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LOG CABIN REPUBLICANS: INTERNATIONAL EXPERIENCE WITH MILITARY INCLUSIVENESS AND THE END OF DON'T ASK, DON'T TELL

David B. Cruz*

ABSTRACT:

*The federal statute mandating the exclusion of lesbian and gay persons from the armed forces was known as “Don’t Ask, Don’t Tell” (“DADT”). Before it was repealed by Congress in 2010, it was subject to challenge politically and legally, including in the U.S. District Court for the Central District of California. Litigating against the ban on behalf of the Log Cabin Republicans, Dan Woods and his legal team established before Judge Virginia A. Phillips that DADT violated the substantive due process and First Amendment rights of lesbian and gay persons. The bench trial before Judge Phillips in *Log Cabin Republicans v. United States of America* presented considerable evidence about the experience of other nations’ militaries with open service by lesbian and gay persons. That trial, and Judge Phillips’s consequent world-wide injunction against enforcement of the exclusion, played a key role in the legislative repeal of DADT. That repeal and comparable evidence of foreign military treatment of transgender servicemembers in turn helped secure the administrative repudiation of the U.S. armed forces’ categorical ban on service by openly transgender persons of all sexual orientations.*

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INTRODUCTION

The early years of the twenty-first century have seen remarkable changes in the treatment of lesbian, gay, bisexual, and transgender (LGBT) persons in the United States, particularly in the legal arena. The country started the century with more than one in four states criminalizing certain forms of sexual intimacy between consenting adults, four of them *only* when it was a same-sex couple involved; with the federal government statutorily precluded by federal statute from accepting lawfully married same-sex couples as married and states statutorily authorized to disregard lawful marriages of same-sex couples from jurisdictions that allowed such; with lesbian and gay persons, whether transgender or cisgender, barred from military service by a federal statute commonly known as “Don’t Ask, Don’t Tell” (DADT); and with transgender persons of any sexual orientation barred by military regulations from serving in the armed forces.

On the personal relationship front, in 2003 the Supreme Court’s decision in *Lawrence v. Texas* invalidated so-called “sodomy laws,” thus protecting people’s rights of intimate association.¹ In 2013 the Court held that the federal government could not ignore same-sex couples’ marriages in *United States v. Windsor*.² In 2015 the Court held that all states must allow same-sex couples to marry civilly and must recognize those marriages and treat them equally with marriages of different-sex couples.³

On the military front, litigation against the lesbian and gay exclusion continued into the twenty-first century. Although some powerful political forces supported repeal of DADT, a bill to effectuate repeal only made it through Congress after Judge (now Chief Judge⁴) Virginia A. Phillips of the U.S. District Court for the Central District of California in late 2010 held DADT unconstitutional in a suit brought by Dan Woods and colleagues, *Log Cabin Republicans v. United States of America*.⁵ Six years later, the Department of Defense (DOD)

1. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

2. *United States v. Windsor*, 133 S. Ct. 2675, 2682 (2013).

3. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607-08 (2015).

4. Press Release, Kory K. Gray, U.S. Dist. Court for the Cent. Dist. of Cal., Judge Virginia A. Phillips Succeeds Judge George H. King as Chief Judge (2016), <http://www.cacd.uscourts.gov/news/judge-virginia-phillips-succeeds-judge-george-h-king-chief-judge>.

5. *Log Cabin Republicans v. United States*, 716 F. Supp. 2d 884, 923 (C.D. Cal. 2010).

repealed the categorical regulatory exclusion of transgender persons from military service.⁶

This Essay, part of the Southwestern Law School Journal of International Law's symposium on the fiftieth anniversary of the Central District of California, looks primarily at Judge Phillips's landmark decision in *Log Cabin Republicans*, one of the most important cases to come out of this court. Part I briefly introduces DADT and the history of challenges to that statute (and predecessor regulations) mandating lesbian exclusion. Part II focuses upon the *Log Cabin Republicans* litigation, the role in the trial and in Judge Phillips's opinion of comparative evidence of other nations' experiences with open military service by lesbian individuals, and the role of *Log Cabin Republicans* in the statutory repeal process that culminated in enactment of the Don't Ask, Don't Tell Repeal Act of 2010 and repeal of the policy the following year. Part III then takes up the military's transgender exclusion, again emphasizing the role that comparative evidence (here, of other nations' experience with open service by transgender individuals) played in the recent repeal of the U.S. military's categorical exclusion of transgender servicemembers.

I. A BRIEF HISTORY OF DON'T ASK, DON'T TELL

Throughout much of the twentieth century, the United States military officially excluded LGBT persons from service.⁷ Courts repeat-

6. Ash Carter, *Remarks on Ending the Ban on Transgender Service in the U.S. Military*, U.S. DEP'T OF DEF. (June 30, 2016), available at <http://www.defense.gov/News/Speeches/Speech-View/Article/821833/remarks-on-ending-the-ban-on-transgender-service-in-the-us-military>.

7. See, e.g., *Steffan v. Perry*, 41 F.3d 677, 707 (D.C. Cir. 1994) ("The basis for separation may include previous, prior service or current service conduct or statements. Homosexuality includes the member engaging in, attempting to engage in or soliciting another to engage in a homosexual act or acts. It also includes statements by the member that he or she is homosexual or bisexual, or the member marrying or attempting to marry a person known to be of the same biological sex."). That noted, I have not seen evidence to support judge Michael Luttig's pronouncement—without citation—that "[f]or as long as it has had a military, the United States has excluded homosexuals from military service." *Thomasson v. Perry*, 80 F.3d 915, 935 (4th Cir. 1996) (en banc) (Luttig, J., concurring).

Given the context, the slippery word "homosexuality" here makes most sense as an abstract noun about a person's sexual orientation, since the "Don't Ask, Don't Tell" statute challenged in *Thomasson* excluded people just for saying they were lesbian, see *infra* text accompanying note 16, and there was no evidence that Thomasson himself had engaged in or even had a "propensity" to engage in homosexual conduct. *Id.* at 921. Thus, the court martial of Lieutenant Gotthold Frederick Enslin in 1778 for sodomy with another man, see RANDY SHILTS, *CONDUCT UNBECOMING: LESBIANS AND GAYS IN THE US MILITARY* 11 (St. Martin's Press, 1st ed. 1993), does not offer adequate support for Luttig's bare assertion.

According to Shilts, "[i]t was during World War I that the punishment of homosexual soldiers was first codified in American military law[.]" and "[t]he idea of excluding people for

edly rebuffed challenges gay and lesbian service members brought against their exclusion.⁸ After the issue's profile was heightened by activism including through such litigation,⁹ change seemed within reach in 1992 when Democratic presidential candidate Bill Clinton pledged to repeal the policy,¹⁰ which he could effectively do because it

having a homosexual orientation, as opposed to punishing only those who committed homosexual acts, was born during World War I False" *Id.* at 15. The transgender exclusion, by contrast, appears of more recent vintage. See Editorial, *Let Transgender Troops Serve Openly*, N.Y. TIMES, June 4, 2015, at A24 ("The rules that prohibit transgender people from entering military service were introduced in the early 1980s, an era during which few people lived openly and those who did were widely stigmatized.").

