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A REPLY TO PROFESSOR KOPPELMAN

William A. Woodruff

Professor Koppelman's response to my article warrants a brief reply. I respect his opinions on this issue, but he and I approach it from different perspectives. Indeed, different perspectives help to sharpen the issues and to reveal both areas of agreement and areas of disagreement. While I see no point in refuting each criticism he raises, and I am sure that he did not address every single point on which we disagree, there are, however, several points in Professor Koppelman's essay that warrant comment.

Professor Koppelman states that my "central claim is that the civilian branches of government ought to defer to the military about military matters."¹ Professor Koppelman has misunderstood my point. I apparently did not make myself clear. I apologize for this misunderstanding and appreciate the opportunity to clarify the issue. As I understand our system of government, we have three branches of government: (1) the executive; (2) the legislative; and (3) the judicial. All three are "civilian." The military, as an agency, is part of the executive branch and the Constitution names the President as Commander-in-Chief.² The Constitution gives Congress plenary authority to make the rules and regulations governing the land and naval forces.³ Thus, the Constitution places responsibility and control over military affairs in two "civilian" branches of government, the executive and legislative. This principle of civilian control of the military is integral to our system of government, part of our national heritage, and I wholeheartedly support it. Neither the Congress nor the Executive has any constitutional obligation to "defer to the military" on anything. In fact, my "central claim" is that Congress, the "civilian branch" of government with the constitutional responsibility and authority to make the rules and regulations in this area, should take action to eliminate the confusion and contradictions that were created by the Department of Defense directives. Thus, I am arguing that Congress should *not* defer to the military, but should actually require DoD to change its implementing directives.

The deference issue, however, does arise when the judicial branch is called upon to review military policy. As I noted,⁴ the Supreme Court has established a long and virtually unbroken line of cases cautioning judicial restraint when reviewing military affairs; affairs that the very text of the Constitution vests in coordinate branches of government. I do not advocate "blind deference" nor giving "infinite weight" to military judgment; I am of the opinion that the application of well-settled principles established by the Supreme Court in a long line of cases sets the correct balance. Professor Koppelman states that my "extreme claim" and "silly argument" of "blind deference" must be applied for the policy to withstand analysis. What Professor Koppelman is really saying is that I am relying upon the clear weight of judicial authority in this area; he just thinks the law should be different.

1. Andrew Koppelman, *Gaze in the Military: A Response to Professor Woodruff*, 64 UMKC L. REV. 179 (1995).

2. U.S. CONST. art. II, § 2.

3. U.S. CONST. art. II, § 8.

4. See William A. Woodruff, *Homosexuality and Military Service: Legislation, Implementation, and Litigation*, 64 UMKC L. REV. 121, nn.75-76 and accompanying text (1995).

Let's face it, it would be "extreme," "silly," "blind" and any number of other pejorative adjectives, including "incompetent," for a lawyer NOT to rely upon the weight of authority when it is in his favor!

While neither the executive nor the legislative branches has any constitutional duty to defer to the military, I do believe that military policy decisions should be made in light of the mission and purpose of the military. In this regard, the views, experience, advice, and opinions of military leaders are critical to determining the impact a proposed policy will have upon the military's ability to accomplish its mission and purpose. Congress and the Executive are constitutionally free to disregard such advice. Professor Koppelman and I disagree on the weight the policy maker should place on the opinions of experienced military leaders in these matters. In the matter at issue here, I think the detailed hearings and investigations conducted by both houses of congress explored and properly weighed the relevant facts, arguments, advice, opinions, and judgments. I, like the Congress, would err on the side of national defense and military readiness. Professor Koppelman would err on the side of individual rights. This, in and of itself, is a policy choice; we approach the issue from different perspectives.

Professor Koppelman notes that in two situations professional military judgment has been proven wrong and is thus suspect in all future cases. He thus criticizes my analysis for not discussing *Korematsu v. United States*⁵ and the history of racial segregation that existed in the armed forces prior to President Truman's 1948 executive order. In general, the fact that military and political leaders, and even a majority of the Supreme Court, erred in deciding some previous policy or case does not warrant abandoning well-established principles that, over the run of cases, have recognized and maintained the constitutional allocation of powers among the three branches of government. Furthermore, Professor Koppelman's reliance on the *Korematsu* tragedy and the history of racial segregation overlooks key factors that make them inapposite to the homosexual exclusion policy.

First, both race and national origin are suspect classes and demand strict scrutiny. While Professor Koppelman, other commentators, and some individual judges have called for granting suspect class status to homosexuals, the courts simply have not done so. The standard of judicial review applicable to the homosexual policy is rational basis review. That is the law that applies and that is the standard under which I analyzed the statute passed by Congress. I applied the law as it currently exists, not the law as Professor Koppelman thinks it ought to be.

