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Don't Ask, Don't Tell, 1993-1999 [1]

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Review of DOD's Implementation of "don't ask, don't tell" policy

Introduction

Since 1982, the Department of Defense (DOD) had maintained a policy requiring separation of any service member deemed to be "homosexual". In 1991, in his campaign for the Presidency, Bill Clinton made this prohibition an issue, and in late 1992, President-elect Clinton said that he intended to "lift the ban" on homosexuals in the military. In the President's first week in office, however, the Joint Chiefs strongly protested such a change. The Senate majority leader also informed the President there were seventy votes against this change of policy. In a compromise between the President, the Joint Chiefs, and the Senate, the "don't ask, don't tell" policy was born. This new policy was implemented by DOD directive. Later in 1993, Congress enacted a statute that was considerably less protective of homosexual service members than the Pentagon policy.

The Law

In 1993, Congress enacted 10 USC 37, Sec. 654, "Policy Concerning Homosexuality in the Armed Forces." Congress found "the presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability." The law directs that a member be separated from the armed forces if: the member has engaged in, attempted to engage in, or solicited to engage in a homosexual act or acts; the member has stated that he or she is a homosexual or bisexual; or, the member has married or attempted to marry a person known to be of the same biological sex. As defined in the law, a homosexual is "a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts, and includes the terms 'gay' and 'lesbian'."

This statute and the DOD directives governing homosexuals in the military were challenged on constitutional grounds. In April 1996, the Fourth Circuit Court of Appeals upheld the constitutionality of both the law and the directives. In October 1996, the Supreme Court denied a request for review of the Circuit Court's decision. In January 1999, the Supreme Court again upheld the constitutionality of the law and the implementing directives.

DOD Implementation of the StatuteUniformed Code of Military Justice (UCMJ)

These are the facts of what is punishable under the UCMJ. Many misconceptions exist among military members with many thinking that homosexuality itself is punishable under the UCMJ. Four articles of the UCMJ could apply to homosexuals, depending on the situation. These articles are:

Sect. 878. Art. 78 Accessory After the Fact

Any person subject to this chapter who, knowing that an offense punishable by this chapter has been committed, receives, comforts, or assists the offender in order to hinder or prevent his apprehension, trial, or punishment shall be punished as a court-martial may direct.

Sect. 907, Art. 107, False Statements

Any person subject to this chapter who, with intent to deceive, signs any false record, return, regulation, order, or other official document, knowing it to be false, or makes any other false official statement knowing it to be false, shall be punished as a court-martial may direct.

Section 925, Art. 125, Sodomy

(a) Any person subject to this chapter who engages in unnatural carnal copulation with another person of the same or opposite sex or with an animal is guilty of sodomy. Penetration, however slight, is sufficient to complete the offense.

(b) Any person found guilty of sodomy shall be punished as a court-martial may direct.

Fraternization.

The recent Executive Order change to the Manual for Military Courts Martial

DOD Directives

The DOD Directive covering homosexuality is 1332.14 with the specifics included in Enclosure 3, Attachment 1. The key points contained in the directive are:

- Homosexual conduct is grounds for separation from the military.
- Homosexual conduct includes homosexual acts, a statement by a member that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage.

- A member's sexual orientation is considered a personal and private matter, and is not a bar to continued service unless manifested by homosexual conduct.
- A member shall be separated if: 1) the member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts; or 2) The member has made a statement that he or she is a homosexual or bisexual, or words to that effect, unless there is a further approved finding that the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.
- The member bears the burden for rebuttal throughout the proceeding and for proving that retention is warranted.

Further guidance is included in Enclosure 3, Attachment 4 outlining the guidelines for fact-finding inquiries into homosexual conduct. These guidelines include:

- Only the member's commander can initiate fact-finding inquiries involving homosexual conduct and only when he or she has received credible evidence that there is basis for discharge.
- The inquiry may be conducted by the commander, or any person he or she appoints.
- Inquiries shall be limited to the factual circumstances directly relevant to the specific allegations.
- If there is credible evidence of criminal misconduct, the procedures in the UCMJ should be followed.

Procedural guidance on inquiries continues with the following:

- Informal fact-finding inquiries and administrative separation procedures are the preferred method of addressing homosexual conduct.
- Commanders shall exercise sound discretion regarding whether credible information exists.
- Commanders or appointed inquiry officials shall not ask, and members shall not be required to reveal, whether a member is a heterosexual, a homosexual or a bisexual. However, upon receipt of credible information of homosexual conduct commanders or appointed inquiry officials may ask members if they are engaged in such conduct.

Policy Statements

DOD issued a policy memorandum in 1997 stipulating guidelines for the investigation of threats against service members on the basis of alleged homosexuality. In August of 1999 this guidance was reissued based on a recommendation from the DOD working

group tasked with evaluating DOD's implementation of the homosexual policy. The policy statements:

- Reiterate the policy regarding the investigation of threats against or harassment of service members on the basis of alleged homosexuality.
- Provide that service members should be able to report crimes and harassment free from fear of harm, reprisal or inappropriate or inadequate governmental response.
- Require commanders to take appropriate action to hold those responsible for the threats or harassment accountable.
- Allow for the fact that a service member reports being threatened or harassed because he or she is said or is perceived to be a homosexual shall not in itself constitute credible information justifying the initiation of an investigation of the threatened or harassed service member.

An additional policy was promulgated in August 1999 that took action on several of the recommendations from the DOD review of the policy implementation discussed below. The guidance issued:

- Requires installation level staff judge advocates consult with senior legal officers at higher headquarters prior to the initiation of an investigation into alleged homosexual conduct.
- Requires any initiation of a substantial investigation into whether a service member made a statement regarding his or her homosexuality for the purpose of seeking separation be approved at the Military Department secretarial level.
- Requires the Service Inspectors General to include as an item of interest in inspections the training of those charged with application and enforcement of the policy.

Statistics and Trends

The large majority of discharges are based on statement of service members who identify themselves as homosexual. The increase in discharge numbers since 1994 is attributable to the increase in statement cases. Most discharged under the policy are junior personnel with very little time in the military. Since extensive inquiries are not made in these cases, the reasons behind the increases are not known.

DISCHARGE FOR HOMOSEXUAL CONDUCT

<u>FISCAL YEAR</u>	<u>TOTAL DISCAHRGED</u>
1980	1754
1981	1817
1982	1998
1983	1815
1984	1822
1985	1660
1986	1643
1987	1380
1988	1101
1989	996
1990	941
1991	949
1992	730
1993	682
1994	617
1995	757
1996	858
1997	997

BASIS FOR HOMOSEXUAL CONDUCT SEPARATIONS BY GENDER**FISCAL YEAR 1997**

<u>STATEMENT</u>			<u>ACT/MARRIAGE</u>		
<u>MALE</u>	<u>FEMALE</u>	<u>TOTAL</u>	<u>MALE</u>	<u>FEMALE</u>	<u>TOTAL</u>
626	194	820 (82%)	147	30	177 (18%)

SEPARATIONS BY YEARS OF SERVICE (YOS)**FISCAL YEAR 1997**

<u>LESS THAN 1YOS</u>	<u>LESS THAN 4 YOS</u>	<u>MORE THAN 4 YOS</u>	<u>TOTAL</u>
576 (58%)	240 (24%)	181 (18%)	997

Policy Reviews

In April of 1997, the Secretary of Defense tasked a review of how well the Department's policies on homosexual conduct are being applied and enforced. This review was completed in April

of 1998. The DOD review examined data on discharges, the application and enforcement of the homosexual conduct policy and provided recommendation where the department could take action to address concerns with the implementation of the policy.

Findings of the report regarding the number of discharges for homosexual conduct conclude that the numbers have indeed risen and the rise is cause for concern even though it continues to be a small percentage of the force. The large majority of the discharges for homosexual conduct are based on statements by service members. Most of the personnel discharged are very junior personnel and this accounts for most of the increase. The majority of discharges for homosexual conduct are uncontested and processed administratively.

In looking at the application and enforcement of the policy only isolated cases were identified in which inquiries were made without the requisite facts or in scope beyond what was necessary. DOD concluded that concerns regarding widespread "witch hunts" and other abuses in the course of investigations are unfounded. Although DOD concluded that the department's policy on homosexual conduct is generally being implemented properly, areas were identified where the policy could be clarified or the implementation enhanced.

DOD concluded that the policy implementation to strike a balance between the prohibition of homosexual conduct in the military and the privacy rights of individuals has posed a challenge to the military. On the whole, the policy has been appropriately applied and enforced. However, specific steps were identified to enhance the implementation of the policy:

- The Department should issue guidance specifying that consultation with higher headquarters legal officials is recommended before initiating investigations into alleged homosexual conduct;
- The Department should issue guidance on the use of pre-trial agreements, or "plea-bargains," to obtain evidence of consensual homosexual conduct;
- Prior authorization should be established at the Service Secretary level prior to initiation of a substantial investigation in "coming out" cases, including where recoupment of financial benefits is at issue;
- The Department should reissue and expand the directive guidance issued by former Under Secretary Dorn concerning threats against service members based on their alleged homosexuality and include specific language to make clear that harassment of service members based on their alleged sexual

orientation is unacceptable and that violators will be held accountable.

- The Department should issue guidance directing that Service Inspectors General make training of those charged with implementing the homosexual conduct policy a specific item of interest for inspection.

Criticism of DOD's implementation

The Servicemembers Legal Defense Network (SLDN) is self-described as the "sole national legal aid and watchdog organization that assists service members hurt by the "don't ask, don't tell, don't pursue" policy. In their March 1999 annual report, they offer the following statistics and observations:

- 400 incidents of harassment were reported to them, up 120% from the 182 reported in 1997. Gays fear reporting harassment within military channels because they might have their sexual orientation discovered.
- 511 incidents were reported where service members were asked and pursued for being or perceived as being lesbian, gay or bisexual - up from 359 violations in 1997.
- Discharges have increased 86% over the past five years. The Pentagon discharged 1,149 service members in 1998, compared to 997 last year. This is the highest number since 1987. The Air Force discharged 415, surpassing the Navy at 345. Army discharges jumped by more than 100, to 312 discharges. The Marine Corps discharged 77.
- Women comprised 27% of gay discharges, although women represent only 14% of the active force. The Army had the worst record, with 36% of its gay discharges being women.
- Incidents of asking and pursuits reported in 1998 were up 42% from 1997 reports.
- Physical abuse by investigators has declined.
- Criminal prosecutions for homosexuality have decreased.
- There were 161 "don't ask" violations in 1998, up 30% from 1997.
- 350 "don't pursue" violations were reported in 1998 - up from 235 in 1997.
- There were 8 cases in 1998 where Services refused to discharge members declaring their homosexual orientation.
- Military leaders have wrongly required service members to keep their sexual orientation a total secret, forcing

them to lie about who they are, even to their families, best friends and health care providers.

SLDN concludes that the "Pentagon implementation of the "don't ask, don't tell, don't pursue" policy is a failure" and offers the following comments and recommendations:

- The Pentagon should promulgate clear, easy to understand guidance on investigative limits, intended to protect service member's privacy.
- The Pentagon should distribute the "Dorn memo" which directs commanders to investigate those who harass, not those who report harassment. More service members report they are 'coming out' as their only recourse against unchecked anti-gay harassment.
- All service members should be trained on the limits to gay investigations.
- Hold accountable those who ask, pursue or harass. In five years, military leaders have not officially disciplined anyone for asking, pursuing or harassing. There must be disincentives to deter violations and incentives to do the right thing. SLDN observes that not all service members harass, but bigots have free rein.
- Provide recourse to service members to stop improper investigations. Service members currently have nowhere to turn to stop illegal witch hunts and other violations.
- Require commanders to state in writing the reasons for an investigation. This will help prevent investigations where the ends justify the means.
- Adopt rules of privacy for conversations with health care providers.
- Adopt an exclusionary rule that will prevent evidence obtained illegally in witch hunts from being presented to administrative discharge boards.
- Appoint a panel of experts to review the administrative separation process.

There is a fairly large body of published reports providing commentary on DOD's implementation of the "don't ask, don't tell" policy. One commentator observed that the "don't ask" part of the policy is not supported by the 1993 law and could therefore end with this Administration. This could leave service members that join under the current policy in jeopardy of being exposed and separated from the military. Citing the policy that "any evidence of conduct that manifests a propensity to engage in homosexual conduct" can trigger an investigation,

one reporter commented that this extreme flexibility permits commanders to launch on witch hunts with little evidence.

Some have noted that DOD is having difficulty implementing the "don't ask, don't tell" policy because of the realities of military culture. Central to military service are the virtues of honesty and respect. The "don't ask, don't tell" policy requires certain members to withhold the truth about their sexual orientation. In addition, there is a fundamental conflict between the law which states that homosexual conduct is a detriment to unit moral and unit cohesion, and the policy which states that military leaders cannot ask service members about this conduct. And finally, some observers have linked the experience of integrating blacks and women into the military with the goal of fully integrating gays into the military. One analyst argues this is an inappropriate use of the race and gender metaphors. Race and gender are ascribed at birth while homosexual conduct is a behavior, generally considered deviant in our society, which is an achieved behavior. There is no precedent for the current effort to integrate homosexuals into the military.

Analysis and Conclusions

To be developed.

Washington Times
October 8, 1999

Clinton Orders Courts-Martial To Consider Anti-Gay Crimes

By Rowan Scarborough, The Washington Times

President Clinton yesterday delivered a victory to the homosexual rights movement by ordering military judges and juries to consider hate as a factor in sentencing violent offenders who sought out victims because they are homosexual.

Mr. Clinton changed the manual for courts-martial, which regulates military trials, by adding language that says sentencing authorities may consider whether the crimes were motivated by the victim's race, color, religion, national origin, ethnicity, gender, disability or sexual orientation.

The gay rights lobby in Washington had pressed the administration to make the revision.

"We welcome the rule providing for sentence enhancement in anti-gay hate crimes," said C. Dixon Osburn, co-director of Servicemembers Legal Defense Network, a group that helps military personnel targeted under the military's homosexual ban.

"Military officials need all the tools at their disposal to discourage and deter violence motivated by hate," he said.

The Family Research Council (FRC), which opposes the homosexual political agenda, condemned the president's move, noting this is just one in a several changes made in Pentagon policy at the urging of homosexual groups.

"The Clinton administration is kowtowing to the gay rights agenda," said Robert Maginnis, a retired Army lieutenant colonel and an FRC analyst. "We have known for some time the gay groups have had unusual access to the leadership at the Pentagon. That's got to be coming out of the White House. Because of that access, the Pentagon has been thrown for a number of personnel loops."

The military currently bans open homosexuality in the ranks in a policy known as "don't ask, don't tell."

In August, the Pentagon changed enforcement procedures, taking some power away from local commanders, after gay groups complained of "witch hunts."

Now, if commanders want to begin a "substantial investigation" into whether a person stated he is a homosexual, they must first get approval from senior service civilians.

"Commanders have no reason to enforce this regulation because it's been essentially taken out of their hands and given to political appointees, who understand the writing on the wall," Mr. Maginnis said.

Conservatives also complained that when the Pentagon put together a high-powered panel to review laws against adultery and fraternization, homosexual and feminist groups were given access to express their views while conservatives were shut out.

In the end, the Pentagon did not decriminalize adultery and fraternization, as homosexuals and feminists wanted. But it did propose new guidelines that discourage commanders from seeking adultery prosecution in all but the most serious cases.

During the Clinton administration, the Pentagon has also changed policy so that personnel discharged under the gay ban are entitled to certain benefits.

The push for some type of hate crime provision came after a soldier at Fort Campbell, Ky., Pfc. Barry Winchell, was beaten to death by a private in his unit. Homosexual groups labeled it an anti-homosexual hate crime and called on the Pentagon to take corrective action.

The department in August complied by ordering all personnel to undergo anti-harassment training that is to begin in recruit training and then occur periodically during a career.

Conservative groups said the training is misplaced in an institution that bans homosexual conduct and deems it harmful to good order and discipline in the ranks.

The new manual language does not increase the maximum penalty for any crime. It does, however, allow prosecutors in the sentencing phase of a trial to cite hate as an aggravating circumstance. This could lead the judge or jury to impose a stiffer penalty.

Mr. Clinton's action brings military law in closer conformity with the federal code. It allows judges to add to a defendant's sentence if the prosecution proves that hate motivated the crime.

Neither the federal code, nor the Uniform Code of Military Justice, makes hate a separate offense.

"We welcome Clinton's executive order which sends the unmistakable message that hate motivated violence against anyone will not be tolerated," said Winnie Stachelberg, political director for the Human Rights Campaign, the nation's largest homosexual rights group.

"This rule sends a strong message that violence based on hatred will not be tolerated," Mr. Clinton said.

October 20, 1999

ACTION

MEMORANDUM FOR SAMUEL BERGER

FROM: HANS BINNENDIJK

SUBJECT: Problems with "Don't Ask, Don't Tell"

You asked us to assess DOD's implementation of the President's "don't ask, don't tell" policy for gays in the military. We have reviewed relevant documents and discussed the issue with Pentagon civilians, White House staff (Richard Socarides and Edward Correia) and the Servicemembers Legal Defense Network (SLDN). We conclude that there are negative trends in policy implementation, that OSD is trying to improve the situation but meets resistance from the Services, and that more can and should be done during the next year to turn this around.

THERE IS A PROBLEM

Three interrelated trends capture the nature of the current problem. In the time allotted, we have not done an independent investigation of these trends and simply report them to you with some analysis.

- **The number of annual discharges for homosexual conduct has doubled since 1994**, growing consistently from 617 in that year to 1149 last year. The discharges constitute a small percentage of the overall force (under .1%). The vast majority of these discharges (82%) were triggered by a personal "statement" admitting to homosexuality. Fifty-eight percent of the discharges were within the member's first year of service. Women were discharged at a rate that is twice their presence in the Armed Forces. The recent trends for discharge cases by Service are: (1) increases in the Army and Air Force, (2) a decline for the Navy, and (3) a relatively constant number for the Marines.
- SLDN data indicates **that incidents of anti-gay harassment have doubled since 1997**. Last year they documented 400 cases that included death threats and verbal abuse. The Fort Campbell

murder, they argue, must be seen in the context of this broader environment of harassment.

