 U.S. 558, 579 (2003).