8. *E.g.*, *Steffan v. Perry*, 41 F.3d 677 (D.C. Cir. 1994) (en banc); *Ben-Shalom v. Marsh*, 881 F.2d 454 (7th Cir. 1989); *Beller v. Middendorf*, 632 F.2d 788 (9th Cir. 1980). *But cf.* *Meinhold v. United States Dep't of Defense*, 34 F.3d 1469, 1479-1480 (9th Cir. 1994) (enjoining Navy from discharging one specific gay soldier based solely on his statement that he was gay because "in the circumstances under which he made it [,] [it] manifests no concrete, expressed desire to commit homosexual acts[.]" taking it outside court's construction of the regulation at issue); *Pruitt v. Cheney*, 963 F.2d 1160 (9th Cir. 1992) (rejecting First Amendment challenge on merits but holding that plaintiff's complaint stated an equal protection claim); *Watkins v. United States Army*, 875 F.2d 699 (9th Cir. 1989) (en banc) (estopping Army from barring reenlistment of one specific gay soldier without reaching constitutionality of exclusion policy). *Cf.* Jill Elaine Hasday, *Fighting Women: The Military, Sex, and Extrajudicial Constitutional Change*, 93 MINN. L. REV. 96, 158 n.260 (2008) ("The policy change [from the predecessor of Don't Ask, Don't Tell to DADT] was not made under judicial pressure; courts had consistently upheld military policies discriminating against gay servicemembers.").

9. Janie M. Dascenzo & Neal A. May, *Cleaning Out the Pentagon's Closet: An Overview of the Defense Department's Anti-Gay Policy*, 23 U. TOL. L. REV. 433, 465 (1992) ("Perhaps no group has struggled more diligently to end the discrimination faced by homosexuals in the military than gay-activist groups. The Military Freedom Institute at the National Gay and Lesbian Task Force, a lobbying group, is optimistic that the abandonment of the policy is close."); Judith Hicks Stiehm, *Managing the Military's Homosexual Exclusion Policy: Text and Subtext*, 46 U. MIAMI L. REV. 685, 688 n.21 (1992) ("Ironically, at the same time the DOD adopted its strict rule, homosexual civilians were experiencing some success in easing legal restrictions, and advocacy groups were increasingly engaged in public education and political action."); Scott Harris, *Gay Activists Hail Ruling on Military Policy*, L.A. TIMES, Aug. 21, 1991, at A3 (discussing ACLU's involvement in the advocacy movement against the lesbian military exclusion).

10. R.L. Evans, *U.S. Military Policies Concerning Homosexuals: Development, Implementation, and Outcomes*, 11 LAW & SEX. 113, 124 (2002) ("During the 1992 presidential campaign, then-candidate Clinton vowed to 'lift the ban' on sexual minorities serving in the military."); Susan Baer, *Clinton Reaffirms his Promise to End Military's Ban on Gays*, BALTIMORE SUN, Nov. 12, 1992, http://articles.baltimoresun.com/1992-11-12/news/1992317161_1_ban-on-gays-clinton-military-leaders ("Asked after the ceremony about his campaign pledge to lift the ban on gays in the military, he referred to an October 1991 Defense Department study reporting that homosexuality did not affect job performance or pose a security risk. 'We've got a study that says a lot of gays have performed with great distinction in the military,' Mr. Clinton said. 'I don't think status alone, in the absence of some destructive behavior, should disqualify people'. . . Mr. Clinton said he would meet with military leaders to work out procedures for lifting the ban and allowing homosexuals to enter the military. 'How to do it, the mechanics of doing it, I want to consult with military leaders about that,' he said. 'My position is we need everybody in America that's got a contribution to make, that's willing to obey the law and work hard and play by the rules.' Clinton spokesman George Stephanopoulos said the timing of such an executive order

was contained within military regulations,¹¹ not congressional statutes. Clinton met resistance, however, from within his own party.¹² Democrat Sam Nunn, chair of the Senate Armed Forces Committee, spearheaded the efforts that led Congress to codify exclusion of lesbian servicemembers in a federal statute.¹³

The result, the National Defense Authorization Act for Fiscal Year 1994,¹⁴ contained the policy that came to be known, somewhat misleadingly, as “Don’t Ask, Don’t Tell.”¹⁵ The statute requires separation from the armed forces of anyone who “engaged in, attempted to engage in, or solicited another to engage in a homosexual act;” “stated that he or she is a homosexual or bisexual . . . unless . . . the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts;” or has “married or attempted to marry a person known to be of the same biological sex.”¹⁶ The breadth of the statute is underscored by its definition of “homosexual act” as including: “(A) any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires; and (B) any bodily contact which a reasonable person would understand to demonstrate a propensity or intent to engage in an act described in subparagraph (A).”¹⁷ Despite rather glaring First

was still uncertain but that Mr. Clinton is ‘committed’ to lifting the ban. ‘It is something he wants to do,’ he said.”).

11. See *supra* note 7.

12. See William A. Woodruff, *Homosexuality and Military Service: Legislation, Implementation, and Litigation*, 64 UMKC L. REV. 121, 122-123 (1995) (“The President’s decision to lift the ban placed the senior military leadership in the awkward position of publicly opposing the Commander-in-Chief. The split in Congress was equally dramatic with influential members of the President’s own party objecting to the President’s unilateral approach to lift the ban.”); see also Evans, *supra* note 10, at 124 (“Clinton’s vow created a firestorm of opposition among the Joint Chiefs of Staff. Senate Armed Services Committee Chair Sam Nunn, other members of Congress, and other opponents mobilized immediately to block the president’s efforts.”).

13. RHONDA EVANS, THE CTR. FOR THE STUDY OF SEXUAL MINORITIES IN THE MILITARY, U.S. MILITARY POLICIES CONCERNING HOMOSEXUALS: DEVELOPMENT, IMPLEMENTATION AND OUTCOMES, <http://archive.palmcenter.org/files/active/1/evans1.pdf> (last visited Nov. 7, 2016) (“Clinton’s vow created a firestorm of opposition among the Joint Chiefs of Staff. Senate Armed Services Committee Chair Sam Nunn, other members of Congress, and other opponents mobilized immediately to block the president’s efforts.”); *supra* note 12.

14. 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.

15. See generally Sharon E. Debbage Alexander, *A Ban by Any Other Name: Ten Years of “Don’t Ask, Don’t Tell,”* 21 HOFSTRA LAB. & EMP. L.J. 403 (2004) (showing the effect of DADT over ten years of application).

16. 10 U.S.C. §§ 654(b)(1)-(3) (1994) (repealed 2010).

17. 10 U.S.C. § 654(f)(3) (1994) (repealed 2010).

Amendment concerns,¹⁸ courts rejected constitutional challenges to DADT as they had challenges to the predecessor exclusion policy.¹⁹

Until *Log Cabin Republicans v. United States of America*.²⁰

II. THE DEMISE OF DON'T ASK, DON'T TELL: LOG CABIN REPUBLICANS, INTERNATIONAL MILITARY EXPERIENCE, AND THE DON'T ASK, DON'T TELL REPEAL ACT

Log Cabin Republicans arguably ranks as one of the most important decisions of the U.S. District Court for the Central District of California. It resulted in the enjoining of DADT, nationwide, if only for a period measured in days. But U.S. District Judge Virginia Phillips's ruling in this suit, which was brought by attorney Dan Woods of White & Case and his legal team, provided crucial impetus for the ultimately successful effort to get a statutory repeal of DADT enacted by Congress.

The Log Cabin Republicans ("LCR") is, as described today, a group of "LGBT Republicans and allies who support equality under the law for all, free markets, individual liberty, limited government, and a strong national defense."²¹ As provided in the Plaintiffs Memorandum of Points and Authorities, LCR

initiated this action in 2004. The government moved to dismiss and, after a lengthy delay, Judge [George P.] Schiavelli granted the motion with leave to amend as to standing and did not reach the constitutional law issues. Log Cabin amended its complaint in compliance

18. See, e.g., David D. Cole & William N. Eskridge, Jr., *From Hand-Holding to Sodomy: First Amendment Protection of Homosexual (Expressive) Conduct*, 29 HARV. C.R.-C.L. L. REV. 319, 320 (1994) ("This shift to conduct is misleading, however, for the military defines conduct in expansive, Orwellian terms.").