- **SLDN also believes that "commands use heavy-handed tactics to pursue gays"** in violation of the "don't ask, don't pursue" elements of the policy. SLDN reports that incidents of "asking and pursuing" were up 42% between 1997 and 1998. The case in which the Navy pursued a member because of comments made on AOL is cited as a recent high profile example of this problem. SLDN further concludes that while reports of threats to extract confessions are up, physical abuse by investigators has declined.

REASON BEHINDS THESE TRENDS

DOD has not made extensive inquiries into "statement cases," so the reasons for the majority of the discharges are not fully known. There are, however, several observations that we can make.

- **The 1993 policy was a compromise that leaves both commanders and gay members in a gray zone.** Under legislation passed in 1993, Servicemembers with a propensity or intention to conduct homosexual activity must be separated from the Armed Forces. The President's policy, however, stresses the privacy rights of individual members. This has posed contradictions for those seeking to implement the policy and for those living with it.
- An April 1998 OSD review concluded that this contradiction has posed a challenge to the Services, but that for the most part the policy has been properly enforced. **However, constrained personal privacy for all members and a cultural emphasis on regulations leave commanders leaning in the direction of the law banning gays rather than the policy supporting privacy if the two appear to clash.** Tension remains between OSD and the uniformed military over policy implementation.
- And yet the "don't ask, don't tell" policy tends to lead some gays to believe that there may be a place for them in the military. Many join to find a culture that does not meet expectations.
- Much of the increase in the discharge cases has come from Lackland Air Force Base, which is a mixed gender training facility. A recent policy shift at Lackland supports the

belief that some statements admitting to homosexual or bisexual preferences may be designed as a short-term escape from unpleasant basic training. A "cooling off" period has been instigated during which a recruit has an opportunity to consult legal counsel to fully understand the policy and retract a privately made statement. Most tend to change their statement upon reflection. In the first seven months of the new policy, the number of gay-related discharges of Lackland recruits dropped from 195 to 31.

OSD EFFORTS TO IMPLEMENT THE POLICY

In general, **OSD appears to be making a good faith effort to implement the President's policy**, but some of their policies are criticized by SLDN. OSD has also been criticized by conservative groups for giving SLDN too much access. **The larger implementation problem may be with the Services.** OSD efforts include the following:

- In 1995, the OSD General Counsel issued a memorandum which gives the commander broad investigative powers upon receipt of "credible information" and which places the burden of proof to "rebut a presumption" on the charged member. These interpretations are criticized by SLDN.
- In 1997, OSD issued the Dorn memorandum, which stated that a report of harassment is not a cause to investigate the person being harassed. It also ordered prompt investigation of harassment charges and ordered training to prevent harassment. Issuance of the Dorn memorandum may account for some of the increase in harassment cases reported to SLDN. After SLDN criticism that the memorandum was improperly circulated, it is being reissued with strengthened language.
- In April 1998, OSD reviewed the "don't ask, don't tell" policy and recommended several improvements, including consultations with higher level commands before investigations begin and improved training for those enforcing the policy.
- **In August 1999, OSD issued a new policy directive** implementing many of the recommendations of the 1998 review and reissuing the Dorn memorandum. **The Services are currently developing implementation plans for this directive.**

OTHER STEPS SUGGESTED BY REFORMERS

SLDN and others who seek to strengthen the current policy have made a series of suggestions. Those which would not require new legislation include the following:

- Train Servicemembers on the policy, on harassment, and on the limits of gay investigations.
- Take additional steps to hold accountable those who ask, pursue, or harass.
- Change the current procedures that place the burden of proof on the member (once an investigation begins) to demonstrate he/she will not engage in homosexual conduct.
- Make commanders accountable for an environment in which harassment appears acceptable.
- Provide recourse to Servicemembers to stop improper investigations.
- Adopt a rule of privacy for confidential conversations.
- Exclude evidence obtained illegally from use in discharge boards.

Concurrence: James Baker

RECOMMENDATIONS

1. Establish an informal Task Force to include OSD, the White House Special Counsel for Civil Rights, and NSC to consider next steps.

Approve _____ Disapprove _____

2. Ask Service Secretaries to brief this Task Force on their plans to implement August 1999 Directive.

Approve _____ Disapprove _____

by those provisions. For purposes of the application of any of such provisions to the Coast Guard Reserve, any reference in those provisions to the Secretary of Defense or Secretary of a military department shall be treated as referring to the Secretary of Transportation.

14 USC 702 note.

(b) REGULATIONS. - Regulations prescribed for the purposes of this section shall to the extent practicable be identical to the regulations prescribed by the Secretary of Defense under those provisions.

(c) TEMPORARY SPECIAL - RETIREMENT AUTHORITY. - Section 1331a of title 10, United States Code, is amended-

(1) in subsection (a), by striking out "Secretary of a military department and inserting in lieu thereof Secretary concerned";

(2) in subsection (c), by striking out "of the military department"; and

(3) in subsection (e), by striking out the period at the end and inserting in lieu thereof "and by the Secretary of Transportation with respect to the Coast Guard."

Subtitle G - Other Matters

SEC. 571. POLICY CONCERNING HOMOSEXUALITY IN THE ARMED FORCES.

(a) CODIFICATION. - (1) Chapter 37 of title 10, United States Code, is amended by adding at the end the following new section:

"Sec. 654. Policy concerning homosexuality in the armed forces

"(a) FINDINGS. - Congress makes the following findings:

"(1) Section 8 of article I of the Constitution of the United States commits exclusively to the Congress the powers to raise and support armies, provide and maintain a Navy, and make rules for the government and regulation of the land and naval forces.

"(2) There is no constitutional right to serve in the armed forces.

"(3) Pursuant to the powers conferred by section 8 of article I of the Constitution of the United States, it lies within the discretion of the Congress to establish qualifications for and conditions of service in the armed forces.

"(4) The primary purpose of the armed forces is to prepare for and to prevail in combat should the need arise.

"(5) The conduct of military operations requires members of the armed forces to make extraordinary sacrifices, including the ultimate sacrifice, in order to provide for the common defense.

"(6) Success in combat requires military units that are characterized by high morale, good order and discipline, and unit cohesion.

"(7) One of the most critical elements in combat capability is unit cohesion, that is, the bonds of trust among individual service members that make the combat effectiveness of a military unit greater than the sum of the combat effectiveness of the individual unit members.

"(8) Military life is fundamentally different from civilian life in that

"(A) the extraordinary responsibilities of the armed forces, the unique conditions of military service, and the critical role of unit cohesion, require that the military community, while subject to civilian control, exist as a specialized society; and

"(B) the military society is characterized by its own laws, rules, customs, and traditions, including numerous restrictions on personal behavior, that would not be acceptable in civilian society.

"(9) The standards of conduct for members of the armed forces regulate a member's life for 24 hours each day beginning at the moment the member enters military status and not ending until that person is discharged or otherwise separated from the armed forces

"(10) Those standards of conduct, including the Uniform Code of Military Justice, apply to a member of the armed forces at all times that the member has a military status, whether the member is on base or off base, and whether the member is on duty or off duty.

"(11) The pervasive application of the standards of conduct is necessary because members of the armed forces must be ready at all times for worldwide deployment to a combat environment.

"(12) The worldwide deployment of United States military forces, the international responsibilities of the United States, and the potential for involvement of the armed forces in actual combat routinely make it necessary for members of the armed forces involuntarily to accept living conditions and working conditions that are often spartan, primitive, and characterized by forced intimacy with little or no privacy.

"(13) The prohibition against homosexual conduct is a long-standing element of military law that continues to be necessary in the unique circumstances of military service.

"(14) The armed forces must maintain personnel policies that exclude persons whose presence in the armed forces would create an unacceptable risk to the armed forces' high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.

"(15) The presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.

"(b) POLICY. - A member of the armed forces shall be separated from the armed forces under regulations prescribed by the Secretary of Defense if one or more of the following findings is made and approved in accordance with procedures set forth in such regulations:

Regulations.

"(1) That the member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts unless there are further findings, made and approved in accordance with procedures set forth in such regulations, that the member has demonstrated that-

"(A) such conduct is a departure from the member's usual and customary behavior;

"(B) such conduct, under all the circumstances, is unlikely to recur;

"(C) such conduct was not accomplished by use of force, coercion, or intimidation;

"(D) under the particular circumstances of the case, the member's continued presence in the armed forces is consistent with the interests of the armed forces in proper discipline, good order, and morale; and

(E) the member does not have a propensity or intent to engage in homosexual acts.

"(2) That the member has stated that he or she is a homosexual or bisexual, or words to that effect, unless there is a further finding, made and approved in accordance with procedures set forth in the regulations, that the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.

"(3) That the member has married or attempted to marry a person known to be of the same biological sex.

"(c) ENTRY STANDARDS AND DOCUMENTS. - (1) The Secretary of Defense shall ensure that the standards for enlistment and appointment of members of the armed forces reflect the policies set forth in subsection (b).

"(2) The documents used to effectuate the enlistment or appointment of a person as a member of the armed forces shall set forth the provisions of subsection (b).

"(d) REQUIRED BRIEFINGS - The briefings that members of the armed forces receive upon entry into the armed forces and periodically thereafter under section 937 of this title (article 137 of the Uniform Code of Military Justice) shall include a detailed explanation of the applicable laws and regulations governing sexual conduct by members of the armed forces, including the policies prescribed under subsection (b).

"(e) RULE OF CONSTRUCTION. - Nothing in subsection (b) shall be construed to require that a member of the armed forces be processed for separation from the armed forces when a determination is made in accordance with regulations prescribed by the Secretary of Defense that-

"(1) the member engaged in conduct or made statements for the purpose of avoiding or terminating military service; and

"(2) separation of the member would not be in the best interest of the armed forces.

"(f) DEFINITIONS. - In this section:

"(1) The term 'homosexual' means a person, regardless of sex, who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts, and includes the terms 'gay' and 'lesbian'.

"(2) The term 'bisexual' means a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual and heterosexual acts.

"(3) The term 'homosexual act' means-

"(A) any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires; and

"(B) any bodily contact which a reasonable person would understand to demonstrate a propensity or intent to engage in an act described in subparagraph (A).".

(2) The table of sections at the beginning of such chapter is amended by adding at the end the following:

"664. Policy concerning homosexuality in the armed forces."

(b) REGULATIONS. - Not later than 90 days after the date of enactment of this Act, the Secretary of Defense shall revise Department of Defense regulations, and issue such new regulations as may be necessary to implement section 654 of title 10, United States Code, as added by subsection (a). 10 USC 654 note

(c) SAVINGS PROVISION. - Nothing in this section or section 654 of title 10, United States Code, as added by subsection (a), may be construed to invalidate any inquiry, investigation, administrative action or proceeding, court-martial, or judicial proceeding conducted before the effective date of regulations issued by the Secretary of Defense to implement such section 654. 10 USC 651 note.

(d) SENSE OF CONGRESS. - It is the sense of Congress that - 10 USC 654 note.

(1) the suspension of questioning concerning homosexuality as part of the processing of individuals for accession into the Armed Forces under the interim policy of January 29, 1993, should be continued, but the Secretary of Defense may reinstate that questioning with such questions or such revised questions as he considers appropriate if the Secretary determines that it is necessary to do so in order to effectuate the policy set forth in section 654 of title 10, United States Code, as added by subsection (a); and

(2) the Secretary of Defense should consider issuing guidance governing the circumstances under which members of the Armed Forces questioned about homosexuality for administrative purposes should be afforded warnings similar to the warnings under section 831(b) of title 10, United States Code (article 31(b) of the Uniform Code of Military Justice).

SEC. 572. CHANGE IN TIMING OF REQUIRED DRUG AND ALCOHOL TESTING AND EVALUATION OF APPLICANTS FOR APPOINTMENT AS CADET OR MIDSHIPMAN AND FOR ROTC GRADUATES.

Section 978(a)(3) of title 10, United States Code, is amended-

(1) in the first sentence, by striking out "during the physical examination given the applicant before such appointment and inserting in lieu thereof "within 72 hours of such appointment"; and

(2) in the second sentence, by striking out "during the precommissioning physical examination given such person" and inserting in lieu thereof "before such an appointment is executed".

SEC. 573. REIMBURSEMENT REQUIREMENTS FOR ADVANCED EDUCATION ASSISTANCE.

(a) IN GENERAL. - Section 2005 of title 10, United States Code, is amended by adding at the end the following new subsections:

"(g)(1) In any case in which the Secretary concerned determines that a person who entered into an agreement under this section failed to complete the period of active duty specified in the agreement (or failed to fulfill any other term or condition prescribed in the agreement) and, by reason of the provision of the agreement required under subsection (a)(3), may owe a debt to the United States and in which that person disputes that such a debt is owed, the Secretary shall designate a member of the armed forces

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Defense Intelligence Agency

Washington Times
October 19, 1999

Gays Influence Pentagon Policies, Opponents Charge

By Rowan Scarborough, The Washington Times

Homosexual groups are increasing their access to Pentagon officials, leading to policy changes that benefit the gay-rights movement, conservative groups charge.

The conservatives say the Pentagon shuts them out during policy reviews of sexual-misconduct regulations, while holding private meetings and conversations with homosexual organizations.

"The Pentagon is catering to homosexual groups that bankrolled the Clinton campaigns so heavily," said Elaine Donnelly, director of the Livonia, Mich.-based Center for Military Readiness. "They do it routinely. It doesn't even occur to them there might be another side to this issue. The conservatives aren't even on the radar screen of the Pentagon."

But C. Dixon Osburn, co-director of the Servicemembers Legal Defense Network, called the charges "bunk."

"If we had an 'in' in the Pentagon, we wouldn't have three to four service members kicked out every day for being gay," said Mr. Osburn, whose group aids people targeted under the military's homosexual ban. "It's the highest rate of discharges in a decade."

Mr. Osburn said he has submitted his annual report on discharges of homosexuals to the Pentagon, which then began a review of its homosexual ban, known as "don't ask, don't tell."

Mr. Osburn said he and a representative from the Human Rights Campaign, the nation's largest homosexual lobby, met with Rudy de Leon, undersecretary of defense for personnel and readiness, who has authority to revise policies on homosexuals. Mr. Osburn said he could not recall how many times he has spoken to Mr. de Leon.

Conservatives raised the access issue after President Clinton two weeks ago amended the military's manual for courts-martial. The new language states that judges and juries in the sentencing phase of a trial may consider whether the defendant was motivated by hate toward a particular group. The categories of hate crimes include sexual orientation.

The Defense Department issued a statement to The Washington Times saying it recommended changes in the manual based on instructions from Congress.

Said the department, "The change was originally prompted by the comments of the House [Armed Services Committee] in their report on the National Defense Authorization Act for Fiscal Year 1997. In its report, the committee requested the secretary of defense study the efficacy of sentence enhancement for crimes against persons or property in the military motivated by the victim's status. . . ."

Robert Maginnis, a Family Research Council analyst, said that when Mr. de Leon and other senior Pentagon officials led a major review of adultery and fraternization rules, his group wasn't asked to

comment.

Mr. Maginnis, a retired Army lieutenant colonel, said he obtained a Pentagon list of groups invited to comment and it contained no "pro-family" organizations. The list included the American Civil Liberties Union, the National Association for the Advancement of Colored People, the National Organization for Women, the National Women's Law Center and Mr. Osburn's Servicemembers Legal Defense Network.

Mr. Maginnis said that while left-wing groups dominate the list, he doesn't believe the Pentagon has ever invited comments from the Family Research Council, a frequent critic of Mr. Clinton.

"It would appear homosexual groups have unusual access for representing such a small group in this country," he said.

Blocked by a Democratic Congress in 1993 from lifting outright the military's ban on homosexuals, Mr. Clinton accepted a compromise, "don't ask, don't tell," that lets homosexuals serve if they keep their orientation private.

"Clearly, he is trying to do through the back door what he failed to do through the front door, which is to get gays into the military and make it very difficult for the military to get rid of them," said Rep. Roscoe G. Bartlett, Maryland Republican and a member of the House Armed Services Committee. "Congress has to say 'Enough is enough. You can't do that.'"

The congressman also questioned whether Mr. Clinton can change the court-martial manual without congressional approval.

"I think this is a clear violation of the Constitution," he said. "Congress makes the laws. The executive does not make laws."

Since the "don't ask, don't tell" policy started in 1994, homosexual groups have pressured the Pentagon to make changes -- with considerable success. The Pentagon has:

- *Decreed that those dismissed for declaring homosexuality do not have to repay the government financial aid in the Reserve Officers' Training Program (ROTC).

- *Ordered commanders to investigate charges of anti-homosexual harassment.

- *Ordered all service members to undergo anti-harassment training from the time they are recruits.

- *Told commanders they must get permission from a political appointee in their service before launching a "substantial investigation" into possible statements of service members' homosexuality.

San Antonio Express-News
October 11, 1999

Ousters From AF Fewer

Gay separations down by half

By Sig Christenson, Express-News Staff Writer

The number of gay trainees discharged from Lackland AFB has dropped dramatically in the wake of criticism over the base's handling of President Clinton's "don't ask, don't tell, don't pursue" policy, according to figures the Air Force released Sunday.

Jim Wolffe, special assistant to Air Force Secretary F. Whitten Peters, said discharges have declined as the service has slowed the separation process in the hope of letting self-described gays, lesbians and bisexuals stay in uniform.

The number of trainees leaving Lackland under the policy has fallen from 210 from Jan. 1-Sept. 30, 1998 to 106 in the same period this year, base spokeswoman Irene Witt said.

"The fact is there aren't many people being discharged for being gay under don't-ask-don't-tell at Lackland now. The numbers have tightened," Wolffe told the San Antonio Express-News. "I think we've made great progress."

