

# PANEL DISCUSSION: LOG CABIN REPUBLICANS V. UNITED STATES: LITIGATING “DON’T ASK, DON’T TELL”\*

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Col. Christopher Miner, Hon. Virginia Phillips &  
Erwin Chemerinsky†*

## I. INTRODUCTION

DANIELLE HART: Thank you all very much for coming to this panel called “Log Cabin Republicans v. United States: Litigating Don’t Ask, Don’t Tell.” I want to take a minute to thank all of the panelists for taking time out of their schedules to talk to us about the military’s Don’t Ask, Don’t Tell policy (DADT).<sup>1</sup> I also wanted to take a brief moment to acknowledge and thank Professor Jonathan Miller and all of the Law Journal students who have been working for months to pull this symposium together. I think it’s pulled together really, really well. I want to acknowledge all of them, their hard work, and all of the various Southwestern offices that have participated in making this day come together. Thank you very much.

As I said, this panel is about *Log Cabin Republicans v. United States*,<sup>2</sup> and our panelists will be discussing the litigation of the U.S. military’s DADT policy.<sup>3</sup> We are very lucky to have the judges who

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\* What follows is an edited and annotated transcript of the live remarks made by selected panelists on March 18, 2016 during the Southwestern Journal of International Law’s symposium, “The U.S. District Court for the Central District of California, 1966-2016: International Context.”

† Danielle Hart, Professor of Law, Southwestern Law School introduced the panelists and moderated the panel. Introductions and short biographies for the included panelists appear in Professor Danielle Hart’s introductory remarks. Professor Nathaniel Frank’s individual remarks have been omitted from the following annotated transcript. His article, *The Role of Research, Litigation and Comparative International Policy in Ending the U.S. Military’s “Don’t Ask, Don’t Tell” Policy*, appears later in this issue.

1. See 10 U.S.C. §654 (1993).

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

3. See 10 U.S.C. § 654 (1993).

heard the decisions, the lawyers, and the witnesses who were instrumental in the case. We will also hear from Colonel Miner, who will talk to us about the implications of the policy post-decision, and Dean Chemerinsky, who will put the entire decision into a larger context for us. I'm going to take a couple of minutes to briefly introduce each of our panelists.

Let me start with the Honorable Terry Hatter, Jr., who is a judge in the United States District Court, Central District of California. He was nominated on September 28, 1979 and was confirmed in December of 1979. In 1998, he became the Chief Judge of the Central District and served in that position until 2001. Prior to joining the federal bench, Judge Hatter served in the Los Angeles Superior Court. He was also Professor of Law at Loyola Law School and the University of Southern California. He has served in a special category of the Army with the Air Force during the Korean conflict.

Next, Dan Woods, who is a partner with Music Peeler & Garret here in Los Angeles, is going to talk. He was the lead plaintiff's attorney in the DADT litigation. He took on the case when he was a partner at White & Case. Prior to going into private practice, where he again was a partner with many different law firms, he was a clerk for the Honorable Andrew A. Hawk at the U.S. District Court for Central District of California. He was also a fellow of the American Bar Association, a board member and the board President of the Inner City Law Center, and a board member of Uncommon Good.

Following Mr. Woods, we're going to have the Honorable Virginia A. Phillips, who is a U.S. District Court Judge for the Central District of California. She was nominated on January 26, 1999 and confirmed on November 15, 1999. Prior to serving on the bench, Judge Phillips was a partner at Best & Krieger with a litigation practice. She also served as a Magistrate Judge in the Central District of California and sat on the California Superior Court. She's a founding member of the Inland Empire Chapter of the Federal Bar Association and serves in leadership roles with various community organizations, including the Riverside Youth Service Center.

Following Judge Phillips, Colonel Chris Miner of the United States Marine Corp will talk to us. He is the officer in charge of Legal Services Support, section West, where he supervises over 100 attorneys, providing legal services in criminal justice and legal assistance in civil administration law at five different installations. He has served all over the world, including Japan, Okinawa, and Afghanistan prior to returning home, where he is now working in his current capacity. He,

again, will be talking to us about the implications of the policy post-decision.

Finally, Dean Erwin Chemerinsky, who is the Founding Dean of the University of California Irvine School of Law, a Distinguished Professor of Law, and Chair of the Raymond Pryke First Amendment Law at UC Irvine School of Law with a joint appointment in political science. He has taught at several different schools. He is the author of eight books, including *The Case Against the Supreme Court*.<sup>4</sup> He frequently argues cases before the United States Supreme Court and is also a commentator for legal issues on national media. He will talk to us and put the issues into larger context for us. With that, I want to turn the discussion over to Judge Hatter.

## II. PANEL DISCUSSION

JUDGE HATTER: Thank you. Let me tell you why I think we're here on this topic, because you wonder: well, what does it really have to do with international law? Clearly, international fact-finding if nothing else. Mr. Meinhold was an outstanding Navy enlisted man. He was an instructor. He was highly esteemed by all of his superiors, including those whom he actually taught in classes. Many of the people that he served with knew that he was gay. He didn't keep it a secret. In no way did it interfere with his work or with the evaluations that he was receiving. But when Mr. Meinhold decided to go on a national news show and he, as they say, came out on national television, he suddenly received orders from the Navy that he was to be discharged.

Mr. Meinhold merely did not want to be discharged. He asked for an injunction and we granted that after there were cross Motions for Summary Judgment.<sup>5</sup> Clearly, the Navy had a very sparse record.<sup>6</sup> There was not much to go on, but the Navy was basically claiming that Mr. Meinhold had not gone through all of the hoops he needed to go through.<sup>7</sup> I determined that it made no difference that he had not gone through them because the response would have been exactly the same. I made the determination that:

[G]ays and lesbians have served and continue to serve the United States military with honor, pride, dignity, and loyalty. The Department of Defense's justifications for its policy banning gays and lesbi-

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4. ERWIN CHEMERINSKY, *THE CASE AGAINST THE SUPREME COURT* (2014).

5. *Meinhold v. United States Dep't of Defense*, 808 F. Supp. 1455, 1456-58 (C.D. Cal. 1993).

6. *Id.* at 1457.