19. See, e.g., *Cook v. Gates*, 528 F.3d 42 (1st Cir. 2008) (rejecting equal protection, due process, and First Amendment challenges to DADT); *Able v. United States*, 155 F.3d 628 (2d Cir. 1998) (rejecting equal protection challenge); *Holmes v. Cal. Army Nat'l Guard*, 124 F.3d 1126, 1132-36 (9th Cir. 1997) (using rational basis review to reject plaintiff's equal protection challenge); *Philips v. Perry*, 106 F.3d 1420 (9th Cir. 1997) (rejecting equal protection and First Amendment challenges); *Thomasson v. Perry*, 80 F.3d 915 (4th Cir. 1996) (en banc) (rejecting equal protection, substantive due process, and First Amendment challenges); *Richenberg v. Perry*, 97 F.3d 256 (8th Cir. 1996) (rejecting First Amendment and equal protection challenges).

20. *Log Cabin Republicans v. United States*, 716 F. Supp. 2d 884 (C.D. Cal. 2010) *vac'd as moot*, *Log Cabin Republicans v. United States*, 658 F.3d 1162 (9th Cir. 2011). *Witt v. Dep't. of the Air Force*, 527 F.3d 806 (9th Cir. 2008) earlier held that DADT as applied in individual cases had to survive a form of heightened scrutiny. On remand, the district court held that Witt's separation pursuant to DADT violated her substantive due process rights, a decision the government chose not to appeal. See *Witt v. Dep't. of the Air Force*, 739 F. Supp. 2d 1308 (W.D. Wash. 2010).

21. *About Us*, LOG CABIN REPUBLICANS, <http://www.logcabin.org/about-us/> (last visited Oct. 21, 2016).

with Judge Schiavelli's order, the government again moved to dismiss, another lengthy delay ensued, and Judge Schiavelli retired without deciding the motion.

The case was eventually reassigned to Judge Virginia A. Phillips,²² and she ultimately rejected the motion to dismiss the amended complaint and set a trial to be held over two weeks in July 2010.²³

After trial, Judge Phillips handed down a memorandum opinion on September 9, 2010,²⁴ and, following post-trial skirmishes,²⁵ an amended and final memorandum and opinion along with findings of fact and conclusions of law on October 12, 2010.²⁶ She had previously rejected LCR's equal protection challenge to DADT based on binding Ninth Circuit precedent.²⁷ But in her final opinion, Judge Phillips concluded that DADT violated LCR's members' substantive due process rights under *Lawrence v. Texas*²⁸ as well as their First Amendment rights.²⁹

The common thread of Judge Phillips's reasoning on these two claims was that DADT did not, and was not necessary to, achieve its aims. On the substantive due process claim, she concluded that "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 [sic]."³⁰ Likewise, on the First Amendment claim, she concluded that "the sweeping reach of the restrictions on speech in the Don't

22. Memorandum of Points and Authorities in Opposition to Defendants' Motion for Summary Judgment at 2, *Log Cabin Republicans*, 716 F. Supp. 2d 884 (No. CV04-8425 VAP(Ex)). Judge Schiavelli had entered a minute order "that the case file was destroyed because it was inadvertently marked 'Closed' by courthouse staff. The Court, however, was able to recover what appears to be copies of the filings. Accordingly, this Court will review the copies to make sure it has all of the materials that were taken under submission on 7/14/2006, and set a hearing at a future date." Civil Minutes, *Log Cabin Republicans*, 716 F. Supp. 2d 884 (No. CV04-8425 VAP(Ex)), Dkt. Entry 34. Another piece of the delay was due to Judge Schiavelli's order staying further proceedings until final disposition of the *Witt* litigation following the decision by the Court of Appeals to remand that case for trial, Order Staying Action, *Log Cabin Republicans*, 716 F. Supp. 2d 884 (No. CV04-8425 VAP(Ex)), Dkt. Entry 52. The case was subsequently transferred to Judge Phillips on Oct. 8, 2008. Order of the Chief Judge, *Log Cabin Republicans*, 716 F. Supp. 2d 884 (No. CV04-8425 VAP(Ex)), Dkt. Entry 65.

23. *Log Cabin Republicans*, 716 F. Supp. 2d at 888 (noting trial held July 13-16 and 20-23).

24. Memorandum Opinion, *Log Cabin Republicans*, 716 F. Supp. 2d 884 (No. CV04-8425 VAP(Ex)), Dkt. Entry 232 (filed concurrently with Findings of Fact & Conclusions of Law).

25. *See id.* at Dkt. Entries 233-239.

26. *Log Cabin Republicans*, 716 F. Supp. 2d. 884.

27. *Id.* at 888 n.2.

28. *Lawrence v. Texas*, 539 U.S. 558 (2003); *Log Cabin*, 716 F. Supp. 2d. at 909, 929.

29. *Log Cabin Republicans*, 716 F. Supp. 2d. at 929.

30. *Id.* at 919.

Ask, Don't Tell Act is far broader than is reasonably necessary to protect the substantial government interest at stake here."³¹ One way of showing that DADT's restrictions are not necessary is to show other comparable nations' experience with military service by lesbian and gay persons. In preparation for and during the trial, LCR, its experts, and its amici extensively addressed such evidence.

For example, Log Cabin Republicans submitted an expert report by Lawrence Korb, who noted that

[t]wenty-four countries allow gay men and lesbians to serve openly in the military. None of these have reported 'any detriment to cohesion, readiness, recruiting, morale, retention or any other measure of effectiveness or quality,' according to the Palm Center, and 'in the more than three decades since an overseas force first allowed gay men and lesbians to serve openly, no study has ever documented any detriment to cohesion, readiness, recruiting, morale, retention' or any other measure of effectiveness or quality in foreign armed services.³²

"Even the British," Dr. Korb reported, "whose military structure and deployment patterns are most similar to ours—and who fiercely resisted allowing gays to serve in the military—were forced to do so by the European Court of Human Rights, and have now seamlessly integrated them."³³ Likewise, LCR's expert Robert J. MacCoun addressed foreign experience with open service. Dr. MacCoun's report concluded that "new evidence from the U.S. military, from foreign militaries, and from multinational forces fails to show any significant deleterious impact of open gays or lesbians on unit cohesion or performance."³⁴

Log Cabin Republicans' Memorandum of Contentions of Fact and Law³⁵ made extensive use of foreign experience. It explained:

At least 23 countries allow homosexual individuals to serve openly in their respective armed forces; these countries include Australia, Austria, Belgium, Canada, the Czech Republic, Denmark, Estonia, Finland, France, Ireland, Israel, Italy, Lithuania, Luxembourg, the

31. *Id.* at 927.

32. Expert Report of Lawrence Korb at 4 n.10, *Log Cabin Republicans*, 716 F. Supp. 2d 884 (No. CV04-8425 VAP(Ex)) (quoting AARON BELKIN ET AL., PALM CENTER, HOW TO END "DON'T ASK DON'T TELL" 8 (2009), <http://archive.palmcenter.org/files/active/0/Executive%20Order%20on%20Gay%20Troops%20-%20final.pdf>).

33. *Id.*

34. Report of Robert J. MacCoun, Ph.D. at 6, *Log Cabin Republicans*, 716 F. Supp. 2d 884 (No. CV04-8425 VAP(Ex)).

35. Plaintiffs' Memorandum of Contentions of Fact and Law, *Log Cabin Republicans*, 716 F. Supp. 2d 884 (No. CV04-8425 VAP(Ex)).