Wolffe's comments were made just a day before his office was to receive a Washington advocacy group's findings on why a record number of gays were discharged last year from the Air Force, a majority of them Lackland recruits.

The Servicemembers Legal Defense Network said the rise in recruits booted from Lackland is rooted, among other things, in limited legal options, harassment from fellow trainees, and confusion about a policy created in part to protect gays.

In a letter to be sent today to Peters, the advocacy group also said the policy is so misunderstood in some quarters that a psychologist and inspector general mistakenly believed they had a duty to report admitted gays.

"I think our report shows the story behind the discharge numbers is more complex than was additionally thought," said SLDN co-director Michelle Benecke, whose group helps officers and enlistees tossed from the military under the policy.

The nine-page letter analyzing problems in Lackland's enforcement of the policy, and offering 14 recommendations to improve it, was based on a visit by the group to the San Antonio base in March.

Benecke and other SLDN officials came to Lackland after the Express-News reported in a copyrighted story that Air Force discharges of gays and lesbians had reached a record high.

In all, 414 airmen were discharged during the fifth year of Clinton's policy.

The Pentagon subsequently revealed that 1,145 soldiers, sailors, airmen and Marines were discharged last year, up from 997 in 1997.

Since the don't-ask-don't-tell policy took effect, 4,311 people have been discharged, with the services generally seeing increases each year.

The number of gays and lesbians discharged from all the military services before the policy was instituted had been on a downward slope, falling from 1,998 in 1992 to 682 in 1993.

Crafted by Clinton as a compromise between gay-rights advocates and those opposed to gays and lesbians in the military, the policy lets gays remain in uniform and forbids commanders from questioning them about their sexual orientation.

It also lets gays, lesbians and bisexuals serve in the military as long as they keep their sexual orientation to themselves and don't perform homosexual acts.

The Pentagon and the Air Education and Training Command at Randolph AFB, which oversees Air Force training at Lackland and other bases, have insisted they've followed the policy to the letter.

Military officials said those leaving the Air Force did so after voluntarily acknowledging they were gay.

But Benecke last spring said a "hostile climate" flourished under the policy. She called the 271 Lackland trainees kicked out a disproportionately high number.

After meeting with trainers, recruits, commanders, military lawyers, chaplains, a psychologist and inspector general at Lackland, a conciliatory Benecke shied away from saying commanders at the base intentionally violated don't-ask-don't-tell.

"What we found was more complex than what the Air Force had originally said was the reason for the increase," she said.

Wolfe accompanied SLDN during its week at Lackland and praised the group as "very thorough and very thoughtful," and said he was "glad they didn't find" evidence of official harassment at the base.

"That's not Air Force policy," Wolfe said. "The fact that they didn't find any official harassment is good news."

Still, he said the Air Force instituted a new procedure about two weeks before SLDN's Lackland visit that gives stressed-out recruits more time to decide if they wish to leave the service.

Under the procedure, recruits claiming to be gay are referred through the chain of command to a defense lawyer and informed of their rights and can make personal statements. The recruits remain in training, rather than face separation from their units, can make a phone call to anyone they wish, and may continue their Air Force careers if they recant their acknowledgement of being gay, lesbian or bisexual.

SLDN raised concern about a letter of counseling issued for trainees recanting their initial statements, saying in the report to Peters it "suggests a failure on the part of the trainee rather than the training." But while Wolfe said the Air Force will study the issue, he also added the letter doesn't stay in recruits' permanent records.

The new procedure, moreover, gives self-proclaimed gays, many homesick and grappling with the intense stress of basic training, a chance to "cool off," he said.

The SLDN letter said several factors might have contributed to Lackland's rising discharge rate. Among them:

Trainees erroneously believed they'd go to jail if they didn't reveal their sexual orientation. That, SLDN said, is because don't-ask-don't-tell is outlined in a training manual and a class on the military's criminal code.

Wolffe said federal law requires Lackland to mention the policy as it outlines the Uniform Code of Military Justice. But he conceded the Air Force needs to make clear gays won't be jailed for failing to reveal their sexual orientation.

Some trainees reported harassment and speculation about the sexual orientation of other recruits, and in some cases it was hostile, SLDN stated. One trainee said he overheard three airmen talking about how they'd assault anyone they found to be gay. Another recruit admitted to calling a fellow trainee a "faggot" to tease him, while such derogatory nicknames as "Twinkle Toes" and "Latrine Queen" were used to describe suspected gay airmen.

Wolffe, who was in the sessions when those statements were made, stressed that such comments weren't "pervasive in what I saw and heard." But, he added, training instructors must ensure "that those kind of comments aren't going to be tolerated any more than comments about race or ethnicity or religious belief or something like that."

The Air Force's core value of integrity conflicts with don't ask, don't tell. Gay trainees concerned about integrity may decide they must reveal their sexual orientation, a move that directly contradicts the policy. To stay in uniform, trainees must "hide, dissemble and lie" to recruits and commanders, SLDN said.

Wolffe said it must be made clear that "not telling under don't-ask-don't-tell is not a violation of Air Force core values."

Trainers and recruits alike weren't properly informed about don't-ask-don't-tell. Instruction "consists of a brief script that a lawyer would have difficulty understanding, let alone a 20-year-old trainee," SLDN said.

The script didn't tell trainees that anti-gay harassment wouldn't be tolerated, didn't adequately outline what activities could trigger their discharge, or tell them of their right to talk with a military lawyer.

Wolffe didn't know what more needs to be done on this issue, but vowed it will be studied further.

Trainees with questions about a variety of personal issues can talk with fellow recruits. But gays, lesbians and bisexuals do that at great risk, the group said, noting that one trainee was discharged after asking his dorm chief if the Air Force could imprison him for being gay. Whether he actually was gay wasn't clear.

Wolffe acknowledged that under the policy recruits must "be careful what they say, because a statement can trigger a discharge."

He also said gay trainees risk discharge by complaining about harassment to psychologists and inspector generals.

"They should be able to go to their IG (inspector general) or to a mental health professional and say they're harassed and an investigation of the harassment occur.

"Now I understand their concern that that also could lead to their being outed, and it is difficult," he said. "But it should be possible to do a harassment investigation without investigating whether the person being harassed is actually gay."

Still, Wolffe admitted, "there's no question there's a risk" of self-proclaimed gay recruits being discharged if they complain of harassment. Asked if the Air Force could eliminate that risk, he replied: "I don't know."

"I'm not a lawyer," Wolffe said, calling the harassment dilemma a complex legal issue. "And I think that our lawyers are going to have to look at that and find out what the room to maneuver is there.

harassment charges. Issuance of the Dorn memo may account for some of the increase in harassment cases reported to SLDN. After SLDN criticism that the memo was improperly circulated, it is being reissued with strengthened language.

-- In April 1998, OSD reviewed the "don't ask, don't tell" policy and recommended several improvements, including consultations with higher level commands before investigations begin and improved training for those enforcing the policy.

-- In August 1999, OSD issued a new policy directive implementing the recommendations of the 1998 review and establishing limited rights of confidentiality for mental health providers. The Services are currently developing implementation plans for this directive.

in court cases,

Other Steps Suggest by Reformers

SLDN and others who seek to strengthen the current policy have made a series of suggestions which include the following:

- Train all service members in the limits of gay investigations.
- Take additional steps to hold accountable those who ask, pursue, or harass.
- Change the current procedures which place the burden of proof on the member to demonstrate he/she is not gay. *(once an investigation begins)*
- Make commanders accountable for an environment in which harassment appears acceptable.
- Provide recourse to service members to stop improper investigations.
- Adopt a rule of privacy for conversations with ^{all} health care providers.
- Exclude evidence obtained illegally from use in discharge boards.
- Narrow the charges for discharging people, making the threshold "don't act". *law*

Recommendations

1. Establish a Task Force to include OSD, White House Counsel, and NSC to consider next steps.
2. Ask Service Secretaries to brief this ~~Task~~ Task Force on their plans to implement the August 1999 Directive.

Memorandum to: Samuel R Berger
Subject: Problems with "Don't Ask, Don't Tell"
From: Hans Binnendijk ~~and Brian Peterman~~

Law is
~~not~~ *engaging*

You asked us to assess DOD's implementation of the President's "don't ask, don't tell" policy for gays in the military. We have reviewed relevant documents and discussed the issue with Pentagon civilians, White House staff (Richard Sacarides and Edward Correia) and the Servicemembers Legal Defense Network (SLDN). We conclude that there are negative trends in policy implementation, that OSD is trying to improve the situation but meets resistance from the services, and that more can be done during the next year to turn this around.

There is a problem.

Three interrelated trends capture the nature of the current problem. In the time allotted, we have not done an independent investigation of these trends and simply report them to you with some analysis.

Service -- **The number of annual discharges for homosexual conduct has doubled since 1994**, growing consistently from 617 in that year to 1149 last year. This is a small percentage of the overall force (under .1%). The vast majority of these discharges (82%) were triggered by a personal statement which indicates a degree of "voluntary" action on the part of the member. 58% of the discharges were within the member's first year of service. Women were discharged at a rate which is twice their presence in the Armed Forces. The recent trends for discharge cases by Service are: 1) increases in the Army and Air Force, 2) a decline for the Navy, and 3) a relatively constant number for the Marines.

-- SLDN data indicates that **incidents of anti-gay harassment have doubled since 1997**. Last year they documented 400 cases which included death threats and verbal abuse. The Fort Campbell?? murder, they would argue, must ~~therefore~~ be seen in the context of this broader environment of harassment.

-- **SLDN also believes that "commands use heavy-handed tactics to pursue gays"** in violation of the "don't ask, don't pursue" elements of the policy. SLDN reports that incidents of "asking and pursuing" were up 42% between 1997 and 1998. SLDN reports "frequent use" by commanders of threats to extract confessions, including threats of criminal charges, confinement, and non-judicial punishment. On the other side of the ledger, SLDN also concludes that physical abuse by investigators and criminal prosecution for homosexuals have declined. OSD indicates that the policy is implemented inconsistently, depending upon the Service and individual commanders. The case in which the Navy pursued a member because of comments made on AOL is cited as a recent high profile example of this problem.

Reasons behind these trends

(DoD has not made

Extensive inquiries ~~have not been~~ into "statement cases", so the reasons for the majority of the discharges is not fully known. There are, however, several observations that we can make.

-- **The 1993 policy was a compromise that leaves both commanders and gay members in a grey zone.** Under legislation passed in 1993, Service members with a propensity or intention to conduct homosexual activity must be separated from the Armed Forces. The President's policy, however, stresses the privacy rights of individual members. This has posed contradictions for those seeking to implement the policy and for those living with it.

-- An April 1998 OSD review concluded that this contradiction has posed a challenge to the Services, but that for the most part it has been properly enforced. Nonetheless, **it is clear that the military culture will tend to lean in the direction of the law banning gays** rather than the policy supporting privacy if the two appear to clash. OSD civilians privately tell us that considerable tension remains between them and the uniformed military over policy implementation.

-- And yet the "don't ask, don't tell" policy tends to lead some gays to believe that there may be a place for them in the military. Many join to find a culture which does not meet their expectations.

-- A recent policy shift at Lackland Air Force Base indicates that **some statements admitting to homosexual or bisexual preferences may be designed as a short-term escape from unpleasant basic training.** A "cooling off" period has been instigated during which a recruit has an opportunity to consult legal counsel and retract a privately made statement. Most tend to change their minds upon reflection. In the first seven months of the new policy, the number of gay-related discharges of Lackland recruits dropped from 195 to 31.

OSD Efforts to Implement the Policy

In general, OSD appears to be making a good faith effort to implement the President's policy, but some of their policies are criticized by SLDN. The larger problem may lie with the Services themselves. OSD efforts include the following:

-- In 1995, the OSD General Counsel issued a memo which gives the commander broad investigative powers upon receipt of "credible information" and which places the burden of proof to "rebut a presumption" on the charged member. These interpretations are criticized by SLDN.

-- In 1997, OSD issued the Dorn memo, which stated that a report of harassment is not a cause to investigate the person being harassed. It also ordered prompt investigation of the

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D. Brian Peterman

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Background

From 1982 to 1993, the Department of Defense (DOD) maintained a policy requiring separation of any service member deemed to be "homosexual". In 1991, in his campaign for the Presidency, Bill Clinton made this prohibition an issue, and in late 1992, President-elect Clinton said that he intended to "lift the ban" on homosexuals in the military. In the President's first week in office, however, the Joint Chiefs strongly protested such a change. The Senate majority leader also informed the President there were seventy votes against his proposed change of policy. In a compromise between the President, the Joint Chiefs, and the Senate, the "don't ask, don't tell" policy was born. This new policy was implemented by DOD directive in early 1993. Later that year, Congress enacted a statute that was less protective of homosexual service members than the Pentagon policy. Current DOD policy implements this statute.

Current Law and DOD Policy

In 1993, Congress enacted 10 USC 37, Sec. 654, "Policy Concerning Homosexuality in the Armed Forces." Congress found "the presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability." The law directs that a member be separated from the armed forces if: the member has engaged in, attempted to engage in, or solicited to engage in a homosexual act or acts; the member has stated that he or she is a

homosexual or bisexual; or, the member has married or attempted to marry a person known to be of the same biological sex. As defined in the law, a homosexual is "a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts, and includes the terms 'gay' and 'lesbian'." The constitutionality of this law has been consistently upheld by the Supreme Court on appeal.

It is DOD policy that a service member's sexual orientation is considered a personal and private matter, and is not a bar to continued service unless manifested by homosexual conduct. Homosexual conduct, which includes making a statement that one is homosexual or bisexual (i.e. "don't tell"), is grounds for separation from the service. If it is found that a service member has engaged in homosexual conduct, the burden for rebuttal rests with the member for proving that retention is warranted.

DOD goes beyond the requirements of the statute to implement the "don't ask" portion of the policy. Individual service members are prevented from asking another service member about their sexual orientation; only a member's commander can initiate a fact-finding inquiry involving homosexual conduct and only when there is credible evidence that there is basis for discharge. Additional restrictions are placed on the types of questions that can be asked during the inquiry.

In 1997 and again in August 1999, DOD issued strong policy to prevent harassment or threats against service members on the basis of alleged homosexuality. The SLDN reported that many service members were reluctant to report harassment because they feared having their own sexual orientation investigated. This policy statement, known as the "Dorn memo", states that commanders should investigate those accused of harassing and not the reporter. In addition, it requires that commanders hold those found responsible for harassment accountable for their acts.

Additional guidance issued in August 1999 requires that commanders obtain their Service Secretary's approval before launching a substantial investigation into whether a person made a statement that they were homosexual. It also requires staff judge advocates to consult with senior legal officers at higher headquarters prior to initiating an investigation into alleged homosexual conduct. Both of these provisions were put in place to help prevent "witch hunts". A provision was also added to require Service Inspectors General to determine in their

inspections that training of personnel charged with application and enforcement of the policy was accomplished.

Statistic and Trends

All statistics indicate the "don't ask, don't tell" policy is not working as originally intended.

DOD completed its own review of the policy implementation in April 1998. This review did not find widespread "witch hunts" or abuses in the course of investigations. They did state that, "to strike a balance between the prohibition of homosexual conduct in the military and the privacy rights of individuals has posed a challenge to the military." Their report made several recommendations to improve policy implementation, many of which were implemented in the August 1999 DOD policy memoranda.

SLDN's fifth annual report released in March 1999 indicates 400 incidents of harassment were reported to them in 1998, up 120% from the year before. 511 incidents were reported where service members were asked and pursued for being or perceived as being homosexual, up from 359 incidents in 1997. They charge that "witch hunts" continue, harassers are not being held accountable and that training on the policy is inadequate.

Perhaps the best barometer on policy health is the number of discharges occurring as a result of homosexual conduct. Since 1994, the number of discharges has increased almost 100%, from 617 in 1994 to 1,149 in 1998, the highest number discharged since 1987. In 1997, 82% of those discharged were released because they stated they were homosexuals. 58% were discharged in their first year of service, while a total of 82% were discharged in their first four-year tour. The DOD review noted that most discharges for homosexual conduct were uncontested and processed administratively. The DOD reviewers could not determine why the trend of discharges was increasing. Some speculate that individuals are using the homosexual policy to conveniently get out of their service contracts early.

Conclusions and Recommendations

The current state of affairs for homosexuals in the military is not as the President intended in 1993. More people are being discharged for homosexual conduct today than there were prior to the legislative and policy changes in 1993, and the trend is getting worse. In addition, the SLDN indicates the reports of harassment are significantly on the rise in the military.

Rudy de Leon provided some helpful insights. Although DOD policy is being set to protect the privacy and welfare of homosexuals in the military, the implementation of that policy is getting varied implementation with the Services. The status of homosexuals is an unsettled issue within society and the generally conservative views of the military makes this issue even more unsettling. Therefore, there is both institutional and individual resistance to fully integrating homosexuals into the military.

Perhaps the most disturbing aspect of the current situation is the increasing, and seemingly unchecked, harassment of individuals perceived to be homosexuals. By policy, homosexuals are permitted to serve in the military as long as they do not engage in homosexual conduct. Those serving under this condition should not be subject to harassment or threats because of their actual or perceived sexual orientation. Harassment tears at the fabric of unit cohesion and should be dealt with decisively. This is the area in which I believe the Administration can help the cause of homosexuals in the military the most over the next year.

In August 1999, DOD issued additional policy guidance that will help reduce harassment of homosexuals. The Service Secretaries are developing their implementing instructions which should be completed shortly. To display White House support for this policy improvement, I recommend you meet with Secretary Cohen, the Service Secretaries and Service Chiefs to hear how they intend to implement and enforce the anti-harassment policy. In addition, Secretary Cohen should make regular reports on how the anti-harassment policy is working. I also recommend a rump group be developed to coordinate DOD's homosexual policies with the White House staff. This group would include Rudy de Leon, Frank Rush, Edward Correia, Laura Marcus, and Hans Binnendijk.