Second, even assuming a parallel between the racial segregation issue and the homosexual issue, I must note that it was the Executive, not the courts, that changed the policy. Thus, one of the political branches with constitutional authority over the military made the decision, not the judiciary.

Finally, invoking the language of the racial segregation debates assumes that racial groups and homosexuals share the same "status." Equating a class defined by skin color with a class defined by sexual behavior overlooks obvious, significant, and material differences. These differences, in large measure, explain why the courts have consistently rejected the analogy and have refused to apply strict scrutiny.⁶

5. 323 U.S. 214 (1944).

6. I apparently disappointed Professor Koppelman by not including a detailed discussion of

Professor Koppelman also criticizes me for relying upon the findings of Congress that are included in the statute. I plead guilty. Under the settled principles of law applicable to these sorts of cases, reviewing courts should rely upon the detailed legislative findings.⁷ If a different standard of review applied, a different analysis would be required, and perhaps a different outcome would result. In view of the unanimous line of authority rejecting suspect class status for homosexuals and rejecting the application of strict scrutiny, however, I did not feel it necessary to analyze the statute under that heightened scrutiny standard. Professor Koppelman's argument is not with me, it is with the Supreme Court decisions that provide the framework for rational basis review and with the constitutional allocation of powers among the three branches of government.

In footnote one of his response, Professor Koppelman notes that General Schwartzkopf "privately stated that he won't mind the policy's termination" and cites Randy Shilts' book, *Conduct Unbecoming*. In fairness to General Schwartzkopf, I must point out that when asked in a hearing before the Senate Armed Services Committee about this alleged comment, General Schwartzkopf characterized Mr. Shilts' account as "a blatant lie."⁸

Professor Koppelman dismisses as "unworthy of response" my "transparently disingenuous claim"⁹ that "all agree" homosexual conduct in the military environment causes "[h]arm to [g]ood [o]rder, [d]iscipline, [m]orale, and [u]nit [c]ohesion."¹⁰ Yet this is precisely the procedural posture of the most celebrated cases challenging the military's policy. Gay rights advocates representing soldiers challenging their discharges for homosexuality have conceded that the military can lawfully discharge those who engage in homosexual conduct. Thus, even the panel decision in the D.C. Circuit that overturned Midshipman Steffan's discharge from the Naval Academy recognized that "'homosexual acts' are forbidden to military servicemembers, and there is no dispute that laws forbidding such conduct are constitutional."¹¹ Congress certainly was of that view when it found "[t]he prohibition against homosexual conduct is a long-standing element of military law that continues to be necessary in the unique circumstances of military service."¹² My use of the phrase "all agree" in reference to this proposition was to express this underlying principle that has never seriously been disputed in the litigation surrounding the policy.¹³ Obviously, Professor Koppelman believes this principle should be disputed. I did not intend to be speaking for Professor Koppelman by using that phrase and extend to him my apologies.

why the courts have unanimously refused to grant suspect class status to homosexuals. Koppelman, *supra* note 1, at 180. In view of the unanimous line of authority on this point, however, it hardly seemed necessary. For a discussion of these cases and their rationale, see MELISSA WELLS-PETRY, *EXCLUSION: HOMOSEXUALS AND THE RIGHT TO SERVE* 37-49 (1993).

7. *Rostker v. Goldberg*, 453 U.S. 57, 68 (1981).

8. *Policy Concerning Homosexuality in the Armed Forces: Hearings Before the Senate Armed Services Committee*, 103d Cong., 1st Sess. 625 (1993).

9. Koppelman, *supra* note 1, at 189 n.52.

10. *Id.*

11. *Steffan v. Aspin*, 8 F.3d 57, 64 (D.C. Cir. 1993).

12. 10 U.S.C.A. § 654(a)(13) (West Supp. 1994).

13. See Woodruff, *supra* note 4, at 156-57 nn.193-200 and accompanying text.

Interestingly, there seem to be some areas where Professor Koppelman and I agree. He does not challenge the absurdity of the status-conduct dichotomy that the current DoD directives create. He apparently agrees that homosexuality is related to same sex behavior.¹⁴ He does not take issue with the underlying assumption that homosexuals, as a class, engage in same sex behavior. Further, he acknowledges that the policy is constitutional when analyzed under rational basis review, even though he does not think it wise, thinks the judicial reasoning rejecting suspect class status for homosexuals was “remarkably tortured,” and thinks the courts should change the level of review and apply strict scrutiny.¹⁵

My purpose in writing was to demonstrate that the 1981 policy and the new statute are indeed constitutional under the existing standards of rational basis review and, because they pass rational basis review, the political branches, not the courts, have the final say on this matter. Professor Koppelman does not really contest either point. Perhaps my arguments were not incomprehensible after all.

14. Koppelman, *supra* note 1, at 188-93.

15. *Id.* at 187.