Netherlands, New Zealand, Norway, Slovenia, South Africa, Spain, Sweden, Switzerland, and the United Kingdom. American forces are stationed in many of those countries, often alongside members of those nations' armed forces, and they study and train together with those nations' forces, frequently as seamlessly integrated units. None of these nations—including several which have specifically studied the issue—has reported any detriment to any metric of military effectiveness, including unit cohesion, readiness, morale, retention, good order, or discipline. Indeed, in our most closely allied nations such as Britain, Canada, and Israel, homosexuals serve openly in the highest positions. In both Afghanistan and Iraq, members of the United States Armed Forces have fought and continue to fight side by side with coalition forces from nations whose forces include openly homosexual servicemembers and commanding officers, with no adverse effects.³⁶

LCR's memorandum found confirmation of its conclusions about the lack of necessity of DADT in "[i]ndependent studies and research," specifically studies by the Palm Center at the University of California, Santa Barbara in 2000 and 2010.³⁷ "[E]xhaustive studies to assess the effects of openly homosexual service [sic] in Britain, Israel, Canada, and Australia" by the Palm Center "found . . . that not one person had observed any impact or any effect at all that undermined military performance, readiness, or cohesion, led to increased difficulties in recruiting or retention, or increased the rate of HIV infection among the troops."³⁸

These factual contentions about other militaries' experiences had significance for LCR's legal claims. For example, in supplemental briefing regarding substantive due process, LCR argued: "Log Cabin Republicans also plead that the military has successfully coordinated with U.S. and foreign military and government entities that do proudly accept the participation of gays and lesbians, thereby belying any claim that DADT is 'necessary' to the successful 'management of the military.'"³⁹ In resisting the government's motion for summary judgment, LCR maintained that it had presented Judge Phillips with "voluminous evidence in the form both of expert opinion from seven distinguished academics, researchers, and scholars, and of reports and documents from the government's own records. That evidence shows

36. *Id.* at 15-16.

37. *Id.* at 16.

38. *Id.* (citations and internal quotations omitted).

39. Plaintiff's Supplemental Brief Re: Substantive Due Process Pursuant to January 29, 2009 Minute Order at 3, *Log Cabin Republicans*, 716 F. Supp. 2d 884 (No. CV04-8425 VAP(Ex)).

that DADT had no rational basis when enacted and continues to have no rational basis today . . .”⁴⁰ As “[s]pecific[]” support for this claim, LCR argued:

- When DADT was enacted, some comparable foreign militaries, e.g., Canada, had already changed their policies to allow open service by homosexuals without any negative impact on unit cohesion, a factor ignored by Congress;
- Many comparable foreign countries’ militaries have, both before and since the enactment of DADT, changed their policies to permit open service by homosexuals without any negative impact on unit cohesion;
- U.S. troops fight side-by-side with openly homosexual members of the armed forces of foreign militaries without any impact on unit cohesion and, in some instances, are commanded by openly homosexual officers from other countries[.]⁴¹

Despite the extent of LCR’s reliance on them, other nations’ experiences with military service by lesbian persons did not feature prominently in Judge Phillips’s opinion. When Congress was considering DADT in 1993, General Colin Powell was among those who testified. As summarized by Judge Phillips in her opinion, “General Powell testified that despite the official position of nondiscrimination towards homosexuals in the militaries of countries such as Canada, Germany, Israel, and Sweden, practice does not always match policy, and homosexuals are often subjected to discrimination in those militaries.”⁴² The judge did not expressly state whether or not she accepted Powell’s testimony as factually accurate.

She did, however, note trial evidence favorable to LCR in her Findings of Fact and Conclusions of Law. Dr. Lawrence Korb “testified before the Senate Armed Services Committee on March 31, 1993 concerning the likely impact on unit cohesion if homosexuals were permitted to serve openly.”⁴³ He testified, she observed, “concerning the experiences of foreign militaries and domestic law enforcement agencies that had integrated homosexual servicemembers, and stated that their integration had not adversely affected unit cohesion or performance in those entities.”⁴⁴

40. Memorandum of Points and Authorities in Opposition to Defendants’ Motion for Summary Judgment at 1-2, *Log Cabin Republicans*, 716 F. Supp. 2d 884 (No. CV04-8425 VAP(Ex)).

41. *Id.* at 17-18.

42. *Log Cabin Republicans*, 716 F. Supp. 2d at 914.

43. *Id.* at 913.

44. *Id.* at 947.

Although these statements too could be read as mere repetitions of the fact that someone took a certain position, that does not seem the best interpretation. For later in her findings and conclusion, Judge Phillips recounted:

According to Professor MacCoun, the RAND working group concluded that task cohesion [i.e., one particular type of unit cohesion⁴⁵] was paramount; it was a more important predictor of military performance than social cohesion, and service in the Armed Forces by openly homosexual members was not seen as a serious threat to task cohesion. Therefore, the recommendation to Secretary of Defense Les Aspin from the RAND Corporation in the 1993 Report [which relied upon the experiences of other countries with service by openly gay and lesbian people] was that sexual orientation should not be viewed as germane to service in the military; the 1993 Report made various recommendations regarding the implementation of this change.⁴⁶

“Thus,” Judge Phillips next concluded, “the evidence at trial demonstrated that the Act does not further significantly the Government’s important interests in military readiness or unit cohesion, nor is it necessary to further those interests.”⁴⁷ At least in part for such reasons, Judge Phillips held that DADT failed heightened scrutiny.

The evidence from foreign military experience showing successful functioning with open service by lesbian and gay persons also helps provide a better explanation of Judge Phillips’s additional holding that DADT violated lesbian and gay servicemembers’ First Amendment rights. As mentioned above,⁴⁸ Judge Phillips concluded that “the sweeping reach of the restrictions on speech in the Don’t Ask, Don’t Tell Act is far broader than is reasonably necessary to protect the substantial government interest at stake here.”⁴⁹ Most of her analysis stressed the breadth of the speech that was suppressed or deterred by DADT.⁵⁰ She did make the point that in some respects, such as by inhibiting personal speech that can facilitate trust between servicemembers, DADT’s limitations “actually serve to impede military readiness and unit cohesion rather than further these goals.”⁵¹

45. See *id.* at 912-13 (articulating distinction between social cohesion and task cohesion).

46. *Id.* at 956. Earlier in her opinion, Judge Phillips characterized Dr. MacCoun’s testimony as “cogent and persuasive.” *Id.* at 922.

47. *Id.* at 956.

48. *Supra* text accompanying note 31.

49. *Log Cabin Republicans*, 716 F. Supp. 2d at 927.

50. See *id.* at 927-28.

51. *Id.* at 928.

By and large, though, she simply repeats the conclusion that the ways that DADT chills servicemember speech are not necessary for military readiness and unit cohesion.⁵² Referring readers back to an earlier portion of her opinion, Judge Phillips's double-negative asserts that a range of evidence—including Colin Powell's views noted earlier in this Essay⁵³—“does not suffice to show the Act's restrictions on speech are ‘no more than is reasonably necessary’ to achieve the goals of military readiness and unit cohesion.”⁵⁴ Perhaps implicit in her cross-reference to her summary of testimony by LCR's expert Dr. Lawrence Korb⁵⁵ is the inference that if nations such as Great Britain with military experience roughly comparable to that of the U.S. have not suffered impairment of their military functioning from letting lesbian and gay persons serve openly, then it is not necessary for the U.S. to restrict such open service in order to protect military functioning.

Having concluded that DADT was doubly unconstitutional, Judge Phillips ordered a permanent injunction against enforcement of it.⁵⁶ As then General Counsel of the U.S. Department of Defense, Jeh Johnson, later put it, Judge Phillips “issued a worldwide injunction to stop the enforcement of the ‘Don't Ask, Don't Tell’ law and policy in every respect . . . in a force of more than two million people worldwide”⁵⁷ Although the U.S. Court of Appeals for the Ninth Circuit shortly stayed the injunction, this was, to put it mildly, still a big deal.⁵⁸ As a consequence, the military did briefly suspend enforcement of DADT and enlisted openly gay servicemembers.⁵⁹

52. *See id.* at 927 (“far broader than is reasonably necessary to protect the substantial government interest at stake”); *id.* (“a vast range of speech, far greater than necessary to protect the Government's substantial interests”); *id.* at 928 (“broader than reasonably necessary to protect the Government's substantial interests”); *id.* (“restricts speech more than reasonably necessary to protect the Government's interests”).

