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PALM CENTER RESPONDS TO WALTER DELLINGER NYT OP-ED
Flawed Reasoning Behind Conclusion That President Obligated To Continue to Defend Gay Ban

SANTA BARBARA, CA – October 22, 2010 – Palm Center Legal Co-Director Diane Mazur has issued the following analysis in response to Walter Dellinger's October 20, 2010 New York Times op-ed. Professor Mazur questions Dellinger's conclusion that the Obama administration is required to continue to defend "don't ask, don't tell" in court:

Walter Dellinger, former head of the Justice Department's Office of Legal Counsel, published a editorial in the New York Times on October 20, 2010, "How to Really End Don't Ask, Don't Tell." In the editorial, he argued that President Obama was legally obligated to appeal the recent federal court ruling in Log Cabin Republicans finding "Don't Ask, Don't Tell" unconstitutional. Dellinger also recommended that the president use the appeal process for an unusual purpose: to argue that DADT was unconstitutional, just as the trial court concluded it was.

Dellinger's editorial sets out a compromise position between two options: 1) a vigorous defense of the law's constitutionality on appeal; and 2) a decision to decline to appeal, and therefore accept the court's ruling that DADT is unconstitutional. However, the editorial greatly overstates both the president's obligation to appeal and the usefulness of an appellate process in which the president supports the trial court position that DADT is unconstitutional. This memo responds to several points made in the editorial and explains why they are partial or misleading.

1) "The administration is required to comply with the law and defend it in court."

Although the Department of Justice generally defends federal law from constitutional challenge, there are established exceptions to that practice, and the exceptions apply to Log Cabin Republicans. The editorial states the general rule but completely disregards the exceptions.

There are good reasons for the general rule. If Congress has made a constitutional judgment in passing a law, and the president has made a constitutional judgment in signing the law, then the executive branch should normally stand behind that shared judgment and defend it. However, the original constitutional judgment underlying DADT is no longer valid today, and that changes the rules for the president's obligation to appeal.

In 1993, the year of the original DADT debate, Supreme Court doctrine allowed government to regulate the

private lives of gay people without having to prove any justification beyond moral disapproval. After Lawrence v. Texas (2003), however, the government would have to demonstrate a good reason for regulating intimate decisions made by anyone, straight or gay. In the Log Cabin Republicans case, Judge Phillips followed Lawrence and required the government to produce some evidence that DADT was necessary to preserve good order and discipline in the military, but the government was unable to do so. In fact, the evidence showed that DADT was undermining military effectiveness.

The President shows no disrespect for Congress in choosing not to appeal. The constitutional assumptions underlying DADT no longer exist, and the president needs to make a new constitutional judgment. He owes no special allegiance to the original decision, because it was made under the wrong constitutional assumptions. The President has no obligation to wait for Congress to act first.

Ted Olson, solicitor general under President George W. Bush, agrees. He told ABC News: "I don't know what is going through the [Obama] administration's thought process on 'don't ask, don't tell…It would be appropriate for them to say 'the law has been deemed unconstitutional, we are not going to seek further review of that.'"

The president's responsibility to make a new constitutional judgment is even stronger with DADT because the law interferes with his commander-in-chief authority. There is an understandable reluctance today to make legal arguments based on commander-in-chief authority, but the president need not avoid appropriate uses of that authority for fear that someone else could use it inappropriately. For example, there is an enormous difference between an executive conclusion that federal laws prohibiting torture are unconstitutional and unenforceable, without any change in constitutional doctrine that might have altered the controlling law, and without any court ruling of unconstitutionality; and an executive conclusion that DADT is unconstitutional because Lawrence has changed the rules for enacting such legislation, and a federal court has already agreed.

2) "The next president might, for example, decide not to enforce the recent health care reform law."

This comparison is flawed and inaccurate. There has been no change in Commerce Clause doctrine that could justify a future president in concluding that Congress's original constitutional judgment about health care reform is now obsolete. The executive branch would be obligated to defend the reasoning under which Congress originally enacted the health care law. Moreover, the health care law does not involve any independent constitutional obligation of the president, such as the commander-in-chief power.