7. *Id.* at 1456-57.

ans from military service are based on cultural myths and false stereotypes. These justifications are baseless and very similar to the reasons offered to keep the military racially segregated in the 1940s.<sup>8</sup>

I found that to be true. As I say, while we're talking about international law, I also talked about international fact-finding. I wrote that in addition to all the countries in North Atlantic Treaty Organizations (NATO), only the United States and Great Britain banned gays and lesbians from their armed forces.<sup>9</sup>

On October 27th (the Meinhold case was filed with us on October 5th of 1992), Canada's military leaders rescinded Canada's policy of banning gays and lesbians from its Canadian forces, albeit as a result of a court order.<sup>10</sup> In explaining why the ban was rescinded, the Chief of their Defense staff reported that the military leadership was satisfied that the policy no longer served the best interests of Canada and its military.<sup>11</sup> On November 23rd of the same year, Australia lifted its ban against gays and lesbians in the Australian Defense Force.<sup>12</sup> The Prime Minister, in support of lifting the ban, stated that the decision "will not have the adverse effect on morale and cohesion predicted by some."<sup>13</sup>

Interestingly, and I'm glad that it was mentioned that I did serve in the military, I got all kinds of hate mail when I issued my order. They would write, and you always feel like, "Boy, I'd like to respond to that," but you can't in this position. In my case, I particularly wanted to, because I would say, "If you'd ever served in the military you'd know that it would work." I felt like writing back, "Not only was I in one branch of the military, but in two." During the Korean conflict, I was in a thing called SCARWAF (Special Category Army with the Air Force), which nobody has ever heard of. I served with the Army first, right after President Truman issued orders integrating the service.

Interestingly to me, when I issued this order, President Clinton was, as you know, early in his Presidency. I received a call from the White House counsel asking if they could have a copy of the Order. I said, "Of course." Unfortunately, the President and his White House

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8. *Id.* at 1458.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* (quoting *Statements by Prime Minister, The Hon. P.J. Keating, Australian Defence Force Policy on Homosexuality*, Nat'l. Archives of Austl. (Nov. 23, 1992)).

team decided that they would not just leave it with the courts. Instead, the President went up on the Hill and met with Sam Nunn, who at that time was a Senator from Alabama and Chair of the Armed Forces Committee in the Senate.

I assumed, and probably rightfully so, that President Clinton, being one of the first Presidents in modern time who had not been in the military, was talked down by the Senator. This case, *Meinhold*,<sup>14</sup> became the precursor for DADT because right after that meeting with the President and Senator Nunn, DADT was offered to us.<sup>15</sup> Shortly after that, the Navy added another defense: that by following my order, they (the Navy) couldn't implement DADT. It was very clear, at least to me, that being gay and not engaging in any activities that would be adverse to the mission of the military was unconstitutional and I so ordered.<sup>16</sup> I also ordered the entire military, the Defense Department, the Navy, and the other parts of the Defense Department to not engage in this unconstitutional activity.<sup>17</sup>

The Supreme Court stayed that injunctive relief and sent it back to the Ninth Circuit.<sup>18</sup> The Ninth Circuit determined that while they would affirm me on *Meinhold*,<sup>19</sup> they would not do the same regarding the sweeping injunction for the entire military.<sup>20</sup> The basis, of course would be that Mr. Meinhold did not bring a class action.<sup>21</sup> With that, I'll turn it over.

DAN WOODS: Let me start by saying a couple words about some of the other panelists here. Judge Hatter, I spoke with you once about *Meinhold* before I was ever involved in DADT. You would never remember this, but we were seated at the same table at some Bar event. I was curious about what caused you to rule in favor of Mr. Meinhold. You said to me that you were struck by the evidence presented to you that the military enforced this ban more often in times of peace than they did in times of war, and if there was a purpose to this policy, it wasn't being served by discharging people more often in times of peace. It seemed more as if there was time to do it. When they needed cannon fodder in times of combat, gays were as

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14. *Meinhold*, 808 F. Supp. 1455.

15. *Meinhold* was decided prior to the passage of DADT. See 10 U.S.C. §654 (1993); see also *Meinhold*, 808 F. Supp. 1455.

16. *Meinhold*, 808 F. Supp. 1455 at 1458.

17. *Id.* at 1480.

18. *United States Dep't of Defense v. Meinhold*, 510 U.S. 939 (1993).

19. *Meinhold v. United States Dep't of Defense*, 34 F.3d 1469, 1472 (9th Cir. 1994).

20. *Id.*

21. *Id.*

good as anybody else. That stayed with me and we used that during the case. Professor Nathaniel Frank's book, *Unfriendly Fire*,<sup>22</sup> became required reading for the people on our team. I really did read it over one weekend. It inspired me and provided us with many, many leads about the evidence we could put on in this case.

This many years later, I think many people take open service for granted. It's not even an issue in the Presidential campaign anymore. When Judge Phillips made her decision,<sup>23</sup> it was extremely controversial. I heard that a number of angry phone calls flooded not just her chambers, but the voice mail of the entire court. Judge Phillips received lots and lots of hate mail and even death threats. She had to be guarded by the United States Marshals for some period of time after she made her decision. I don't think she appreciated the commotion it would cause, but it certainly did. We recognize her courage that way.

I want to talk, though, about the trial of the DADT case. Trying and winning the DADT case was a tremendous experience for me and the entire team of lawyers who worked on the case. It was a wonderful opportunity as a trial lawyer to try the case. It had lots and lots of interesting moments. You have signature moments in any case, but this trial included moments where I could argue successfully about important constitutional law principles. I could argue the admissibility of a tweet by the Chairman of the Joint Chiefs of Staff. I could say in a closing argument, "Your Honor, the evidence showed that the government would rather give a convicted felon a gun than to give a gay guy a typewriter."

The case and the trial were memorable, not just because of the skills and the craftsmanship involved, but also because of the subject matter of the case. The gay men and women we were representing, and on whose behalf we brought the case only wanted to serve our country.<sup>24</sup> They wanted to conform to military standards and values.<sup>25</sup> These were people who wanted to shave their heads; who wanted to go to boot camp; who wanted to risk their lives to fight for our country while it was depriving them of their constitutional rights.<sup>26</sup> They were the real heroes in the whole DADT story from our perspective.

