

“RUM, SODOMY, AND THE LASH”: WHAT THE MILITARY THRIVES ON AND HOW IT AFFECTS LEGAL RECRUITMENT AND LAW SCHOOLS*

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I. OPENING REMARKS

MS. GREER:

Winston Churchill once said that “Naval Tradition is just rum, sodomy, and the lash.” I’m Sharra Greer. I’m the director of Law and Policy for the Service Members’ Legal Defense Network. We’re a national nonprofit dedicated to ending “Don’t Ask, Don’t Tell” and related forms of discrimination. We’re a legal services lobbying and litigation organization. Today’s panel is an examination of *FAIR v. Rumsfeld*;¹ what law schools, law students, and the legal community can do in the wake of the decision to continue the commitment to nondiscrimination; the efforts to end the discrimination within the military; and a discussion about the relationship that could be, should be, and does exist between the law students, the law schools, the military, and the military legal community.

Today we have an esteemed panel. With me is Warrington Parker. He is a partner at Heller Ehrman LLP. Prior to that, he was an assistant United States attorney. He was also a key part of the *FAIR* litigation team. Next to Mr. Parker is Professor Beth Hillman. She is a professor of Law and the Director of Faculty Development at Rutgers—Camden. She is also an expert on the U.S. Military Justice System, a former Air Force officer and the author of *Defending America: Military Culture and the Cold War Court-Martial*,² a book on military justice. Professor Hillman previously taught history at the Air Force Academy and at Yale University. We also have with us Professor Diane Mazur, who is a professor of law at the University of Florida. Professor Mazur writes in the area of civil military relations under the constitution and is also a former Air Force officer. She’s the author of many articles in this area, including “A Blueprint for Law School Engagement with the Military.”³

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1. Forum for Academic & Institutional Rights, Inc. (*FAIR*) v. Rumsfeld, 126 S. Ct. 1297 (2006).
2. ELIZABETH LUTES HILLMAN, *DEFENDING AMERICA: MILITARY CULTURE AND THE COLD WAR COURT-MARTIAL (POLITICS AND SOCIETY IN TWENTIETH CENTURY AMERICA)* (2005).
3. Diane H. Mazur, *A Blueprint for Law School Engagement with the Military*, 1 J. NAT’L SECURITY L. & POL’Y 473 (2005).

Each panelist will make their remarks and then we will open the floor to questions. I hope this will be a good discussion. So, without further ado, I will turn things over to Warrington Parker.

II. *FAIR* V. *RUMSFELD* AND THE SOLOMON AMENDMENTS

MR. PARKER:

On March 6, 2006, the U.S. Supreme Court upheld the constitutionality of the Solomon Amendment in *FAIR v. Rumsfeld*,⁴ a case brought by the Forum for Academic and Institutional Rights (FAIR), the Society for American Law Teachers (SALT), and several individual plaintiffs. FAIR is an association of law schools and law faculties whose members have policies opposing discrimination based on, *inter alia*, sexual orientation.⁵ FAIR contended that the Solomon Amendment⁶ violates the First Amendment rights of its members by conditioning federal funds to universities on its members' affirmative support of military recruitment on campus—recruitment that blatantly excludes openly gay, lesbian, and bisexual law students. The Supreme Court decided that law schools' and law faculties' First Amendment free speech rights were not violated by the Solomon Amendment because law schools and faculties remain free to voice their opposition to the military's discriminatory "Don't Ask, Don't Tell" policy.

The Solomon Amendment, named for Rep. Gerald B.H. Solomon, R-N.Y., was first enacted in 1994 and denied Department of Defense funding to any schools that prohibited the military from recruiting on campus.⁷ In 1996, Congress extended the law's reach to include funding from the Departments of Education, Labor, and Health and Human Services.⁸ This second Solomon legislation put law schools at risk of losing federal financial aid monies that are critical to many students. The new law forced schools to choose between protecting students who are on financial aid from economic and educational hardship and protecting students who are gay or lesbian from discrimination. The Solomon Amendment was revised again in 1999, when Rep. Barney Frank, D-Mass., pushed through an exemption for federal monies used for financial aid,⁹ and again in 2001, when alterations pushed by the Republican leadership on the House Armed Services Committee made it so that an entire university would lose its federal funding if any of its constituent schools blocked access to recruiters.¹⁰ This alteration significantly strengthened the Act, as the military had sought access mostly to law schools, which receive little in federal money, unlike medical schools, which are not usually targeted by recruiters.

The Solomon Amendment created, as the law schools viewed, a clash between the nondiscrimination policies of the law schools and the military's policy regarding gays and lesbians. In response, many law schools permitted the

4. *FAIR*, 126 S. Ct. at 1297.

5. *Id.* at 1302.

6. 10 U.S.C. § 983 (West Supp. 2006).

7. Pub. L. No. 103-160, § 571(a)(1), 107 Stat. 1547 (1994) (amended in 1999, 2002, and 2004).

8. Pub. L. No. 104-106, § 541(a), 110 Stat. 315 (1996) (amended in 1999, 2002, and 2004).

9. Pub. L. No. 106-65, § 549(a)(1), 113 Stat. 609 (1999) (amended in 2002 and 2004).

10. Pub. L. No. 107-296, § 1704(b)(1), (3), 116 Stat. 2314 (2002) (amended in 2004).

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military to recruit on campus but asked that they recruit at locations separate from the respective law schools. For example, the University of Southern California (USC) asked the military to recruit at the Reserves Officers Training Corps (ROTC) building located on the University's main campus instead of recruiting with the other legal recruiters.

For years, the military accepted these accommodations because they maintained strong recruiting success rates for their Judge Advocate General's (JAG) Corps. In fact, the military would often write letters to elite law schools such as New York University Law School noting that it had so many applicants that it had to deny employment positions to many qualified candidates. Even at USC, there was substantial turnout for JAG positions despite the modified recruiting format.

After 9/11, the military began to insist that they be afforded the same access enjoyed by other recruiters. Though only an anecdotal, qualitative, visceral reaction drove this demand, the military began to insist it was necessary. Law schools came together and discussed alternative arrangements consistent with their nondiscrimination policies. The military, however, said they would discuss alternatives only at the same time that the government considered the law schools' federal funding. This debate continued until 2003, when an association of law schools and law professors formed FAIR and sued the government, claiming that the Solomon Amendment violated the First Amendment.

First Amendment doctrine grants several freedoms including: (1) the right to be free from compelled speech; (2) the right to speak and not to host speech; and (3) the freedom to associate.¹¹ FAIR made three arguments based on First Amendment doctrine against the Solomon Amendment requirements. FAIR also argued that the "unconstitutional conditions doctrine" is implicated here because the Solomon Amendment places the unconstitutional conditions of compelled speech and compelled association in return for federal funds.

First, because the Solomon Amendment required law schools to serve military recruiters with services that are equal in quality and in scope to the services that the schools provide to employers who do not discriminate, the government is compelling the law schools to promulgate speech that they vehemently oppose.¹² The services being required of the law schools are essentially communicative actions such as: distributing, posting, and printing literature; making introductions; and sponsoring private forums for exchange of information.¹³ Forcing law schools to carry the military's inherently discriminatory message through these communicative actions is a form of government compelled speech that is against the First Amendment.

Second, FAIR argued that the Solomon Amendment deprived the law schools of their right to speak by essentially forcing them to cancel or minimize their antidiscrimination policies.¹⁴ The First Amendment protects the right of law

11. Brief for Respondent at 16, *FAIR*, 126 S. Ct. 1297 (Oct. 3, 2005) (No. 04-1152) [hereinafter *FAIR*, Respondent Brief], available at 2005 WL 2347175.

12. *FAIR*, Respondent Brief, *supra* note 11, at 21.

13. *Id.*

14. *See id.* at 23.

schools to convey the messages they choose and not to host speech that directly contradicts or eliminates those messages. Ironically, one of the main cases supporting that argument is *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*.¹⁵ In *Hurley*, members of Boston's GBLT community were denied permission to march in the St. Patrick's Day Parade organized each year by a veteran's group.¹⁶ The veteran's group argued that since it was their parade and since the event was privately organized, it was their right not to be affiliated with the sort of speech that would be conveyed by the GBLT group. The Court agreed, holding that the veteran's group was a First Amendment speaker and the selection process for who would march was essentially First Amendment speech.¹⁷

Third and finally, FAIR argued that the Solomon Amendment required their respective law schools to collaborate with military recruiters in promoting an unjust message.¹⁸ Thus these law schools had a right to deny full access to their communities from associations who did not share their views.