This is a highly emotional issue for both pro- and anti-homosexual groups with strong societal and religious overtones. I think we have learned this issue will not be resolved by edict. Steady, focused progress should be the goal. Stopping harassment of homosexuals in the military should be the immediate, short-term goal. If bigots are held accountable for their actions and harassment ends, the climate will be improved to allow further gains.

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DOD goes beyond the requirements of the statute to implement the "don't ask" portion of the policy. Individual service members are prevented from asking another service member about their sexual orientation; only a member's commander can initiate a fact-finding inquiry involving homosexual conduct and only when there is credible evidence that there is basis for discharge. Additional restrictions are placed on the types of questions that can be asked during the inquiry.

In 1997 and again in August 1999, DOD issued strong policy to prevent harassment or threats against service members on the basis of alleged homosexuality. The SLDN reported that many service members were reluctant to report harassment because they feared having their own sexual orientation investigated. This policy statement, known as the "Dorn memo", states that commanders should investigate those accused of harassing and not the reporter. In addition, it requires that commanders hold those found responsible for harassment accountable for their acts.

Additional guidance issued in August 1999 requires that commanders obtain their Service Secretary's approval before launching a substantial investigation into whether a person made a statement that they were homosexual. It also requires staff judge advocates to consult with senior legal officers at higher headquarters prior to initiating an investigation into alleged homosexual conduct. Both of these provisions were put in place to help prevent "witch hunts". A provision was also added to require Service Inspectors General to determine in their

inspections that training of personnel charged with application and enforcement of the policy was accomplished.

Statistic and Trends

All statistics indicate the "don't ask, don't tell" policy is not working as originally intended.

DOD completed its own review of the policy implementation in April 1998. This review did not find widespread "witch hunts" or abuses in the course of investigations. They did state that, "to strike a balance between the prohibition of homosexual conduct in the military and the privacy rights of individuals has posed a challenge to the military." Their report made several recommendations to improve policy implementation, many of which were implemented in the August 1999 DOD policy memoranda.

SLDN's fifth annual report released in March 1999 indicates 400 incidents of harassment were reported to them in 1998, up 120% from the year before. 511 incidents were reported where service members were asked and pursued for being or perceived as being homosexual, up from 359 incidents in 1997. They charge that "witch hunts" continue, harassers are not being held accountable and that training on the policy is inadequate.

Perhaps the best barometer on policy health is the number of discharges occurring as a result of homosexual conduct. Since 1994, the number of discharges has increased almost 100%, from 617 in 1994 to 1,149 in 1998, the highest number discharged since 1987. In 1997, 82% of those discharged were released because they stated they were homosexuals. 58% were discharged in their first year of service, while a total of 82% were discharged in their first four-year tour. The DOD review noted that most discharges for homosexual conduct were uncontested and processed administratively. The DOD reviewers could not determine why the trend of discharges was increasing. Some speculate that individuals are using the homosexual policy to conveniently get out of their service contracts early.

Conclusions and Recommendations

The current state of affairs for homosexuals in the military is not as the President intended in 1993. More people are being discharged for homosexual conduct today than there were prior to the legislative and policy changes in 1993, and the trend is getting worse. In addition, the SLDN indicates the reports of harassment are significantly on the rise in the military.

Rudy de Leon provided some helpful insights. Although DOD policy is being set to protect the privacy and welfare of homosexuals in the military, the implementation of that policy is getting varied implementation with the Services. The status of homosexuals is an unsettled issue within society and the generally conservative views of the military makes this issue even more unsettling. Therefore, there is both institutional and individual resistance to fully integrating homosexuals into the military.

Perhaps the most disturbing aspect of the current situation is the increasing, and seemingly unchecked, harassment of individuals perceived to be homosexuals. By policy, homosexuals are permitted to serve in the military as long as they do not engage in homosexual conduct. Those serving under this condition should not be subject to harassment or threats because of their actual or perceived sexual orientation. Harassment tears at the fabric of unit cohesion and should be dealt with decisively. This is the area in which I believe the Administration can help the cause of homosexuals in the military the most over the next year.

In August 1999, DOD issued additional policy guidance that will help reduce harassment of homosexuals. The Service Secretaries are developing their implementing instructions which should be completed shortly. To display White House support for this policy improvement, I recommend you meet with Secretary Cohen, the Service Secretaries and Service Chiefs to hear how they intend to implement and enforce the anti-harassment policy. In addition, Secretary Cohen should make regular reports on how the anti-harassment policy is working. I also recommend a rump group be developed to coordinate DOD's homosexual policies with the White House staff. This group would include Rudy de Leon, Frank Rush, Edward Correia, Laura Marcus, and Hans Binnendijk.

This is a highly emotional issue for both pro- and anti-homosexual groups with strong societal and religious overtones. I think we have learned this issue will not be resolved by edict. Steady, focused progress should be the goal. Stopping harassment of homosexuals in the military should be the immediate, short-term goal. If bigots are held accountable for their actions and harassment ends, the climate will be improved to allow further gains.

October 19, 1999

ACTION

MEMORANDUM FOR SAMUEL BERGER

FROM: HANS BINNENDIJK

SUBJECT: Problems With "Don't Ask, Don't Tell"

You asked us to assess DOD's implementation of the President's "don't ask don't tell" policy for gays in the military. We have reviewed relevant documents and discussed the issue with Pentagon civilians, White House staff (Richard Socarides and Edward Correia) and the Servicemembers Legal Defense Network (SLDN). We conclude that there are negative trends in policy implementation, that OSD is trying to improve the situation but meets resistance from the services, and that more can and should be done during the next year to turn this around.

THERE IS A PROBLEM

Three interrelated trends capture the nature of the current problem. In the time allotted, we have not done an independent investigation of these trends and simply report them to you with some analysis.

- **The number of annual discharges for homosexual conduct has doubled since 1994**, growing consistently from 617 in that year to 1149 last year. The discharges constitute a small percentage of the overall force (under .1%). The vast majority of these discharges (82%) were triggered by a personal "statement" admitting to homosexuality. Fifty-eight percent of the discharges were within the member's first year of service. Women were discharged at a rate that is twice their presence in the Armed Forces. The recent trends for discharge cases by Service are: 1) increases in the Army and Air Force, 2) a decline for the Navy, and 3) a relatively constant number for the Marines.
- SLDN data indicates **that incidents of anti-gay harassment have doubled since 1997**. Last year they documented 400 cases which included death threats and verbal abuse. The Fort Campbell

murder, they argue, must be seen in the context of this broader environment of harassment.

- **SLDN also believes that "commands use heavy-handed tactics to pursue gays"** in violation of the "don't ask, don't pursue" elements of the policy. SLDN reports that incidents of "asking and pursuing" were up 42% between 1997 and 1998. The case in which the Navy pursued a member because of comments made on AOL is cited as a recent high profile example of this problem. SLDN also reports "frequent use" by commanders of threats to extract confessions, including threats of criminal charges, confinement and non-judicial punishment. On the other side of the ledger, SLDN concludes that physical abuse by investigators and criminal prosecution of homosexuals have declined.

REASON BEHINDS THESE TRENDS

DOD has not made extensive inquiries into "statement cases", so the reasons for the majority of the discharges is not fully known. There are, however, several observations that we can make.

- **The 1993 policy was a compromise that leaves both commanders and gay members in a gray zone.** Under legislation passed in 1993, service members with a propensity or intention to conduct homosexual activity must be separated from the Armed Forces. The President's policy, however, stresses the privacy rights of individual members. This has posed contradictions for those seeking to implement the policy and for those living with it.
- An April 1998 OSD review concluded that this contradiction has posed a challenge to the Services, but that for the most part the policy has been properly enforced. **However, constrained personal privacy for all members and a cultural emphasis on regulations leaves commanders leaning in the direction of the law banning gays rather than the policy supporting privacy if the two appear to clash.** OSD civilians privately tell us that considerable tension remains between them and the uniformed military over policy implementation.
- And yet the "don't ask, don't tell" policy tends to lead some gays to believe that there may be a place for them in the military. Many join to find a culture, which does not meet expectations.

- A recent policy shift at Lackland Air Force Base supports the belief **that some statements admitting to homosexual or bisexual preferences may be designed as a short-term escape from unpleasant basic training.** A "cooling off" period has been instigated during which a recruit has an opportunity to consult legal counsel to fully understand the policy and retract a privately made statement. Most tend to change their minds upon reflection. In the first seven months of the new policy, the number of gay-related discharges of Lackland recruits dropped from 195 to 31.

OSD EFFORTS TO IMPLEMENT THE POLICY

In general, **OSD appears to be making a good faith effort to implement the President's policy,** but some of their policies are criticized by SLDN. **The larger problem may be with the Services themselves.** OSD efforts include the following:

- In 1995, the OSD General Counsel issued a memo which gives the commander broad investigative powers upon receipt of "credible information" and which places the burden of proof to "rebut a presumption" on the charged member. These interpretations are criticized by SLDN.
- In 1997, OSD issued the Dorn memo, which stated that, a report of harassment is not a cause to investigate the person being harassed. It also ordered prompt investigation of harassment charges. Issuance of the Dorn memo may account for some of the increase in harassment cases reported to SLDN. After SLDN criticism that the memo was improperly circulated, it is being reissued with strengthened language.
- In April 1998, OSD reviewed the "don't ask, don't tell" policy and recommended several improvements, including consultations with higher level commands before investigations begin and improved training for those enforcing the policy.
- **In August 1999, OSD issued a new policy directive** implementing the recommendations of the 1998 review and establishing limited rights of confidentiality for mental health providers. **The Services are currently developing implementation plans for this directive.**

OTHER STEPS SUGGESTED BY REFORMERS

SLDN and others who seek to strengthen the current policy have made a series of suggestions. Those which would not require new legislation include the following:

- Train service members on the policy and the limits of gay investigations.
- Take additional steps to hold accountable those who ask, pursue, or harass.
- Change the current procedures which place the burden of proof on the member (once an investigation begins) to demonstrate he/she is not gay.
- Make commanders accountable for an environment in which harassment appears acceptable.
- Provide recourse to service members to stop improper investigations.
- Adopt a rule of privacy for conversations with all health care providers.
- Exclude evidence obtained illegally from use in discharge boards.

RECOMMENDATION

1. Establish a Task Force to include OSD, the White House Special Counsel for Civil Rights, and NSC to consider next steps.

2. Ask Service Secretaries to brief this Task Force on their plans to implement August 1999 Directive.

Approve _____ Disapprove _____

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GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
1600 DEFENSE PENTAGON
WASHINGTON, D.C. 20301-1600

18 AUG 1995



MEMORANDUM FOR THE GENERAL COUNSELS OF THE MILITARY DEPARTMENTS
THE JUDGE ADVOCATE GENERAL OF THE ARMY
THE JUDGE ADVOCATE GENERAL OF THE NAVY
THE JUDGE ADVOCATE GENERAL OF THE AIR FORCE
THE STAFF JUDGE ADVOCATE TO THE COMMANDANT OF THE
MARINE CORPS

SUBJECT: Policy on Homosexual Conduct in the Armed Forces

With reference to the policy on homosexual conduct in the armed forces, this memorandum is to provide guidance with respect to two issues: (1) investigative actions a commander may take in "statements" cases; and (2) the circumstances in which a person who states that he or she is a homosexual claims that the rules preclude separation of anyone based on their sexual orientation.

With respect to the first issue, DoD Directives 1332.14 and 1332.30 provide that upon receipt of credible information that there is a basis for discharge, a commander may initiate a fact-finding inquiry, which may consist of an examination of the information reported or a more extensive inquiry, as necessary. The Directives further provide that the inquiry should gather all credible information that directly relates to the grounds for possible separation.

In "statements" cases, the statute authorizes the service member to seek to demonstrate that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts. Included among the permissible issues into which a commander or inquiry officer may inquire in such cases are whether the service member has engaged in homosexual acts or marriages, attempted to engage in homosexual acts or marriages, or intends or has a propensity to engage in homosexual acts. In addition, the service member may be asked why he or she made the statement and what he or she meant by the statement.

With respect to the second issue, both the statute and Directives provide for discharge if a service member makes a statement that he or she is a homosexual, or words to that effect, unless the member demonstrates that he or she does not engage in, attempt or intend to engage in, or have a propensity to engage in homosexual acts. The Directives further make clear that a "statement" that is grounds for discharge can include "statements such as . . . 'I have a homosexual orientation.'" See DoD Dir. 1332.14 (Encl. 3, Att. 4, § B.4.b); DoD Dir. 1332.30 (Encl. 8, § B.4.b). Thus, although "sexual orientation" (as



defined in the Directives¹) in itself is not a basis for discharge "unless manifested by homosexual conduct," see DoD Dir. 1332.14 (Encl. 3, Att. 1, § H.1); DoD Dir. 1332.30 (Encl. 2, § C), the Directives make clear that a statement that one has a "homosexual orientation" is treated like any other statement that one is a homosexual. It raises the presumption that one engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts, and will result in separation unless the member successfully rebuts the presumption.

A member may not avoid the burden of rebutting the presumption merely by asserting that his or her statement of homosexuality was intended to convey only a message about sexual orientation, as defined in the Directives, and not to convey any message about propensity or intent to engage in homosexual acts. To the contrary, by virtue of the statement, the member bears the burden of proof that he or she does not engage in, and does not attempt, have a propensity, or intend to engage in homosexual acts. If the member in rebuttal offers evidence that he or she does not engage in homosexual acts or have a propensity or intent to do so, the offering of the evidence does not shift the burden of proof to the government. Rather, the burden of proof remains on the member throughout the proceeding. See DoD Dir. 1332.14 (Encl. 3, Att. 1, § H.4.c); DoD Dir. 1332.30 (Encl. 2, § C.2).

In determining whether a Service member has successfully rebutted the presumption, a Board may consider, among other evidence: whether the member has engaged in homosexual acts; the member's credibility; testimony from others about the member's past conduct, character and credibility; the nature and circumstances of the statement; and any other evidence relevant to whether the member engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.

Please take all necessary steps to ensure that these aspects of the policy are fully understood in the field. In connection therewith, please provide me within 30 days of the date of this memorandum with evidence that guidance and training for judge advocates and commanders in these regards is unambiguous and clear. If you contemplate sending new training materials or additional guidance to the field, please provide it to me in draft form so that I may review it prior to implementation.

¹ The Directives define "sexual orientation" as "(a)n abstract sexual preference for persons of a particular sex, as distinct from a propensity or intent to engage in sexual acts." DoD Dir. 1332.14 (Encl. 2, Definition O); DoD Dir. 1332.30 (Encl. 1, Definition 16).

Thank you for your assistance.

Judith Miller
Judith A. Miller

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1. The Advocate (The national gay & lesbian newsmagazine), May 25, 1999, Pg. 25 ; ISSN: 0001-8996, 1579 words, The Body speaks; Minnesota governor Jesse Ventura; Interview, KIRBY, DAVID
2. The New Republic, JANUARY 4, 1999 / JANUARY 11, 1999, Pg. 16, 1113 words, MILITARY COUP, Nathaniel Frank
3. Canadian Dimension, September 1, 1998, No. 5, Vol. 32; Pg. 13; ISSN: 0008-3402, 2445 words, In the interest of the state; national security campaign against gay men and lesbians in Canada, Kinsman, Gary
4. Yale Law Journal, June 1998, Vol. 107, No. 8 Pg. 2667-2672; ISSN: 0044-0094; CODEN: VISPAJ, 2911 words, When the evidence is the crime, Goitein, Elizabeth, 01671252
5. Women's Review of Books, March 1997, Vol. 14, No. 6; Pg. 20-1; ISSN: 0738-1433, 00914429, 1943 words, Women and/or warriors, Ginzburg, Lori
6. Insight on the News, November 25, 1996, Monday, Final Edition, Part NATION: WHAT NOW?; Pg. 13, 1752 words, Clinton Policy Plans Await His Second Term, David Wagner; INSIGHT
7. Time, November 4, 1996, TIME ON CAPITOL HILL SUPPLEMENT/ELECTION GUIDE '96; Pg. E4 [NOT AVAILABLE IN ALL EDITIONS], 5484 words, NEW JERSEY
8. Time, November 4, 1996, TIME ON CAPITOL HILL SUPPLEMENT/ELECTION GUIDE '96; Pg. E4 [NOT AVAILABLE IN ALL EDITIONS], 6896 words, OHIO
9. Yale Law Journal, November 1996, Vol. 106, No. 2 Pg. 531-536; ISSN: 0044-0094; CODEN: UCLRA2, 3668 words, Upholding "Don't ask, don't tell", Ratliff, Warren L, 01356921
10. The Nation, June 24, 1996, Vol. 262 ; No. 25 ; Pg. 11; ISSN: 0027-8378, 4068 words, To have and to hold: the case for gay marriage.includes related article on right-wing reaction to the idea of same-sex marriage; Cover Story, Rotello, Gabriel ; Graff, E.J., IAC 18405778
11. New Statesman (1996), June 21, 1996, Vol. 125 ; No. 4289 ; Pg. 20; ISSN: 1364-7431, 2056 words, Can New Labour come out? The party is sending the gay community some very confusing signals.United Kingdom Labor Party; Cover Story, Edge, Simon, IAC 18524217
12. Insight on the News, May 27, 1996, Monday, Final Edition, Part FAIR COMMENT; Pg. 28, 1085 words, ROTC Program Defies Gay-Exclusion Rule, Elaine Donnelly; SPECIAL TO INSIGHT
13. Public Administration Review, March/April 1996, Vol. 56, No. 2 Pg. 208-210; ISSN: 0033-3352; CODEN: PBARBM, 1857 words, Above and beyond, Lewis, Gregory B, 01189324
14. Insight on the News, October 16, 1995, Monday, Final Edition, Part FAIR COMMENT; Pg. 24, 1530 words, Don't Tell: We Got What We Asked, Elaine Donnelly;



