ACLU of Virginia

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VIA E-MAIL

Delegate Robert Marshall
General Assembly Building, Room 501
Capitol Square
Richmond, Virginia 23219

Dear Delegate Marshall:

Based on recent news reports, I understand that you intend to introduce a bill that will prohibit gay men and lesbians from serving in the Virginia National Guard. Because such a bill would be unconstitutional and subject to court challenge, I urge you not to introduce it.

As you are no doubt aware, a federal court recently struck down the recently repealed "Don't Ask Don't Tell" (DADT) policy, which prohibited gay men and lesbians from serving openly in the United States Military. The court held that the policy infringed on service members' rights of substantive due process, encompassing "an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct." *Log Cabin Republicans v. United States*, 716 F.Supp.2d 884, 911 (C.D. Cal. 2010) (quoting *Lawrence v. Texas*, 539 U.S. 558, 562 (2003)). The court found that there was no evidence that DADT improved military readiness or unit cohesion. *Id.* at 915. Indeed DADT actually *diminished* military readiness, by requiring the discharge of qualified service members – including those with critically needed skills – despite troop shortages during a time of war. *Id.* at 915-16.

A recent Pentagon report supports the district court's finding that the exclusion of gay men and lesbians does not promote military readiness or unit cohesion. When asked about how having an openly gay service member in their immediate unit would affect the unit's ability to "work together to get the job done," 70% of service members said it would have positive, mixed, or no effect. Of those who actually served with a unit member whom they believed was gay, 92% of service members stated that the unit's ability to work together was "very good," "good," or "neither good nor poor."

If, as the district court found, DADT violates the Due Process Clause, it follows that the exclusion of gay men and lesbians from the Virginia National Guard would likewise be unconstitutional.

For similar reasons, such an exclusion would also violate the Equal Protection Clause. The United States Supreme Court has held that government may not discriminate against gay men and lesbians without at least a rational basis for the disparate treatment. *Romer v. Evans*, 517 U.S. 620 (1996). Given that the exclusion of gay men and lesbians from the armed forces is demonstrably ineffective at promoting military readiness or unit cohesion, no such basis exists.

Finally, it is questionable whether the Virginia General Assembly has the power to exclude gay men and lesbians from service in the Virginia National Guard. Article I, Section 8 of the United States Constitution gives the federal government the authority for "disciplining" state militias, and for "governing such Part of them as may be employed in the Service of the United States." As at least one federal court has found, the discharge of National Guard members based on sexual orientation comes within the federal authority to "discipline" the National Guard, and not within the state authority to appoint officers. *Johnson v. Orr*, 617 F.Supp. 170 (D.C. Cal. 1985).

For these reasons, any attempt to exclude service members from the National Guard would be unconstitutional and ill-advised, and would certainly face a federal court challenge. Again, I urge you not to introduce such a bill.

Sincerely,

Kent Willis
Executive Director