FAIR was unsuccessful in the District Court,¹⁹ successful in the Third Circuit,²⁰ and thoroughly unsuccessful in the Supreme Court. The Court held that the law schools were not being asked to promulgate speech. Compelled-speech violations under the First Amendment occur when the speaker's own message is affected by the speech it was forced to accommodate. This situation does not amount to promulgation of military speech because the law schools remained free to voice their opposition to military recruiting policies. As a result of the *FAIR* decision, it is possible to urinate on the American flag,²¹ but it is not possible to exclude military recruiters as a form of protest. Under the Court's rationale, Congress can tell law schools not to exclude the military recruiters, which is akin to telling law schools not to post a sign saying "No Whites Need Apply." With the *Rumsfeld v. FAIR* decision, law schools would have to articulate reasons other than opposition to "Don't Ask, Don't Tell" to justify any decisions to deny military recruiters placement locations on the law school campus.

15. 515 U.S. 557 (1995).

16. *Id.* at 558.

17. Randall Bezanson & Michelle On-Ja Choe, *Speaking Out of Thin Air: A Comment on Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 25 HASTINGS COMM. & ENT. L.J. 149 (2002).

18. *FAIR*, Respondent's Brief, *supra* note 11, at 17.

19. *Forum for Academic and Institutional Rights, Inc. v. Rumsfeld*, 291 F. Supp. 269 (D.N.J. 2003) (holding that the Solomon Amendment did not intrude upon the law schools' ability to express their views, unlike in *Hurley* or other First Amendment cases).

20. *Forum for Academic and Institutional Rights, Inc. v. Rumsfeld*, 390 F.3d 219 (3d Cir. 2004) (holding that the Solomon Amendment "compelled law schools to express [a] message with which they disagreed" and "impeded [the] law schools' right of expressive association" (alterations added)).

21. See *Texas v. Johnson*, 491 U.S. 397 (1989). In *Johnson*, the respondent's burning of the flag constituted expressive conduct given the context and history of the flag, and thus it was speech protected by the First Amendment, whereas *FAIR* held that the law schools' act of treating the military differently from other recruiters was not expressive. Cf. *FAIR v. Rumsfeld*, 126 S. Ct. 1297, 1311 (2006) ("Unlike flag burning, the conduct here is not so inherently expressive that it warrants protection . . .").

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The Court said that the second argument, regarding the hosting of speeches and the right to speak, was not of merit because nothing was being hosted and no confusion existed between the military’s recruiting purposes on campus and the law school’s anti-discrimination message. Unlike in *Hurley*, where a parade has a genuine expressive quality, law school recruiting services—such as recruiting emails, notices, receptions, and interviews—are not expressive by nature. Prior to the Solomon Amendment, law schools showed their disagreement with the military’s policy with conduct such as treating the military recruiters differently from other recruiters. The Court held that such actions alone are not expressive, but instead are pure conduct with little speech content.

Finally, the Court held that the right of association had little meaning in this context because there was no interference with the law school’s mission. Unlike in *Boy Scouts of America v. Dale*,²² in which the Boy Scouts freedom of expressive association was violated by a state law requiring them to accept gay members, here the military was not insinuating itself as a member of the law schools.²³ The Court held that the military recruiters were still outsiders entering law schools with the minimal purpose of recruiting students, not becoming members of the schools expressive association.²⁴

With the “unconstitutional conditions doctrine,” federal funding conditions are not unconstitutional if they can be directly imposed by Congress. Here, because Congress is constitutionally able to directly impose the Solomon Amendment’s access requirements upon law schools (because there is no violation the First Amendment), the Solomon Amendment’s conditions for federal funds were not unconstitutional.²⁵

The Supreme Court has seemingly held with the *FAIR* decision that sexual orientation discrimination exists only in the grossest sense, such as when Colorado passed a statewide initiative to deprive equal rights to gays and lesbians.²⁶ Had other discriminated groups been involved here, this decision would have come out much differently. Had the military, for example, discriminated on the basis of race or gender, the court would have almost certainly allowed law schools to exercise their First Amendment rights by excluding military recruiters.

III. MILITARY NEEDS AND MILITARY LAWYERS

PROF. HILLMAN:

The first part of the title of our Panel is “Rum, Sodomy, and the Lash.” Sharra Greer already provided some background about the history of the military and its discrimination related to homosexuality. It’s the second part of

22. 530 U.S. 640 (2000).

23. *FAIR*, 126 S. Ct. at 1301.

24. *Id.*

25. *Id.* at 1300.

26. See *Romer v. Evans*, 517 U.S. 620 (1996) (holding that an amendment to the Colorado state constitution preventing any town, city, or county from taking any legislative, executive, or judicial action to protect gays and lesbians from sexual orientation discrimination had no rational basis, was based in pure animus against gays and lesbians as a class, and was thus unconstitutional).

the panel title that I'm going to talk about now: "what the military thrives on and how it affects legal recruitment in law schools," especially "what the military thrives on." I want to focus on the military itself in order to build a larger context for understanding these issues. I think our efforts to bring equality into military service, and to bring dignity to gay and lesbian citizens and service members, should take into account the realities of military service. We should understand the essential mission of the armed forces, what the military is all about, and the demographic changes that have already taken place in the Armed Forces over the course of thirty years of a volunteer military.

I also want to suggest that when we think about not only the military, but about lawyers in the military, we should first understand the changing role of law and legal professionals in the armed forces. We have witnessed, in the last half century, a massive legalization of military operations. In today's military, lawyers are more important than ever before in the prosecution of war. Their counsel affects the management of all military operations and all military personnel decisions. They help to establish policies for occupation forces and for detainee operations. Because of the essential role of military lawyers in making military operations possible, I think it's important that we understand what we are getting ourselves into—as a country and as a minority group—as we work toward fair and reasonable policies with respect to military personnel and homosexuality.

To do that, I want to talk about two things on which the military thrives: maintaining the legitimacy of war and ensuring there are enough people to fill the ranks of soldiers. Preserving the lawfulness of state violence is essential to military operations and is an important part of what military lawyers do. Whether or not this is a good idea—that is, whether we as lawyers *ought* to be engaged in preserving the legitimacy of war—is a part of a conversation that we rarely engage in when we discuss fairness and equality in military personnel policies. It's not only essential that the military maintain the lawfulness of war, it's important that it fill the ranks with people who will perform effectively. The United States has chosen to do that through a volunteer force since the end of the Vietnam War. That decision—the decision to end conscription and forced service in favor of a volunteer army—has profound political and social implications. Many of those implications have been explored by my fellow panelist, Diane Mazur, whose work I recommend to you. Today, to make sure that we understand who is serving in the military right now, I will focus on military demographics and their evolution over time.

My first topic is how the United States and its armed forces help to maintain the legitimacy of war and protect the legality of military operations. The armed forces rely on war to justify the tremendous investments that the nation makes in national defense and, now, homeland security. More narrowly, and more relevant to discussing legal recruitment and the role of law schools in the process of preparing students to become judge advocates, it's not merely the existence of armed conflict that justifies a United States military operation, but rather the specific legitimacy of an individual military action in which the United States gets involved. That legitimacy is determined by the reasons that motivate a military operation, by the conduct of service members during the operation, and by the resolution of legal issues—such as the repatriation of

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prisoners of war or the payment of compensation for damages—related to the operation. The stakes here are high for military professionals: War must be legitimate for military leaders to be respected, for military forces to be effective, and to provide incentives for service members to act with restraint in dangerous situations. Because of the centrality of lawfulness in postmodern military operations, that is, in operations that take place in environments of international scrutiny, mindfulness about human rights, and proliferating means of communicating information, lawyers play a very important role in setting and enforcing policies before, during and after armed conflict.

The members of each service’s Judge Advocate General’s (JAG) corps are critical to the military’s effort to promote lawfulness during military operations. Judge advocates implement the military justice system, which is the separate system of criminal trials and criminal code to which service members (and even retired service members) are subject. Judge Advocates run courts-martial and now also military commissions, which are governed by a newly minted and untested set of legal procedures. JAG officers also play a central role in the non-criminal justice aspects of military operations, including the now-notorious handling of detainees and prisoners of war.

Who are these JAG officers who are burdened with such great responsibilities? Candidates for the JAG corps are recruited out of our active-duty military forces and our law schools. At Rutgers I talk to many students who are interested in going into the JAG corps. They seek me out because of my military background and because I teach military law. Although I was not a lawyer in the military, I know many JAGs, and during my service as a line officer in the Air Force, I became familiar with many military legal issues. Many students are interested in serving as military lawyers—with good reason: There exist great opportunities to practice in all kinds of areas of law in the armed forces, and to contribute to the public in important and critical ways. Young judge advocates get exposure and experience that is difficult to find in non-governmental jobs for young lawyers. Part of a military lawyer’s duties involve the criminal justice system, including the military commission system; part engages the larger context of military operations in peace and war; and part concerns the management of internal military personnel issues, including enforcement of the “Don’t Ask, Don’t Tell” policy.

