

DO ASK, DO TELL, DO JUSTICE:



PURSuing JUSTICE FOR LGBTQ MILITARY VETERANS

A Summary Report from a Two-Day Summit
Held at Harvard Law School
April 19 & 20, 2018



Table of Contents

Introduction	2
Summit Participants	3
Background	5
Institutionalized Discrimination against LGBTQ Servicemembers	5
2011 DADT Repeal	6
Current Obstacles to Upgrading Discharges	7
Individual Battle Scars from Discrimination and Identity Concealment	7
The Double Closet Dilemma	9
Canada’s Innovative Response	9
Unsuccessful Attempts at U.S. Federal Legislation	10
Stakeholders	12
Strategies for Connecting with Stakeholders	12
Special Role of the Department of Veterans Affairs	13
Needs Identification	14
Prioritizing Needs	15
From Ideas to Action	16
State and Local Legislation	16
Proposed Solutions	17
Outreach & Media	18
Litigation	18
Cultural Competency	18
Policy Reform & Political Action	18
Recommendations	19
Raise Awareness	19
Improve Collaboration	19
Build Momentum	20
Conclusion	20

Introduction

On April 19th & 20th, 2018, the Veterans Legal Clinic at the Legal Services Center of Harvard Law School, OUTVETS, and Veterans Legal Services co-hosted “*Do Ask, Do Tell, Do Justice: Pursuing Justice for LGBTQ Military Veterans*,” a two-day Summit. Also spearheading the event was John R. Campbell, Former U.S. Deputy Undersecretary of Defense for the Office of Warrior Care and 2017 Harvard Advanced Leadership Initiative Fellow.

The objective of the Summit was to explore the history of discrimination against generations of LGBTQ servicemembers and the ongoing harms experienced by LGBTQ veterans. Immersed in this historical context, participants concentrated on assessing and developing potential responses to the present-day legacy of discrimination by considering the role of civilian law, military law, communications/media, nonprofit organizations, private law firms, government, healthcare, and other stakeholders.

Summit participants engaged in facilitated collaborative problem-solving to develop strategies for addressing the unique issues faced by LGBTQ servicemembers and veterans. The Summit brought together dozens of experts and community leaders on LGBTQ military and veterans matters from the United States and Canada. The group of legal, political, and healthcare leaders examined both past and present discriminatory policies—including “Don’t Ask, Don’t Tell”—and the Trump Administration’s recent effort to implement a transgender service ban.

The Summit provided a forum for participants to examine, in a multi-disciplinary way, both legal and non-legal remedies to enforce the rights of LGBTQ veterans and to honor and fully recognize their military service and unique sacrifices. Participants who shared their stories, experiences, and best practices included individuals from OutServe-SLDN; the U.S. Department of Veterans Affairs; American Veterans for Equal Rights; the National Veterans Legal Services Program; Dartmouth Hitchcock Medical Center; Johns Hopkins; Cambridge, LLP; McKiggan Hebert Lawyers; and the Massachusetts LGBTQ Bar Association, as well as co-hosts OUTVETS, the Veterans Legal Clinic at the Legal Services Center of Harvard Law School, and Veterans Legal Services.

The Summit’s primary focus was on how to fully honor the service of LGBTQ veterans, especially those who received less-than-fully honorable discharges. These discharges not only impose profound stigma on LGBTQ veterans, they also frequently bar—by operation of civilian law—LGBTQ veterans from receiving critically needed veterans benefits, healthcare, and supports. To this day, thousands of LGBTQ veterans are still denied access to essential veterans services—with dire consequences for their mental and physical health, financial wellbeing, and peace of mind.

This report details the Summit’s findings about how to begin breaking down the considerable barriers LGBTQ veterans face as they pursue justice and access to essential services.

Summit Participants

Gathering a Range of Viewpoints

Recognizing that a diversity of viewpoints leads to a stronger outcome, Summit co-hosts OUTVETS, the Legal Services Center of Harvard Law School, and Veterans Legal Services, aspired to include a diverse roster of participants across multiple backgrounds and disciplines. A complete list of participants is set forth below. Because participants attended in their individual capacity, titles and organizational affiliations are included for identification purposes only.

David F. Addlestone *Co-Founder, National Veterans Legal Services Program*

Gavin Alexander *Co-Chair, Massachusetts LGBT Bar Association; Co-Chair, Affiliate Congress, National LGBT Bar Association*

Bryan Bishop *Commissioner of Military and Veterans' Services, City of Somerville; Commander, OUTVETS*

Andy L. Blevins *Director of Law and Policy, OutServe-SLDN*

George R. Brown *Associate Chairman for Veterans Affairs; Professor of Psychiatry, East Tennessee State University*

John R. Campbell *Former Deputy Undersecretary of Defense for Warrior Care and Transition Policy, United States Department of Defense*

Andrew Cohen *Supervising Attorney, Health Law Advocates*

Nanette DeRenzi *Former Judge Advocate General (JAG) of the US Navy*

R. Douglas Elliott *Partner, Cambridge, LLP*

Brian Ellner *Executive Vice President and group head of Public Affairs, Edelman Worldwide New York*

Antonia Fasanelli *Executive Director, Homeless Persons Representation Project*

Lynn A. Girton *Pro Bono Director, Veterans Legal Services*

Betsy Gwin *Associate Director, Clinical Instructor & DAV Charitable Service Trust Fellow, Veterans Legal Clinic, Legal Services Center, Harvard Law School*

Jennifer Levi *Transgender Rights Project Director, GLAD*

John McKiggan *Partner, McKiggan Hebert Lawyers*

Shannon McLaughlin *State Judge Advocate, Massachusetts National Guard; Lead Plaintiff, McLaughlin v. United States; National Advisory Committee on Women Veterans*

Denny Meyer *Public Affairs and Veterans Affairs Officer, American Veterans for Equal Rights*

Rev. Irene Monroe *Columnist, Public Speaker, Media Commentator, and LGBT Activist*

Dana Montalto *Clinical Instructor, Veterans Legal Clinic, Legal Services Center of Harvard Law School*