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SPECIAL TO INSIGHT

15. Interview, September, 1995, Vol. 25 ; No. 9 ; Pg. 132; ISSN: 0149-8932, 3239 words, Virtually normal; interview with author Andrew Sullivan; Interview, Marvel, Mark ; Sischy, Ingrid, IAC 17403851
16. Business & Commercial Aviation, August 24, 1995, REFLECTIONS; Vol. 77, No. 2; Pg. 80, 2286 words, THE FATEFUL FLIGHT OF THE ENOLA GAY, ROBERT SEARLES
17. The Lawyer, August 1, 1995, ISSUES: GAYS/JUDICIAL POWERS; Pg.10, 1467 words, We want you as a new recruit, Except If You'Re Openly Gay. Martin Bowley Qc Examines The Recent Case Upholding The Ban On Homosexuals In The Military
18. Harvard Gay & Lesbian Review, Summer 1995, Vol. II, No. 3; Pg. 11; ISSN: 1077-6591, 01742740, 1149 words, Return to "Gay-in-the-Military", Post, Laura
19. Harvard Gay & Lesbian Review, Summer 1995, Vol. II, No. 3; Pg. 13; ISSN: 1077-6591, 01742760, 1023 words, These Are the Facts, Benecke, Michelle; Osburn, Dixon C
20. Insight, April 1995, 01174632, 4798 words, Clinton Administration Scuttles First Court Test of Military's Homosexual Law, Maginnis, Robert L
21. The National Journal, March 25, 1995, Washington Update: Policy and Politics in Brief; National Security; Pg. 748; Vol. 27, No. 12, 1480 words, Not Asking Or Telling, No Remedy?, DAVID C. MORRISON
22. U.S. News & World Report, February 6, 1995, SCIENCE & SOCIETY; Vol. 118, No. 5; Pg. 60, 1458 words, One true gay life in the Navy, By Lynn Rosellini
23. Harvard Gay & Lesbian Review, Winter 1994, Vol. I, No. 1; Pg. 20; ISSN: 1077-6591, 01717899, 1498 words, Requiem to an Anachronism, Colbert, Charles R III
24. History Today, November, 1994, Vol. 44 ; No. 11 ; Pg. 23; ISSN: 0018-2753, 4069 words, 'An army of lovers:' the Sacred Band of Thebes; homosexual soldiers in ancient Greece, Crompton, Louis, IAC 15901325
25. Harvard Gay & Lesbian Review, Autumn 1994, Vol. I, No. 4; Pg. 1; ISSN: 1077-6591, 01725028, 4660 words, Toward a Politics of Dignity, Mohr, Richard D
26. Harvard Gay & Lesbian Review, Summer 1994, Vol. 1, No. 3; Pg. 5; ISSN: 1077-6591, 01725018, 1358 words, Stonewall: After Many a Summer Endures a Symbol: Freedom Summer, Schulman, Sarah
27. Off Our Backs, June 1994, Vol. 24, No. 6; Pg. 8; ISSN: 0030-0071, 00689639 2852 words, The Navy--Inside and Out
28. Redbook, May, 1994, Vol. 183 ; No. 1 ; Pg. 196; ISSN: 0034-2106, 2012 words, The bonds of love; homosexuality and family life as seen through the experiences of Joanne Schilling, her Marine Corps husband, Fred Peck, and and gay stepson, Bruno, Mary, IAC 15373815
29. Government Executive, April, 1994, NATIONAL SECURITY, 3174 words, ASK ME NO QUESTIONS; The Pentagon's newly implemented "Don't Ask, Don't Tell"



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compromise pleases the military establishment more than it does gay activists, who are looking to the courts for relief., James Kitfield

30. The New Republic, December 20, 1993, Vol. 209 ; No. 25 ; Pg. 17; ISSN: 0028-6583, 19253 words, Conduct Unbecoming: Gays and Lesbians in the U.S. Military._book reviews, Berman, Paul, IAC 14743261

31. Society, November, 1993, Vol. 31 ; No. 1 ; Pg. 13; ISSN: 0147-2011, 6797 words, Homosexuals and the military establishment; Homosexuality and Military Culture, Butler, John Sibley, IAC 14643627

32. Society, November, 1993, Vol. 31 ; No. 1 ; Pg. 22; ISSN: 0147-2011, 1186 words, Parable, principle, and the military ban; Homosexuality and Military Culture, Money, John, IAC 14643629

33. Society, November, 1993, Vol. 31 ; No. 1 ; Pg. 24; ISSN: 0147-2011, 3578 words, Lifting the gay ban; Homosexuality and Military Culture, Davis, Charles L., IAC 14643631

34. Society, November, 1993, Vol. 31 ; No. 1 ; Pg. 29; ISSN: 0147-2011, 6124 words, Power, morals, and military uniqueness; Homosexuality and Military Culture, Burk, James, IAC 14643633

35. Society, November, 1993, Vol. 31 ; No. 1 ; Pg. 37; ISSN: 0147-2011, 3851 words, Homosexuals in Western armed forces; Homosexuality and Military Culture, Segal, David R. ; Gade, Paul A. ; Johnson, Edgar M., IAC 14643635

36. Society, November, 1993, Vol. 31 ; No. 1 ; Pg. 43; ISSN: 0147-2011, 3845 words, Military culture and effectiveness; Homosexuality and Military Culture, Bacevich, A.J., IAC 14643637

37. The American Spectator, September, 1993, PRESSWATCH, 2934 words, Off the Straight and Narrow, John Corry; John Corry is a former New York Times media critic and the author of My Times: Adventures in the News Trade, forthcoming from Putnam.

38. The Progressive, September, 1993, Vol. 57 ; No. 9 ; Pg. 8; ISSN: 0033-0736 1184 words, Profile in cowardice; Bill Clinton on gays in the military; Editorial, IAC 14235566

39. Tikkun, September, 1993, Vol. 8 ; No. 5 ; Pg. 5; ISSN: 0887-9982, 4758 words, Curing homophobia and other conservative pathologies; Pres Bill Clinton and the politics of meaning; Special Focus: Which Politics? Whose Meaning?, Lerner, Michael, IAC 14511269

40. Time, August 2, 1993, U.S. Edition, LAW; Pg. 29, 1106 words, SEE YOU IN COURT; Gay activists hope to overturn Clinton's gay policy, but the odds -- and Sam Nunn -- are against them, By DAVID VAN BIEMA

41. The Progressive, August, 1993, Vol. 57 ; No. 8 ; Pg. 41; ISSN: 0033-0736, 1234 words, Conduct Unbecoming: Gays and Lesbians in the U.S. Military._book reviews, Ensign, Tod, IAC 13201827

42. Reason, August, 1993, Vol. 25 ; No. 4 ; Pg. 38; ISSN: 0048-6906, 3053 words, The third way; homosexual rights, Lochhead, Carolyn, IAC 14171970



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43. Reason, August, 1993, Vol. 25 ; No. 4 ; Pg. 42; ISSN: 0048-6906, 2195 words, Military disservice; President Bill Clinton's policy on homosexuals in the military, Mohr, Richard D., IAC 14171972
44. The National Journal, July 31, 1993, POLITICAL PULSE; Vol. 25, No. 31; Pg. 1952, 1686 words, FOR CLINTON, IT'S ALMOST NEVER EASY, WILLIAM SCHNEIDER
45. Time, July 26, 1993, U.S. Edition, THE WEEK; Pg. 15, 1591 words, NEWS DIGEST; JULY 11-17
46. Time, July 26, 1993, U.S. Edition, THE MILITARY; Pg. 40, 1128 words, THEN THERE WAS NUNN; After six months of negotiations and wrangling over language, the Administration fashions a gay compromise -- but there's trouble ahead, By MARGARET CARLSON WASHINGTON; With reporting by Michael Duffy and Bruce van Voorst/Washington
47. The National Journal, July 24, 1993, INSIDE POLITICS; Jack W. Germond and Jules Witcover; Vol. 25, No. 30; Pg. 1887, 1006 words, MEASURING BILL CLINTON'S LEADERSHIP
48. The Nation, July 5, 1993, Vol. 257 ; No. 1 ; Pg. 26; ISSN: 0027-8378, 4162 words, We can get there from here; ideals and strategies; lesbian and gay liberation, Harris, Sherry ; Haynes, Todd ; Hollibaugh, Amber ; James, John S. ; LeVay, Simon ; Schulman, Sarah ; Shilts, Randy ; Vaid, Urvashi, IAC 14035882
49. U.S. News & World Report, July 5, 1993, SCIENCE & SOCIETY; COVER STORY; Vol. 115, No. 1; Pg. 42, 3113 words, Straight talk about gays, By Joseph P. Shapiro; Gareth G. Cook; Andrew Krackov
50. Air Force Magazine, July, 1993, WASHINGTON WATCH; Pg. 12, 3042 words, Gay Horizons, By John T. Correll, Editor in Chief
51. The Humanist, July, 1993, Vol. 53 ; No. 4 ; Pg. 27; ISSN: 0018-7399, 3493 words, Choosing sides in the cultural war; homosexuality, gays in the military and public opinion; Column, Tucker, Scott, IAC 14088660
52. Newsweek, June 28, 1993 , UNITED STATES EDITION, SPECIAL REPORT; Pg. 24, 1387 words, Rancor in the Ranks: The Troops vs. the President, BY DAVID H. HACKWORTH
53. The Nation, June 7, 1993, Vol. 256 ; No. 22 ; Pg. 806; ISSN: 0027-8378, 1974 words, Conduct Unbecoming: Lesbians and Gays in the U.S. Military._book reviews, D'Emilio, John, IAC 13822316
54. The American Spectator, June, 1993, THE GAY AMERICAN SALOON SERIES, 1574 words, Club El Malaria, Ian Forman; Ian Forman is a writer living in Ipswich, Massachusetts.
55. The American Lawyer, June, 1993, TAKING ISSUE; Pg. 35, 1367 words, Gay Rights: What The Court Should (And Shouldn't) Do, by Stuart Taylor, Jr.
56. Campaigns & Elections, June, 1993 - July, 1993, ANALYSIS, 1266 words, Gays in the Military; A DEMOCRATIC PERSPECTIVE, Frederick S. Yang; Fred Yang is



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vice president of Garin-Hart Strategic Research Group, a Washington, D.C.-based Democratic polling firm.

57. Campaigns & Elections, June, 1993 - July, 1993, ANALYSIS, 1293 words, Gays in the Military; A REPUBLICAN PERSPECTIVE, Glen Bolger and W.D. McInturff; Glen Bolger and Bill McInturff are partners in Public Opinion Strategies, a Virginia-based Republican polling firm.

58. Commentary, June, 1993, Vol. 95 ; No. 6 ; Pg. 49; ISSN: 0010-2601, 1144 words, The androgyny party; shifting sex roles and the Democratic Party, Emery, Noemie, IAC 13815024

59. Georgia Trend, June, 1993, Vol 8; No 10; Sec 1; pg 28, 3884 words, Sam Nunn's new agenda, David Nordan, Perry; GA; US; South Atlantic, 9355640

60. Georgia Trend, June, 1993, Vol 8; No 10; Sec 1; pg 28, 3884 words, Sam Nunn's new agenda, David Nordan, Perry; GA; US, 9355640, GEOR

61. Harper's Bazaar, June, 1993, No. 3378 ; Pg. 54; ISSN: 0017-7873, 1280 words, Tales from the closet; homosexuality; Books, Kopkind, Andrew, IAC 14082544

62. Playboy, June, 1993, Vol. 40 ; No. 6 ; Pg. 94; ISSN: 0032-1478, 3468 words Of lust and arms; gays in the military, Broyles, William, Jr., IAC 13704762

63. Maclean's, May 24, 1993, CANADA; Pg. 14, 1535 words, Armed and gay, LUKE FISHER in Ottawa

64. Time, May 24, 1993, U.S. Edition, THE MILITARY; Pg. 41, 1584 words, Hearts and Minefields; A son's admission of his homosexuality to his Marine father adds poignancy to the debate about how open gays can be in the military, By JILL SMOLOWE

65. Commonweal, May 21, 1993, Vol. 120 ; No. 10 ; Pg. 6; ISSN: 0010-3330, 1359 words, Tom Dooley's many lives; homosexual Catholic doctor, Fisher, James T., IAC 13784198

66. The Christian Century, May 19, 1993, Vol. 110 ; No. 17 ; Pg. 540; ISSN: 0009-5281, 1554 words, Gays in the military: homosexual stereotypes; Column, Gudorf, Christine E., IAC 13822192

67. The National Journal, May 15, 1993, INSIDE POLITICS; Vol. 25, No. 20; Pg. 1196, 1049 words, DRAFT ISSUE IS STILL HAUNTING CLINTON, JACK W. GERMOND AND JULES WITCOVER

68. The New Republic, May 10, 1993, Vol. 208 ; No. 19 ; Pg. 15; ISSN: 0028-6583, 1907 words, Battle-worn: gays in the military, 300 B.C; Cover Story, Boswell, John, IAC 13815383

69. The New Republic, May 10, 1993, Vol. 208 ; No. 19 ; Pg. 22; ISSN: 0028-6583, 1097 words, Straight answer; how heterosexual men can better cope with gay advances; Cover Story, Lewis, Michael, IAC 13815389

70. The New Republic, May 10, 1993, Vol. 208 ; No. 19 ; Pg. 24; ISSN: 0028-6583, 8461 words, The politics of homosexuality: a new case for a new



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beginning; Cover Story, Sullivan, Andrew, IAC 13815391

71. The Humanist, May, 1993, Vol. 53 ; No. 3 ; Pg. 23; ISSN: 0018-7399, 2106 words, Sweet land of libertines? Fearmongering over gays in the military., Miletich, Leo N., IAC 13818501

72. The Humanist, May, 1993, Vol. 53 ; No. 3 ; Pg. 41; ISSN: 0018-7399, 3265 words, Panic in the Pentagon; gays in the military; Column, Tucker, Scott, IAC 13818515

73. The New Republic, April 26, 1993, Vol. 208 ; No. 17 ; Pg. 18; ISSN: 0028-6583, 3278 words, Only connect? Cohesion vs. combat effectiveness; ban on gay military personnel, Garvey, Gerald J. ; DiIulio, John J., Jr., IAC 13685852

74. People, April 26, 1993, PAGES; Pg. 73, 1176 words, Randy Shilts fought off AIDS to report on the bitter reality faced by gays in uniform; WRITER OF WRONGS, DAVID ELLIS JOHNNY DODD in San Francisco

75. The New Republic, April 19, 1993, Vol. 208 ; No. 16 ; Pg. 11; ISSN: 0028-6583, 1008 words, Bunk mates: gays in the military, 1951., Litvin, Martin, IAC 13655270

76. The National Journal, April 17, 1993, WHITE HOUSE NOTEBOOK; Vol. 25, No. 16; Pg. 944, 1026 words, CAN CLINTON STRIKE A DELICATE BALANCE?, JAMES A. BARNES

77. Commonweal, April 9, 1993, Vol. 120 ; No. 7 ; Pg. 11; ISSN: 0010-3330, 1099 words, Searching for the soap: coming clean on gays in the military; Column Carlin, David R., Jr., IAC 13654306

78. Newsweek, April 5, 1993 , UNITED STATES EDITION, NATIONAL AFFAIRS; Pg. 42, 1119 words, The Battle of the Gay Ban, STEVEN WALDMAN with DANIEL GLICK, MARK MILLER and ELEANOR CLIFT in Washington

79. Time, April 5, 1993, U.S. Edition, DEFENSE; Pg. 30, 1467 words, Man in a Minefield; Talk about a tall order: Les Aspin has to shrink the Pentagon, find a compromise on gays in the military, and keep Sam Nunn out of Clinton's way, By BRUCE VAN VOORST WASHINGTON

80. U.S. News & World Report, April 5, 1993, U.S. NEWS; Vol. 114, No. 13; Pg. 24, 2380 words, Shape up or ship out, By Bruce B. Auster; Gloria Borger, Fort Hood

81. The National Journal, April 3, 1993, INSIDE POLITICS; Jack W. Germond and Jules Witcover; Vol. 25, No. 14; Pg. 836, 1022 words, CLINTON'S GAYS-IN-THE-MILITARY SNARE, JACK W. GERMOND AND JULES WITCOVER

82. Policy Review, 1993 Spring, No. 64; Pg. 68, 2229 words, MAKE WAR, NOT LOVE; The Pentagon's Gay Ban Is Wise and Just, JOHN LUDDY; JOHN LUDDY is a defense policy analyst at The Heritage Foundation, and a former Marine infantry officer.