I believe it is a mistake to counsel persons interested in joining the military’s legal corps without talking about the responsibility of military lawyers to enforce existing personnel rules, including the legal discrimination against gays and lesbians that the “Don’t Ask, Don’t Tell” policy embraces. Those rules also include many limitations on the service of women. Yet we don’t talk about such policies very often when we discuss the appeal of service in the JAG corps. Instead, we tend to celebrate the toleration of many openly lesbian and gay service members and the expansion of women’s opportunities in the military. There are, however, still significant legal discriminations against men and against women in the Armed Forces today. The draft is male-only. The prohibition on assigning women to direct ground combat units (the definition of which is a very murky process that does not survive close examination) continues to make many jobs off limits to women in the armed forces. A GAO report sent to Congress in 2005 estimated that the five percent of enlisted

occupational specialties and one percent of officer career fields that remain closed to women constitute fifteen to twenty percent of all military positions.²⁷ This report's lack of statistical precision is uncharacteristic of military social science; it reflects the inherent difficulty of separating "combat" from "non-combat" jobs. This sort of personnel policy is overseen by military lawyers, who make recommendations about compliance with state, federal, and international law to commanders, and who provide legal counsel when personnel problems arise, as they inevitably do.

Military lawyers help to enforce legitimacy in criminal justice outcomes as well as in personnel policies. The war in Iraq has created a massive criminal docket for the armed forces. We have held many courts martial, some of which you've no doubt read about—the Abu Ghraib courts-martial appeared on the front pages for months. But over the last five years, most of those crimes committed by deployed service-members have been "garden variety" crimes, not violent war crimes or sordid sexual abuse. The crimes most frequently committed in Iraq and Afghanistan have been classified by the military as those "related to alcohol"; second on the list is "false official statements," another common, minor criminal offense prosecuted at court martial.²⁸ In the much less frequent but high profile cases about which you have read—the torture of detainees and atrocities committed in the field against civilians—military lawyers face a tremendous challenge in trying to gauge the appropriate extent of criminal responsibility. JAG officers help to determine how far up the chain of command accountability ought to lie for individual and group misconduct in these politically delicate, highly scrutinized situations.

Many military lawyers, not only those who reach very high military grades, but also captains and majors who are still in relatively early stages of their careers, participate in decisions that establish critical standards of legality in areas of military operations such as interrogation policy and detention procedures. Yet some top lawyers have not been listened to, as you've likely seen reported in the newspapers. Uniformed lawyers have been dismissed by high ranking civilian officials in the Department of Defense and in the White House, with their guidance about military commissions and other aspects of detainee operations particularly being ignored. So, one of the constraints that affects military lawyers mirrors a constraint that affects all military officers and troops: Ultimately, service members must obey the orders of their commanders. When their judgment is in conflict with the judgment of their commanders, they don't have a lot of options, especially in the kind of career-oriented, self-selected military that we have today. That poses special difficulties for military lawyers, whose responsibilities include defending not only the Constitution and

27. See GEN. ACCOUNTING OFFICE, MILITARY PERSONNEL: REPORTING ADDITIONAL SERVICEMEMBER DEMOGRAPHICS COULD ENHANCE CONGRESSIONAL OVERSIGHT 38–39, 45 (2005) [hereinafter GAO, MILITARY PERSONNEL 2005], available at <http://www.gao.gov/new.items/d05952.pdf>. The total percentage of off-limits jobs is much higher than the percentage of off-limits military occupations because of the high number of troops assigned to the relatively short list of "direct ground combat" occupations like the infantry.

28. See, e.g., CODE COMM. ON MIL. JUSTICE, ANNUAL REPORT §§ 3–6 (2005) (reporting on the Army, Navy, Air Force, and Coast Guard JAGs for 2005), available at <http://www.armfor.uscourts.gov/annual/FY05AnnualReport.pdf>.

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promoting justice, but also meeting their commanding officers' demands. In order to keep war legitimate, then, military lawyers help to improve the effectiveness of the armed forces on the ground, to preserve American standards of law and human rights, and to respect international standards and the laws of war. This is no easy task.

The second issue I want to raise is another aspect of military operations in which military lawyers play a crucial role—and another area in which it is difficult to reconcile legal and military obligations. That topic concerns how the United States fills its ranks of soldiers with troops. Personnel policies are a critical part of any effective armed force; a military must not only operate within a larger structure of legal effectiveness and legitimacy, it must have people in uniform who can actually carry out assigned missions in accordance with appropriate laws and regulations. Any commander in the Armed Forces would tell you that her most important resource is her troops. The people who serve in the military are essential to its success. In the all-volunteer force that we have today, the people who serve are not the same group as in past periods of American history such as World War II or the Vietnam War. Understanding these demographic transformations is an important part of appreciating the recruiting challenges that face military leaders and the relationship between the military and civilian leadership in the United States. Although our focus today is on recruiting in law schools, that subset of military recruiting is but a tiny piece of the overall picture. Because of that reality, and because personnel policies and recruiting are influenced by law and policy in which military lawyers have a hand in developing and executing, I want to spend a few minutes discussing that bigger picture of military recruiting.

Military recruiting is a complex phenomenon. Even identifying success or failure, which at first glance seems very straightforward, is a tricky process in military recruiting. Absolute numbers and trends can be presented in many different ways, making it hard to see what's really happening over time. For example, one might report retention rates as either “nearly half of first-term enlistees opt to reenlist after their first term of service” or “the military loses more than half of all first-term enlistees.”²⁹ As Mark Twain and others before him suggested, there are three kinds of lies: “lies, damn lies, and statistics.” In the realm of military recruiting, statistics are especially likely to be unclear indicators, partly because recruiting numbers tend to reflect only snapshots of particular service branches at particular moments rather than an overall assessment of military personnel. Earlier, Warrington Parker mentioned the diversity across the military in terms of individual policies, a useful reminder that the military is not a single institution, but a collection of different services with various missions, occupational specialties, and personnel needs. The culture of the Air Force, the Navy, the Army, and certainly the Marine Corps, is distinctive from its sister services, as are the regulations and, to some degree, the

29. Re-enlistment rates vary across the branches of service and occupational specialties as well as over time; many government-sponsored studies have investigated the factors that affect retention. See generally, e.g., JAMES HOSEK, JENNIFER KAVANAGH & LAURA MILLER, HOW DEPLOYMENTS AFFECT SERVICEMEMBERS (2006); JAMES HOSEK, NEW MEASURE OF ENLISTED PERSONNEL QUALITY REVEALS THAT SERVICES RETAIN HIGHER QUALITY PERSONNEL (2004); JAMES HOSEK, DEPLOYMENT, RETENTION, AND COMPENSATION (2004).

legal structures of each. The services do not always act in concert, nor are their goals entirely consistent. Respecting those differences and the tensions that result is a key part of understanding both military recruiting and the roles of military lawyers in general.

Notwithstanding the complexity involved in assessing military recruiting, there are some changes that have taken place in recent years that must be reckoned with to appreciate the current interplay of law, policy, and military personnel. The shift away from conscription to an all-volunteer force has effected a dramatic change in the make-up and diversity of the United States armed forces. When, in *Grutter v. Bollinger*,³⁰ a group of prominent retired generals and admirals filed an amicus curiae brief (one of a record-setting number of amici, and one that earned a quotation in Justice Sandra Day O'Connor's opinion for the Court) in support of the University of Michigan's affirmative-action practices, they represented the military as the standard-bearers of diversity.³¹ Those retired military leaders set forth what is now common wisdom in the armed forces: a conviction that the military needs diversity in order to succeed. This premise was not an accepted truth when the all volunteer force was hatched in the aftermath of the Vietnam War. Those who planned for the end of the draft didn't think that the military would change significantly with the end of conscription. They were wrong. The military did change—in a dramatic fashion. A telling example is the difference in the gender demographics of military personnel. As the limits placed on women's enlistment and advancement were lifted with the end of the draft, women rescued the early all volunteer force by enlisting in significant numbers and by raising the educational standards of the military. In the mid 1970s, the percentage of male high school graduates who enlisted fell as low as fifty-two percent; the number of enlisted women who were high school graduates never dropped below eighty-eight percent.³² The scores of women on military entrance exams were also higher than the scores of men.³³ Without female volunteers, the military would have suffered dramatic shortfalls in personnel strength and capability.

Members of racial minorities performed similar rescue missions after the end of the draft. During the first decade of the all-volunteer force, the percentage of African Americans serving doubled.³⁴ The advent of gender and racial integration made it possible for the military to fill its ranks without relying on the forcible service of conscripts. The demographic evolution of the military continued after the early years of the all-volunteer force. For example, consider the overlap between the two groups I mentioned so far: African Americans and women. Today, the number of African American women in the service is

30. 539 U.S. 306 (2003).