Daniel Nagin *Clinical Professor of Law; Vice Dean for Experiential and Clinical Education; Faculty Director, WilmerHale Legal Services Center; Faculty Director, Veterans Legal Clinic; Harvard Law School*

Paula M. Neira *Clinical Program Director, Johns Hopkins Center for Transgender Health*

Peter Perkowski *Legal Director, OutServe-SLDN*

Julie Rafferty *Senior Advisor for Advancement, Legal Services Center, Harvard Law School*

Anna Schleelein Richardson *Co-Executive Director and Chief Counsel, Veterans Legal Services*

Evan R. Seamone *Clinic Attorney, Veterans Legal Clinic, Legal Services Center, Harvard Law School*

Jillian C. Shipherd *Clinical Research Psychologist, Women's Health Sciences Division, National Center for PTSD, VA Boston Healthcare System*

Pedro Spivakovsky-Gonzalez *Staff Attorney and Skadden Fellow, Veterans Legal Services*

Matt Thorn *President and Chief Executive Officer, OutServe-SLDN*

Hanna Tripp *Military and Veteran Fellow, Office of Congressman Joseph P. Kennedy III*

John H. Turco *Endocrinologist, Dartmouth Hitchcock Medical Center*

Halee F. Weinstein *Associate Judge, District Court of Maryland, District 1, Baltimore City*

Evan Wolfson *Senior Counsel, Dentons*

Jessica Youngberg *Staff Attorney, Veterans Legal Services*

Background

The Military's Historical Legacy of Discrimination against LGBTQ Servicemembers

The following is an excerpt of the background reading materials provided to Summit participants.¹

Institutionalized Discrimination against LGBTQ Servicemembers

Between the end of WWII and the repeal of “Don’t Ask, Don’t Tell” (DADT), approximately 114,000 U.S. servicemembers were involuntarily separated based on sexual orientation.² The “Don’t Ask, Don’t Tell” policy existed from 1993 until 2011. Prior to this, the military had different—often inconsistent—standards on administrative discharge of servicemembers for same-sex sexual orientation or behavior. Department of Defense (DoD) directives in the ‘50s established “Class I,” “Class II,” and “Class III Homosexual” categories, that would result in sanctions ranging from a general or honorable conditions discharge to a general court-martial.³ In 1993, DADT was instituted as a compromise and to limit widespread persecution, as implied in the remainder of the DADT policy title, which includes: “Don’t Pursue, Don’t Harass.” Consensus established that the policy created additional burdens.

The diagram shows a DD-214 discharge form with several callouts pointing to specific fields:

- SECNAVINST 19101C**
AFREG. 39-10
MILPERSMAN 3630400
AR 635-200
- Honorable General Other Than Honorable**
- 23. TYPE OF SEPARATION**
RELEASE FROM ACTIVE DUTY
- 24. CHARACTER OF SERVICE (Includes upgrades)**
GENERAL
- 25. SEPARATION AUTHORITY**
AR 635-200, CHAP 15
- 26. SEPARATION CODE**
JRB
- 27. REENTRY CODE**
RE-4
- 28. NARRATIVE REASON FOR SEPARATION**
HOMOSEXUAL ADMISSION
- 29. DATES OF TIME LOST DURING THIS PERIOD**
NONE
- 30. MEMBER REQUEST**
COPY 4
- DD Form 214-1, 1 OCT 88** (Previous edition delete.)
- RE-4 RE Code 4 Ineligible**
- SPN CODE OR SEP CODE**
BLC, BML, BRA, DLC, GKC, GML, HLC, HRC, HWL, JKC, JML, JRA, JRB, 249, 250, 251, 252, 253, 255, 256, 257, 586
- Homosexual Conduct Homosexual Admission Homosexual**

Examples of stigmatizing and identifying codes on DD-214 discharge form for veterans affected by bans on LGBTQ service

Between 1922 and 1993, these military policies shifted significantly, often in response to legal action and community advocacy. Some of the factors that influenced shifting standards on gay bans included

¹ Ahead of the Summit, participants were provided with background reading materials that summarized the history and legacies of military policies that targeted servicemembers for punishment and discharge on the basis of their sexual orientation or identity. See Evan R. Seamone, Survey of Key Issues Related to Discrimination by the Military Against LGBTQ Veterans: Advance Reading for Ideas-in-Action Summit (April 2018).

² Matthew M. Burke, *Bill Would Upgrade Records of Those Discharged Under DADT*, STARS & STRIPES, June 21, 2013, <https://www.stripes.com/news/us/bill-would-upgrade-records-of-those-discharged-under-dadt-1.226901>.

³ Comment, *Homosexuals in the Military*, 37 FORDHAM L. REV. 465, 468 (1969).

114,000 U.S. troops were involuntarily separated from the military between the 1940s and 2011. Countless more pretext separations were instituted targeting sexual orientation or identity but based on other grounds.

federal lawsuits based on constitutional violations, such as the case of Sergeant benShalom, a drill instructor who was separated from the Army Reserve based on the violation of a discharge policy stating a basis for separation when a soldier “evidences homosexual tendencies, desire, or intent, but is without overt homosexual acts.”⁴ The Eastern District of Wisconsin held that such overbroad language violated the First Amendment and offended privacy protections; the terminology would have applied to even an academic discussion about sexual orientation.⁵ Other changes to policies were based on the increasing

involvement of and reliance on mental health providers in the discharge process. Some of these professionals were in favor of the option to redeem homosexual servicemembers, which led the military to institute a system of classification that would result in mandatory military responses.⁶

While these policies targeted gay and bisexual military members, it is likely that many more transgender servicemembers were also involuntarily separated from the Service under different policies, such as separations based on “psychiatric and behavioral disorders.”⁷

2011 DADT Repeal

In 2011, after extensive debate and study, DADT was repealed and gay, lesbian, or bisexual behavior or admissions were no longer bases to separate a servicemember from the military. Because the military still banned the participation of transgender personnel, some suggested that the existing transgender ban represented a “new” DADT.⁸ This major shift in policy led the DoD to articulate special rules to address the status of the many thousands of veterans who had been discharged under the policy. While falling short of restoration and reinstatement to military duty or payment of lost salaries, a memorandum of September 20, 2011, articulated specific rules for upgrading of discharges.⁹ In summary, veterans who were discharged on the basis of sexual orientation but without “aggravating circumstances,” such as misconduct, would receive upgrades to fully honorable if discharged with a lesser characterization and would further have the ability to change the narrative reason of their discharge from common statements like “Class I Homosexual,” “Homosexual Admission,” or “Homosexual Acts” to the less specific “Secretarial Authority.”