Once we decided to try the case, we had to win the case. It was important not just for the thousands of people who were involved in

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22. See NATHANIEL FRANK, *UNFRIENDLY FIRE: HOW THE GAY BAN UNDERMINES THE MILITARY AND WEAKENS AMERICA* (2009).

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

24. *Id.* at 900-08.

25. *Id.*

26. *Id.*

the military, but also for the whole LGBT community. We thought it was important for the whole country and the world to show that we could win this case. Ending DADT was and is one of the major civil rights victories of our generation. We collectively made history in causing DADT to be ruled unconstitutional and then legislatively repealed.<sup>27</sup>

We started this case in 2004 after the Supreme Court decided *Lawrence*.<sup>28</sup> Before *Lawrence*, every case that challenged the constitutionality of DADT had failed. After *Lawrence*, we thought that there might be an argument that could be made that DADT was indeed unconstitutional. We decided, “Okay, how do we go about doing that?” We first decided that it would be preferable to have a “facial challenge” to the constitutionality of the statute as opposed to an “as applied” challenge brought by one or a small number of service members. We thought that would have more impact. Along with that, we decided to have associational standing. This gay Republican advocacy group, the Log Cabin Republicans, would be the plaintiff, not an individual service member. We also decided to bring the case in the Central District, partly because of the *Meinhold* case and the 9th Circuit’s view of it, but also because it was convenient to us. Finally, we decided to bring claims based on violations of Due Process, Equal Protection and the First Amendment.<sup>29</sup> We met very stiff resistance from the government in this case throughout its long history. After various Motions to Dismiss and Summary Judgment Motions by the government, we came to a point where we were prepared to try the case on the Due Process and First Amendment claims, the claims that survived all these motions.<sup>30</sup> We had to put on a great deal of evidence in order to persuade our friend Judge Phillips that this was an unconstitutional statute.

Now, while we recognize the potential historical significance of the case, like any other trial, we had to focus on the elements of our claims. We had to prove the elements of our claims for relief. On the Due Process claim, as a result of *Lawrence*, and another 9th Circuit case called *Witt*,<sup>31</sup> we knew what we had to prove. Since DADT intruded on protected constitutional rights, we had to prove that DADT

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27. 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); see also *Log Cabin Republicans*, 716 F. Supp. 2d at 929 (holding the Don’t Ask, Don’t Tell policy unconstitutional).

28. *Lawrence v. Texas*, 539 U.S. 558 (2003).

29. *Log Cabin Republicans*, 716 F. Supp. 2d at 888.

30. *Id.*

31. *Witt v. Dep’t of the Air Force*, 527 F.3d 806, 818-819 (9th Cir. 2008).

did not further the government's interest in a strong military and was not the easiest or narrowest way to do that.<sup>32</sup> That was our real burden as we went forward.

At any trial, you have themes that you want to keep repeating during the trial. The themes that we tried to present were that we were not talking about this as a gay rights issue. We were addressing this as a *civil rights* issue, a pro-military issue, and we tried to emphasize the patriotism and bravery of the people who were being discharged under DADT.

Now, we did introduce a lot of evidence in a variety of different forums during the trial. One piece of evidence we introduced was a 1993 General Accounting Office report done before DADT was even passed.<sup>33</sup> This report studied the militaries of twenty-nine different countries and reported that permitting open service did not impair the functioning of those countries' militaries.<sup>34</sup> It had a special focus on Israel, Canada, Germany, and Sweden, and concluded as follows: "Military officials in all four countries said the presence of homosexuals in the military is not an issue and has not created problems in the functioning of military units."<sup>35</sup> We had expert testimony from Professor Frank and his colleague Professor Belkin who explained all of the reports they had done and why they were significant.

To me, the more interesting evidence was the testimony from soldiers. It wasn't just that these other countries had changed their rules. Our soldiers were working with other soldiers and fighting with soldiers from those countries. They were in these combat areas in the Middle East, working with soldiers from Canada, England, and so forth, without any problem. They were even in some situations being trained or taught by those people and in other situations being commanded by openly gay people from these countries.<sup>36</sup> It didn't seem to have any impact on military readiness for our countries and forces.

We also did something very interesting. It's called, for those civil procedure fans, a Rule 30(b)(6) deposition.<sup>37</sup> I did a Rule 30(b)(6) deposition of the United States of America. We asked the government to produce witnesses to testify on certain subjects. One of them was a study of foreign militaries. The government produced Dr. Paul Gade,

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32. *Id.*

33. U.S. GEN. ACCOUNTING OFFICE, GAO/NSIAD-93-215, HOMOSEXUALS IN THE MILITARY POLICIES AND PRACTICES OF FOREIGN COUNTRIES (1993).

34. *Id.* at 3.

35. *Id.* at 8.

36. *Id.* at 9.

37. FED. R. CIV. P. 30(b)(6).

who was the chief of a research program for the U.S. Army Research Institute for the Behavioral and Social Sciences. We introduced his deposition testimony at the trial. He testified that the experience of foreign militaries was the best method of evaluating openly homosexual service in our military.<sup>38</sup> He identified a number of studies showing that open service did not create any issues,<sup>39</sup> and he had to admit that there was no study showing that it would create an issue.<sup>40</sup> That testimony was very helpful.

We also used a lot of other evidence. We had documents we obtained from the government in discovery. We showed that this evidence proved that DADT did not further its purposes. It was used more often in times of peace than in war.<sup>41</sup> Discharges occurred more often after lengthy periods of service.<sup>42</sup> DADT disproportionately impacted women in the military.<sup>43</sup> Those discharged included people in a variety of professions, not just combat troops.<sup>44</sup> We even had a regulation in evidence, which showed that those under investigation nevertheless went with their comrades on deployment, but that their investigation would resume when they returned (if they returned).<sup>45</sup>

We also had a variety of other party admissions that we used. At the same time the case was gearing up, we had Senate hearings on DADT. The Chairman of the Joint Chiefs of Staff, Admiral Mullen, made admissions that we used;<sup>46</sup> we also used admissions made by the Secretary of Defense;<sup>47</sup> and even the President's admissions were used.<sup>48</sup> The President said in speeches, "Don't Ask, Don't Tell doesn't contribute to our national security. . . . [R]eversing this policy . . . is essential for our national security."<sup>49</sup> Over a lot of objections, we got

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38. Deposition of Paul Gade at 112, *Log Cabin Republicans v. United States*, 716 F. Supp. 2d 884 (C.D. Cal. 2010) (No. 2:04-cv-08425).