31. See, e.g., *id.* at 331 (quoting Consolidated Brief of Lt. Gen. Julius W. Becton, Jr., et al., as Amici Curiae Supporting Respondents at 5, *Grutter v. Bollinger*, 539 U.S. 306 (Feb. 21, 2003) (No. 02-241), 2003 WL 1787554). See also Lauren Robel, *Affirmative Action: Lessons from the Military* (2003), <http://jurist.law.pitt.edu/forum/symposium-aa/robel.php> (last visited Mar. 27, 2007).

32. See generally, e.g., Elizabeth L. Hillman, *The Female Shape of the All-Volunteer Force, in IRAQ AND THE LESSONS OF VIETNAM, OR, HOW NOT TO LEARN FROM THE PAST* (Marilyn B. Young & Lloyd C. Garner eds., 2007).

33. See *id.*

34. See *id.*

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disproportionately high compared to their representation in the U.S. population: African Americans now constitute about thirty percent of all of the women in the Armed Forces and are the fastest-growing segment of veterans.³⁵ To compress a much longer and intricate story, these shifts reflect the confluences of social change and political shifts on the demographics of the military. That deeper history of military recruiting and retention after the end of conscription is relevant in understanding the ways in which the burdens and benefits of military service have been allocated since the Vietnam War.

Today, our military institutions are struggling to recruit successfully, though the extent of that struggle varies by branch and by military specialty. For example, the JAG corps seems to have little difficulty finding willing applicants; the Navy has apparently advised its selection boards not to take more than half of the applicants for JAG corps positions in the Navy and similar boards in the Army and the Air Force have been able to be comparably selective.³⁶ The Marine Corps, however, has a harder time recruiting for its JAG corps—with good reason. All Marines, JAG officers included, must endure the basic training in infantry skills that the Marine Corps considers fundamental.

The challenges that face the military in other areas of recruiting, however, especially in the Army, have forced the United States to invest tremendous resources in attracting volunteers. For example, in fiscal year 2003, the DOD spent \$592 million on recruiting advertising alone—and another \$455 million on enlistment bonuses, college fund contributions, student loan repayments, and other such allotments in an effort to attract and retain qualified volunteers.³⁷ The Army and other services have developed sophisticated marketing strategies to reach potential volunteers. In addition, the services have relaxed entrance standards to expand the groups of persons eligible for military service. For example, the Army has increased the number of recruits they will take from “Category Four,” a classification for applicants with lower test scores and aptitude assessments.³⁸ In 2006, the Army and Army reserves convinced Congress to raise the maximum age of enlistment from thirty-five to forty-two years of age.³⁹ In 2002, President Bush issued an order streamlining the process by which citizenship is granted to foreign service members, giving recruiters yet another opportunity to attract new groups to military service. In 2006, there

35. *See id.*

36. *See* 150 CONG. REC. H1709 (daily ed. Mar. 30, 2004) (statement of Rep. Meehan). *See also generally* Eugene R. Kim, *The Judge Advocate Recruiting Office: The Gateway to Service*, ARMY LAW., June 2004, at 34; U.S. Army, Army JAG Corps, <http://www.goarmy.com/jag/> (advertising the Army’s JAG corps) (last visited Mar. 27, 2007); United States Navy JAG, Careers, <http://www.jag.navy.mil/Careers/Careers3.htm> (advertising the Navy’s JAG corps, which includes the Marine Corps) (last visited Mar. 27, 2007); U.S. Air Force, Judge Advocate Recruiting <http://www.jagusaf.hq.af.mil/> (advertising the Air Force’s JAG corps) (last visited Mar. 27, 2007); U.S. Coast Guard Legal, Career Resources—CG Legal, <http://www.uscg.mil/legal/recruit/index.htm> (advertising the Coast Guard’s JAG corps) (last visited Mar. 27, 2007).

37. *See* GOV’T ACCOUNTING OFFICE, MILITARY RECRUITING: DOD NEEDS TO ESTABLISH OBJECTIVES AND MEASURES TO BETTER EVALUATE ADVERTISING’S EFFECTIVENESS 6 (2003), *available at* <http://www.gao.gov/new.items/d031005.pdf>; GAO, MILITARY PERSONNEL 2005, *supra* note 27, at 4.

38. *See, e.g.*, Nick Turse, *U.S. is recruiting misfits for army*, S.F. CHRON., Oct. 1, 2006, at F-6.

39. *See, e.g.*, Patrik Jonsson, *Newest Army Recruits: the Over-35 Crowd*, CHRISTIAN SCI. MONITOR, Sept. 6, 2006, at 1.

were almost 70,000 foreign-born persons serving in the military; many have, or are now, transitioning to U.S. citizenship⁴⁰ All of these measures have served to increase the number of potential military recruits.

Because these ongoing campaigns to revise the laws and policies that limit or expand military recruiters' access to segments of the population is directly relevant to the question of whether or not the armed forces needs the services of lesbian and gay lawyers and lesbian and gay troops in general, I want to report one more set of recent recruiting numbers. According to the Department of Defense, half of all of the youth in the country, age sixteen to twenty-one, are disqualified for military service because of physical or mental deficits.⁴¹ Those deficits include asthma and obesity, illegal drug use, or the use of prescription antidepressants; they also include character and moral unfitness. Waivers for all of these disqualifiers are available, however, and they are routinely granted today; in fact, while the number of character and moral waivers seemed to be down somewhat in 2005, the number of physical waivers was up.⁴²

Before I close this brief review of the military's interest in, and military lawyers' responsibility for, preserving the legitimacy of war and meeting the personnel demands of military operations, I'd like to return to a theme I mentioned at the start of these remarks: the importance of grappling with the essential nature of military duty and institutions as well as the legal discrimination that continues today. Before we can trace a path toward dignity and equality for all persons in the military through the minefields of the "Don't Ask, Don't Tell" policy and the Solomon Amendment, we have to reckon with the bigger landscape in which those minefields exist. We have to understand the military missions that we ask our soldiers, sailors, airmen and marines to take part in; we have to understand the harm and the good that happens at the hands of American troops around the world and here at home; we need to recognize who bears the burden of military service; and we need to understand the roles and limits of the law in restraining or encouraging militarization in American policy and culture.

Warrington noted a few minutes ago that one of the basic tenets of First Amendment jurisprudence is the idea that one cannot be forced to convey a message with which one disagrees, reflecting the idea that "compelled speech" is anathema to our cherished freedom of speech. Because of this legal doctrine, in at least some instances the Constitution protects us from being forced to say something that we don't want to say. Before we all line up to enlist in military service, whether "Don't Ask, Don't Tell" is repealed or not, I think we ought to be clear about exactly what messages we will be sending about law, war, and human rights.

40. See Joseph G. Miller, *Fast Track to Naturalization: Service, U.S. Armed Forces*, 39 MD. BAR J. 44, 46 (July-Aug. 2006).

41. See GAO, *MILITARY PERSONNEL* 2005, *supra* note 27, at 4.

42. See *id.* at 69.

IV. “DON’T ASK, DON’T TELL”

MS. GREER:

We move from considering the military generally to gays in the military and, specifically, the statute that is known as “Don’t Ask, Don’t Tell.” I want to take a moment to talk about the statute. Occasionally, during discussion of the military’s discrimination on the basis of sexual orientation, the real meaning of the statute is lost. “Don’t Ask, Don’t Tell” is not in fact the military’s policy. Congress passed a statute to the effect of: “You shall be separated from the military if you make a statement that you are homosexual or bisexual, if you engage in a conduct which is broadly defined, or you marry, or attempt to marry someone of the same gender.” The statute is actually identical to the regulation that was in place prior to 1993 except for one word. The change was “homosexuality” to “homosexual conduct.” The word change made little practical difference, but the change from regulations (the military’s own internal policy) to a statute (Congress’s policy) was a significant change.

There has been a prohibition in one form or another on gays, lesbians, bisexuals, and transgender individuals serving in the military since World War II (and arguably before that). Since World War II, and long before that—Winston Churchill’s quote comes to mind—there have been gays, lesbians, and bisexuals in the military. The current ban works much like previous bans. People in the military who are gay, lesbian and bisexual⁴³ serve until someone who cares finds out, and then they get kicked out. Over 11,000 gays and lesbians have been discharged from the military in the twelve years since the implementation of “Don’t Ask, Don’t Tell.” There are, however, an estimated 65,000 gays and lesbians currently serving in the military, a fact which discussions about military discrimination and the law schools’ response often overlook. We tend to talk about “the Military,” “the Gay Community,” or “the Law School Community” as if they are mutually exclusive and separate groups. The military has gay people in it. The military has lawyers in it. The military has gay lawyers in it, although, of course, if discovered, they will be discharged.