⁴ *benShalom v. Sec’y of Army*, 489 F. Supp. 964, 973-74 (E.D. Wis. 1980).

⁵ *Id.*

⁶ Comment, *Homosexuals in the Military*, 37 *FORDHAM L. REV.* 465, 466 (1969).

⁷ Matthew F. Kerrigan, *Transgender Discrimination in the Military: The New Don’t Ask, Don’t Tell*, 18 *PSYCH. PUB. POL’Y & L.* 500, 507 (2012).

⁸ *See generally id.*

⁹ Memorandum from Clifford L. Stanley, Under Sec’y of Def., to Sec’y of the Military Dep’ts, on Correction of Military Records Following Repeal of Section 654 of Title 10, United States Code (Sept. 20, 2011).

Current Obstacles to Upgrading Discharges

With a significant portion of the 114,000 veterans who had been discharged on the basis of DADT or predecessor policies now able to take advantage of more favorable upgrading policies, it is surprising that the vast majority have not applied. Optimistic estimates suggest that perhaps only eight percent of eligible veterans have applied.¹⁰ Many of those who have applied fall into the population of elderly veterans nearing death who have decided to apply only when confronted with their mortality.¹¹

92% of those who might qualify for corrections or upgrades of discharges based on sexual orientation have *not* applied.

For others the pain of revisiting their most haunting military memories was too much to bear and led to abandonment of the applications.¹² Aside from the re-trauma of unsettling memories, a second reason for the lack of applications may be the inability to identify LGBTQ veterans and to reach them with targeted messages in the media or through traditional LGBTQ advocacy groups. Finally, some veterans may resist the notion of upgrading because concealment of the reason why they were separated might be seen as lack of pride in the reason for the discharge.

For those who do apply, they face the same burdens as other veterans who seek discharge upgrades, and those burdens are significant. The process for upgrading discharges remains totally reactive, in that the Discharge Review Boards and Boards for Correction of Military/Naval Records wait for veterans to apply to them rather than identifying and notifying veterans of applicable changes in standards. Once a veteran does apply, it can take between 12 to 18 months just to receive a response.

Individual Battle Scars from Discrimination and Identity Concealment

Two exhaustive volumes, Randy Shilts's *Conduct Unbecoming*¹³ and Nathaniel Frank's *Unfriendly Fire*,¹⁴ are representative in their detailed descriptions of the military's war on LGBTQ servicemembers, which often extended to arrests, jailing, and threats from law enforcement, combined with hostility from members of one's own unit and exposure to harassing comments and behavior. In some cases, servicemembers faced the threat of "corrective rape," which required sex with a member of the opposite sex in order to prove that the servicemember was not homosexual as suspected.¹⁵ The lived experiences of veterans who were forced to carry on two separate lives to exercise the right to serve in the Armed Forces has led to major long-term consequences. By concealing their identities, veterans

¹⁰ Jennifer McDermott, *Few Veterans Expelled Under "Don't Ask" Policy Seek Remedy*, MILITARY.COM, June 25, 2016, <https://www.military.com/daily-news/2016/06/25/few-veterans-expelled-dont-ask-policy-seek-remedy.html>.

¹¹ See, e.g., Dave Philipps, *Ousted as Gay, Aging Veterans Are Battling Again for Honorable Discharges*, N.Y. TIMES, Sept. 6, 2015, <https://www.nytimes.com/2015/09/07/us/gay-veterans-push-for-honorable-discharges-they-were-denied.html>.

¹² *Id.*

¹³ RANDY SHILTS, *CONDUCT UNBECOMING: GAYS & LESBIANS IN THE U.S. MILITARY* (1993).

¹⁴ NATHANIEL FRANK, *UNFRIENDLY FIRE: HOW THE GAY BAN UNDERMINES THE MILITARY AND WEAKENS AMERICA* (2009).

¹⁵ Keren Lehavot & Tracy L. Simpson, *Incorporating Lesbian and Bisexual Women into Women Veterans' Health Priorities*, 28 J. GEN. INTERNAL MED. S609, S611 (2d Supp. 2013).

lacked important social supports that are necessary for conceptualizing the self. This prolonged strain also led to greater health consequences, both physical and mental.

Veterans were impacted in different ways by DADT and its predecessor policies.¹⁶ Many of the lasting consequences can be traced to the process of concealing one's identity. The psychological impact of the DADT policy is noteworthy because of the manner in which it created "internal" and "external" conflicts. The internal conflict was "taking an oath of honesty and integrity and subsequently being forced to conceal one's true identity."¹⁷ The external conflict was "feared reactions of heterosexual counterparts and military command that could result in retaliation up to and including discharge from the service."¹⁸ According to clinical social worker Maria Heliana Ramirez and her colleague Paul Sterzing, as a result of being forced to create false identities and disavow the true ones, many veterans missed out on a vital component of LGBT identity development: "a coherent sense of self and community."¹⁹ Many years later, the impact of identity concealment has been isolation, and it has been common for LGBTQ veterans to not want to revisit their experiences or discuss them with other LGBTQ partners, peers, and fellow veterans.

It would be stereotypical and wrong to assume that all LGBTQ veterans are victims who were damaged in some way by DADT and its predecessor policies. Many LGBTQ veterans, in fact, resisted the policies and supported one another in ways that allowed them to grow and flourish even in the face of such challenges. To this end, the article "Coming Out in Camouflage" describes the many ways that LGBTQ veterans have been resilient.²⁰ However, it remains the case that some LGBTQ veterans have been deeply affected by this discrimination. In general, the article "Toward Complete Inclusion," describes how medical studies of LGBTQ veterans have revealed risks of smoking, phobias, panic attacks, and substance abuse, and other mental health conditions independent of the already substantial risks that all veterans face based on the realities of their military service, such as combat-related Post-traumatic Stress Disorder (PTSD).²¹ LGBTQ veterans also have heightened risks of suicide, with transgender veterans diagnosed with Gender Identity Disorder under the care of VA facing a 20 times greater risk of suicide than veteran patients in general.²²

Veterans with Gender Identity Disorder face a 20 times greater risk of suicide than veterans without the Disorder who are receiving care at VA.