39. *Id.* at 71-72.

40. *Id.* at 77-78.

41. *Log Cabin Republicans*, 716 F. Supp. 2d at 916.

42. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-299, *MILITARY PERSONNEL: FINANCIAL COSTS AND LOSS OF CRITICAL SKILLS DUE TO DOD'S HOMOSEXUAL CONDUCT POLICY CANNOT BE COMPLETELY ESTIMATED* 18-19 (2005).

43. *Id.* at 10; *see also* Expert Witness Report of Melissa Sheridan Embser-Herbert at 2-4, Ph.D, *Log Cabin Republicans v. United States*, 716 F. Supp. 2d 884 (2010) (No. CV 04-08425); Declaration of Elizabeth Hillman at 4, *Log Cabin Republicans v. United States*, 716 F. Supp. 2d 884 (2010) (No. CV 04-08425).

44. *Log Cabin Republicans*, 716 F. Supp. 2d at 916.

45. *Id.* at 918.

46. *Id.* at 919.

47. *Id.* at 922.

48. *Id.* at 919.

49. *Id.*

that into evidence. I argued in the closing that those were the greatest party admissions in the history of party admissions.

This doesn't have as much to do with the international context, but the key to the case, I thought, in really persuading the court to rule in our favor was the emotional testimony of the seven service members that we brought. They all came from a cross-section of backgrounds: different ages, male and female, different branches, officers and enlisted personnel. They told in heartbreaking terms how DADT impacted them. Ultimately, we were successful in having Judge Phillips rule in our favor and issue an injunction that we argued for, which had worldwide scope.<sup>50</sup> For some reason I could never figure out, the government argued that the injunction should be limited to the Central District of California.<sup>51</sup> Judge Phillips was good enough to issue a worldwide, permanent injunction.

There have been a lot of books written about DADT since all this happened. In all of the books I've read, while the authors of each book took primary credit for DADT's repeal, they at least credited Judge Phillips in all of them.

I will tell you that after the case was decided, I did happen to encounter Secretary of Defense, Robert Gates, and talked with him about the case. I said, "I'd like to introduce myself. I'm Dan Woods. I sued you. We won and you lost." We talked about the case briefly. He acknowledged that the decision was the key factor in causing the military to change its view about DADT, and to cause its repeal. As he put it, and I'm trying very hard to quote, "I wasn't going to let some judge in California tell me how to run my military."

JUDGE PHILLIPS: Thank you very much for the invitation to be on this panel of really distinguished speakers. It's an honor for me. It really is an interesting opportunity because what really struck me so far is that the focus of the other speakers is very similar to what I had planned to say. We didn't try to coordinate our remarks at all and I hadn't spoken with any of the others about our respective roles in speaking today. I don't know if any of the others had meetings about what we were all going to say and they just didn't include me.

Let me start by answering a question I got asked a lot: "How did this case end up in Riverside?" We have this sleepy, country courthouse. You've probably never heard of it and nothing big ever hap-

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50. *Id.* at 929.

51. Brief For Appellee Log Cabin Republicans at 14, *Log Cabin Republicans v. United States*, 658 F.3d 1162 (9th Cir. 2011) (No. 10-56634).

pens in our courthouse. The short one is, it’s a very simple, but important answer. My colleague, Judge Schiavelli, had some physical ailments and he decided rather suddenly to retire. When a judge on our court leaves the bench for whatever reason, their cases are randomly assigned throughout the district. Although Judge Schiavelli is here in Los Angeles, I got this case as part of the random distribution along with some other cases. I remember clearly, my secretary was out that day and I was standing at her desk going through the group of cases that I was getting from Judge Schiavelli, which included this one. I thought, “I’ve heard of this case.”

That’s how it came here. I would also like to state that when change happens because of a lawsuit, the credit really has to go to the litigants and the lawyers who bring the case, because as judges we just take what cases are sent to us. We don’t have a choice. It was random. It wasn’t random, however, for Mr. Woods and his law firm to bring this case on a pro bono basis and it wasn’t random for the Log Cabin Republicans to decide to litigate this case. My role in it is really much smaller.

As Mr. Woods pointed out, one of the things I enjoyed the most or one of the things I thought was unique and wonderful about this case was the variety of legal issues that were presented. As you might expect given my job, I’m a real civil procedure junkie. I loved the fact that there was such a difficult, from my perspective, and meaty standing issue.<sup>52</sup> All right, so maybe not everybody would feel that way, but I really loved the standing issue. At one point, I asked for additional briefing on it. To me, the court has a *sua sponte* duty to address its standing. To me, that was a very critical and perhaps close call.

Some of the testimony that I found most compelling, from an international standpoint, was the testimony about the experience of other militaries, partly because there was a great deal of such evidence and it was intensely factual and, frankly, very persuasive. On a side note, there was also some testimony about the experience that women had had in the military and that they were affected more in terms of this policy than others. At one point, one of the expert witnesses who testified explained to me, the trier of fact, the history of women serving in the military.

The very first women to serve as officers in the military were nurses in World War I. My grandmother was one of those women. Her picture has always been on my desk, because to me she is a really

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52. *Log Cabin Republicans*, 716 F. Supp. 2d at 889.

inspiring example of public service. It's easy for us now when we travel to Europe, we just need to get on a plane. My grandmother got on an Army ship, crossed the Atlantic Ocean in a very difficult journey when those ships were being torpedoed, and served right in the trenches with the horrible casualties of World War I in France and Belgium. It was a private moment for me to listen to someone else telling me that these were the very first female officers. My grandmother died before I even graduated from college, but I'd like to think that she was proud of that moment when I was hearing that testimony and thinking, "Yeah, I knew that."