The goal of the organization I work for, Servicemembers Legal Defense Network, is to end discrimination in the military so that gays, lesbians and bisexuals can serve—including as lawyers. We are doing that in several ways, one of which is through Congress. This is the first Congress to introduce a bill to repeal the statute known as “Don’t Ask, Don’t Tell.” The legislation introduced in the House of Representatives would require non-discrimination. That bill is currently in the House of Representatives. As of now, there is no companion bill in the Senate. The legislation, the Military Readiness Enhancement Act of 2006, H.R. 1059, has 118 cosponsors. In other words, there are 118 members of Congress who have stood up and said, “This is wrong and it needs to change.” The level of support for the bill is remarkable and evidences significant progress since 1993. There is a way to go before we have support sufficient to pass that law. Further, the current president is not likely to sign into law a bill lifting the

43. In discussing “Don’t Ask, Don’t Tell” I only reference gays, lesbians, and bisexuals. The statute specifically applies to homosexuals and bisexuals. Transgender persons are also banned from military service, but under a regulatory scheme separate from “Don’t Ask, Don’t Tell.”

ban on gays in the military. The power to change the prohibition on open service lies in Congress' hands.

Discrimination in the military on the basis of sexual orientation can also change through the courts; there are several current challenges to the constitutionality of "Don't Ask, Don't Tell." You might say, "Why now? It's 2006. Didn't this law come into effect in 1994? Were there not previous constitutional challenges?" Yes, there were.

Immediately after passage of "Don't Ask, Don't Tell," there were many challenges to the constitutionality of the statute. They all lost. Four Circuit Courts, including the Ninth Circuit, all upheld the constitutionality of "Don't Ask, Don't Tell." Why are there challenges now? If there are four Circuits that have already ruled on the constitutionality of the statute the question is closed, isn't it? The answer is *Lawrence v Texas*.⁴⁴ All of the prior decisions ruling on the constitutionality of "Don't Ask, Don't Tell" were based either explicitly or implicitly on *Bowers v. Hardwick*.⁴⁵ *Bowers* was the root of many evils, including being one of the pillars that held up the prohibition on gays in the military. *Lawrence* explicitly ruled that *Bowers* was wrong when it was decided, therefore, perhaps now there is an opportunity to go back and challenge the constitutionality of "Don't Ask, Don't Tell." I certainly hope so. I thought "Don't Ask, Don't Tell" was unconstitutional before *Lawrence*. I think so now. I will review the current challenges, but first I will discuss something a little closer to home and closer to *Lawrence*: sodomy.

There is a statute prohibiting sodomy in the military: Article 125 of the Uniform Code of Military Justice (UCMJ).⁴⁶ Article 125 is a very broadly written statute from the 1950s. The drafters of the UCMJ essentially took the Maryland and Washington, D.C. sodomy statutes and put it into the military code. In the military, anything that is not missionary position is sodomy. In the military, unlike in the civilian world, straight people are actually prosecuted for sodomy regularly. A survey of the appellate cases in the military criminal courts where there was a conviction for consensual sodomy found eighty-six cases in a three-year period. All but three involved heterosexual men convicted of conduct with a woman. One was a woman for conduct with a man, and two were for conduct between two men.

It is surprising to many that people are convicted under sodomy laws for heterosexual sexual conduct under the military statute. One reason for this is the way the UCMJ is written. Under the UCMJ, the only way to prosecute certain types of forcible sexual conduct is through the sodomy statute. Many of the consensual sodomy convictions result from situations where the original charge is forcible sodomy and the defense is that the conduct was consensual.

When *Lawrence* was decided there were many individuals with consensual sodomy convictions within the military criminal appellate system. *Lawrence*, therefore, had its first application in the military context in the military criminal court system. Almost immediately appellants began to challenge their conviction for consensual sodomy. One case, *United States v. Marcum*, came

44. 539 U.S. 558 (2003).

45. 478 U.S. 186 (1986).

46. 10 U.S.C. § 925 (2000).

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before the military’s highest criminal court: the Court of Appeals of the Armed Forces (CAAF).⁴⁷ *United States v. Marcum* took the opportunity to address the effect of *Lawrence* on Article 125. There had, of course, been prior challenges to Article 125 that had been rejected because of *Bowers*.⁴⁸

The court in *Marcum* made several noteworthy moves, the most important of which was finding that *Lawrence* had not been decided on a bare rational basis standard.⁴⁹ First, the court found that *Lawrence* applied to the military. The government had actually argued that because *Lawrence* applied to a state statute and the military’s criminal system is different, *Lawrence* shouldn’t even apply.⁵⁰ However, the *Marcum* court said that *Lawrence* applies to the military: military members do not lose all of their constitutional rights upon beginning service.⁵¹ The court then turned to the standard of review required by *Lawrence*. The court was unsure whether it was rational basis or strict scrutiny, but the court said it has to require a searching constitutional inquiry.⁵² At the time, we were very disappointed with the finding; however, *Marcum* is currently one of the most liberal readings of the standard of review in *Lawrence* and one of the most powerful.

The *Marcum* court proceeded to set forth a very interesting three-part test. First, the determination must be made whether this is “*Lawrence*-type” conduct: “Is this private, consensual sexual activity with an adult?”⁵³ Second, if the conduct is “*Lawrence*-type,” a determination must be made of whether the conduct falls under the “*Lawrence* exceptions,” for example, conduct with a minor or without consent.⁵⁴ Finally, if the conduct meets the first two prongs, one must ask if there is a military reason to uphold this conviction: Is there a special need for the military to prohibit this particular type of conduct—a need that outweighs *Lawrence* and the protections provided there?⁵⁵

In *Marcum*, the petitioner was convicted of conduct with an immediate subordinate.⁵⁶ *Marcum* was a male instructor and the conduct was with a male student. The *Marcum* court found that this was a situation where consent was difficult to give because *Marcum* had so much authority over his subordinate and thus *Marcum*’s conviction was upheld.⁵⁷

47. 60 M.J. 198 (2004).

48. See, e.g., *Holmes v. California Army Nat’l Guard*, 124 F.3d 1126 (9th Cir. 1997) (rejecting substantive due process argument because, under *Schowengerdt v. United States*, 944 F.2d 483 (9th Cir. 1991), any “substantive due process claim . . . was foreclosed by *Bowers*”), *cert. denied*, 525 U.S. 1067 (1999); *Richenberg v. Perry*, 909 F. Supp. 1303, 1313 (D. Neb. 1995) (rejecting right of privacy claim based on *Schowengerdt* and other cases relying on *Bowers*), *aff’d*, 97 F.3d 256 (8th Cir. 1996), *cert. denied*, 522 U.S. 807 (1997); *Philips v. Perry*, 106 F.3d 1420, 1426 & n.11 (9th Cir. 1997) (holding that *Bowers* forecloses “heightened scrutiny” of “government regulation of homosexual conduct”).

49. 60 M.J. at 205.

50. *Id.* at 203.

51. *Id.*

52. *Id.* at 204.

53. *Id.* at 206.

54. *Id.* at 206–07.

55. *Id.* at 207.

56. *Id.*

57. *Id.* at 208.

Following *Marcum*, there has been a growing split within the military criminal appellate courts. The Navy-Marine Court of Criminal Appeals (NMCCA) has upheld all the convictions for consensual sodomy before it. The NMCCA has used the third prong as the exception that swallows the rule. Very little is required to establish that there is a military reason to prohibit the conduct. In one instance, a service member, married to a Japanese national, was bringing other women into his barracks room, engaging in oral sex, and then bragging about it. The NMCCA found that this behavior was an embarrassment to the Navy, which justified upholding the conviction. The Army Court of Criminal Appeals (ACCA) has gone in a completely different direction. It has overturned several convictions and has applied the rules much more stringently. The ACCA's interpretation of *Marcum* is that service members can constitutionally be convicted for private conduct between adults.

The legal landscape is still uncertain for Article 125, the military's sodomy statute. Eventually, there will be further clarification from CAAF, unless Congress changes the statute. Interestingly, the Pentagon, after several years of deliberating what *Lawrence* meant, recommended to Congress that the UCMJ be changed to remove the consensual part of the military sodomy statute. Congress, however, has not leapt to action to change the statute, and right before an election, I do not think we are going to see a radical change in the military sodomy law. On the other hand, the Pentagon does have influence with Congress, and hopefully, that law will be changed.

How is *Marcum* relevant to "Don't Ask, Don't Tell"? It is relevant for three reasons. First, it is relevant because the standard of review in *Lawrence* is relevant to any due process claim being brought forward now; *Marcum* held the standard was higher than rational basis. Second, it is relevant because *Marcum* made clear that *Lawrence* applies in the military context. Finally, it is relevant because the existence of the sodomy statute (even though it is applied mostly in opposite-sex contexts) has always been used as a justification for upholding the ban on service by gays and lesbians.