¹⁶ See generally Brandon Alford & Shawna J. Lee, *Toward Complete Inclusion: Lesbian, Gay, Bisexual, and Transgender Military Service Members After Repeal of Don't Ask, Don't Tell*, 61 SOC. WORK 257, 260 (2016).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Maria Heliana Ramirez et al., *If We Ask, What They Might Tell: Clinical Assessment Lessons from LGBT Personnel Post-DADT*, 60 J. HOMOSEXUALITY 401, 406 (2013).

²⁰ See generally M. Heliana Ramirez & Paul R. Sterzing, *Coming Out in Camouflage: A Queer Theory Perspective on the Strength, Resilience, and Resistance of Lesbian, Gay, Bisexual, and Transgender Service Members and Veterans*, 29 J. GAY & LESBIAN SOC. SERVICES 68 (2017).

²¹ Alford & Lee, *supra* note 16, at 260.

²² Michele D. Sherman, *An Empirical Investigation of Challenges and Recommendations for Welcoming Sexual and Gender Minority Veterans into VA Care*, 45 PROF'L PSYCHOL.: RES. & PRAC. 433, 434 (2014) (reporting statistics from the period 2000 to 2011).

Importantly, the military’s discriminatory policies did not only affect those veterans who were discharged from the service. With LGBTQ servicemembers estimated at three to four percent of the veteran population,²³ the hostility, harassment, assaultive behavior, and law enforcement targeting of LGBTQ servicemembers potentially impacted 870,000 additional LGBTQ veterans.²⁴ In this respect, a growing body of medical literature confirms how all veterans who concealed their identities during the time of open discrimination are at significant risk of negative physical and mental health outcomes.²⁵ With greater attention to the health risks facing military veterans due to combat and operational stress, it is noteworthy that these consequences of identity concealment are independent of—and have an additive effect to—uniquely military stressors.²⁶ Although public health concerns are mounting regarding higher rates of sexual minority veteran mental illness and suicide, there are many obstacles to providing remedies, including some impediments imposed by DoD (e.g., the current limits on open transgender service²⁷), VA (e.g., the current ban on surgery for transgender veterans²⁸), and even the LGBTQ community (e.g., a general anti-war sentiment that can impose stigma on veterans within the LGBTQ community). Additional difficulties arise when LGBTQ veterans are treated as a homogenous group and the individual and special needs of each subpopulation represented by the acronym are not taken into account.

The Double Closet Dilemma

In addition to general reluctance to revisit old traumas, the impacts of identity concealment are compounded by the dilemma of the “double closet.” On the one hand, individuals might be reluctant to disclose their status as a veteran within an LGBTQ community organization based on concerns about anti-war or anti-military bias or concerns about lack of understanding of military service. On the other hand, individuals might be reluctant to come out within the veterans community due to the hypermasculine culture of the military and actual or perceived homophobia. This concept—known as the “double closet”—represents not just a problem for individual LGBTQ veterans, but also a significant problem for the larger community. This double closet can act as a barrier to effective outreach to and integration of LGBTQ veterans in any communities that might otherwise serve as a base for organizing.

Canada’s Innovative Response

Despite the few geographic miles that separate the United States from Canada, our nations’ political climates are light years apart on the issue of LGBTQ veterans. Largely in response to the U.S. military’s campaign to oust LGBTQ servicemembers, Canada instituted its own “Gay Purge” over a

²³ Laura Johnson & Edward J. Federman, *Pathways and Barriers to Care for LGBT Veterans in the U.S. Department of Veterans Affairs (VA)*, 7 J. LGBT ISSUES IN COUNSELING 218, 218 (2013).

²⁴ Ramirez et al., *supra* note 19, at 402.

²⁵ Alford & Lee, *supra* note 16, at 260.

²⁶ *Id.*

²⁷ Helene Cooper & Thomas Gibbons-Neff, *Trump Approves New Limits on Transgender Troops in the Military*, N.Y. TIMES, March 24, 2018, <https://www.nytimes.com/2018/03/24/us/politics/trump-transgender-military.html>.

²⁸ U.S. DEP’T OF VETERANS AFFAIRS, DIR. 2013-003, PROVIDING HEALTHCARE FOR TRANSGENDER AND INTERSEX VETERANS ¶2b (Feb. 8, 2013).

four-decade period from the '50s through the '90s.²⁹ This “widespread campaign” resulted in the ouster of thousands of members of the Canadian Armed Forces and corresponding criminal investigations, interrogations, ridicule, harassment, and other discriminatory acts.³⁰ Like the United States, medical studies in Canada indicate a similar continuing legacy of discrimination despite repeal of the ban. For example, research psychologists observed that Canadian veterans who were discharged from the military under the “purge” suffered identifiable “short- and long-term physical, psychological, and social consequences” that are comparable to those identified in U.S. studies.³¹

Attorney John McKiggan instituted a lawsuit on behalf of Alida Satalic, a woman who had served in the Canadian Armed Forces as a postal clerk and who was forced to leave the military on the basis of homosexuality after brutal interrogation. The suit alleged violations of the Canadian Charter of Rights. Over time, additional plaintiffs joined Ms. Satalic in a class action suit involving several major Canadian firms and attorneys that practiced in the area of LGBTQ, civil, and human rights.³² In November 2017, the plaintiffs reached a settlement with the Department of Justice, which established a framework to compensate Ms. Satalic and her similarly-situated plaintiffs with fixed awards for the treatment and outcomes they experienced.³³ Before announcing the implementation of the \$100 million compensation plan, Prime Minister Justin Trudeau issued a public apology to the veterans who were affected by the military’s actions, recognizing with teary eyes that, the policy represented inexcusable “systematic oppression, criminalization, and violence against sexual minorities.”³⁴

Unsuccessful Attempts at U.S. Federal Legislation

In contrast to Canada, current events in the U.S. make it questionable whether a public apology from the President of the United States would be desired or helpful even if it were possible. However, in recognition that discharge upgrading processes can be improved to assist more LGBTQ veterans, a number of federal legislators have been attempting to implement legislation to simplify the process. With knowledge that many more LGBT veterans deserve to have their honor restored, Senators Brian Schatz (D-HI), Kirsten Gillibrand (D-NY) and U.S. Representatives Mark Pocan (D-WI) and Charles Rangel (D-NY) re-introduced the Restore Honor to Service Members Act in July 2015 specifically to

²⁹ Dan Levin, *Canada Offers \$85 Million to Victims of its “Gay Purge,” as Trudeau Apologizes*, N.Y. TIMES, Nov. 28, 2017, https://www.nytimes.com/2017/11/28/world/canada/canada-apology-gay-purge-compensation.html?_r=0.