I should mention that the government decided not to put on any of the other testimony. Their position was that this was a facial attack and I should only look at the legislative history.<sup>53</sup> I discussed, I hope thoroughly in my decision, why I found that was not the appropriate thing to do.<sup>54</sup> The testimony of the witnesses who were actually serving or had served in the military was particularly effective because the prosecution team was excellent about deciding the order of their witnesses. At one point, near the end of the case, the government complained that, "They just cherry picked a bunch of really effective witnesses." I don't know, I thought that was what most lawyers would try to do in a case. In any event, they were right.

The first witness, I believe, was a man who had served in the military. He was heterosexual. He said, "Look, I was from Nebraska. I didn't know any gays. I held a lot of prejudices against gays. I was serving with and then rooming with someone who I thought was a terrific soldier and I found out there were rumors he was gay, so I warned him. He said, 'No, it's true.'" The testimony of this witness was at the outset of the trial, but his testimony—that he decided not to re-up because he eventually found it so uncomfortable to serve in the military with this rule—was very effective and persuasive. All of the soldiers, airmen, and sailors who testified were very persuasive about the effect.

I don't know if this is true, but I was later told that I was the first judge in a published opinion to rule that a tweet was admissible.<sup>55</sup> It was fascinating to have to have the foundation laid for a tweet. It was a great tweet from the plaintiff's perspective in terms of the international impact.

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53. *Id.* at 895.

54. *Id.* at 895-97.

55. See Transcript of Record at 469-71, *Log Cabin Republicans*, 716 F. Supp. 2d 884 (No. CV 04-08425).

I don’t know if my colleagues have the same experience, but when I sit down to write my decision, my experience is that I usually haven’t decided a case—especially a court trial—before I start to write. It is the discipline of writing that helps me decide. As I went through and I was writing this, I really valued the importance of judicial independence. I struggled a lot and spent a lot of hours in chambers working on this case as we do with every case, but I only had to worry about the correctness and the validity of my decision. “Was I making the right decision? Have I addressed all the facts? Have I addressed all the arguments on both sides? Am I reaching a sound, reasoned, and the right decision?” I didn’t have to worry about whether I was going to be re-elected. That, I’m afraid is a luxury, but it made me value even more the importance of judicial independence.

I always say to juries during *voir dire* and at the end of a trial when I’m thanking them for their service: “This may not be the longest case or whatever, but this is the most important case in the world to the parties involved.” That’s true in this case and it’s true in every case. I feel like I really try to treat all cases by that standard. This certainly affected more people than some other cases between private litigants, but all cases are really important.

I’ll end with one small anecdote that impressed on me. I was very very focused on my decision of course and a bit naïve about how much attention it would get. Very naïve as it turned out. My case was tried shortly after Judge Walker (of the Northern District) tried the Prop 8 case, which got a lot more media attention at the time. Due to the relative lack of media attention to our trial, I thought, “Maybe the Los Angeles Times might cover the outcome.” I was a little bit wrong about that. One of my volunteer externs at the time was checking the news casts all night and did a little mini PowerPoint that he sent around to everyone in my chambers of all the international news organizations that covered the outcome within about 12 hours. It was really astonishing to me. I also wasn’t prepared for the amount of interest and the effect, not only eventually of the injunction, but also of the decision itself.

About a month after the decision, I had a law clerk who happened to be working outside of chambers that day and I needed to get in touch with him. He was home. I sent him an email to his personal Gmail account. Luckily it had no confidential information. His email address was his first name, middle initial, and last name at Gmail. I sent an email saying, “Hi, I need to talk to you about the Monday calendar and you have a file that I need. Could you give me a call?” I

didn't get an answer for an hour or two and I thought that was a little peculiar. Then I got an answer that said, "Dear Virginia," and I thought, "Boy, I guess he's very comfortable after a month or two in my chambers. That's great." "I received your email. I think you may have sent it to the wrong person. I am a computer analyst in Germany. Wrong middle initial. P.S.: If you are the Judge Phillips from Don't Ask, Don't Tell, great work."

COL. MINER: I'd like to thank Southwestern Law School for inviting me to this symposium. It is an honor to be up here with such an esteemed and accomplished group. I'm going to talk a little bit about the repeal of DADT and its impact on the military. Now many of you have heard this before, but since I am a Marine here appearing in uniform, I must do the disclaimer: this is solely my own opinion and not that of the military. I don't speak for the President, ma'am, and you can't hold that against me.

Now I'm sure most of you know that the opponents of DADT objected to the repeal based upon mission readiness and the military readiness. The Comprehensive Review Panel issued a report in November of 2010, which found that 30% of the military members surveyed believed the repeal would have a negative impact on the military mission.<sup>56</sup> The Marine Corp was higher, with 58% of our combat arms personnel believing it would have a negative impact, which is a significant number.<sup>57</sup>

What impact did the repeal really have? I'm going to give you an anecdote that I think summarizes it pretty well and I'll discuss it a little bit further. As I was explaining to another Senior Judge Advocate the other day about why I was coming to this panel and what I was going to be addressing, he said, "Repeal of DADT? Isn't that a little dated? It's almost like my daughter telling me my dance moves were so 1980." He wasn't making light of the repeal, but his question brought home the point of how far we have advanced in the U.S. military from the debate that we had just a few years ago regarding the perceived negative impact that the repeal would have on issues of readiness to engage in combat and related missions. By the end of the year after the repeal, all of the military services reported that there was no negative impact on the basis of mission readiness, and one year after that, they all reported no negative impact altogether.

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56. U.S. DEP'T OF DEF., REP. OF THE COMPREHENSIVE REV. OF THE ISSUES ASSOCIATED WITH A REPEAL OF "DON'T ASK, DON'T TELL" 64. (2010).

57. *Id.* at 75.

Part of the reason the implementation of the repeal was so successful is that the military is a microcosm of society in many ways. Our societal views evolved on sexual orientation since 1993. The other reason for the repeal's success was military leadership. I also believe that the effective leadership of the military was significant to the implementation of the repeal. I believe all the service leadership remain faithful to their obligation and oath to protect and defend the Constitution. For example, General Jim Amos, Commander of the Marine Corps, who was an opponent of the repeal, made it clear that the debate was over and it was now time to move forward. That's exactly what we did.