The *Marcum* decision, therefore, although not a declaration that Article 125 as applied to consensual conduct is unconstitutional, is an important case that we hope will help in the challenges to "Don't Ask, Don't Tell." There are three challenges currently pending. One is a case in which SLDN is co-counsel with Wilmer Hale LLP, called *Cook v. Rumsfeld*.⁵⁸ *Cook* is a case brought by twelve veterans who each have amazing and compelling stories; some have served for over ten years, some have served in combat, some served a short period of time, and they are from every service except for the Marine Corps. The twelve veterans in *Cook* are challenging the constitutionality of "Don't Ask, Don't Tell" and seeking to return to the military.⁵⁹ The plaintiffs in *Cook* are not seeking any sort of back pay or raise in rank; they just want to go back and serve their country. The *Cook* case was filed in district court in Boston. The district court

58. 429 F. Supp. 2d 385 (D. Mass. 2006) (granting government's motion to dismiss), *reh'g denied*, 2006 WL 2559766, No. 04-12546-GAO, slip op. at *1 (D. Mass. Sept. 5, 2006), *appeal argued sub nom*, *Cook v. Gates*, No. 06-2313 (1st Cir. Mar. 7, 2007).

59. *Id.*

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judge dismissed the case and it is on appeal to the First Circuit Court of Appeals.

The second case is *Log Cabin Republicans (LCR) v. United States*.⁶⁰ The *LCR* case was filed in the United States District Court for the Central District of California as an associational challenge to the constitutionality of “Don’t Ask, Don’t Tell.” The case was dismissed for lack of standing.⁶¹ It has now been re-filed with a named plaintiff, Alex Nicholson.⁶² There is currently pending a motion to dismiss in that case.

The third case, *Witt v. United States Air Force*, was filed in Washington State.⁶³ *Witt* was brought by a private attorney and the ACLU of Washington State. Maj. Margaret Witt is still serving and has been in the Air Force for eighteen years. Witt, a member of the reserves, was told to stop reporting to drill when an investigation began.⁶⁴ The procedural history is complicated. Simply put, the case was dismissed by the district court judge and is on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.⁶⁵ All three cases have three primary arguments: that “Don’t Ask, Don’t Tell” violates due process, equal protection, and the First Amendment. The arguments around the due process clause are significantly different from the earlier cases because of *Lawrence*. The District Court decisions in both *Witt* and *Cook* hinged on what *Lawrence* means.⁶⁶ The judges, and particularly the judge in the *Cook* case, wrestled with the standard of review. Unfortunately, both district judges concluded that *Lawrence* only requires bare-minimum rational basis review—and nothing more.⁶⁷ We are hopeful that, on appeal, *Lawrence* will be more broadly interpreted and the challenges will proceed and be successful.

V. JUDICIAL DEFERENCE AND ENGAGING THE MILITARY

PROF. MAZUR:

Rumsfeld v. FAIR says, “Students and faculty are free to associate to voice their disapproval of the military’s message.”⁶⁸ This is what *Rumsfeld v. FAIR* invites us to do, but it is a trap. If this is all we do, nothing will change. If all we do is increase the volume of our disapproval in the belief that it will send the same message as the exclusion of military recruiters from law schools, nothing will change. The result in *FAIR* gives law schools a new opportunity to engage the military in ways that will strengthen civilian control and make it more likely that “Don’t Ask, Don’t Tell” will be invalidated or repealed.

People tend to view the military as this monolithic, unchanging institution. They say, “Well, the military is the way it is because it is the military.” This is

60. *Log Cabin Republicans v. United States*, No. 04-08425 (C.D. Cal. Mar. 2006) (order dismissing for lack of standing).

61. *Id.*

62. *Id.*, refiled sub nom, *Nicholson v. United States*, No. 04-08425 (C.D. Cal. May 2, 2006).

63. 444 F. Supp. 2d 1138 (W.D. Wash. 2006).

64. *Id.* at 1141.

65. *Id.*, appeal docketed, No. 06-35644 (9th Cir.).

66. *Witt*, 444 F. Supp. 2d at 1144; *Cook v. Rumsfeld*, 429 F. Supp. 2d 385, 393–96 (D. Mass. 2006).

67. *Witt*, 444 F. Supp. 2d at 1145; *Cook*, 429 F. Supp. 2d at 395–96.

68. *FAIR v. Rumsfeld*, 126 U.S. 1297, 1301 (2006).

not true at all. The character and the nature of the military are very much shaped by the forces that civilians bring to bear on it. The military, in fact, has changed dramatically since the Vietnam War for two reasons. First, as we have already talked about a little, the end of the draft has made the military much less politically representative than it used to be. Second, since the Vietnam War, we have seen the rise of the Supreme Court's doctrine of judicial deference to the military.

Judicial deference is a very convenient device for avoiding conversations about matters related to the military: it is used to discourage true engagement across the civil-military line, it is used to distance civilian society from the military, and it is used to limit governmental accountability for military policy. Judicial deference to the military is grounded in the assumption that the military is a separate society, distant from the civilian world in terms of experience, culture, and morality. The doctrine of judicial deference assumes that military issues are uniquely inaccessible to civilians and, therefore, the military should not be subject to law in the same way that other civilian institutions in government are. It exempts the military from normal constitutional review on the basis that courts cannot understand the needs of the military.

There are two well-known cases for anyone who has attended law school: *Rostker v. Goldberg*, holding that Congress need not constitutionally justify the exclusion of women from registration for the draft;⁶⁹ and *Goldman v. Weinberger*, holding that the Air Force need not constitutionally justify its decision to punish the wearing of religious headgear.⁷⁰

Judicial deference, of course, is the principal means of defending "Don't Ask, Don't Tell." Justifications for "Don't Ask, Don't Tell" can be less than rational—even less than plausible—because of the assumption that it is not the place of courts to require either Congress or the military to explain or justify its judgment. The problem for us is that law schools have relied on these same themes of separatism and distance in expressing their disagreement with "Don't Ask, Don't Tell." Before *FAIR*, law schools sought to physically distance the military from the law school community. After *FAIR*, law schools will likely often substitute protest as a means of attempting to physically distance—or at least to intellectually distance—the military from law schools, and unfortunately, this distance is then going to be used to further reinforce the need for judicial deference to "Don't Ask, Don't Tell."

Law schools take a very "out of sight, out of mind" approach to the military and to military legal issues. They see the military's presence, and not its underlying policies, as the principal problem. Much of what they do is focused on reacting to the military's temporary, periodic presence instead of directly engaging the military and its legal issues on a full-time basis.

In distancing themselves from the military, law schools are only joining in a larger trend of the last thirty years, since the end of the Vietnam War, in which institutions of law across the board are abdicating their responsibility for civilian control of the military. Courts have already deemed themselves incompetent to understand military issues, and so they defer to congressional and military

69. 453 U.S. 57 (1981).

70. 475 U.S. 503 (1986).

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judgment. Law professors have completely lost interest in legal control of the military, seemingly afflicted with a bad case of deference themselves. There was once a day when law schools were major participants in every facet of military legal reform, but no more; they have absolutely no seat at the table.

Law schools need to think about whether the means they choose to affirm values of equality are the most productive means. If distancing ourselves from the military is only going to reinforce a system of deference in which the military can then be used to deny equality, we need to rethink that strategy. I argue that law schools need to actively engage the military, not disengage themselves from it. They need to bring the military inside the law school community and bring military issues and military scholarship within the law school community. We need a commitment to become knowledgeable, credible participants in discussions about every facet of military legal reform.

I think one of the reasons that law schools have not done this is the unspoken assumption that any engagement with the military, or any expression of interest in the military or its issues, somehow indicates an agreement with the military or betrays a commitment to equality. What we worry about most, more than anything else, is that if we do not object to the military's presence, then it means we do not object to their policies, and I would argue that those two things are not connected to one another.

We need a renewed emphasis in law schools on all aspects of military legal reform. We need joint intellectual pursuits between law schools and military lawyers. We need visiting military law professors in civilian law schools. We need visiting military courts operating in law schools.

Today—and I think this is the thing people don't understand—we are closer than at any time since 1993 to reaching a consensus with the military that "Don't Ask, Don't Tell" is counterproductive. Now, we are not near a consensus with Congress, but we are near a consensus with the military. We cannot afford to treat the military just like any other employer who fails to affirm a non-discrimination policy. With other civilian employers who fail to comply, we shun them, we send them away. We have no continuing responsibility for them, and they have no continuing effect on us. The military, however, is an employer of constitutional magnitude for which law schools have an institutional obligation. We have an institutional obligation to participate in civilian control of the military.

Recent events have taught us very dramatically that when institutions of law—law schools, courts, and lawyers—withdraw from active participation in civilian control of the military, it has a real effect on whether the military stays in its lane under the Constitution. I can draw you a direct line that runs from the mindset of "Don't Ask, Don't Tell" through Abu Ghraib and claims of immunity for misconduct under the law of war.

