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**PALM RELEASES MEMO ON RISK TO TROOPS**

*Also Issues Statement on DOJ Overreach*

SANTA BARBARA, CA, April 1, 2010 -- This week, the Pentagon and the Department of Justice raised several questions about the military's "don't ask, don't tell" policy. On Monday, the Department of Justice's Civil Division, led by Assistant Attorney General Tony West, issued what experts believe is a highly questionable brief to dismiss a case challenging the gay ban. Then, during a breakfast meeting with reporters on Wednesday, the Secretary of the Army, John McHugh, made statements advising that he would not seek to discharge troops who "come out" during the year-long review process. In both instances, the rights of service men and women, which can be easily misconstrued, are discussed.

Today Palm Center is releasing a [memo](#) written by Legal Co-Director of the Palm Center, Diane Mazur, describing the risks to all service members in speaking openly to the Pentagon Working Group, and outlining steps the Pentagon could take to mitigate those risks. Professor Mazur has also issued the following statements relating to the issues above:

Responding to the Department of Justice Brief:

"The Department of Justice this week filed a brief in support of summary judgment in the case of Log Cabin Republicans v. United States. The lawsuit seeks to overturn the ban on openly gay service. Lawyers and experts do not question that the Department has an obligation to make a reasonable legal defense of the constitutionality of a federal statute. However, Assistant Attorney General Tony West went a step beyond defending constitutionality and wrote a brief defending the policy itself.

"With this brief, West and his team chose to highlight uninformed arguments made to justify the policy, including those citing a need for segregated facilities. Unbelievably, the brief also states that second-guessing of military policy may be inappropriate, and that evidence supporting such second-guessing may be inadmissible. These are outlandish legal claims without any support.

"In an incomprehensible and unprofessional move, they also chose to mock and misrepresent expert witnesses testifying on behalf of service members by placing quotation marks around the word 'expert' and dishonestly claiming that these scholars lent credence to the discredited "privacy rationale" for DADT. As the transcripts



show, the scholars, who include Palm Director Dr. Aaron Belkin and Senior Research Fellow Dr. Nathaniel Frank, said that privacy concerns themselves are not irrational, but that using those concerns to defend DADT is irrational. DOJ should be embarrassed by the sleight-of-hand it pulled in misconstruing the remarks of expert witnesses.

“This brief could have been written very differently and still complied with any obligation to defend an arguably constitutional law. Assistant AG West could have emphasized arguments that Log Cabin plaintiffs did not have proper legal standing to challenge DADT. On the merits, he could have stated, without elaboration and without endorsing evidence that is no longer considered accurate, that 1) federal courts have held that the 1993 congressional debate provided a rational basis for DADT, but 2) intervening cases such as Lawrence and Witt raise issues that have not been fully resolved. In this brief, unfortunately, DOJ is making arguments that weaken gay civil rights generally, not only challenges to DADT.”

Responding to Secretary McHugh’s Statements:

“Whatever good intentions senior officials like Secretary McHugh and others may have, the truth is that the way the law currently stands, service members do not have protection from later enforcement of the policy. There are ways to legally make that happen and to give Secretary McHugh and others the ability to stand by their word, but right now, if a service member ‘tells’ during the review process, or if a straight service member ‘outs’ a lesbian or gay colleague, a ‘don’t ask, don’t tell’ discharge can still commence.

“When the issue is a guarantee of immunity to service members who may be ‘outed’ as a result of the study process, one needs to be able to point to something in the law or regulation itself that limits what otherwise would be a commander’s full discretion to enforce. Without it, lawyers would not be comfortable advising service members to speak freely.

“In order to ensure that the Working Group gets full, candid information from its ongoing review, the Secretary should revise the Department’s implementing regulations to expressly reference the ongoing review and prohibit commanders from using information disclosed as a direct or indirect result of the Working Group’s activities to enforce ‘don’t ask, don’t tell.’ This would create the firmest guarantee of protection that DOD itself can make without the involvement of Congress. Anything short of that exposes gay service members to some risk of separation, notwithstanding the good faith of the Working Group.”

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The Palm Center is a think tank at the University of California, Santa Barbara. Since 1998, the Center has been a leader in commissioning and disseminating research in the areas of gender, sexuality, and the military. For more information visit [www.palmcenter.ucsb.edu](http://www.palmcenter.ucsb.edu).