83. The New Republic, March 8, 1993, Vol. 208 ; No. 10 ; Pg. 19; ISSN: 0028-6583, 1333 words, Love field: patriotism vs. eros; military gay ban, Kahn, Paul W., IAC 13510471



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84. The Christian Century, March 3, 1993, Vol. 110 ; No. 7 ; Pg. 233; ISSN: 0009-5281, 3932 words, Church leaders on gay issue; News, IAC 13566325
85. Copyright 1993 Penton/IPC, Industry Week, March 1, 1993, HUMAN RIGHTS; Pg. 48, 1903 words, THE COLORADO BOYCOTT: A WAKE-UP CALL TO ALL BUSINESSES?; The military isn't alone in facing a firestorm over discrimination against gays, By SHARI CAUDRON
86. Minerva, Spring 1993, Vol. 11, No. 1; Pg. 1-8; ISSN: 0736-718X, 00816515, 3523 words, The Spectacle as Political Resistance: Feminist and Gay/Lesbian Politics in the Military [Part 1 of 2], Katzenstein, Mary Fainsod
87. Minerva, Spring 1993, Vol. 11, No. 1; Pg. 8-16; ISSN: 0736-718X, 00816519, 2133 words, The Spectacle as Political Resistance: Feminist and Gay/Lesbian Politics in the Military [Part 2 of 2], Katzenstein, Mary Fainsod
88. Mother Jones, March, 1993, No. 2, Vol. 18; Pg. 24; ISSN: 0362-8841, 1429 words, Boys in the barracks: admitting gays into the military isn't about sex - it's about desire; Sex & Power; Cover Story, Browning, Frank
89. The Public Perspective, March, 1993 / April, 1993, Vol. 4, No. 3; Pg. 32, 1493 words, UNDERSTANDING THE GAY AND LESBIAN VOTE IN '92, By Murray Edelman; Murray Edelman, is director, Voter Research & Surveys.
90. Commonweal, February 26, 1993, Vol. 120 ; No. 4 ; Pg. 8; ISSN: 0010-3330, 1045 words, They call themselves liberals; liberals and bigotry, Carlin, David R., Jr., IAC 13609393
91. Commonweal, February 26, 1993, Vol. 120 ; No. 4 ; Pg. 9; ISSN: 0010-3330, 1157 words, Prejudice or disagreement? Homosexuals in the military., Garvey, John, IAC 13609395
92. The Nation, February 22, 1993, Vol. 256 ; No. 7 ; Pg. 224; ISSN: 0027-8378 1032 words, Beltway bandits; gays in the military; Column, Corn, David, IAC 13509941
93. The New Republic, February 22, 1993, Vol. 208 ; No. 8 ; Pg. 4; ISSN: 0028-6583, 1202 words, Unusual suspects; TRB - constitutionality of the military's gay ban; Column, Kaus, Mickey, IAC 13470715
94. America, February 20, 1993, Vol. 168 ; No. 6 ; Pg. 3; ISSN: 0002-7049, 1368 words, Homosexuals in military service: an issue needing distinctions; Editorial, IAC 13510423
95. The Christian Century, February 17, 1993, Vol. 110 ; No. 5 ; Pg. 163; ISSN: 0009-5281, 1097 words, A matter of civil rights: gays and the military Editorial, Wall, James M., IAC 13509999
96. The New Republic, February 15, 1993, Vol. 208 ; No. 7 ; Pg. 7; ISSN: 0028-6583, 1571 words, Arms and the men; lesbians and gay men in the military; Editorial, IAC 13417629
97. The New Republic, February 15, 1993, Vol. 208 ; No. 7 ; Pg. 11; ISSN: 0028-6583, 1254 words, Major dud; White House Watch - military ban on gays policy; Column, Barnes, Fred, IAC 13417635



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98. People, February 15, 1993, UP FRONT; Pg. 40, 1445 words, THEY ALSO SERVE; Gays have fought and died for their country, but the obstacles to their integration into the military are daunting, BILL HEWITT BRYAN ALEXANDER in New York City, TOM CUNNEFF in Los Angeles and BONNIE BELL in Chicago
99. The National Journal, February 13, 1993, WASHINGTON UPDATE; Policy and Politics in Brief; National Security; Vol. 25, No. 7; Pg. 400, 1387 words, LOTS OF BRASS ON DISPLAY AT THE PENTAGON, BY DAVID C. MORRISON
100. The National Journal, February 13, 1993, FOCUSES; Politics; Vol. 25, No. 7; Pg. 429, 1026 words, A SINKHOLE FOR DEMOCRATS IN DIXIE, JAMES A. BARNES
101. New Statesman & Society, February 12, 1993, Vol. 6 ; No. 239 ; Pg. 24; ISSN: 0954-2361, 1441 words, Judicious measures; gays in the military; Column, Cockburn, Alexander, IAC 13475781
102. Newsweek, February 8, 1993 , UNITED STATES EDITION, NATIONAL AFFAIRS; Pg. 22, 1048 words, Battle Scars, BY ELEANOR CLIFT; With MARK MILLER in Washington
103. Time, February 8, 1993, U.S. Edition, THE ADMINISTRATION; Pg. 26, 1624 words, OBSTACLE COURSE; By getting snarled in a battle over gays in the military, Clinton has lost valuable momentum. How long will it take him to get back on track?, By MICHAEL DUFFY WASHINGTON; -- With reporting by David S. Jackson/San Francisco and Elaine Shannon and Nancy Traver/Washington
104. Time, February 8, 1993, U.S. Edition, ARMED FORCES; Pg. 29, 1289 words, SEX, LIES AND THE MILITARY; For gays and lesbians, life in the armed forces means unflagging vigilance and some tactical deception, By JILL SMOLOWE
105. U.S. News & World Report, February 8, 1993, U.S. NEWS; Vol. 114, No. 5; Pg. 33, 36, 1523 words, Why Clinton fights for gays, By Kenneth T. Walsh; Matthew Cooper; Steven V. Roberts; Bruce B. Auster
106. The National Journal, February 6, 1993, WASHINGTON UPDATE; Policy and Politics in Brief; Washington Inc.; Vol. 25, No. 6; Pg. 343, 1260 words, GAY GROUPS WERE LEFT IN THE DUST, BY DAVID C. MORRISON
107. Newsweek, February 1, 1993 , UNITED STATES EDITION, SOCIETY; Pg. 52, 2151 words, GAYS AND THE MILITARY, TOM MORGANTHAU with DOUGLAS WALLER, DANIEL GLICK, MARK MILLER and JOHN BARRY in Washington and bureau reports
108. Newsweek, February 1, 1993 , UNITED STATES EDITION, SOCIETY; Pg. 58, 2074 words, What's Fair in Love and War, BY RANDY SHILTS; Randy Shilts is national correspondent for the San Francisco Chronicle. For his forthcoming book, "Conduct Unbecoming: Gays & Lesbians in the U.S. Military" (St. Martin's Press, April 1993), he conducted interviews with 1,100 gay U.S. military personnel who have served since the Vietnam War.
109. U.S. News & World Report, February 1, 1993, U.S. NEWS; ON THE AGENDA; Vol. 114,, No. 4; Pg. 40, 1367 words, Dropping a bomb on the Pentagon, By Bruce B. Auster; Peter Carey; Jack Egan; Jim Impoco; Mike Tharp, San Diego; Barstow, Calif.



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JANUARY 4, 1999 / JANUARY 11, 1999

SECTION: Pg. 16

LENGTH: 1113 words

HEADLINE: MILITARY COUP

BYLINE: Nathaniel Frank

HIGHLIGHT:

Who decides if **gays** should serve?

BODY:

This fall the Clinton administration's "don't ask, don't tell" policy on **gays** in the **military** received a seal of approval from the U.S. Court of Appeals for the Second Circuit--the fourth appellate court to uphold the policy since it was first announced. In this particular case, a lower court had struck down the policy for violating both the free speech and equal protection clauses of the Constitution, by requiring that only **gay**--and not straight--soldiers keep their sexual orientation secret and remain celibate both on and off base. But the three-judge appeals panel reversed the lower court's decision, suggesting that the only place **military** policy can be written is the Pentagon. "Courts are ill-suited to second-guess **military** judgments that bear upon **military** capability or readiness," wrote the panel. The plaintiffs are now considering whether to appeal to the Supreme Court, but the Court has already refused to consider challenges to the policy in four other cases.

Thus, the courts seem poised to become the third and final branch of government to have shirked responsibility over the issue of **gays** in the **military**. By handing over decision-making power to a small minority of **military** men and their supporters, the courts have failed to exercise their constitutional duty to ensure that providing for the common defense does not trump the laws, rights, and ideals being defended. This is troubling both because the policy that has emerged is deeply flawed and, most significantly, because it is a cardinal principle of democracy that civilian authorities should control the unelected **military**.

Back in the heady days of Clinton's first campaign for the presidency, that principle seemed secure. At the time, Pentagon regulations banned all homosexuals from serving in the **military**, but candidate Clinton promised that he would issue a presidential directive lifting the ban. Almost immediately upon taking office, he directed his then-defense secretary, the late Les Aspin, to begin reviewing the issue. But Clinton's move aroused an uproar of opposition--not just from the ranks of the **military** but from members of Congress sympathetic to their views. Congress, led by members such as Senator Sam Nunn, threatened to preempt Clinton by making the ban on **gays** in the armed services part of the U.S. code--as opposed to just a Defense Department regulation. But rather than holding his ground and vowing to fight potential opposition from



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Congress--as President Harry Truman did when he issued his presidential directive integrating the **military** in 1948--Clinton agreed to a compromise. Having entered office with a murky draft record and a shaky relationship with the **military**, Clinton was wary of taking on the men in uniform. And so he agreed

with Nunn that Congress would hold hearings on the matter and that his administration would abide by whatever emerged.

Unfortunately, during the nine days of Senate hearings that ensued, Congress showed that it too was unwilling to exercise genuine leadership in the face of the **military's** obstinacy. Senators fixated on the testimony of those opposed to lifting the ban, witnesses who spoke repeatedly about "discipline," "morale," "cohesion," and "national security." Phrases like "the **military** is unique" and "the **military** is not a democracy" were heard over and over again, as was the reminder that the Constitution does not guarantee a right to serve in the **Armed Forces**. After the hearings, Congress passed a statute requiring the Defense Department to discharge openly **gay** soldiers. In a finding accompanying the statute, Congress explained that "the presence in the **armed forces** of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of **military** capability." Based on the statute, the Defense Department approved the "don't ask, don't tell" policy.

Yet no one has actually been able to link **gays** serving openly in the **military** with impaired readiness or combat effectiveness. In fact, a major study commissioned by the **military** concluded that **gays** could serve openly as long as the policy received firm support from senior **military** leaders. The study, which cost taxpayers \$1.3 million, was conducted in 1993 by the influential Rand Corporation, a research group with established ties to the **military**. According to The New York Times, Pentagon officials have since acknowledged that they never took the Rand report seriously because the Joint Chiefs of Staff were uncomfortable with its implications.

The **military** is aware, of course, that raw homophobia is not a tenable rationale for denying **gays** their civil rights. And so its leaders have fallen back on an argument that caters to the prejudices of heterosexual soldiers: namely, that avowed homosexuals make straight soldiers uncomfortable, threatening unit cohesion and **military** readiness. But the **military's** argument buckles under the weight of its inconsistencies.

Consider the case of women. By the government's own logic, lesbians are punished for no reason at all. Research has shown that women are much less concerned about living and working with **gays** than their male counterparts are. Nevertheless, women, who made up only 14 percent of the **Armed Forces** in 1997, accounted for 22 percent of discharges for sexual orientation; in 1996, women made up 13 percent of service members and 29 percent of sexual-orientation discharges.

Instead of confronting **military** leaders with the flaws of their argument, Congress chose to cater blindly to their fears. The result has been a policy that has been at least as bad for **gays** as the original ban. Furthermore, discharges have ballooned since the policy first took effect: the **military** booted 997 **gay** troops in 1997, a 67 percent increase over the 597 discharged in



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1994. Command violations--asking or pursuing by **military** officials--have increased steadily as well. The Service-members Legal Defense Network, an independent watchdog group that documents violations in the field, reports that command violations have swelled every year since the policy took effect, reaching 563 in 1997.

In short, in place of exercising their democratic duty, the courts, Congress, and the White House have given the men of the **military** carte blanche to impose their own brand of justice on the citizens they serve. Is this a brand of justice worth fighting for?

Nathaniel Frank is a doctoral student in American history at Brown University and a freelance writer living in New York City.

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SECTION: No. 5, Vol. 32; Pg. 13; ISSN: 0008-3402

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HEADLINE: In the interest of the state; national security campaign against gay men and lesbians in Canada

BYLINE: Kinsman, Gary

BODY:

The National Security Campaign Against Gay Men and Lesbians

On April 14, 1998 we released a research report titled "In the Interests of the State: The Anti-Gay, Anti-Lesbian National Security Campaigns in Canada" at a media conference in Ottawa with representatives of the Canadian Labour Congress, Equality for Gays and Lesbians Everywhere, and the Public Service Alliance of Canada there to show their support for the report's recommendations. This was the first major research into the social organization of the "national security" campaigns against gay men and lesbians in Canada.

A brief media feeding frenzy ensued and for a short period some major mass media attention was focused on this topic. As I was fielding media questions that day I began to discern some of the frameworks they were attempting to use to interpret or 'work up' this story. One was that the "Canadian public" was now supposedly fed up with equality-seeking groups coming forward to ask for apologies, commissions of inquiry, and compensation for careers and lives that had been destroyed. In this context many journalists leaped at the brief mention of compensation in the recommendations and focused in on this to the exclusion of the recommendations for an official apology, for a commission of inquiry, for an end to continuing discrimination regarding security clearances, for full spousal and family recognition rights within the public service and military, for making it easier to access national security information on the 1950s and 1960s, and support for gay, lesbian, bisexual history and archival projects.

Another attempted media frame was to suggest that in the context of the Cold War of the 1950s and 1960s that concerns over "black-mail" and "security risks" were justified. I was quick to point out that a number of the gay men and lesbians that we had talked to who were purged from their jobs or interrogated by the RCMP reported that the only people who tried to blackmail them were the RCMP who tried to force them to give the names of other homosexuals.

Although the media was not very successful in establishing these frames, they



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still tended to neglect the report's main substance - the detrimental effects of these campaigns, which were organized at the highest levels of the Canadian state, for the lives of hundreds and perhaps thousands of people. They also seemed not to notice the significance of a CSIS spokesperson's remarks on CBC radio that CSIS would still in 1998 deny a security clearance to a closeted **homosexual** because of supposed blackmail concerns. The media missed the importance of the critique which the report develops of the very conceptualization of "national security" which has so often been used against socialists, peace activists, immigrants, Native activists, Quebec sovereignists, and **gays** and lesbians.

History from Below

Since 1994 Patrizia Gentile, Heidi McDonnell, Mary-Mahood Greer and myself have been engaged in research on the national security campaigns against **gay** men and lesbians in Canada. While other aspects of the security campaigns in Canada against the unions, the Communist Party and socialists have been documented to some extent there has been little documentation and analysis of the national security campaigns against **gay** men and lesbians which affected thousands of people.

We draw on two major sources of data in the report. The first is interviews with people who were directly affected by these security campaigns. So far we have spoken to 20 **gay** men and five lesbians who were directly affected. We have learned from these men and women a great deal about how people's lives were affected by the national security campaigns and how they actively negotiated these security policies. This research is distinctive in emphasizing that a great deal can be learned regarding the social organization of national security by starting from the accounts of those who were most directly affected. This research is a form of "history from below."

We also spoke to one former Mountie who was directly involved in these security investigations and a few government officials who were connected with the national security campaigns. All the first names used in this article are pseudonyms to protect people's confidentiality. The one full name that is used is from someone who has already gone public with his case.

The second source is a critical reading of the national security documents that have been released through the Access to Information Act. This includes documents from the Security Panel (an interdepartmental committee under the cabinet formed to coordinate security efforts), the RCMP and other state documents. These texts were not 'neutral' or 'objective' but were crucial parts of how the **gay** men and lesbians, and many other groups, were socially constructed as "national security risks" during these years. These texts were crucial to the coordination of these national security campaigns. Within the national security discourse **homosexuals** were defined as a threat to national security because we supposedly suffered from a "character weakness" which made us unreliable and vulnerable to "blackmail." At the same time not a shred of any Canadian evidence of any blackmail on this basis leading to the divulging of secrets is provided.

Thousands of men and women in the public service and the **military** were affected. In 1961-1962 the RCMP reported having identified 850 suspected and confirmed **homosexuals** in the public service. In 1967-1968 the RCMP reported they



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had a list of 9,000 suspected and confirmed **homosexuals** in the Ottawa region, only about a third of whom were in the public service. Thousands of suspected **homosexuals** were spied upon. Throughout these years hundreds of **gay** men and lesbians lost their jobs. In the **military** and the RCMP these purges continued until the late 1980s and early 1990s.

The Security Panel even authorized the development of a detection technology to determine who was a **gay** man or a lesbian. Psychology Professor Robert Wake of Carleton University developed a report on a special project which came to be called the "fruit machine." Basically this involved showing men and women pictures of naked men and women and photographing their pupils at half-second intervals to determine their responses. This technology never did work and it was eventually abandoned in the late 1960s although it was supported by the Security Panel, the RCMP, the Department of National Defence and Health and Welfare for more than four years.

Many careers and lives were destroyed by these campaigns. Harold who had a distinguished career in the Navy reports that the security investigation of him by both Naval Intelligence and the RCMP in the late 1950s led to his dismissal. "Quite unnecessarily, I feel, I have undergone an experience which has destroyed the efforts of my life to date ... I have been deprived of two basic human needs - a reason for living and a degree of self-confidence."

Herbert Sutcliffe reports that he was in "a daze" when he was informed by the Director of **Military** Intelligence that the "RCMP has advised us that you are a **homosexual** ..." in the early 1960s. After initially thinking about shooting himself, Sutcliffe decided that "they're not going to kill me." Within a few days his **military** career was over.

Sue reports that when her superiors discovered that she was a lesbian she was forced to leave the militia or face a court martial. Faced with this choice she decided to leave. As she put it, "I was going to make it [the **military**] my ongoing career ... so I've lost my career, and I had just got a promotion to a lance corporal, the youngest ever."

Yvette was purged from the Air Force in the late 1950s when the **military** discovered she was a lesbian. As Yvette put it "sexual orientation ... made me a non-person in their eyes." When she was being discharged there was mention of the danger of "blackmail" because she was a lesbian.

Albert, who had a very respected career as a civil servant, had his career ended when his superior found out he was **gay**. "He indicated to me that I should no longer be associated with the type of work which dealt with personnel matters ... since it would appear I might be a **homosexual**.... As a result I was transferred from that work to another area. So this did effect my employment since this was an area I felt I was reasonably skilled in and it was going to be denied me...." When Albert realized that all possibilities for career advancement were ended he left the civil service.

Hank was a civil servant in Ottawa. In the late 1960s or early 1970s a RCMP officer who was discovered to be **gay** was forced to do an investigation of Hank and another suspected **gay** man. The officer was told this was the only way to get a workable service record which he could use to try to get another job. One day while the RCMP officer and Hank were in bed together the RCMP officer told Hank



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what was going on. Hank was outraged.