We cannot afford to distance ourselves from the military if that distance is going to harden judicial doctrines that protect "Don't Ask, Don't Tell." Thank you very much.

VI. SELECTED QUESTIONS AND ANSWERS

FROM THE AUDIENCE:

President Harry Truman, as Commander-in-Chief, integrated the armed forces by executive order. I gather that, before Congress enacted “Don’t Ask, Don’t Tell,” the president could have done the same as to homosexuals. In light of the “Don’t Ask, Don’t Tell” statute, may the president issue an executive order overturning the policy?

MS. GREER:

No. We have law professors and lawyers up here; I am sure we could get really creative in making up ways that the president could try and do that, but it would be pretty much flying in the face of a congressional statute and a congressional mandate. There are fun things that you could do in terms of enforcement and in terms of the regulations, but the statute is pretty clear. There is some wiggle room there, but it is a statute that Congress is going to have to address to really get rid of the ban.

PROF. HILLMAN:

The only thing I would add to that is that Truman’s order started the ball rolling on racial integration, but did not do it by itself. There was a lot of unevenness in implementation, and it mandated equality of treatment, a standard that was not met for decades. So it is complicated. It is not a simple order that changes anything in the military. So even if a President Kerry were able to do that, it would have required a complicated set of regulations and steps to effect a big change.

FROM THE AUDIENCE:

I have two questions about the bill—with the marvelous title of “Military Readiness Enhancement Act”—that I understand is before Congress and may repeal “Don’t Ask, Don’t Tell.” First, does it explicitly remove Article 125 from the Uniform Code of Military Justice? And second, if Congress were to pass the Act, would President Bush veto it?

MS. GREER:

The bill itself is called the Military Readiness Enhancement Act, and it is very simple and reasonably conservative. All it does is allow people to serve in the military who are openly gay. It is very clear that it does not address domestic partner issues. It does not allow you family rights. It explicitly references the Defense of Marriage Act (DOMA). It also is very clear that it does not change conduct rules. You still have to live by the same conduct rules as everyone else, which includes Article 125 of the Uniform Code of Military Justice, and part of that is just politics. Sodomy is very incendiary. Moreover, as a legal matter, you do not need to get rid of Article 125 in order to allow gay people to serve in the military. It is really a statute that applies mostly to heterosexual people. The bill itself is designed to simply allow people to serve in the military. In terms of this administration, they have only made two statements on “Don’t Ask, Don’t Tell,” one of which is, “It stays.” Bush is a “Don’t Ask, Don’t Tell” man, and the Republican leadership in Congress is not supportive of repeal at all. The Chairs of the Armed Services Committee in the

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House and Senate are also not in favor of repeal, and so if it got to President Bush’s desk, there is no doubt that he would veto it.

FROM THE AUDIENCE:

You stressed several times that “Don’t Ask, Don’t Tell” has actually become enacted through Congress statutorily and is not just a regulation of the military anymore, and that got me thinking about deference. Does the fact that it is an act of Congress arguably give us a lower degree of deference than the military is entitled to, since it is actually not just the military’s law but Congress’ statute now?

PROF. MAZUR:

It is really amazing what a flexible, malleable doctrine judicial deference to the military is. Sometimes, like in the *Goldman v. Weinberger* case in which the military made a particular decision about whether a member of the Air Force could wear religious headgear, the Court’s decision is deferential to the Air Force’s judgment.⁷¹ However, in situations in which the military-related judgment is actually made by Congress and is enacted into law, the doctrine very cleverly morphs and becomes deferential to Congress’s judgment about the military. On the other hand, in *Rostker v. Goldberg*⁷²—concerning if women needed to be registered for the draft when men were—the military argued in favor of registering women. They said, “We can use tens of thousands of women were we ever to have a draft.” Congress said, “Never on our watch are women going to be drafted.” Yet, the Court still wrote an opinion that depended on this idea of judicial deference to military judgment, even though it was Congress’ military judgment which disagreed with the military’s judgment.

FROM THE AUDIENCE:

This question is for Prof. Mazur. You seem to be saying that we should find ways of constructively engaging the military, and I can see where there may be some common ground on other issues. How, though, do you think it is possible to constructively engage the military, since they are under no obligation to engage us on issues like “Don’t Ask, Don’t Tell” and its position on hiring women and things like that? How do we get them to engage us on a very practical level?

PROF. MAZUR:

I think the best way to do that is to have something of value to offer, and I think law schools are not offering anything of value right now. There was a time when law school faculties carried enormous expertise about military law and military legal reform, and they were actually the first call that would be made when the military was sitting down and beginning to think about how it was going to reform its laws. Today, that would be the last call the military would make, because that expertise, over the last generation, really has evaporated. I think the way that you bring together two voluntary institutions, which are not required to engage with each other, is to show that each side has something to

71. 475 U.S. 503 (1986).

72. 453 U.S. 57 (1981).

offer of value to the other, and I think it is possible that law schools could do that if we made an institutional commitment to building that knowledge and that credibility. Does anyone else want to add something to that?

PROF. HILLMAN:

Yeah. I have to say I think Aaron Belkin's work is a great example of that. He is a political scientist, not a law professor, but the reason that Diane can say that the military is this close to agreeing institutionally that "Don't Ask, Don't Tell" is a bad idea, is driven by concerns about efficiency and personnel, but also by a conversion that Aaron has almost single-handedly accomplished. He has gone to the war colleges. He has talked to commanders. He has brought masses of sociological and anthropological and political science modeling to this issue of whether or not it really is a disaster to let people serve openly in the military, and it has changed people's minds. I think Aaron has actually gone out and taken his message to the military in a way that works. That said, there is resistance from the military that you have to be willing to overcome. It is not easy. In my experience, military lawyers are experienced and they are professionals, and they know what they think about a lot of these issues, and they think the rest of us do not have much to offer.

One time, I was at a conference of military judges, and I was speaking about the recommendations of a blue ribbon panel called the Cox Commission that suggested changes in the Uniform Code of Military Justice (UCMJ). The Cox Commission's recommendations were not what I would have said should change about the UCMJ—I was just the messenger at this conference. I was just reporting on what these people [the Cox Commission]—who were very experienced in the area of military law—said should change, and the conference attendees were completely dismissive. They really did not want to hear it, and they said they do not have time to deal with those kinds of things. However, there were some changes. One change that the Commission recommended applies to the sexual assault code in the UCMJ, containing the articles that address rape, carnal knowledge, and sodomy. Currently, there are pending changes to the Manual for Courts-Martial that actually make big changes in the way that the military will prosecute sexual assault. So it is possible for these things to get through, but there is institutional resistance by the armed forces, apart from our own disengagement, that plays a role here.

FROM THE AUDIENCE:

Two quick, unrelated questions. I wondered if you could say something about the demographics of the 11,000 people that have been dismissed, as between men and women and by race, and if there has been a shift in the demographics of dismissals under "Don't Ask, Don't Tell." Second, if somebody could speak briefly about the generational change that is happening, both among enlisted personnel and junior officers—especially in a time of war, when there is discretion about dismissals, is there a generational tipping point that is occurring, where there is a broader disregard for "Don't Ask, Don't Tell" (particularly at a time of war), that ultimately undermines the legitimacy of Congress's position on this?

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MS. GREER:

I will answer the demographic question first because that is easiest. Of the 11,000 who have been separated, the one consistent demographic is women are about fifteen percent of the services. It varies from service to service, and they have consistently been about thirty percent of the discharges every year. So women are disproportionately discharged in a fairly significant way. In terms of race, service, and rank, for the most part, they match the demographics within the military. So there is no huge, disproportionate skew other than rank and age. Disproportionately, the people who are discharged tend to be junior enlisted officers, so there is also a skew in terms of the fact that it is the more junior personnel that tend to be hit hardest by the law.

In terms of the generational shift, and I would like some of my fellow panelists to comment on this too—as I encounter it in my work, it is stunning. Even in the five years that I have been working at Servicemembers' Legal Defense Network (SLDN)—and we do have a legal services program—in addition to our other work, my colleagues and I talk to gay and lesbian service members everyday.

We also talk to people on both the defense side and the command side in the JAG shops. We talk to commanders, and the changes are remarkable. The vast majority of the people that we talk to do not care whether gays and lesbians serve openly within the military. We are moving to a point where they really do not care, and in addition to not really caring if their troop is gay or not, especially if it is a good troop, it is an inconvenience to them. It is annoying to them to have to kick somebody out. It is an administrative nightmare. It affects their retention numbers. The response that I get, mostly from commands, is that this is a complete waste of their time and a pain and they are losing a good service member. We talked to the younger, straight service members—they do not care. They do not think this is an issue, and one of my biggest challenges is that a lot of the gay service members do not think it is an issue, so they are reasonably out, and then they get in trouble. I do think there is a generational shift.