In the Marine Corps, we undertook a tiered approach to training. The training was focused at experts, such as myself, judge advocates, and chaplains, and also geared toward our senior leadership - our commanding officers, our senior enlisted advisors, and all the Marines in general. The emphasis of the training was on having effective leadership, professionalism, discipline, and respect. Even the units that were deployed in combat at the time in Iraq or Afghanistan received this training. That's how serious the Department of Defense was to make sure this happened and was implemented effectively. The number one message of the training was that everyone who serves, regardless of who they are, is entitled to dignity and respect.

Having provided you with a little bit of an overall assessment of the impact of the repeal, I'm going to go over a few of the policies. I'm going to try not to belabor any of them. These are some of the policies that were either implemented prior to the repeal or after the repeal. I'll try to make note of those as I can.

Number one is accessions and separations: No longer was being a homosexual a bar to enlistment and no longer could it be used to separate one solely on that characterization. That was huge. What happened with that? In the year following the repeal, all of the services reported that they had achieved 100% of their recruiting mission in the active duty services.

Standards of conduct: Our standards of conduct really did not change after the repeal. Everybody was supposed to be treated, like I said, with dignity and respect regardless of sexual orientation. In the Marine Corps, we remain dedicated to our core values of honor, courage, and commitment. That didn't change.

One thing that was a little peculiar that this panel mentioned before was consensual sodomy. It took until 2014 with the passage of

the National Defense Authorization Act<sup>58</sup> where we actually repealed consensual sodomy under Article 125 of the UCMJ.<sup>59</sup> I look at that as they look at laws about spitting on sidewalks: it was archaic and I think people put it out of mind. I don't believe that we actually used a charge of consensual sodomy in a court-martial after the repeal. Again, the deference to the military just wouldn't have been there in light of *Lawrence v. Texas*.<sup>60</sup> It would not have been present.

Moral and religious concerns: The repeal didn't affect any individual's moral or religious beliefs. People can continue to have their own personal beliefs. Our chaplains are still afforded the opportunity to practice the free exercise of religion according to their faith. They can refrain from any practice contrary to their religious beliefs. While it was probably not necessary, the protection to chaplains was codified in the National Defense Authorization Act of 2013.<sup>61</sup> The evidence indicates that chaplain retention and recruiting had not been affected as some had argued earlier on.

Equal opportunity was huge obviously. All service members, regardless of sexual orientation, are entitled to be in an environment free from personal, social or institutional barriers that prevent them from advancing free from discrimination and harassment or abuse. While initially after the repeal we did not roll sexual orientation up into our military equal opportunity programs, in June of 2015, the Department of Defense changed our directives on that. Now sexual orientation is included in military equal opportunities.<sup>62</sup> Before, if somebody had a complaint of discrimination, they were supposed to address it either through their commander channels or through the inspector general channels. Now, it is part of the MEO (Military Equal Opportunity Program).<sup>63</sup> Other avenues of redress are now available. People can come in for things like mediation and alternate dispute resolution that may not have been available to them in the past. My research also suggested that there were only six complaints of discrimination in the whole Department of Defense based on sexual orientation made through IG channels through June of 2015, when the policy was instituted.

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58. National Defense Authorization Act For Fiscal Year 2014, Pub. L. No.113-66, § 1707, 127 Stat. 961 (2013).

59. *Id.*

60. 539 U.S. 558, 578 (2003).

61. National Defense Authorization Act For Fiscal Year 2013, Pub. L. No. 112-239, § 533, 126 Stat. 1632 (2013).

62. Department of Defense Directive 1020.02 (2015).

63. *Id.*; see also Department of Defense Directive 1350.2 (1995).

Many of the benefits that were available to homosexual service members continue to be in place, such as being able to designate somebody as a beneficiary for your life insurance or your retirement savings account. You probably should know, and you probably all know, that the one benefit you were not entitled to had to do with being married or one’s dependent status. That was because of the Defense of Marriage Act (DOMA).<sup>64</sup> Of course in 2013, the Supreme Court ruled Section 3 of DOMA to be unconstitutional and that opened the door for same-sex couples to receive the same benefits as heterosexual couples, with medical care and housing being the biggest ones.<sup>65</sup> They could even avail themselves now of legal assistance in my offices. Again, that was change that, I know, was slow to come, but it came and I think it adds a lot to the repeal to be able to have same-sex partners receive those same benefits.

Even though there was some concern that the implementation of the repeal of DADT was going to have a roar on military readiness, it was really a whimper when it comes down to it. I think the generational and societal changes and the effective leadership that our commanders provided made a big difference in the outcome.

In February of 2012, I deployed to Afghanistan. We were still in that period of one year where we were supposed to be reporting any issues. In a combat environment where we started with about 18,000 Marines in the Helmand province, to the time we had somewhere between 7 and 8,000 Marines, I can’t recall one incident that was unusual. Did we have some misconduct? Yeah. Do you know what the misconduct was? General order number one, which prohibited sexual relations between anyone. As my general used to say, “If I ain’t getting any, nobody’s getting any.” We did have some homosexual service members who were administratively punished for engaging in sexual relationships, but we also had heterosexuals who were punished for the same thing. With that I thank you for your time and I’ll pass it along.

DEAN ERWIN CHEMERINSKY: I am so honored to been asked to be a part of this distinguished panel. I was asked to put Judge Hatter’s decision in *Meinhold v. United States Department of Defense*,<sup>66</sup> and Judge Phillips’ decision in *Log Cabin Republicans v.*

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64. Defense of Marriage Act, Pub. L. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 and 28 U.S.C. § 1738C (1996)).

65. *United States v. Windsor*, 133 S. Ct. 2675, 2696 (2013).

66. 808 F. Supp. 1455 (C.D. Cal. 1993).

*United States*<sup>67</sup> in a larger constitutional context. I think this context not only shows how far constitutional law has advanced with regard to protecting gays and lesbians from discrimination, but also how much is left to be done. It also shows that we would not be at this point if it wasn't for wise and courageous judges like Terry Hatter and Virginia Phillips, so I think this is also an opportunity to recognize and thank them for how they are responsible for where we are today.

I want to address two points: First, what is the history in the Supreme Court and the Ninth Circuit with regards to sexual orientation discrimination, especially in the military. I think this history is important. Relatively soon, people will think that the protection of gays and lesbians in the military, and with regard to marriage, was inevitable and preordained. It is easy to forget in the context of the military that it wasn't just conservative Republican administrations who defended the exclusion of gays and lesbians in the military in DADT. It was the Carter, Clinton and Obama administrations as well. I also think that looking at the historical context is important in seeing how much it really was wise and courageous judges who made a difference. So I will take a few minutes to sketch the history.