Dellinger's editorial also mischaracterizes President Bill Clinton's response to Congress's decision to discharge all HIV+ military personnel. Clinton did not "inform the courts" that he would not defend the law on appeal; he announced even before there was a legal challenge that he would not defend the law. Obama's position is much stronger. He has already unsuccessfully defended DADT in two federal proceedings, and he is entitled to decide when further effort is futile. [History of the HIV provision: http://www.aegis.org/NEWS/re/1996/RE960215.html]

3) A decision to appeal, but argue the law is unconstitutional, "could significantly affect how the court rules." "The President could increase the chances that the appellate courts would agree with him."

This is highly unlikely. The most likely consequence of following the Dellinger option is years of delay without any significant benefit.

There is a common misunderstanding that federal courts are divided on the constitutionality of DADT. First, any cases upholding DADT before Lawrence v. Texas was decided are irrelevant, because the controlling legal doctrine is now different. The only case upholding DADT after Lawrence—Cook v. Gates in the First Circuit Court of Appeals in 2008—is distinguishable because Cook did not follow the Supreme Court's reasoning. The First Circuit evaluated the constitutionality of DADT in a proceeding that was bizarrely inconsistent with Lawrence and the Constitution's protection of individual liberty. Cook ruled that the government did not have to offer any evidence that DADT improved military readiness, and it also barred the service-member plaintiffs from offering any evidence that DADT was undermining military effectiveness. It's easy for the government to win a case when it doesn't have to offer evidence, and the opponent is prohibited from proving its own case. Lawrence does not allow constitutional liberty to be discarded so easily—without evidence and without justification.

The only two federal courts to consider DADT under a Lawrence standard—which only means that the government must have evidence that DADT is important to good order and discipline in the military—have ruled against the government. In both Log Cabin Republicans and Witt v. Department of the Air Force, the government failed spectacularly. It had no evidence that DADT had any military justification, and the Department of Justice has the authority to conclude that further attempts to justify the policy will be ineffective and embarrassing.

If the Department of Justice continues to appeal unfavorable rulings, one of two things will happen. First, the appellate court could affirm the trial court's finding of unconstitutionality. In the interim, the policy will continue to burden the lives of gay service members and the military will continue to discharge valuable personnel. Second, if the appellate court reverses, it will likely reverse on the basis of a doctrine of judicial deference to military decision-making. The court will not uphold the policy because it has any special insight into the evidence, but only because it chooses to defer to another branch of government.

The doctrine of judicial deference shows why the Dellinger option provides little benefit, and only adds further delay. The principal case on judicial deference is Rostker v. Goldberg (1981). In Rostker, the Supreme Court was asked to decide whether young women should be required to register for a potential military draft along with young men. The elected branches were in conflict in ways that parallel DADT. Congress decided that women should not be required to register for the draft, primarily because Congress believed involuntary military service was culturally inappropriate for females. President Carter, however, believed there were good military reasons for registering all persons, male or female, whose service and skills might be helpful to the military. Senior military officers agreed with the president. ("All four service chiefs agreed that there are no military reasons for

refusing to register women, and uniformly advocated requiring registration of women.") The Court was asked to decide whether excusing women from this fundamental obligation of citizenship was a violation of equal protection of the laws.

In Rostker, the court approved the exclusion of women from draft registration, citing judicial deference as a justification for disregarding constitutional values of equality. The court offered no guidance on constitutional equality and simply chose the preferences of one political branch (Congress's power to govern and regulate the military) over another political branch (the president's power as commander-in-chief). Almost thirty years later, we still have a draft registration system that excludes women, although most military positions are now open to both men and women. The effect of Rostker was to entrench for decades an unconstitutional understanding of equality between men and women—and at the military's expense.

If appellate courts reverse the Log Cabin Republicans ruling, it will likely be because they made a similar choice between competing political positions, and not because they had any helpful expertise, guidance, or grounds for consensus. It makes little sense to postpone for years what is now a political disagreement, in order to wait for a higher court ruling that may be nothing more than another political choice—and one that does not even respect the needs of the military. The President is in a position today to make a constitutional judgment that DADT cannot be justified by either law or fact. He can do so by directing DOJ not to appeal Log Cabin Republicans.

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