³⁰ Steve Lee, *Canadian Government LGBT Purge Class Action Settlement Reached*, LGBT WEEKLY (San Diego), Nov. 28, 2017, <http://lgbtweekly.com/2017/11/28/canadian-government-lgbt-purge-class-action-settlement-reached/>.

³¹ Carmen Poulin et al., *Discharged for Homosexuality from the Canadian Military: Health Implications for Lesbians*, 19 FEMINISM & PSYCHOL. 496, 507 (2009).

³² Editorial, *LGBT Discrimination Class Actions Against Federal Government Merge*, CBC NEWS, Mar. 30, 2017, <http://toronto.citynews.ca/2017/03/30/lgbt-discrimination-class-action-lawsuits-federal-government-merge/>.

³³ For example, a veteran involuntarily separated from the military for sexual orientation would receive \$50,000 in compensation. A veteran who endured “being questioned, denied a promotion or [who faced] targeted harassment from their superiors” would receive \$5,000 in compensation. Additional compensation of up to \$100,000 per veteran is reserved for those who experienced “lasting and severe psychological harm from physical or sexual assault as a result of the process of being investigated, sanctioned, or dismissed.” In total, veterans who suffered the most severe treatment could be compensated a maximum of \$150,000 per person. Editorial, *LGBTQ “Gay Purge” Payouts Range From \$5,000 to \$150,000 Per Person*, TORONTO SUN, Nov. 29, 2017, <http://torontosun.com/news/national/lgbtq-gay-purge-payouts-to-range-from-5000-to-150000-per-person>.

³⁴ Levin, *supra* note 29.

“do everything possible to rectify the effects of past discriminatory policies.”³⁵ The original bill, proposed in 2013 in the Congress and 2014 in the Senate, died in committee. Some aspects of the proposed law included the development of policies to streamline the upgrading process, including a prohibition on denying review based on the lack of documentation that often resulted in denials.³⁶ The law also included provisions to require military historians to review discharges based on discriminatory policies in order to preserve the histories of these veterans and provide additional resources to assist applicants for discharge upgrading.³⁷ Despite continued advocacy for the passage of this law, especially in recognition of low numbers of applicants, iterations of this proposed law died and continued to be rejected after reintroduction in 2017.

³⁵ Press Release, *Senators Shatz, Gilibrand & Congressmen Pocan, Rangel Introduce Legislation to Correct Record of Service Members Discharged Due to Sexual Orientation*, WWW.SHATZ.SENATE.GOV, <https://www.schatz.senate.gov/press-releases/senators-schatz-gilibrandand-congressmen-pocan-rangel-introduce-legislation-to-correct-record-of-service-members-discharged-due-to-sexual-orientation>.

³⁶ Brian Shatz et al., *Restoring Honor to Gay, Lesbian and Bisexual Veterans*, USA TODAY, Nov. 11, 2015, <https://www.usatoday.com/story/opinion/2015/11/11/restoring-honor-gay-lesbian-bisexual-veterans-military-recordcolumn/75522706/>.