My guess is that some is familiar to all of you, but some may have been forgotten. Let's start in 1986 with the Supreme Court's decision in *Bowers v. Hardwick*.<sup>68</sup> There the Supreme Court, in a 5-to-4 decision, upheld a Georgia law that prohibited oral-genital or anal-genital contacts.<sup>69</sup> The Supreme Court in a 5-to-4 decision ruled that homosexual sodomy is not protected by the Constitution.<sup>70</sup> Justice Byron White wrote the opinion for the court. It turns out that Lewis Powell was the fifth vote in the majority. Initially, he had voted with the dissenters to strike down the Georgia statute, but then he changed his mind. Not long after leaving the bench, in a speech at New York University Law School, he said the one decision he regretted being a part of was the majority in *Bowers v. Hardwick*.<sup>71</sup>

Two years later, in 1988, the Ninth Circuit decided *Watkins v. Department of Defense*.<sup>72</sup> *Watkins* is a case that I fear has been forgotten, but is enormously important in this history. It involved the military

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67. 716 F. Supp. 2d 884 (C.D. Cal. 2010).

68. 478 U.S. 186 (1986).

69. *Id.* at 196.

70. *Id.* at 191.

71. Ruth Marcus, *Powell Regrets Backing Sodomy Laws*, WASH. POST (Oct. 26, 1990), <https://www.washingtonpost.com/archive/politics/1990/10/26/powell-regrets-backing-sodomy-law/a1ae2efc-bec6-47ec-bfb6-1c098e610c5b/>.

72. 847 F.2d 1329 (9th Cir. 1988).

seeking to discharge and prevent reenlistment of Perry Watkins for being gay.<sup>73</sup> The Ninth Circuit, in a 2-to-1 decision, held that the exclusion of gays and lesbians from the military denied equal protection.<sup>74</sup> The Ninth Circuit said that discrimination on the basis of sexual orientation is discrimination on the basis of a suspect classification and that there was no evidence that excluding gays and lesbians from the military enhanced military preparedness and readiness.<sup>75</sup> Judge William Norris wrote the opinion, joined by Judge William Canby. If you’re not familiar with the decision, you will be stunned when I tell you who the dissenter was—Judge Stephen Reinhardt. Judge Reinhardt ruled that on the basis of *Bowers v. Hardwick*, though he disagreed with the Army’s position, he could not find that it was unconstitutional.<sup>76</sup>

The next year, the Ninth Circuit *en banc* held that the exclusion of Watkins was impermissible based on an estoppel theory, but did not reach the constitutional question.<sup>77</sup>

In 1990, the Ninth Circuit decided *High Tech Gays v. Defense Industry Security Clearance Office*,<sup>78</sup> and the question was whether it was constitutional to deny an individual a security clearance on account of being gay or lesbian.<sup>79</sup> There, the Ninth Circuit said that *only* rational basis review should be used for sexual orientation discrimination,<sup>80</sup> and that it *was* permissible to deny somebody security clearance on the basis of their sexual orientation.<sup>81</sup> Judge Melvin Brunetti wrote the opinion for the court.

So in that context, when *Meinhold v. United States Department of Defense* came to Judge Hatter in 1993, you can see why it was such a courageous ruling. Judge Hatter ruled that the exclusion of Meinhold was a denial of equal protection and that the Army’s policy was unconstitutional.<sup>82</sup> This, as Judge Hatter said, led to Congress passing DADT.<sup>83</sup> The next year, the Ninth Circuit said that Meinhold could not be excluded from the military, but that the military policy was

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73. *Id.* at 1331.

74. *Id.* at 1352.

75. *Id.* at 1349-51.

76. *Id.* at 1353 (Reinhardt, J., dissenting).

77. *See* *Watkins v. United States Army*, 875 F.2d 699, 711 (9th Cir. 1989).

78. 895 F.2d 563 (9th Cir. 1990).

79. *Id.* at 565.

80. *Id.* at 571.

81. *Id.* at 580.

82. *Meinhold v. United States Dep’t of Defense*, 808 F. Supp. 1455, 1458 (C.D. Cal. 1993).

83. *See supra* note 15 and accompanying text.

constitutional.<sup>84</sup> Here, I think it is worth looking at the words of Judge Pamela Rymer. She wrote: “[O]n the merits, we defer to the Navy’s judgment, that the presence of persons who engage in homosexual conduct or who demonstrate a propensity to engage in homosexual conduct by their statements, impairs the accomplishment of the military mission.”<sup>85</sup>

In 1996, in *Watson v. Perry*,<sup>86</sup> the federal district court judge in the District of Washington upheld the constitutionality of DADT.<sup>87</sup> It is also worth noting that 1996 was the year that the Supreme Court, for the first time, declared a law unconstitutional on grounds of sexual orientation discrimination. In *Romer v. Evans*,<sup>88</sup> the Supreme Court, 6-to-3, declared unconstitutional Colorado’s amendment that repealed all laws in the state protecting gays and lesbians from discrimination and that prevented the enactment of any new laws protecting gays and lesbians from discrimination.<sup>89</sup>

In 2003, the Supreme Court decided *Lawrence v. Texas*.<sup>90</sup> There, the court expressly overruled *Bowers v. Hardwick*, holding that if the right to privacy means anything, it safeguards what consenting adults do in the privacy of their own bedroom.<sup>91</sup> In 2008, in *Witt v. Dep’t of Air Force*,<sup>92</sup> the Ninth Circuit said that a military policy excluding gays, including DADT, has to serve an important interest, substantially further that interest, and has to be necessary.<sup>93</sup> That, of course is the test Judge Phillips had to apply. We should also remember that 2008 is the year that California voters passed Proposition 8,<sup>94</sup> which amended the California Constitution to say that marriage had to be between a man and a woman.<sup>95</sup>

It was two years after, in 2010, that Judge Phillips handed down a decision in *Log Cabin Republicans*. If you haven’t read it, or have not read it recently, I commend you to do so. It is an incredibly thorough

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84. *Meinhold v. United States Dep’t of Defense*, 34 F.3d 1469, 1479 (9th Cir. 1994).