FROM THE AUDIENCE:

Just two brief questions. I am a law school career-services person. Was *Rumsfeld v. FAIR* unanimous; and also, do you know whether federal funding for any law school has either been challenged or cut under the Solomon Amendment?

MR. PARKER:

The *FAIR* decision was almost unanimous because Justice Alito did not participate, but otherwise it was eight-zero. There have been a few law schools who I understand have foregone federal funding. No school has had its federal funding cut out through a challenge, and I do not remember the names of the law schools, but a few independents have just decided—none affiliated with a larger school—to forego federal funding altogether.

FROM THE AUDIENCE:

Hello, when I was in the military, and a soldier was just not happy with the military, usually the first option would be to say that he was gay, and usually he

was not gay. So, I was wondering, do you have numbers that speak to the number of soldiers who were separated under "Don't Ask, Don't Tell" or homosexual conduct regulations who were not actually homosexual?

MS. GREER:

We don't have any good numbers on that. I actually think that is a really fascinating point to bring up. Periodically, we hear from people in the Pentagon that soldiers are just saying they are gay to get out of their military service obligations. We hear that from some commanders, too. This goes to the absurdity of this law. First, there is no way to tell if somebody is really gay or not. There is not a litmus test for good, bad, or otherwise. The statute says that, if you say you are gay, you should be separated. So, under the statute, if you say you are gay, there is now a presumption that you have the propensity to engage in homosexual conduct, and you now have to prove otherwise. The people who contact us for help, who we have worked with, and who have been kicked out, almost without exception have been gay or lesbian and have not been trying to get out of their military service obligations. We have actually had straight people who were accused of being gay, and who had to fight really hard to prove that they were not gay. One of the things that I say when people raise this issue is,

If you are worried about people saying they are gay to get out of their military obligation, change the law. Repeal "Don't Ask, Don't Tell," and then you can get back to what you should be doing, which is worrying about disruptive conduct. Take care of the disruptive conduct, but let's get on with the business of having a good, effective military and stop kicking people out because they say they are gay.

PROF. HILLMAN:

Yeah, the numbers are really deceptive here. SLDN's work in tracking this is essential to all of us, but it does not begin to account for all the people who leave the service because they happen to realize they are gay at some point during their service. So there is a huge number of people who do not show up in those statistics, apart from the renegade straight people trying to escape the services.

FROM THE AUDIENCE:

Hi, I am a career-services person at Fordham Law School, and we have the military coming on campus in about ten days and then again in the spring. I would like your input or advice on our protest of "Don't Ask, Don't Tell." Where should we put our focus? It sounds that perhaps one of the best tactics may be to enlist students from across the nation (or local community members) to write to representatives in Congress to encourage their support for MREA [the Military Readiness Enhancement Act]?

PROF. HILLMAN:

I would, of course, be thrilled. The more people tell our members of Congress that this is an important issue and that the law needs to be changed, the better. One of our struggles with actually moving this bill through Congress is that, if the Congressional members do not believe that it is important to their constituents and they are not hearing about it, then they do not think it is an

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issue that needs to be acted on. So I think that would be a very helpful thing to do.

PROF. MAZUR:

I think you could say that the administration is not listening to its military lawyers on detainee policies, on interrogation procedures, and on military commissions, and it is also not listening to them on "Don't Ask, Don't Tell." So, I think you could link it to other issues, too.

MS. WILSON:⁷³

I wanted to make a point here. All of you are going to be lawyers, and to the best of my knowledge, I am practically the only LGBT-identified lawyer in the United States who routinely practices in the area of military jurisprudence on an open basis. Certainly, there are other gay or lesbian or bisexual or transgender lawyers who do some military cases, but it is a small realm. Beth Hillman serves as an Officer for the National Institute of Military Justice (NIMJ), which is the coalition of civilians who engage military jurisprudence. I would suggest to any of you to go to NIMJ's website and start learning about the huge world of military justice and law, and to begin the process of educating yourself, and I would invite all of you to become a part of the Civilian Military Bar. It is a fascinating group of people, and more importantly, it is part of the engagement of bringing a civilian perspective. One of my best friends in San Diego is a Navy judge. Two of the people he respects, actually three of the people he respects in this world, are sitting on this panel. He asked me a year or so ago if I knew this "Diane Mazur" person. He had seen her at a conference and thought she was very impressive. He practiced in the Appellate Defense Division when Beth Hillman was clerking at the Court of Appeals for the Armed Forces, the highest military court.

My recruiting for you is that in the incredibly un-lucrative, obscure world of military jurisprudence, if you pick a small enough, obscure enough, but most importantly unprofitable enough area of law, you too can become a national expert. It is my suggestion that some of you go out and make military jurisprudence some small part of your practice, because when you go to courts-martial, as I did last month, you will find that you are very well-received. I used this chance in Washington, D.C. to get sworn in before the Army Court of Criminal Appeals on Thursday, the only one of the military courts that makes you show up in person to be sworn in. I got a tour of the Army Legal Services building right at the Boston tram. They were very happy to see civilians. They are fascinated with everyone who is crazy enough to be a civilian and do this work. You bring the face of the civilian world to military jurisprudence and as lawyers, go back to your law schools and teach it, and as individuals, learn it. So, I refer you to Beth Hillman's organizational connection and the wonderful people at NIMJ who work very hard at keeping civilians attached to military justice.

73. Bridget J. Wilson is a shareholder in Rosenstein, Wilson & Dean, P.L.C. She is a veteran of the U.S. Army Reserve and currently serves with the California State Military Reserve as a judge advocate.

PROF. MAZUR:

That was Bridget Wilson, who served on a panel yesterday.

MR. PARKER:

Bridget does public service in this area of law and her work is really an inspiration to all of us. One more thing about the National Institute of Military Justice (NIMJ): Diane is also on the board, and we are running a program in November for civilian teachers of military law. It is going to be here in Washington, D.C. at American University's Washington College of Law. I work on education for NIMJ and we are going to primarily invite people who are teaching or have taught military law-related issues in law schools. The academics make up two cohorts: the people who are interested now because of the War on Terror and the legal issues related to the military, and then a much older cohort that had a big impact on internal military law and criminal justice many years ago. Our hope, our goal, is to generate some energy and some connections between these groups of people, so that we can try to do some of the work Diane and Bridgette talked about.

MS. GREER:

This will be our last question.

FROM THE AUDIENCE:

I was wondering if the panel could comment on other issues under the Solomon Amendment besides "Don't Ask, Don't Tell" that might inhibit the military under the standard anti-discrimination policy that most employers that go to law schools and other campuses are forced or are requested to sign on to. Are there any other military policies or employment policies that might prohibit or inhibit the military's ability to go on campus, outside of "Don't Ask, Don't Tell"? Things that were mentioned earlier were women, as well as transgender issues; I was wondering if there could be a little bit of expansion of that discussion.

MR. WAGGONER:⁷⁴

Listen, under the *FAIR* decision, the military can get on campus, period. The danger of the *FAIR* decision is what Congress can place funding conditions on what it can order directly. The Court essentially says in *FAIR* that Congress can order law schools to accept the military as recruiters, regardless of their acceptance of federal funding. So "Don't Ask, Don't Tell" is not merely one limit; one can, just as Prof. Hillman indicated, find other ways in which the military discriminates against people based on disability and gender, and yet they are still allowed to go on campus—and the *FAIR* decision would say they essentially have a *right* to go on campus.

PROF. MAZUR:

The situation related to discrimination on the basis of sex is actually in many ways very parallel to the "Don't Ask, Don't Tell" controversy, in that the military today would love to have much more flexibility in the way that it

74. Lawrence W. Waggoner is the Lewis M. Simes Professor of Law at the University of Michigan Law School.

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assigns women. Congress—just as it does with “Don’t Ask, Don’t Tell”—very tenaciously tries to enforce traditional notions of what women should or should not be doing in military service. So when we target our career services-related objections toward the treatment of women and speak primarily to the military, we do not have the best audience, because the military is likely to tell you that it understands the problem and wishes that it had more flexibility with the assignment of women. But it is running up against a much more hardened Congress on this issue, in the same way as in “Don’t Ask, Don’t Tell.” So, I would say that the questions you raised are valid, but they really raise exactly the same concerns that “Don’t Ask, Don’t Tell” does.

MR. PARKER:

The military did not at all support the Solomon Amendment when it was enacted, and this is interesting because the *FAIR* decision starts off with judicial deference to the military, even though the military did not want this. I do know that, in California, military recruiters have had a traditionally difficult time finding people and meeting their recruiting numbers. So this is an issue where there are certain impediments the military is facing that I do not think they want to face. The fact that we have a decision that starts off with judicial deference and then runs into the First Amendment (without really linking the two) is fascinating, but I think it also hides what is truly at issue here.

MS. GREER:

Alright, well I want to thank my fellow panelists and thank you for getting up this morning.

[Applause.]