When Ruth, a Toronto lesbian, who had some troubles with the law in the 1960s applied for a pardon in the 1970s she was informed that she could not get one since she was a "risk to national security" since she was a lesbian.

Many of the people who were directly affected by these campaigns report that they would be interrogated by the RCMP about whether "so and so is a homosexual" or "do you know of any homosexuals who work in External Affairs [or some other department]?" Some were shown photo albums or cardex files and were asked to identify any homosexuals.

Fred, an RCMP officer in Ottawa in the late 1960s, told us that much of his work revolved around meeting gay men, developing some friendship with them, and converting them into informants. He would ask them if any new public servants had been at gay parties or gatherings and if they had, a photograph of the suspected homosexual would be taken, and if this photo was confirmed as the person at the gay gathering he would be moved into the confirmed homosexual category. This confirmation of homosexuality by "confirmed" homosexual informants also meant that the RCMP relied on the information provided by gay informants which would become a "weak link" in the organization of this national security campaign.

One of the main objectives of the RCMP as set out in official texts was to move "alleged" or "suspected" homosexuals into the "confirmed" category. Once they could designate someone as a confirmed homosexual in the public service they could then bring into play the security policies mandated by the Security Panel and Cabinet that led to the firing, or transferring to lower level positions of the individuals so identified.

Non-Cooperation and Resistance

The RCMP security campaigns did, however, encounter obstacles and noncooperation. In 1962-1963 the RCMP reported non-cooperation from homosexual informants. In 1963-1964 the RCMP continued to report that many previously "cooperative" homosexuals were no longer cooperating. Our research established that this non-cooperation was rooted in the expansion of gay and lesbian networks in Ottawa during these years that led to a growing solidarity, especially for those outside the public service and the military. This provided the basis for more people to refuse to cooperate with the security campaign and for some to resist it.

David, who was part of such a gay network by 1964, reports that the RCMP sent agents to take pictures of gay men in the basement tavern of the Lord Elgin which by then was a major gay meeting spot in Ottawa. "We even knew that there was somebody in some police force or some investigator who would be sitting in a bar ... And you would see someone with a ... newspaper held right up and if you ... looked really close you could find him holding behind the newspaper a camera and these people were photographing everyone in the bar."

What is most remarkable is how David describes the response of the men in the bar to this surveillance. "We always said that when you saw someone with a newspaper held up in front of their face ... that somebody would take out something like a wallet and do this sort of thing [like snapping a photo] and



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then of course everyone would then point over to the person and of course I'm sure that the person hiding behind the newspaper knew that he had been found out."

Michael, another gay non-civil servant who was interrogated by the RCMP in the 1960s, told us that the advice in the gay networks he participated in was never to give any names to the RCMP. Michael also reported that when he was left alone in the interrogation room with one RCMP officer that officer said: "'Is it true that you are a homosexual?' and I said 'yes!' And he looked at me and I said, 'is it true that you ride side-saddle?' And he laughed. I mean, my intent was there, don't bother me any more, because I began to get the impression that it was a witch hunt. It was a real witch hunt." Even in the constraints of the early to mid 1960s some gay men and lesbians were able to refuse to cooperate with the RCMP.

In response to these forms of noncooperation the RCMP shifted its work. It extended its capacities of surveillance by relying on local police forces and morality squads to provide it with homosexual informants. Given that all homosexual sexual acts were illegal until 1969, the local police could 'lean' on gays and try to get them to provide information to the RCMP.

The anti-gay, anti-lesbian national security campaigns continued into the 1970s and 1980s. They were re-affirmed by Pierre Trudeau in the 1970s and in the 1980s. Problems continued for civilian employees of the military and purge campaigns continued in the RCMP and military. Problems continue to this day for public servants trying to get security clearances.

These national security campaigns played an important part in establishing the discriminatory practices gay men, lesbians and bisexuals have faced in employment in Canada, helping to construct gay and lesbian workers as "untrustworthy" and "unreliable" and in forcing many gay men and lesbians underground and into the closet. An official apology from the Canadian government for the injustices done to hundreds of gay men and lesbians and a commission of inquiry into the broad-ranging national security campaigns is needed to help ensure that nothing like this can ever happen again in Canada.

Gary Kinsman is a gay liberation and socialist activist currently teaching sociology at Laurentian University in Sudbury. He is the author of *The Regulation of Desire: Homo and Hetero Sexualities*.

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Holmes v. California Army National Guard, 124 F.3d 1126 (9th Cir. 1997). With its recent decision in Holmes v. California Army National Guard,' the Ninth Circuit became the fourth federal appeals court to uphold the **military's** "don't ask/don't tell" policy.² In doing so, it closely followed the reasoning set out by Judge Wilkinson in Thomasson v. Perry³ and echoed by Judge Loken in Richenberg v. Perry:⁴ **Homosexuals** are not a suspect class for purposes of equal protection review;⁵ the government has a legitimate interest in preserving **military** unit cohesion,⁶ an interest that is served by the prohibition of **homosexual** conduct;' and dismissal for statements of homosexuality does not penalize speech, but rather the conduct of which that speech is probative evidence.'

Taken in the context of the other circuit courts' decisions, Holmes represents a disturbing trend: the courts' progression toward a more and more facile dismissal of **gay** servicemembers' First Amendment arguments. The Fourth and Second Circuits, the first to review the policy, devoted a moderate amount of space to the question of whether the policy's "don't tell" provision violates the First Amendment.⁹ The Richenberg opinion, however, spent only one paragraph discussing the claim's merits and delegated the responsibility of a fuller explanation to a handful of cited cases.¹⁰ The single paragraph Holmes offers is even shorter than that in Richenberg, and Holmes cites to fewer precedents.

Yet it is far from the case that the courts have satisfactorily disposed of the relevant First Amendment questions. Even if the government's target is not speech, but the conduct evidenced by that speech, the First Amendment requires further inquiry—a point that only one of the circuit courts has articulated in the context of the **military's** policy.¹² The reviewing court must ascertain that the government's interest lies only in the nonspeech component of the speech act.¹³ The Holmes court did not fulfill this constitutional obligation. Had it done so, it would have found that it is the expressive element of statements of **homosexual** orientation, rather than their evidentiary value, that underlies the government's interest in "don't tell." I In Holmes, the Ninth Circuit consolidated two cases on appeal, those of Lieutenant Richard P. Watson and First Lieutenant Charles Andrew Holmes.

Each man had been discharged from **military** service after he offered information about his homosexuality. Each was discharged pursuant to 10 U.S.C.



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654(b)(2), which provides for dismissal of a servicemember who states that he is gay, "unless there is a further finding . . . that the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in **homosexual** acts."⁴

Both Watson and Holmes attended hearings in which they were afforded the opportunity to rebut the presumption that they engaged in **homosexual** conduct. Instead, they used the hearings to present evidence of their excellent records of **military** service. Subsequently, they were discharged.

Watson and Holmes filed complaints alleging that the policy violated their rights to equal protection under the Fifth Amendment and to freedom of speech under the First Amendment. The United States District Court for the Western District of Washington granted summary judgment for the Navy in Watson's case.⁵ It reasoned that the prohibition of **homosexual** conduct was constitutional⁶ and that the discharge was based on likelihood of **homosexual** conduct rather than expression of **homosexual** orientation." The United States District Court for the Northern District of California, however, granted summary judgment to Holmes with respect to his equal protection and First Amendment claims, concluding that 654(b)(2) punishes speech and status rather than conduct and is thus a violation of the First Amendment.⁸

In Holmes, the Ninth Circuit reversed the decision pertaining to Holmes and upheld the decision pertaining to Watson.⁹ Applying rational basis review, the court rejected the equal protection challenge, finding that the government had a legitimate state interest (i.e., the maintenance of cohesion among troops)²⁰ and that its chosen means were rationally related to that interest." The court rejected the argument that a mere statement of **homosexual** status is not rationally related to the interest in prohibiting **homosexual** conduct, finding that a declaration of **homosexual** orientation indicates a likely propensity toward **homosexual** conduct.² The court disposed of the First Amendment claim on similar grounds: It held that the "don't ask/don't tell" policy targets not the speech itself, but the conduct of which the speech is probative evidence, and that the First Amendment is therefore "not implicated."²³

Many have questioned the application of the speech-as-evidence framework on the grounds that one cannot infer **homosexual** conduct from the words "I am gay."²⁴ This argument does not attack the use of speech as evidence generally—clearly, oral admissions of guilt may be used as evidence in court—but denies that a serviceperson's statement of **homosexual** orientation has any bearing on whether he or she will violate the **military's** prohibition on **homosexual** conduct. This argument fails largely because of the **military's** definition of **homosexual** conduct, a definition that includes the "propensity" to engage in **homosexual** acts. It is a potentially problematic definition; in other (criminal) contexts, the Supreme Court has held it unconstitutional for the government to penalize someone criminally for her status absent identifiable criminal acts.²⁶ But as long as **homosexual** conduct is thus defined, it seems reasonable to treat a statement of **homosexual** orientation as bearing on the likelihood of such conduct.

Nonetheless, accepting that statements of **homosexual** orientation bear on the likelihood of **homosexual** conduct does not mean that the First Amendment is "not implicated." *Wayte v. United States*,²⁷ for example—a case cited for its speech-as-evidence rationale by all three of the other circuit courts that



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examined the **military's** policy²⁸-addressed the First Amendment in detail.

In *Wayte*, the government pursued a "passive enforcement" policy in prosecuting people who failed to register for the Selective Service: It prosecuted only those who communicated their intention not to register.

Although the Court eventually determined, in part on a speech-as-evidence basis,²⁹ that this practice was permissible, it did not make this determination summarily. Instead, it recognized that any government practice that claims to target the nonspeech aspects of an expressive act must pass the test articulated in *United States v. O'Brien*.³⁰ This is equally true in the context of 654(b)(2). The statement "I am **gay**" may have nonspeech value as evidence of conduct, but it clearly has speech value as well, and so the *O'Brien* test must be applied.

The premise of the *O'Brien* test is that "a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."³¹ The four-prong test the Court used to implement this standard contains the requirement that the governmental interest involved be "unrelated to the suppression of free expression."³² At a minimum, then, the government must have an "important or substantial" interest that would remain even if the combined speech/nonspeech act were stripped of its expressive elements. In many cases, this inquiry will be an exercise in judicial imagination, since acts like burning a draft card (the act at issue in *O'Brien*) cannot be accomplished without an expressive component. But a court can still assert, as the *O'Brien* Court did, that the government would have an interest in preventing the destruction of a draft card even if this were a wholly noncommunicative act.³³ Similarly, in *Wayte*, the government would have an interest in the efficient enforcement of the registration requirement even if refusal to register did not communicate a point of view.

Would the government have a substantial interest in penalizing expressions of **homosexual** orientation if these expressions were stripped of their communicative element? In other words, would its interest in the evidence remain if the evidence were not expressive in nature? The answer, of course, depends largely on what the government's interest in the evidentiary component is. Because the *Holmes* court did not subject 654(b)(2) to the *O'Brien* test, it did not require the government to state its interest in the evidentiary statements. It is only logical, however, to assume that the government's interest in responding to evidence of conduct is the same as its interest in prohibiting the conduct in the first place-an interest the government has repeatedly defined as the preservation of unit cohesion among **military** troops.³⁴ The question then must be: If the statement "I am **gay**" were stripped of its expressive, communicative element, would penalizing such a statement advance the government's interest in preserving unit cohesion?

Both logic and legislative history dictate an answer of no. A propensity to engage in **homosexual** acts that is in no way communicated to the unit does not, and logically cannot, affect the unit's morale. This simple intuition is confirmed by a glance at the testimony on which Congress relied in enacting the legislation. The report of the Association of the United States Army, for example, stated that "(h)eterosexual animosity toward known **homosexuals** can cause latent or even overt hostility, resulting in degradation of team or unit esprit."³⁵ General H. Norman Schwatzkopf testified that "the introduction of an open **homosexual** into a small unit immediately polarizes that unit."³⁶



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General John P. Otjen stated that disruption occurs "when somebody identifies themselves as a **homosexual**."³⁷ These statements show that the expression of a serviceperson's propensity toward **homosexual** behavior is fundamental to the unit disruption such a propensity might cause. Where the confession is necessary to complete the crime,³⁸ it is more than just evidence.

It is expression.

Framed in this way, 654(b)(2) clearly fails the third prong of the O'Brien test. If this section of the statute is to survive a First Amendment challenge, therefore, it cannot be on the grounds that it is unrelated to the restriction of free expression.

III

What lessons can be drawn from this conclusion? First, acknowledging that expression of **homosexual** conduct is key to the asserted harm has ramifications for other facially nonspeech sections of the statute. Section 654(b)(1), for example, flatly prohibits engaging in **homosexual** acts. Of course, before the government can penalize such acts, they must be somehow "expressed." This is not a function of 654(b)(1) in particular; as a practical matter, any illegal act must be communicated to others in some way before it can be penalized.

A baseline quantity of expression is thus implicated in all restrictions on conduct—it is just too clearly "incidental" to require O'Brien analysis. But is it so clearly incidental in the case of 654(b)(1)? The above analysis of 654(b)(2) suggests that the expression of these acts—expression which must have occurred in order for the inquiry to arise in the first place—may be necessary not just for the prosecution of the crime, but for the crime itself. If this is the case, there has been a strange twist: Rather than expression serving as a proxy for conduct (the government's claim regarding the "don't tell" provision), conduct in 654(b)(1) serves as a proxy for expression.

The conclusion that 654(b)(2) and 654(b)(1) deliberately restrict expression, however, does not guarantee the unconstitutionality of the **military** policy. The government may admit to treating statements of **homosexual** orientation (and even **homosexual** conduct itself) as expressive acts and still argue that it has a compelling reason to penalize such acts, given their effect on **military** cohesion. It might advance some kind of a yelling-"fire"-in-a-crowded-theater argument;³⁹ it would surely invoke the courts' traditional deference to the **military** in all matters,⁴⁰ including those implicating the First Amendment.⁴¹ But in doing so, it would face the proper level of scrutiny demanded by government actions that directly target expression. Moreover it could no longer promulgate the myth that the **military's** policy does not have serious implications for free expression. By uncritically accepting the speech-as-evidence framework, the Holmes court missed the opportunity to explode that myth.

Footnote:

1. 124 F.3d 1126 (9th Cir. 1997).

2. The **military's** policy on **homosexuals** is codified at 10 U.S.C. 654 (1994). The statute provides for dismissal of servicemembers who "demonstrate a



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propensity or intent to engage in homosexual acts," *id.* 654(a). This demonstration may be made by engaging in homosexual acts, stating that one is homosexual or bisexual, or marrying a person of the same biological sex, see *id.* 654(b)(1)-(3). This language differs only slightly from the former military policy; the main difference is that the previous policy was articulated in administrative regulations only and was not codified. The part of the military's policy that departs in substance from the former policy-the "don't ask" provision-is contained not in the statute, but in the Defense Department's implementing regulations. See DOD Directives Nos. 1304.26, 1322.18, 1332.14, 1332.30, and DOD Instruction No. 5505.8. The substance of these directives is not mandated by the statute. Thus, the "don't ask" prong may be altered or dropped at the Defense Department's discretion.

3. 80 E3d 915 (4th Cir. 1996) (en banc).

4. 97 F3d 256 (8th Cir. 1996).

5. See Holmes, 124 F.3d at 1132; Richenberg, 97 F3d at 260 & n.5; Thomasson, 80 F.3d at 928.

6. See Holmes, 124 F.3d at 1133-34; Richenberg, 97 F.3d at 261-262; Thomasson, 80 E3d at 928-930.

7. See Holmes, 124 F3d at 1133; Richenberg, 97 F3d at 261-62; Thomasson, 80 F.3d at 929.

8. See Holmes, 124 F3d at 1136; Richenberg, 97 F.3d at 262-63; Thomasson, 80 F3d at 931-32; see also *Able v. United States*, 88 F.3d 1280, 1294-96 (2d Cir. 1996) (holding that the policy does not violate the First Amendment and remanding on the question of whether it violates the Equal Protection Clause).

Footnote:

9. See *Able*, 88 F3d at 1292-96; Thomasson, 80 F3d at 931-34.

10. See Richenberg, 97 E3d at 263.

11. See Holmes, 124 F.3d at 1136.

12. See *Able*, 88 F.3d at 1295. 13. See *infra* text accompanying notes 31-33.

14. 10 U.S.C. 654(b)(2) (1994).

Footnote:

15. See *Watson v. Perry*, 918 F. Supp. 1403 (W.D. Wash. 1996), *aff'd sub nom.* Holmes, 124 F.3d 1126 (9th Cir. 1997). 16. See *id.* at 1414. 17. See *id.* at 1415-16, 1417.

18. See *Holmes v. California Army Nat'l Guard*, 920 E Supp. 1510, 1527-28, 1534-36 (N.D. Cal. 1996), *rev'd*, 124 F3d 1126 (9th Cir. 1997). 19. See Holmes, 124 F3d at 1128. 20. See *id.* at 1133-34. 21. See *id.* at 1134-36. 22. See *id.* at 135. 23. *Id.* at 1136.

24. At the judicial level, the most cogent exposition of this argument is



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Judge Wald's dissent in *Steffan v. Perry*, 41 F.3d 677, 710 (D.C. Cir. 1994) (Wald, J., dissenting). 25. See 10 U.S.C. 654(a) (15) (1994).

Footnote:

26. See, e.g., *Robinson v. California*, 370 U.S. 660 (1962) (holding that the mere status of being a narcotics addict may not be criminalized); see also Taylor Flynn, *Of Communism, Treason, and Addiction: An Evaluation of Novel Challenges to the Military's Anti-Gay Policy*, 80 IOWA L. REV. 979, 1000-01 (1995) (outlining the argument that propensity relates to status, not conduct). 27. 470 U.S. 598 (1985).