85. *Id.* at 1472.

86. 918 F. Supp. 1403 (W.D. Wash. 1996).

87. *Id.* at 1417-18.

88. 517 U.S. 620 (1996).

89. *Id.* at 635-36.

90. 539 U.S. 558 (2003).

91. *Id.* at 578.

92. 548 F. 3d 1264 (9th Cir. 2008).

93. *Id.* at 819.

94. CAL. SEC’Y OF STATE, CALIFORNIA GENERAL ELECTION TUESDAY, NOV. 4, 2008: OFFICIAL VOTER INFORMATION GUIDE 128 (2008), <http://vig.cdn.sos.ca.gov/2008/general/pdf-guide/vig-nov-2008-principal.pdf>.

95. CAL. CONST. art. I, § 7.5.

and detailed opinion. Judge Phillips presents statistics: from 1994 to 2001, 7,856 soldiers had been excluded because of DADT.<sup>96</sup> From 2002 to 2009, 5,167 individuals had been removed from the military for being gay or lesbian.<sup>97</sup> She talked about how this was in light of a serious troop shortage; how it meant that the military didn’t have critical skills; and how it undermined morale.<sup>98</sup>

Based on all of the testimony before her, there was no evidence that this policy significantly furthered military readiness.<sup>99</sup> She found that DADT was a content-based restriction on speech that violated the First Amendment and violated Due Process.<sup>100</sup> And, of course, it was her decision that led Congress to repeal DADT.

In 2013, in *Windsor v. United States*,<sup>101</sup> the Supreme Court declared Section 3 of the Defense of Marriage Act unconstitutional.<sup>102</sup> It found that the law was an impermissible denial of equal protection to gays and lesbians.<sup>103</sup> And on June 26, 2015, in *Obergefell v. Hodges*,<sup>104</sup> the Supreme Court found that laws in Kentucky, Michigan, Ohio and Tennessee that prohibited same-sex marriage violated the Constitution.<sup>105</sup> Now, gays and lesbians have the right to marry in all fifty states and all territories in the United States.<sup>106</sup>

So, what lessons can be drawn from this quick recitation of history? I think it shows that judicial action is necessary for social change, but it is not sufficient. The reality is that we would not be where we are today without the courageous judges in the Massachusetts Supreme Judicial Court in *Goodrich v. Massachusetts Dep’t of Public Health*<sup>107</sup> in 2003, or the decisions in *Meinhold* and *Log Cabin Republicans* by Judge Hatter and Judge Phillips, respectively. At the same time, I don’t mean to imply that their decisions were sufficient for bringing about social change—it’s a much more complicated story than that. I think T.V. shows like *Will and Grace* and movies like the *Kids Are Alright* were key in changing social attitudes. I think legislative actions, such as the New York Legislature passing a statute al-

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

97. *Id.* at 915.

98. *Id.* at 915-16.

99. *Id.* at 911.

100. *Id.* at 926.

101. 133 S. Ct. 2675 (2013).

102. *Id.* at 2695.

103. *Id.* at 2693.

104. 135 S. Ct. 2584 (2015).

105. *Id.* at 2599.

106. *Id.* at 2607.

107. 798 N.E.2d 941 (Mass. 2003).

lowing marriage equality,<sup>108</sup> were key. I think voter passed initiatives in the 2012 election to allow marriage equality in Maine, Maryland, and Washington were important. But all of this is a model for how law in a social movement can bring about change.

But the second point I want to make is that there is still a long way to go. It's a mistake to take the successes I have described, that we are celebrating today, as implying that it's the end of the story. For example, the Supreme Court never has said that heightened scrutiny is to be used for sexual orientation discrimination. In cases like *Lawrence v. Texas*, *Windsor*, *Obergefell v. Hodges*, the Supreme Court simply did not say the level of scrutiny it was applying.<sup>109</sup> That is quite important—if a federal, state or local law is challenged for discrimination based on sexual orientation, the outcome will likely depend on the level of scrutiny used. In fact, in a trial court, can peremptory challenges be used on the basis of sexual orientation? If sexual orientation gets heightened scrutiny (through intermediate or strict scrutiny), then it cannot be the basis of peremptory challenges. Then it is treated the same as race and sex. But if sexual orientation discrimination is given rational basis review, then it can be the basis of peremptory challenges. The Ninth Circuit in *Smith Klein v. Abbott Laboratories*<sup>110</sup> said that sexual orientation discrimination gets heightened scrutiny and therefore peremptory challenges cannot be used on that basis in federal courts in the Ninth Circuit.<sup>111</sup> But the other circuits haven't ruled and the Supreme Court hasn't ruled.

Also, though we are celebrating the repeal of DADT and the lack of sexual orientation discrimination against gays and lesbians in the military, we should not forget that the military still discriminates against transgender individuals; that the protection that has been accomplished for gays and lesbians hasn't yet come for others who deserve this. And if I can step aside for a second beyond the Constitution, there is still no federal statute that prohibits employment discrimination on the basis of sexual orientation. Though the so-called ENDA statute has been proposed many times, it has never been passed by Congress. So, while federal law prohibits employment discrimination based on race, sex or religion, it does not prohibit on the basis of sexual orientation.

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108. NY DOM. REL. art. 3, §10-a. (2011).

109. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2623 (2015) (Roberts, C.J., dissenting); see also *United States v. Windsor*, 133 S. Ct. 2675, 2706 (2013) (Scalia, J., dissenting); *Lawrence v. Texas*, 539 U.S. 558, 586 (2003) (Scalia, J., dissenting).

110. *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471 (9th Cir. 2014).

111. *Id.* at 474.

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*LITIGATING "DON'T ASK DON'T TELL"*

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Over 40 years ago, I decided to apply to law school because I was inspired by the civil rights lawyers of the 1950s and the 1960s. I wanted to use law for social change. Their efforts convinced me that law was the most powerful tool for social change. My hope is that the litigation that has been brought by those on this panel and the decisions of the judges on this panel inspire the next generation of people to go to law school and be lawyers and to believe that law is the most powerful tool for social change.