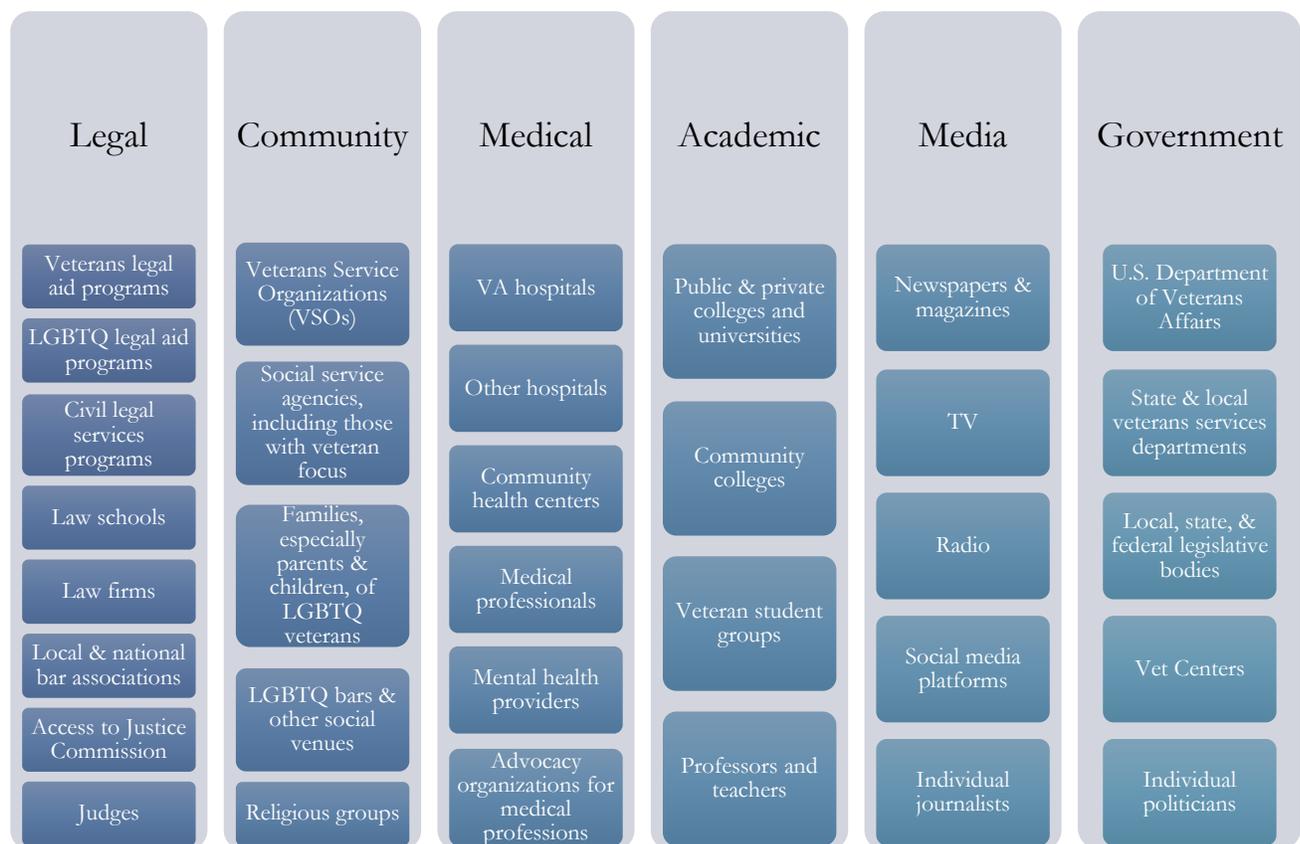
³⁷ *Id.*

Stakeholders

Stakeholders: Who Can Respond to LGBTQ Veteran Needs?

While various factors in the United States prevent the legislative and executive branches of government from implementing the comprehensive solutions now seen in Canada, the question arises whether it is possible for communities and organizations to more effectively reach LGBTQ veterans. At the Summit, participants found it necessary and important to identify stakeholders in evaluating all available options.

During the Summit, participants were asked to describe the institutions, groups or other entities that support and provide services to LGBTQ veterans' communities. Through small group discussion, Summit participants created a comprehensive list of stakeholders across a variety of categories: legal, community, medical, academic, media, and government.



Strategies for Connecting with Stakeholders

Given the variety of individuals, organizations, and government entities identified as being part of the community of interest, Summit participants saw a distinct need for improved coordination and

collaboration across disciplines and other boundaries. While many stakeholders may have in-depth awareness and knowledge of LGBTQ veterans' unique needs, not all were connected with other stakeholders who could provide assistance to address those needs. Improving connections between these various entities was identified as a key step toward finding and implementing better solutions.

Special Role of the Department of Veterans Affairs

Among the stakeholders identified, the role of VA in responding to the needs of LGBTQ veterans was discussed extensively by Summit participants. Beginning in 2011, VA recognized that LGBTQ veterans presented unique needs compared to non-LGBTQ veterans. The institutional response initially included the development of a transgender care policy from the Veterans Health Administration (VHA).³⁸ In 2012, a formalized program for LGBT veterans was created within the Office of Patient Care Services.³⁹ In March 2016, VA established 175 LGBT Veteran Case Coordinator positions, with the aims of placing a clinical coordinator in each facility managed by the VHA.⁴⁰ Specially-targeted services are now advertised widely, and, in many cases, Coordinators arrange group sessions where LGBTQ veterans can safely and supportively discuss their experiences, which has led to significant gains.⁴¹

However, all of these programs are operated by VA employees who have other primary duties and whose time and resources are limited in the services offered. Beyond this, some VA providers share significant concerns that other VA patients may not be as welcoming to LGBTQ veterans as some medical staff.⁴² There are additional concerns that not all providers are enthusiastic about providing patient-centered care to address LGBTQ-specific issues, such as discussing sexual behavior for the purpose of preventive health or relationship issues that may arise in the context of counseling. VA estimates that 250,000 LGBTQ veterans use VA services and that VA represents the largest U.S. provider of LGBTQ healthcare.⁴³ This includes services to an estimated 5,000 transgender veterans⁴⁴ who are not eligible for surgery paid for by VA, but may be entitled to hormone and other treatment.⁴⁵ As a result of limitations on services provided, feelings of stigma obtaining VA health care services, and other factors, many LGBTQ veterans who are eligible for VA services may elect not to obtain these services.

³⁸ Michael R. Kauth & Jillian C. Shipherd, *Transforming a System: Improving Patient-Centered Care for Sexual and Gender Minority Veterans*, 3 *LGBT Health* 177, 177 (2016).

³⁹ *Id.* at 178.

⁴⁰ *Id.*

⁴¹ Ramirez et al., *supra* note 19, at 406.

⁴² Sherman, *supra* note 23, at 438-439.

⁴³ Kauth & Shipherd, *supra* note 38, at 177.

⁴⁴ *Id.*

⁴⁵ U.S. DEP'T OF VETERANS AFFAIRS, DIR. 2013-003, PROVIDING HEALTHCARE FOR TRANSGENDER AND INTERSEX VETERANS ¶2b (Feb. 8, 2013).

Needs Identification

What Are the Most Pressing Needs of the LGBTQ Veterans Community?

To help clarify and prioritize the nature of the problem the Summit intended to address, participants were divided into small groups and asked: How would you characterize the needs of each of the LGBTQ veterans' communities in light of the history of discrimination? This exercise in needs-identification produced a number of insights.

Directly related to the legacy of the military's discriminatory policies, Summit attendees saw a clear need for changing the official discharge documents of veterans affected by such policies. For those veterans who received less-than-honorable discharges from the military, there is a need for assistance in applying to the DoD's Discharge Review Boards and Boards for Correction. Even if veterans were discharged under honorable conditions, they may still have a narrative reason for separation or separation codes on their discharge paperwork that reference sexual orientation or actions, outing them as a "homosexual" or alleging they engaged in "homosexual acts," among other phrases. Depending on a veteran's situation, this information may be harmful, stigmatizing, or simply wrong. Yet, veterans need to use their discharge paperwork to verify their military service and status as a veteran for a variety of purposes, from employment to housing to healthcare. Of course, a less-than-honorable discharge can sometimes prevent a veteran from accessing VA benefits or healthcare services. In order to successfully seek an upgrade or records correction, many veterans need more awareness of the process, information about their rights, and legal assistance to complete the process.