53. *Id.* at 914; *supra* text accompanying note 42.

54. *Log Cabin Republicans*, 716 F. Supp. 2d at 928 (citing section IV(C)(1) of Judge Phillips opinion).

55. *Id.* at 913.

56. *Id.* at 888, 929.

57. Jeh C. Johnson, *Implementation of “Don't Ask, Don't Tell” Repeal*, 5 ALB. GOV'T L. REV. 407, 419 (2012).

58. *See, e.g., A look at some of the top national and international news events of 2010*, CAN. PRESS (Dec. 30, 2010) available on Westlaw at 12/30/10 Can. Press 00:00:00 (reporting that “Federal judge in California issues worldwide injunction ordering U.S. military to immediately suspend its 17-year ‘don't ask, don't tell’ policy after ruling in September it was unconstitutional; another court grants a stay 8 days later pending U.S. government appeal.”).

59. *See, e.g., Warren Richey, No Delay For ‘Don't Ask, Don't Tell’ Ruling, So Pentagon Takes Gays For Now*, CHRISTIAN SCI. MONITOR (Oct. 19, 2010), <http://www.csmonitor.com/USA/Justice/2010/1019/No-delay-for-don-t-ask-don-t-tell-ruling-so-Pentagon-takes-gays-for-now> (“The Pentagon's undersecretary for personnel and readiness, Clifford Stanley, said in a memo

Ultimately, the Court of Appeals directed that *Log Cabin Republicans* be vacated as moot once DADT was repealed by Congress.⁶⁰ Indeed, in a somewhat unusual display of intent that Judge Phillips's actions in the case be a legal nullity, the Court of Appeals emphatically declared that it was vacating "the district court's judgment, injunction, opinions, orders, and factual findings—indeed, all of its past rulings—to clear the path completely for any future litigation. Those now-void legal rulings and factual findings have no precedential, preclusive, or binding effect."⁶¹

This most recent chapter in the saga of how the congressional repeal of the military exclusion of LGBT persons came about,⁶² as Jeh Johnson has recounted, started with Barack Obama's 2008 presidential campaign pledge to work with the military to craft a repeal of DADT.⁶³ In his January 2010 State of the Union address, President Obama announced that "[t]his year, I will work with Congress and our military to finally repeal [Don't Ask, Don't Tell] . . ."⁶⁴ Secretary of Defense Robert Gates "announced the appointment of a high-level DOD internal working group to assess essentially two things: one, the risk to overall military effectiveness of the repeal of 'Don't Ask, Don't Tell,' if the law were repealed, and, two, what recommendations for new policies we would make in the event that the law was repealed."⁶⁵ The working group produced a report released publicly in November 2010, titled *Report of the Comprehensive Review of the Issues Associated with a Repeal of "Don't Ask, Don't Tell."*⁶⁶ Congress passed the

that openly gay recruits are now free [sic] begin the process of joining the military."); Symposium, *Don't Ask, Don't Tell: Beyond the Log Cabin Republicans Injunction and the Defense Authorization Act*, 1 AM. U. LAB. & EMP. L.F. 127, 132-33 (2011) (remarks by David Rittgers) (noting that "on October 20, Lieutenant Daniel Choi, an openly gay man who had previously been discharged under DADT, re-enlisted").

60. *Log Cabin Republicans v. United States*, 658 F.3d 1162, 1168 (9th Cir. 2011).

61. *Id.*

62. For discussion of earlier phases of the repeal effort, see generally Michelle Benecke, *Turning Points: Challenges and Successes in Ending Don't Ask, Don't Tell*, 18 WM. & MARY J. WOMEN & L. 35 (2011).

63. Johnson, *supra* note 57, at 408.

64. *Id.* at 410 (quoting President Barack H. Obama, Address Before a Joint Session of Congress on the State of the Union Address (Jan. 27, 2010)).

65. *Id.* at 411.

66. JEH C. JOHNSON & CARTER F. HAM, DEPT. OF DEF., COMPREHENSIVE REVIEW OF THE ISSUES ASSOCIATED WITH A REPEAL OF "DON'T ASK, DON'T TELL" (2010), <https://archive.org/details/ComprehensiveReviewOfTheIssuesAssociatedWithARepealOfdontAsk>.

Don't Ask, Don't Tell Repeal Act of 2010 on December 18,⁶⁷ and President Obama signed it December 22.⁶⁸

The Act did not repeal DADT when the President signed it. Rather, it required that the President, the Secretary of Defense, and the Chairman of the Joint Chiefs certify to Congress, first, that they had "considered the recommendations contained in the report and the report's proposed plan of action;"⁶⁹ second, that the DOD "ha[d] prepared the necessary policies and regulations to exercise the discretion provided by" the repeal act;⁷⁰ and, third, that "the implementation of necessary policies and regulations . . . is consistent with the standards of military readiness, military effectiveness, unit cohesion, and recruiting and retention of the Armed Forces."⁷¹ Then, following the passage of sixty days, the DADT statute would be repealed.⁷² The President delivered the required certification to Congress on July 22, 2011, and DADT was accordingly repealed effective September 20.⁷³ Following the repeal, the U.S. Court of Appeals for the Ninth Circuit, as mentioned above, vacated Judge Phillips's work in *Log Cabin Republicans* on September 29, 2011.⁷⁴

Nevertheless, the impact of *Log Cabin Republicans* and Judge Phillips's (briefly enforced) injunction far exceeds the enabling of some servicemembers to enlist during those few days of October 2010 while the injunction was in force. Congress's repeal of DADT was unlike its adoption of DADT in a key respect. As Jill Elaine Hasday has noted, the statutory enactment of DADT in 1993 "was not made under judicial pressure;" at the time, "courts had consistently upheld military policies discriminating against gay servicemembers."⁷⁵

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

68. Johnson, *supra* note 57, at 420 (citing H.R. 2965, 111th Cong. (2010)) (House amendment passed in the Senate on Dec. 18, 2010).

69. 124 Stat. 3515 § 2(b)(2)(A).

70. 124 Stat. 3515 § 2(b)(2)(B).

71. 124 Stat. 3515 § 2(b)(2)(C).

72. 124 Stat. 3515 § 2(b).

73. Press release, Leon E. Panetta & Mike Mullen, DOD News Briefing with Secretary Panetta and Adm. Mullen from the Pentagon (Sept. 20, 2011), <http://archive.defense.gov/transcripts/transcript.aspx?transcriptid=4886> ("As of 12:01 a.m. this morning, we have the repeal of "Don't Ask, Don't Tell," pursuant to the law that was passed by the Congress last December."); Johnson, *supra* note 57, at 420 ("That certification was delivered to the Congress on July 22, 2011, and the law took effect, repealing "Don't Ask, Don't Tell" sixty days after that, which is how you get to September 20, 2011.").

74. *Log Cabin Republicans v. United States*, 658 F.3d 1162, 1166-68 (9th Cir. 2011).

75. Jill Elaine Hasday, *Fighting Women: The Military, Sex, and Extrajudicial Constitutional Change*, 93 MINN. L. REV. 96, 158 n.260 (2016).