Simultaneously, some needs identified during the Summit were not immediately due to the effects of military policies, but rather were indirect results of discrimination and a persistent culture of—at best—misunderstanding and—at worst—homophobia and hostility. For example, a significant portion of the Summit discussion focused on the provision of healthcare services, primarily at VA. Participants identified a lack of cultural competence in LGBTQ issues as a barrier to veterans seeking and receiving appropriate healthcare.

Prioritizing Needs

Following the small group discussions, participants were asked to catalog five of the most important needs of LGBTQ veterans and submit their choices to be compiled into a complete list. That compiled list of critical needs was then submitted to participants for further evaluation and prioritization. This process yielded the following listing of priority needs:



On the second day of the Summit, participants were given another chance to review and reflect on the ranked list of needs. This proved to be one of the more complicated areas of discussion—without a consensus about the precise problems to be solved, identifying solutions would be exceedingly difficult. There was healthy disagreement among participants about which needs were most pressing and which ones should be prioritized. This diversity of opinion speaks to the need for a diversity of approaches to respond to a complex set of problems such as these.

From Ideas to Action

How Do We Move Forward?

In spite of the challenges encountered by participants in their efforts to agree upon a specific prioritization of needs among LGBTQ veterans, participants were eager to identify solutions to address the range of needs that had been identified. Significant attention was devoted to identifying current programs and innovations specifically targeting LGBTQ veteran needs. Discussion revealed that some states and counties have filled the void left by nonexistent federal programs or policies.

State and Local Legislation

Aside from the 2011 DoD Memorandum about upgrading discharges, no federal law creates a streamlined process for LGBTQ veterans to upgrade their discharge statuses or ensure access to benefits and services. As a result, some local jurisdictions have stepped in to support LGBTQ veterans in a more direct manner.

Perceiving a gap in needed assistance from the federal government to upgrade discharges, in 2017, the Nevada legislature passed the most robust state protections for LGBTQ veterans discharged as a result of sexual orientation. The new law mandates that no veteran whose discharge was based on LGBT status “may be denied eligibility for any [state]” program to assist veterans if the veteran would otherwise qualify for that program or service.⁴⁶ It further requires targeted outreach to LGBTQ veterans, their spouses, and their dependents in light of their “unique needs.”⁴⁷ Not only is the Nevada Department of Veterans Services required to assist in applications for benefits, but it must also assist in appealing denials of federal and state benefits, including discharge upgrades and correction of narrative reasons for discharge for LGBTQ veterans.⁴⁸ Another provision requires the development and distribution of resource materials.⁴⁹

Connecticut developed a similar law encouraging the state Department of Veterans Services to assist LGBTQ veterans with referrals to appropriate resources, but conditioned the availability of state benefits on future federal legislation if the Department of Defense or Congress were to upgrade discharge characterizations of LGBT veteran regardless of their discharges.⁵⁰ If this contingent provision was an attempt to encourage federal action, it has not yet worked. However, in 2017, at the state level, the Connecticut Department of Veterans Services multiplied its efforts to identify and assist LGBTQ veterans with less-than-honorable discharges by joining forces with the Yale Legal Services Clinic to conduct a search of the state’s digitized copies of residents’ discharge certificates.⁵¹

⁴⁶ NEV. REV. STAT. ANN. § 417 (Lexis-Nexis 2018), Acts of 2017, ch. 56 § 3(1).

⁴⁷ *Id.*, Acts of 2017, ch. 56 § 2(1)(a).

⁴⁸ *Id.*, Acts of 2017, ch. 56 § 2(1)(b)-(d).

⁴⁹ *Id.*, Acts of 2017, ch. 56 § 2(1)(e).

⁵⁰ CONN. GEN. STAT. § 27-102p (2016).

⁵¹ State of Conn., Dep’t of Veterans Affairs, Memorandum, Subject: Non-Disclosure of CT Veterans’ Personal Information (Mar. 15, 2017) (discussing aspects of the Don’t Ask, Don’t Tell Discharge Upgrade Project).

At the local level, the Albany County legislature in New York State passed “A Local Law to Bestow County Level Privileges to Veterans Who Were Discharged from the Military for Their Lesbian/Gay/Bisexual/Transgender Status Under the Federal Don’t Ask Don’t Tell Law.”⁵² The legislature instituted this measure on the basis that, “while the Federal government is best suited to effect restoration of LGBT veterans’ discharge records, legislation at the Federal and State level has gone nowhere.”⁵³ Some special features of this law include eligibility and assistance with all county-level benefits, including property tax exemptions for veterans and civil service points.⁵⁴ The law even provides that the Albany County Veterans Bureau will assist LGBTQ veterans in obtaining records and applying for federal discharge upgrades when the discharge was based solely upon sexual orientation.⁵⁵ Although there are still considerations for how to best implement the law’s provisions, it represents the most robust remedy for perceived inadequacies in discharge upgrading and the benefits that successful applications often obtain. Aside from the recent surveyed efforts, it does not appear that other localities have developed or implemented such comprehensive services for LGBTQ veterans discharged under DADT or a similar policy.

Proposed Solutions

After considering various existing programs, including a Canadian approach that seems difficult to replicate within the U.S. socio-political climate, and remaining gaps, Summit participants’ solutions fell into at least four broad categories:



⁵² Local Law X for 2016, A Local Law to Bestow County Level Privileges to Veterans Who Were Discharged From the Military for Their Lesbian/Gay/Bisexual/Transgender Status Under the Federal Don’t Ask Don’t Tell Law (Albany County, N.Y., Dec. 5, 2016).

⁵³ *Id.* § 1.

⁵⁴ Amanda Fries, *Albany Lawmakers Extend Benefits to Vets Discharged for LGBT Identity*, TIMES-UNION (Albany), Sept. 11, 2017, <https://www.timesunion.com/news/article/Albany-lawmakers-extend-benefits-to-vets-12189544.php>.

⁵⁵ Local Law X for 2016, A Local Law to Bestow County Level Privileges to Veterans Who Were Discharged From the Military for Their Lesbian/Gay/Bisexual/Transgender Status Under the Federal Don’t Ask Don’t Tell Law § 4 (Albany Cty., N.Y., Dec. 5, 2016).