In marked contrast, the congressional repeal of DADT was effectuated against the backdrop of the ongoing *Log Cabin Republicans* litigation. The lawsuit was filed by Dan Woods on October 12, 2004, and an amended complaint filed April 28, 2006.⁷⁶ President Obama's election was more than two years after that. So, although the review process that Obama initiated started early in 2010, before Judge Phillips's worldwide injunction against DADT, the case pre-dated that development. Furthermore, Judge Phillips presided over the trial in July of 2010,⁷⁷ more than four months before the working group completed and released its report. Even before trial, Judge Phillips had rejected the defendants' efforts to have DADT assessed under rational basis review, instead measuring the policy's consistency with substantive due process under the form of heightened scrutiny that the Ninth Circuit Court of Appeals had adopted in 2008 in *Witt v. Department of the Air Force*.⁷⁸

Accordingly, the prospects of losing should have been clear to the government long before Judge Phillips's injunction. Indeed, I think the defense's legal strategy in the case reflected such awareness. In addressing the merits of the constitutional challenge, Judge Phillips noted that:

Defendants did not specifically identify any item of legislative history upon which they are relying in their Memorandum of Contentions of Law and Fact; Defendants only identified specific items of the legislative history during their closing argument at trial Defendants did not include precise citations to any portion of the above-referenced materials to support the constitutionality of the Policy.⁷⁹

This choice might be interpreted in line with conspiracy theories that President Obama was trying to have the Justice Department lose the case.⁸⁰ It is, however, more plausible that the DOJ attorneys were

76. Order Granting Defendants' Motion To Dismiss Without Prejudice at 14-15, *Log Cabin Republicans v. United States*, 716 F. Supp. 2d 884 (C.D. 2010) (No. CV04-8425 VAP(Ex)) (granting the defendants' motion to dismiss the original complaint for lack of associational standing).

77. *See Log Cabin Republicans v. United States*, 716 F. Supp. 2d 884, 888 (C.D. Cal. 2010).

78. *See, e.g., id* at 911 (citing *Witt v. Dep't of Air Force*, 527 F.3d 806 (9th Cir. 2008)); Order Denying Defendants' Motion for Summary Judgment at 6-9, *Log Cabin Republicans*, 716 F. Supp. 2d 884 (C.D. 2010) (No. CV04-8425 VAP(Ex)). *Witt*, however, had held "that this heightened scrutiny analysis is as-applied rather than facial." *Witt*, 527 F.3d at 819. Judge Phillips's order extended that standard of review.

79. *Log Cabin Republicans*, F. Supp. 2d at 911.

80. *See, e.g.,* Devin Dwyer, "Don't Ask, Don't Tell": Is Obama Administration Bound to Defend Law it Opposes?, ABC NEWS (Oct. 21, 2010), <http://abcnews.go.com/Politics/don't-debate-obama-administrations-legal-defense-gay-ban/story?id=11928405> (noting that "the legal de-

trying to create an illusion of legality in the face of a statute that clearly could not survive any heightened scrutiny (as many legal scholars have long maintained of both DADT and its predecessor policy⁸¹). That is, one could see the government lawyers as having made the choice to try to limit the evidence the court could consider in light of a realization that if the court were not constrained in some artificial way, the policy would almost certainly fail. Hence, the government's desperate and not very plausible contention that because LCR challenged DADT on its face, the court could only consider its legislative history and no other evidence.⁸² Judge Phillips was right to side with LCR and reject this attempt to cabin her analysis so as to blink reality.⁸³

In sum, then, the writing was on the wall that DADT would fail constitutional scrutiny in Judge Phillips's court. Since she was applying the level of scrutiny set by the Ninth Circuit Court of Appeals in the *Witt* case, a decision of which the government declined to seek review in the Supreme Court, DADT also appeared destined to doom on appeal. Furthermore, with the Commander-in-Chief of the armed forces already on record as viewing DADT as harming the military and the nation⁸⁴ and median Justice Anthony Kennedy having authored the Court's major "gay rights" opinions in *Romer v. Evans*⁸⁵ and *Lawrence v. Texas*,⁸⁶ DADT's prospects in the Supreme Court also were

fense the administration has mounted has drawn sharp criticism from supporters of 'don't ask, don't tell,' some of whom have suggested the administration has been complicit in the situation that led to Phillips' injunction ending the ban on openly gay troops" and quoting Ed Whelan, president of the conservative Ethics and Public Policy Center, as saying "The fact that DOJ has filed a formal notice of appeal shouldn't distract from the deeper scandal that the political appointees at DOJ have been only pretending to mount a vigorous defense of DADT while in fact operating to undermine it").

81. See, e.g., Arthur S. Leonard, *Exorcising the Ghosts of Bowers v. Hardwick: Uprooting Invalid Precedents*, 84 CHL.-KENT L. REV. 519, 556-57 (2009) (fails heightened scrutiny); Robert I. Correales, *Don't Ask, Don't Tell: A Dying Policy on the Precipice*, 44 CAL. W. L. REV. 413, 454 (2008) (fails "searching rational basis review"); Shannon Gilreath, *Sexually Speaking: "Don't Ask, Don't Tell" and the First Amendment after Lawrence v. Texas*, 14 DUKE J. GENDER L. & POL'Y 953, 967-68 (2007) (fails strict scrutiny).

82. *Log Cabin Republicans*, F. Supp. 2d at 895 ("According to Defendants, because Plaintiff challenges the constitutionality of the statute on its face, rather than challenging its application, the only evidence the Court should—indeed may—consider, is the statute itself and the bare legislative history; thus, according to Defendants, all other evidence is irrelevant.").

83. *Id.* at 895-97.

84. See *id.* at 919 (quoting President Barack Obama, Remarks at the White House (June 29, 2009)) ("'Don't Ask, Don't Tell' doesn't contribute to our national security . . . preventing patriotic Americans from serving their country weakens our national security. [R]everting this policy [is] the right thing to do [and] is essential for our national security.").

85. *Romer v. Evans*, 517 U.S. 620 (1996).

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

not great. Thus, the potential for judicial invalidation of DADT was real and quite significant.

Judicial repeal of DADT was also *not* something that the DOD wished to see. In an interview on CNN, Defense Secretary Robert Gates described an exchange he had with President Obama right after Judge Phillips issued her injunction: “I said ‘You, you really can’t let this be done by an act of a single judge, or by your executive order. This needs to be done with the consent and the support of the Congress.’”⁸⁷ As Jeh Johnson recounted:

[O]ur leadership . . . believed that if the law was going to be repealed, it should not be by judicial fiat. Rather, repeal should occur in an orderly manner through the political branches of government, through the democratic process, Congress, the executive branch, with training, and with education. A large part of the Secretary of Defense’s appeal to Congress for immediate repeal in the lame duck session was to spare us from judicial fiat. I know that also had a huge impact on a number of members of Congress that I spoke to, both Republicans and Democrats.⁸⁸

I would not use the word “fiat” myself, with its frequent connotation of unreasoned will or excessively concentrated power—not characteristics I would ascribe to courts exercising reasoned judgment to apply constitutional law to DADT. Nonetheless, the articulated concern shows the importance of Judge Phillips’s ruling in *Log Cabin Republicans* to the statutory repeal of DADT.

III. A BRIEF NOTE ON THE REPEAL OF THE CATEGORICAL ANTI-TRANSGENDER BAN

As alluded to in Part I of this Essay,⁸⁹ until very recently, the armed forces of the United States categorically barred transgender persons from military service. As Allison Ross has described, medical fitness standards requiring physical and psychological examinations screened out transgender persons at the time of enlistment.⁹⁰ Should transgender persons manage to enlist (whether or not they realized they were transgender at that time), any activity to present themselves

87. *Q&A with Robert Gates* (C-SPAN television broadcast Jan. 22, 2016), available at <http://www.c-span.org/video/?402922-1/qa-robert-gates>.