Following debriefing of the group discussions, several ideas emerged as common across the groups and, based on feedback from participants, many ideas were identified as relatively high-impact solutions. Within the categories described above, the following ideas emerged as potential action items:

Outreach & Media

- Disseminating information and self-help advocacy guidance for veterans seeking discharge upgrades specific to repeal of DADT and other common issues facing LGBTQ veterans
- Collecting stories of veterans affected by DADT and prior policies in order to document the history of the LGBTQ veterans community's struggles, resistance, and successes
- Creating a consolidated intake line and website portal to help streamline screening and referral of LGBTQ veterans' requests for assistance with discharge upgrades and other issues

Litigation

- Developing legal strategy for clarifying definition of "aggravating factors" in context of post-DADT-repeal discharge upgrade applications
- Seeking an update to the 2011 DoD memorandum about seeking upgrades following DADT repeal
- Using existing VA frameworks for sexual harassment to compensate veterans who suffered the effects of discrimination based on sexual orientation
- Pursuing back pay and lost benefits and statuses on behalf of veterans discharged under DADT and prior discriminatory policies

Cultural Competency

- Developing cultural competency curriculum to cross-train both medical & legal providers about issues unique to veterans and members of the LGBTQ community
- Instituting a "Rainbow Seal of Approval" certification program to encourage and support identification of LGBTQ-friendly and competent veterans liaisons within local, state, and federal government agencies
- Encourage traditional Veterans Service Organizations to conduct targeted outreach to LGBTQ veteran populations

Policy Reform & Political Action

- Advocating for increased funding for LGBTQ-specific veterans programs, especially within VA
- Building political support for state or national recognition of the distinct struggles and contributions of LGBTQ veterans, including a formal apology from military leaders, issuance of a medal, creation of a memorial, and creation of an LGBTQ veteran reunion event

Recommendations

Following the Summit, the event organizers spent time reflecting on the ideas discussed and action items proposed by participants. The following recommendations represent the proposals that the Veterans Legal Clinic at the Legal Services Center of Harvard Law School, Veterans Legal Services, and OUTVETS believe are ready to be acted upon and implemented now in order to seek justice on behalf of LGBTQ veterans.

Raise Awareness

As the action items identified by Summit participants indicate, outreach and communication through media are an important part of raising awareness about LGBTQ veterans needs and spreading the word about available solutions. We need to continue increasing visibility of the unique problems affecting LGBTQ veterans not only to educate those with the power to make change and provide relief, but also to break down the closet doors that keep some LGBTQ veterans from self-identifying, speaking out, or seeking help.

Part of this effort should focus on the past: collecting the stories of LGBTQ veterans who have been affected by discrimination to preserve their history, witness their resilience, and build upon their strength. The creation of a history project could potentially also help normalize military service by LGBTQ servicemembers and help build recognition and visibility of LGBTQ veterans' contributions to the military. The effort should also look to the future: disseminating accurate information to LGBTQ veterans about their rights, the discharge upgrade process, and pathways to access healthcare and other needed services.

Improve Collaboration

The Summit exposed ways in which LGBTQ veterans' advocates have sometimes worked in silos or on parallel tracks without being fully aware of others' efforts. This is similar to other challenges facing civilian LGBTQ populations where members of the distinct groups do not believe their interests are adequately considered by other subgroups or collectives. This lack of coordination among veterans advocates and service providers harms LGBTQ veterans' abilities to access appropriate, timely, and needed services and assistance. By building a stronger coalition among all stakeholders, we can ensure that we don't unnecessarily duplicate efforts and also join our voices and resources to reach more LGBTQ veterans and civilians in need, especially those who are most vulnerable.

While it will likely continue to be difficult to agree upon a specific set of priorities among the numerous, critical needs faced by LGBTQ veterans, any efforts to achieve solutions will certainly benefit from cross-disciplinary collaborations. Moreover, the breadth of problems identified will require a broad network of organizations and individuals working in different areas. We recommend the creation of a national coalition to help build relationships among stakeholder organizations and improve service coordination for LGBTQ veterans.

Build Momentum

Advocates and allies of LGBTQ veterans should not be satisfied with the minimal steps taken so far by the federal government. The repeal of DADT was an important victory, but it did not end the battle for many LGBTQ veterans. And the guidance provided by DoD to LGBTQ veterans seeking to upgrade their discharges is not sufficient to encourage veterans to apply nor guide them to success. Where the federal government is slow or unwilling to act, states and localities can step in to provide solutions for LGBTQ veterans. Legislative protections and supports implemented in states like Nevada and localities like Albany County, NY, are examples of small but important steps forward at the state and local level. We should follow their example in considering legislative proposals and other efforts to support LGBTQ veterans.

Conclusion

LGBTQ veterans, while far from a homogenous group, do face common challenges as a result of prior discriminatory policies enforced the U.S. military and their ongoing legacies. Many stakeholders are actively working to meet the needs of LGBTQ veterans, but greater coordination between organizations, institutions, and individuals is needed to ensure that all LGBTQ veterans seeking help or supports have meaningful access. Current efforts should not just continue, but should be enhanced and expanded. Advocates for and allies of the LGBTQ veterans community should not be satisfied with the status quo of well-intentioned but (thus far) unsuccessful attempts at federal legislation to remedy the effects of discriminatory discharge policies, nor with the low rate—just 8%—of eligible veterans who actually seek relief through discharge upgrade processes.

The Summit findings presented here are just the beginning of a conversation that we hope will continue. Going forward, we recognize that any approach to assisting and supporting LGBTQ veterans will benefit from a diversity of perspectives and collaboration across disciplines and sub-populations within the LGBTQ veterans community, including greater inclusion of perspectives from diverse racial, ethnic, socioeconomic, and other backgrounds. We welcome input and feedback from those not represented at the Summit and those interested in collaborating on next steps in implementing the recommendations proposed here to pursue justice for LGBTQ veterans.

Thank You

We are grateful for the service of all members of the U.S. Armed Forces in defense and support of our country, including those who served under discriminatory policies that prevented them from serving openly or fully.