88. Johnson, *supra* note 57, at 419.

89. See *supra* text accompanying note 7.

90. Allison Ross, *The Invisible Army: Why the Military Needs to Rescind Its Ban on Transgender Service Members*, 23 S. CAL. INTERDISC. L.J. 185, 189-90 (2014) (recounting a variety of physical and mental conditions that Army standards, for illustrative purposes, use to exclude transgender persons, whether or not they have undergone any bodily transition procedures).

consistently with their gender, including such things as taking hormones, subjected them to separation on grounds such as enlistment violations, “cross-dressing,” and failure to report outside (non-service provided) medical care.⁹¹ And the applicability of these various military regulations to recalled members of the inactive reserves pressured servicemembers to delay their transitions or face separation.⁹²

This web of regulatory exclusions was unnecessary and unjust. Transgender persons – Mick Andoso, Allyson Robinson, Paula Neira,⁹³ Shane Ortega,⁹⁴ Landon Wilson,⁹⁵ Kristin Beck,⁹⁶ and literally untold countless others⁹⁷— have served honorably and effectively. As the American Psychiatric Association has recognized with its replacement of the diagnosis of “gender identity disorder” with “gender dysphoria” in the *Diagnostic and Statistical Manual of Mental Disorders* in 2013,⁹⁸ persons’ simply being transgender does not necessarily entail that they have psychopathologies that might interfere with their functioning. Furthermore, as Allison Ross has detailed,⁹⁹ “[d]isqualifying transgender service members because of medical concerns is inconsistent with how the military generally addresses other medical conditions and diagnoses.”¹⁰⁰

Ross’s note is only one of a number of works of legal scholarship that have criticized the exclusion of transgender servicemembers.¹⁰¹

91. *Id.* at 190-91.

92. *Id.* at 191-92.

93. *See id.* at 194-95 (describing their circumstances).

94. Sunnive Brydum, *Meet the First Out Trans Soldier in the U.S. Military*, THE ADVOCATE (Apr. 10, 2015, 4:19 PM), <http://www.advocate.com/politics/transgender/2015/04/10/meet-first-out-trans-soldier-us-military>.

95. Jonathan Lapook, *Transgender People Push for Acceptance in Military – and Beyond*, CBS NEWS (Mar. 17, 2015, 7:05 PM), <http://www.cbsnews.com/news/transgender-people-hope-for-acceptance-in-military-society/>.

96. Devin Friedman, *Kristin Beck: A Navy SEAL in Transition*, GQ MAG., (Nov. 25, 2015, 6:00 AM), <http://www.gq.com/story/kristin-beck-transgender-navy-seal>.

97. Leora F. Eisenstadt, *Fluid Identity Discrimination*, 52 AM. BUS. L.J. 789, 801 (2015) (“Recent estimates suggest that despite the military’s current policy ‘more than 15,000 transgender individuals [serve] in the military[,] the National Guard and the Reserve.’”) (quoting Helene Cooper, *Hagel ‘Open’ to Reviewing Military’s Ban on Transgender People*, N.Y. TIMES, May 12, 2014, at A12).

98. AM. PSYCHIATRIC ASS’N., DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 451-59 (5th ed. 2013).

99. Ross, *supra* note 90, at 196-99 (comparing situation of transgender servicemembers to those of servicemembers who take hormones, are diabetic, or are pregnant).

100. *Id.* at 196.

101. *See also* Kevin M. Barry, et al., *A Bare Desire to Harm: Transgender People and the Equal Protection Clause*, 57 B.C. L. REV. 507, 512 (2016) (arguing that “[a] successful equal protection challenge [to the ADA’s exclusion of discrimination based on gender identity disorder] will also reach far beyond disability rights to any laws that single out transgender people for

Much activism challenged it as well.¹⁰² Transgender Marine Corp vet Dee Fulcher, Transgender Army vet Giuliano Silva, and the Transgender American Veterans Association petitioned the Secretary of Veterans Affairs to change VA rules that impose a blanket ban on providing transition-related surgeries to transgender veterans.¹⁰³ The ACLU and the Palm Center (a think tank at UC Santa Barbara that received over \$1 million for a Transgender Military Service Initiative¹⁰⁴) convened a day-long conference in 2014 to “continue building a strategic roadmap to help the United States join the rank[s] of the other 18 countries that allow transgender military service.”¹⁰⁵ Organizations such as SPARTA¹⁰⁶ campaigned for the end of transgender military exclusion.¹⁰⁷

disparate treatment. This includes current DOD policies that prohibit military service on the basis of ‘transsexualism’ and ‘transvestism,’”) (footnote omitted); Mark R. Milhiser, *Transgender Service: The Next Social Domino for the Army*, 220 MIL. L. REV. 191 (2014); Matthew F. Kerrigan, *Transgender Discrimination in the Military: The New Don’t Ask, Don’t Tell*, 18 PSYCHOL. PUB. POL’Y. & L. 500 (2012).

This is not to imply that all legal scholars or all trans persons support removing barriers to transgender persons serving in the military. Cf. Gabriel Arkles, *No One Is Disposable: Going Beyond the Trans Military Exclusion Debate*, 13 SEATTLE J. FOR SOC. JUST. 459, 468-69, 512-14 (2014) (quite carefully not expressly answering whether or not the current exclusion should be ended, while being very critical of the U.S. military); Chris Geidner, *Meet The Trans Scholar Fighting Against The Campaign For Out Trans Military Service*, BUZZFEED (Sept. 9, 2013, 2:03 PM), https://www.buzzfeed.com/chrisgeidner/meet-the-trans-scholar-fighting-against-the-campaign-for-out?utm_term=.RepBky2Q8r#.fm1R6EGbWY (quoting transgender legal scholar Dean Spade, without claiming that Spade thinks the exclusion should in fact remain in place, as saying “This [the campaign for transgender military service] is shoddy window dressing for the realities of U.S. militarism, which is bad for the world and certainly bad for populations, like women and LGBT people, who are targets of sexual and gender violence.”). For a respectful yet pointed response to Spade, see Brynne Tannehill, *We’re Not Astroturf: Why Open Trans Military Service Is a Worthy Fight*, HUFFINGTON POST (Sept. 16, 2013, 7:46 PM), http://www.huffingtonpost.com/brynn-tannehill/were-not-astroturf_b_3903502.html.

102. See, e.g., Tannehill, *supra* note 101 (“I am out in front and pushing this because the people I represent still have to serve in silence. Over the past 18 months we have worked together with LGB and straight allies, many of whom are veterans of the DADT fight, to raise awareness of this issue.”).

103. Katy Steinmetz, *Exclusive: Transgender Veterans Petition the V.A. to Lift Blanket Ban on Surgery*, TIME (May 10, 2016), <http://time.com/4324586/transgender-veterans-affairs-surgery-petition/>; *Petition for Rulemaking to Promulgate Regulations Governing Provision of Sex Reassignment Surgery to Transgender Veterans* (May 9, 2016), http://www.lambdalegal.org/sites/default/files/petition_va_20160509_surgery-for-transgender-veterans.pdf.

104. Margaret Eby, *How Colonel Jennifer Pritzker Pushes for Transgender Rights in Military*, FORWARD (Nov. 11, 2014), <http://forward.com/culture/208832/how-colonel-jennifer-pritzker-pushes-for-transgend/>.

105. Remington Gregg, *Working Toward LGBT Inclusion in the Armed Forces*, HUM. RTS. CAMPAIGN (Oct. 21, 2014), <http://www.hrc.org/blog/pushing-for-transgender-military-service>.

106. *Homepage*, SPARTA, www.spartapride.org (last visited Oct. 23, 2016).

107. See, e.g., Sandhya Somashekhar, *Gay rights groups urge military to lift ban on transgender service members*, WASH. POST (Feb. 23, 2015), <https://www.washingtonpost.com/politics/>

One upshot of activism on the issue, combined with receptiveness from the Obama administration, was an examination by the armed forces of the issue of transgender military service. “[I]n July 2015, Secretary of Defense Ashton Carter announced that DoD would create a working group to study the policy and readiness implications of welcoming transgender persons to serve openly.”¹⁰⁸ As part of the review, the RAND National Defense Research Institute—the same one that found no need for the lesbian exclusion in 1993—was not only asked to study the implications of allowing open military service by transgender individuals, but in particular, as one of three specified tasks, to “review the experiences of foreign militaries that permit transgender service members to serve openly.”¹⁰⁹

Out of the eighteen countries that allow transgender individuals to serve openly in their armed forces, the RAND study concentrated on Australia, Canada, Israel, and the UK because they had “the most well-developed and publicly available policies on transgender military personnel.”¹¹⁰ This review helped RAND identify a variety of “best practices” for dealing with such military service.¹¹¹ Perhaps most importantly, the study found that “[i]n no case was there any evidence of an effect on the operational effectiveness, operational readiness, or cohesion of the force” of a foreign country from open service by transgender persons.¹¹²

Finally, after some delay,¹¹³ the military announced regulatory changes that repealed the categorical ban. Directive-type Memorandum 16-005, “Military Service of Transgender Servicemembers,”

gay-rights-groups-urge-military-to-lift-ban-on-transgender-service-members/2015/02/23/c056e5b6-bb73-11e4-8668-4e7ba8439ca6_story.html.

108. AGNES GEREKEN SCHAEFER ET AL., RAND, ASSESSING THE IMPLICATIONS OF ALLOWING TRANSGENDER PERSONNEL TO SERVE OPENLY, at iii (2016), available at http://www.rand.org/pubs/research_reports/RR1530.html.

109. *Id.*

110. *Id.* at xii.

111. *See id.* at xiii, 45, 49-62.

112. *Id.* at xiii.

113. *See, e.g.*, Michael S. Schmidt, *Study Finds Few Obstacles to Lifting Military's Transgender Ban*, N.Y. TIMES, May 16, 2016, at A10 (“The RAND study was completed in March, and Brad Carson, the senior Pentagon official in charge of the working group, gave a memo to defense officials in April on how to carry out the policy change. [¶] But since then, Mr. Carson has resigned, the process has stalled, and Mr. Carter has declined to release the report. Mr. Carter’s aides said they had a policy of not releasing reports until after a decision directly tied to them was made, but transgender advocates have accused Mr. Carter of sitting on the report because it shows that there would be few hurdles to allowing transgender people to serve openly.”); Dan Lamothe, *Plan to allow open transgender military service tripped up by internal resistance*, WASH. POST, Checkpoint, May 15, 2016, <https://www.washingtonpost.com/news/checkpoint/wp/2016/05/15/disagreements-slow-pentagons-plan-to-allow-transgender-service-members/>.

“[e]stablishes policy, assigns responsibilities, and prescribes procedures for the standards for retention, accession, separation, in-service transition, and medical coverage for transgender personnel serving in the Military Services.”¹¹⁴ This DTM provides that “[e]ffective immediately, no otherwise qualified Service member may be involuntarily separated, discharged or denied reenlistment or continuation of service, solely on the basis of their gender identity.”¹¹⁵ Notably, in explaining the process the military used to study the potential policy change, Defense Secretary Carter made a point of noting that “[w]e looked carefully at what lessons could be learned from the outside, including from allied militaries that already allow transgender servicemembers to serve openly”¹¹⁶

Despite some predictable criticism from the political right,¹¹⁷ the policy shift is an important, although flawed¹¹⁸ and incomplete,¹¹⁹

114. Directive-Type Memorandum (DTM) 16-005, Military Service of Transgender Service Members, at 1 (June 30, 2016), http://www.defense.gov/Portals/1/features/2016/0616_policy/DTM-16-005.pdf.

115. *Id.* at attachment p.1.

116. Ash Carter, *DoD Transgender Policy Changes: New Policy will End Ban on Transgender Americans in the United States Military*, MEDIUM (June 30, 2016), <https://medium.com/@SecDef/dod-transgender-policy-changes-4f473b21b416>.

117. *See, e.g.*, Press Release, U.S. House Representative Brian Babin, Military Should Not Be Used as Vehicle for Obama’s Social Engineering, (June 30, 2016), available at <http://babin.house.gov/news/documentsingle.aspx?DocumentID=849> (decrying “another needless distraction by this President that puts his personal liberal social agenda ahead of military preparedness and training” and “the Obama Administration’s social experiments”); FAM. RES. COUNCIL, *Family Research Council Criticizes Pentagon for Transgender Policy Change* (June 30, 2016), <http://www.frc.org/newsroom/family-research-council-criticizes-pentagon-for-transgender-policy-change> (lamenting “another example of President Obama using America’s military to fight culture wars instead of to fight real wars against the enemies of our nation”); David French, *The Pentagon’s New Policy on Transgender Soldiers Is Pure Social Engineering*, NAT’L REV. (June 30, 2016), <http://www.nationalreview.com/corner/437360/pentagon-new-policy-transgender-soldiers-pure-social-engineering> (purportedly fearing use of this policy change “to retrain the ranks about the very concepts of sex and gender, introducing radical LGBT theology as the government-approved, Army-mandated world view”); Greg Corombos, *Obama’s Transgender Policy ‘Devastating’ Military*, WORLD NEWS DAILY (July 3, 2016, 7:12 PM), <http://www.wnd.com/2016/07/obamas-transgender-policy-devastating-military/> (quoting Elaine Donnelly, President of the Center for Military Readiness – which worked unsuccessfully to retain the exclusion of lesbian persons from the military – as lambasting the policy because it “will encourage indiscipline and sexual tension and a range of problems that have nothing to do with strengthening the Armed Forces”).

118. Perhaps the most glaring flaw of the new policy is its specification that “transgender people wishing to sign up after the lifting of the ban must prove that they have been stable in their gender identity for 18 months before being medically cleared to serve.” Michael Lambert, *Transgender Americans Can Have Rights, Leaders Say—As Long As They Stick to the Binary*, OUT MAG. (July 7, 2016, 12:51 PM), <http://www.out.com/news-opinion/2016/7/07/transgender-americans-can-have-rights-leaders-say-long-they-stick-binary>. The National Center for Transgender Equality has criticized this period on the ground that “Eighteen months is much longer

achievement. It puts an end to the categorical exclusion of individuals from military service simply because they are transgender or undertake transition procedures. It saves resources by forestalling the separation of (expensively) trained and competent military personnel for reasons that do not compromise their ability to do their job. It makes the forces that defend the United States more representative of the people of the country. We should be grateful for all that, and to all those who helped pave the way by contributing to the repeal of DADT, not least Judge Virginia Phillips for her decision and injunction in *Log Cabin Republicans*.

CONCLUSION

Although the situation of LGBT persons in the U.S. remains far from ideal, particularly for those of us who may be persons of color or poor or living with disabilities, I count it an important victory that we are seeing the elimination of our exclusion from the U.S. armed forces, which has been a potent marker of us as legally inferior. Dan Woods's litigation and Judge Virginia A. Phillips's rulings in *Log Cabin Republicans v. U.S.* in the Central District of California have played critical roles in this advance. For this, I am, and the country should be, deeply in their debt.

than delays associated with other comparable medical treatments." Harper Jean Tobin, *Pentagon Lifts Transgender Military Service Ban*, NCTE BLOG, (June 30, 2016), <http://www.transequality.org/blog/pentagon-lifts-transgender-military-service-ban>. See also Editorial, *Transgender Troops Protected at Last*, N.Y. TIMES, July 1, 2016, at A22 (calling the 18-month waiting period "an extraordinarily high bar" that should be replaced, as Secretary Carter has suggested it might, within two years); Lambert, *supra* (reporting "Sue Fulton, president of SPARTA, an organization for transgender soldiers" as saying "'It's not supported by the facts; it doesn't take that long to be 'stable' on hormones or in your gender expression.'").

119. See, e.g., Lamothe, *supra* note 113 (suggesting that military still will have to address rules for things including restroom and shower facilities, details on gender-specific physical fitness standards, and seeing to it that laws change to allow Tricare, "a health-care program for active-duty troops, their families, military retirees and Defense Department employees," to cover gender transition surgery).