28. See *Richenberg v. Perry*, 97 F.3d 256, 263 (8th Cir. 1996); *Able v. United States*, 88 F.3d 1280, 1295 (2d Cir. 1996); *Thomasson v. Perry*, 80 F.3d 915, 932 (4th Cir. 1996) (en banc). 29. See *Wayte*, 470 U.S. at 612 ("(T)he letters written to Selective Service provided strong, perhaps conclusive evidence of the nonregistrant's intent not to comply-one of the elements of the offense."). 30. 391 U.S. 367 (1968), cited in *Wayte*, 470 U.S. at 611. 31. *Id.* at 376 (emphasis added). 32. *Id.* at 377.

Footnote:

33. See *id.* at 382 ("For this noncommunicative impact of his conduct, and for nothing else, he was convicted.").

34. See *supra* text accompanying note 6. 35. H.A.S.C. 103-18, at 337 (emphasis added).

36. S. Hrg. No.103-845, at 595-96 (statement of General H. Norman Schwartzkopf) (emphasis added). 37. S. Hearing No. 103-845, at 780 (statement of Gen. John P. Otjen). 38. The crime analogy is, of course, only an analogy; the statute does not subject those with propensities toward homosexual conduct to criminal sanctions.

Footnote:

39. See *Schenck v. United States*, 249 U.S. 47, 52 (1919).

40. See, e.g., *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981) (noting that judicial deference "is at its apogee" when reviewing congressional acts that pertain to the military).

41. See, e.g., *Brown v. Glines*, 444 U.S. 348, 354 (1980) ("(W)hile members of the military services are entitled to the protections of the First Amendment, 'the different character of the military community and of the military mission requires a different application of those protections.'" (quoting *Parker v. Levy*, 417 U.S. 733, 758 (1974))).

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Interview with Colonel Margarethe Cammermeyer, officer discharged from military upon discovery of her sexual preference

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The Ordeal of Col. Cammermeyer

LAURA POST

In April, 1989, Colonel Margarethe ("Grethe") Cammermeyer revealed to a defense investigative officer during an interview for security clearance that she was a lesbian. For the next several years, Cammermeyer was put through a prolonged investigation and, in 1992, was discharged from the **military**. In 1994, she described her experiences in a book, *Serving in Silence* (with Chris Fisher), which was later turned into a made-for-TV movie starring Glenn Close as Cammermeyer, broadcast last May.

Born in Nazi-occupied Norway in 1942, Cammermeyer moved to the United States at age nine and learned English for the first time. By the time she was fifteen, she was playing semiprofessional fast-pitch softball. She overcame a misogynistic father, passive mother, and the special demands placed on an eldest child. Cammermeyer completed college in 1963 and went on active duty in the Army. Having earned grades that would not gain her entry into medical school, she settled on nursing. By 1964, she was married to a fellow soldier she bore four sons and eventually divorced him in 1980. In 1968, she left the **military** after having served as an Army Nurse in Long Binh, Vietnam, from February 1967 to May 1968, witnessing several campaigns and earning her four stars on her Vietnam combat ribbon as well as the Bronze Star Medal. In 1972, she resumed active duty in the Reserves with the 50th General Hospital in Seattle, Washington. In 1985, she was named Nurse of the Year by the Veterans Administration. Two years later, she earned the rank of full colonel. However, a new life pattern was beginning to emerge.

In 1988, Cammermeyer met Diane, the woman who was to become her partner. On June 11, 1992, three years and two months after she officially came out to the



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military, Colonel Margarethe Cammermeyer was discharged. Her involuntary separation from the **military**, though honorable, truncated a formidable service career. Cammermeyer is the highest-ranking **military** officer to challenge the anti-gay U.S. **military** policy to date. Like Sharon Kowalski and Karen Thompson, like Rosa Parks, like others who have spoken out for what they believe is right, Margarethe Cammermeyer has become an inadvertent folk hero.

Cammermeyer's area of specialization as a medical nurse has led her to work with veterans suffering from war-related Post Traumatic Stress Disorder, or PTSD. "Every war left its veterans with different triggers for memories," she observes. Cammermeyer has devoted most of her professional life to helping people overcome the excruciating after-effects of war. While the media attention of the last few years has detracted from the time she has for this pursuit, she has continued to work at the Veterans Administration Medical Center at American Lakes. She lives with her family in Seattle.

I recently interviewed Margarethe Cammermeyer to get an update on her status and to gain some insight into the evolution of her thinking about the entire "gays-in-the-military" situation as it currently stands.

Laura Post: Let me begin by asking you about your current situation in the **military**.

Margarethe Cammermeyer: I was reinstated in June, at the same job, as the Chief Nurse of the 164th MASH Unit. However, it would be naive to assume that my career will resume the same way it was before all this happened.

LP: While some have faced hostility and ostracism when they came out, you have described your experience as largely positive. Could you talk about that?

MC: I have had support in all arenas. Particularly from minorities, who understand discrimination, and who can relate to my case not everyone who has stood by me is a lesbian or gay man. In some way, I speak for all of those people who have fought, or wanted to fight, the status quo when it was unfair. There may be people who disagree with me and what I have done, but these are not the people who speak to me.

LP: Having served in Vietnam, you are famous for having supported the American effort long after it was fashionable to be anti-war. How would you characterize your position today?

MC: It's very curious that it's only been since my recent experience with the **military** that I have looked at Vietnam and the country's resistance to Vietnam in a different way. In my memory, there is pain and hurt and death, so it would do a disservice to say that everyone who was there was wrong. Maybe we were pawns, but we believed and we served, and people died. I now have respect for those who fled to Canada or who were jailed, who lost things like their jobs, their homes, their freedom, their residence in the United States.

LP: What would you recommend that **gay** men and lesbians who are still in the **military** do at this point in time?

MC: This question is easy to answer. People in the **military** are bound by the current law of this country, and they must not ask and must not tell. For **gay**



people in the **military**, harassment can be an issue and there are several organizations which can help people to avoid trouble and to defend themselves: Lambda Legal Defense and Education Fund, Servicemembers Legal Defense Network.

LP: So you don't think that they should come out publicly, as you did?

MC: Not unless they want to lose their career. It is pointless for anyone else to challenge the **military** the way I have done. Through the courts, through Congress, the law is changing. It is foolhardy to think that any other individual would make a difference in allowing the legal process to take place.

LP: A ruling on Able v. USA, the first major legal challenge to the "don't ask, don't tell" policy adopted in 1993, determined that the law was unconstitutional. What do you expect to happen with this?

MC: Able will be appealed, and the Supreme Court will have to decide whether Congress made another mistake.

LP: What would be your message for the rank-and-file civilian population to advance the cause of **gay** rights?

MC: Our job is twofold. We must recognize, as a society, that we have challenged the anti-**gay** and anti-lesbian policy in the **military** and we must continue to talk and teach about being **gay** and lesbian and take the fear away. We are all folks who have lives and responsibilities we live day-to-day, including homes and family and, sometimes, the **military**. My idea is, on National Coming Out Day, for every **gay** or lesbian couple to invite a straight couple to their home for dinner. Such meetings will start the process of change. **Gay** men and lesbians are more similar to straight people than dissimilar, and we should all have equal opportunity.

Laura Post's writings on lesbian issues have appeared in Ms., Off Our Backs, and Sojourner, among other publications.

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LEVEL 1 - 29 OF 109 STORIES

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HEADLINE: ASK ME NO QUESTIONS;

The Pentagon's newly implemented "Don't Ask, Don't Tell" compromise pleases the military establishment more than it does gay activists, who are looking to the courts for relief.

BYLINE: James Kitfield

BODY:

As policy debates go, this one came in with a bang that deafened the defense establishment to nearly all other issues. In the end, however, the new regulation on gays in the military went out to the field in March with little more than a whimper.

The Clinton Administration could not overcome continuing objections in Congress -- and in the military -- to its proposed dictum that "homosexual orientation is not a bar to service," and it settled for a seemingly minor but apparently symbolically important change: The Pentagon's regulation reads, "sexual orientation is not a bar to service." Thus did Defense Department officials quietly usher in the era of "Don't Ask, Don't Tell, Don't Pursue."

Though the heated debate over gays in the military consumed his early months in office and outlasted his tenure, former Defense Secretary Les Aspin contends the timing of the compromise he brokered was unavoidable. "Because they were adding unnecessarily to a sense of uncertainty in the ranks that was damaging morale, we felt it important to get the social issues such as women in combat and gays in the military dealt with early," Aspin said at a mid-February breakfast meeting with reporters. Inasmuch as the new policy was not met with the kind of fireworks that surrounded the issue when proposed changes were announced at the beginning of the Clinton Administration, Aspin believes that strategy worked.

"The test of the policy from our standpoint was whether it stopped being a major irritant to the services, and in that sense it has dropped off the screen. It's no longer the topic of conversation for troops in the field," says Aspin. "That doesn't mean, however, that it's a dead issue. A lot of things will still happen concerning the policy, and the courts will have their say."

Don't Ask, Tell, or Pursue

The new regulation attempts to straddle the gulf between those who support the ban on gays in the military and President Clinton's original promise to open military ranks to homosexuals. For instance, the regulations maintain the



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fundamental principle that **homosexual** conduct is incompatible with **military** service. On the other hand, sexual orientation in the absence of conduct is not a bar to **military** service, and is considered a private matter. Commanders negotiating the murky area between the two have been given these specific instructions:

Don't Ask. Those persons who enlist in the **military**, apply for a security clearance or go before a promotion board will no longer be asked about their sexual orientation. Persons expressing an obvious intention to engage in **homosexual** acts, however, will be barred from enlisting.

Don't Tell. Individuals who state that they are **homosexual** open themselves up to potential discharge from the services. Though persons accused of making such statements will have a chance to defend themselves, the burden of proving they have not engaged in **homosexual** conduct shifts to them. Those persons caught in **homosexual** acts or in same-sex marriages are subject to discharge.

Don't Pursue. Investigations of alleged **homosexual** conduct will be handled just like investigations of other alleged criminal sexual acts. **Military** law enforcement agencies will not be allowed to conduct investigations solely to determine a service member's sexual orientation.

Critics charge that the ambiguous phrasing of the new policy attempt to mask a fundamental contradiction. The policy, in essence, is that sexual orientation is not a bar to **military** service as long as you keep it in the closet. This "guts the spirit of what President Clinton was trying to accomplish, because it shifts the burden of proof back to the service member, and pretty much allows the **military** to carry on as it always has," says Lawrence Korb, who served in the Pentagon during the Reagan Administration and is now at the Brookings Institution.

Though the new regulation will almost certainly put an end to witch hunts for **homosexuals**, such advancement is "microscopic," says David Smith of the National Gay and Lesbian Task Force. "The core philosophy which underpins the new regulation is the same as the old, which is that you cannot identify yourself as **gay** and serve in the **military**. And the reason is that most people in the **military** are prejudiced against **gay** people," says Smith. "Rather than deal with that prejudice, the new regulation accommodates it."

A Different Standard

Prejudice against **gays** undeniably exists in the **military**, as in other parts of society. But some argue that what might be considered rampant homophobia in another context should be judged by a different standard in the **military**. Many **military** officers contend that even those who champion the civil rights of **gays** and lesbians in the civilian world might experience some unease at being told to share a bunk bed and shower stall with a **homosexual** during a long deployment. In the **military**, unease is anathema to unit cohesion.

"Because it is more pluralistic than many segments of society, I think the **military** in some instances is more open to diversity," says an Army chaplain who asked not to be named. "But in light of all the places the Army has been asked to fight in recent years, there was real concern that the policy on **gays** as



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originally worded would undermine the esprit de corps that the Army has worked so long to recover."

Privately, one senior Army general argues that the original policy simply pushed a traditionally conservative **military** too far, too fast. "Personally, I think us not being able to ask about someone's sexual orientation is positive and healthy progress, because that's an invasion of privacy," he says. However, the issue of allowing openly **gay** individuals to serve, he believes, falls on the fault line between two powerful forces in American society; the advancement of individual freedoms and civil liberties on the one side, and group responsibility and **military** readiness on the other. "And in the **military**, we come down solidly in favor of group responsibility," says the three-star general. "We give up certain rights, wear the same clothes, line the buttons on our uniforms up the same way, all as part of a group ethic. And an openly **homosexual** lifestyle jars that group ethic."

Proponents of opening the **military** to **homosexuals** point out that the services were also uneasy at one time about integrating blacks and women into their ranks. Some sociologists counter, however, that those advancements took place over a period of many years. "**Gay** advocates expect the services to change overnight, but that's not the way the **military** works," says Martin Binkin, a manpower expert with the Brookings Institution. "The **military** takes time to absorb these changes; it's like trying to turn an aircraft carrier."

Full Court Press

While the Pentagon has been debating the change in its policy on **gays** in the **military**, the focus has shifted to the courts. **Gay** rights groups have won two recent rulings that call into question the constitutionality of the previous policy on **gays**.

In one case under appeal, a three-judge panel ruled that the ban was unconstitutional. That case is now being heard by the U.S. Court of Appeals for the District of Columbia. In another case, a U.S. district court judge ruled that the Navy must reinstate Keith Meinhold, a sailor who had been discharged after acknowledging he was **gay**. The government has appealed the ruling.

"Our attention and any optimism we have that we can correct this policy is now directed at the legal system," says Smith of the National **Gay** and Lesbian Task Force, who believes the wide latitude the Pentagon's new policy gives individual commanders makes it ripe for abuse. "Ultimately, the issue will be decided by the courts."

Some experts believe, however, that the foundation has been carefully laid for the Pentagon's new policy to be upheld by the Supreme Court. "I believe they will uphold it, because unlike the previous ban, this is not a policy that has been slipped through the back door," says Aspin. The policy, he points out, has been thoroughly debated and approved by the Joint Chiefs, the President and both houses of Congress.

Aspin says the courts should recognize that the policy goes far enough in accomodating **homosexual** interests: "If I were arguing the case for the Justice Department, I would . . . ask the Supreme Court to be faithful to its consistent



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view over the years that the **military** is a different kind of institution. Because it undertakes jobs that can cost people their lives, there are civil liberties guaranteed to civilians that are denied to service members for the sake of cohesion. And if people don't like it, there's a simple redress to deal with that: Don't join."

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LEVEL 1 - 106 OF 109 STORIES

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February 6, 1993

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LENGTH: 1260 words

HEADLINE: GAY GROUPS WERE LEFT IN THE DUST

BYLINE: BY DAVID C. MORRISON

BODY:

President Clinton's plans to overturn the **military's** exclusion of openly **gay** troops, Haley Barbour, the Republican national Committee's new chairman, charged on CBS News' Face the Nation on Jan. 31, are driven by "a very powerful special-interest group of the Democratic Party."

If **gays** and lesbians are such a potent political force, that wasn't exactly evident during the stormy final days of January. Orchestrated by Christian activist and **military** alumni groups, phone calls logged at the White House and on Capitol Hill ran overwhelmingly against lifting the **gay** ban. Rep. Lamar S. Smith, R-Texas, who favors the ban, says that only 60 of 1,200 supported Clinton.

The vaunted **homosexual** lobby, it seems, was caught somewhat unawares by the tumultuous eruption of a controversy that bids fair to dominate the political discourse this year. (See this issue, p. 374.)

In a critical Jan. 29 story, The Washington Blade, a **gay** and lesbian weekly published in the District of Columbia, reported that "pro-**gay** [congressional] staffers and their bosses reacted with disbelief beginning last Friday, when [gay organization] officials told them their lobbying plans for January and February had centered around an over-all federal **gay** civil rights bill, not the **gays-in-the-military** question."

A Jan. 27 press conference, planned weeks earlier, was slated to include only lesbian veterans, feminist leaders and female Members of Congress speaking out against the ban. Only after congressional aides argued against so narrow a focus, the Blade reported, were all Members opposed to the ban invited to speak. But, when Senate Minority Leader Robert Dole, R-Kan., and other congressional critics of Clinton were dominating the airwaves, these lawmakers were given but a minute each to argue against the ban before the news media cameras and microphones.

"Let's face it, it probably wasn't handled the best way," William Waybourn, executive director of the Gay and Lesbian Victory Fund, a Washington-based



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political action committee, said. "But if anyone could have predicted this 800-pound gorilla dropping down on us, they should have been more vocal about it."

A stiff warning was issued, in fact. In a Dec. 22 memo to **gay** activists, Barney Frank, D-Mass., one of two openly **gay** House Members, urged that they "put their immediate efforts into making sure that Bill Clinton's ending of the ban on **gay** and lesbian **military** service is upheld in Congress when the votes come." Only then should attention shift to "broader questions like the **gay** and lesbian civil rights bill," Frank added. His exhortation fell largely upon deaf ears.

"We had been focusing the primary amount of our energies on the transition and the national **gay**-rights bill," Gregory King, spokesman for the Human Rights Campaign Fund, a **gay**-rights group based in Washington, explained. "The problem is that we don't have the same kind of resources available that some of our opponents do."

Indeed, while the campaign fund claims 75,000 members, the Traditional Values Coalition, a California-based group in the vanguard of opposing **gay** rights, says that it represents 25,000 churches around the nation. The Religious Right also boasts hundreds of radio and cable television stations with which to marshal its forces. No less important, in the case of the **gay** ban, the evangelical movement mobilized early.

Christian Voice, a 300,000-strong "political lobby for conservative evangelicals," based in Alexandria, Va., for example, has dispatched more than half a million pieces of direct mail hammering on the issue since Election Day.

"Bill Clinton avoided serving in the **military**, and now he wants to allow practicing homosexuals into the ranks with our healthy boys and girls," the letter, signed by Christian Voice president Robert G. Grant, says. The recipient is asked to sign a "citizens ballot" addressed to Clinton and opposing **gays** in the **military**, and to "send your largest possible contribution you can afford."

"By the time this is over, I anticipate that we will have sent out five million pieces of mail," Gary L. Jarmin, Christian Voice's legislative consultant, said. "And we have logged already over 100,000 calls on the phone bank."

Another evangelical group headquartered in Alexandria, the 70,000-member Christian Action Network, is putting together a pamphlet justifying the **gay** ban and producing a television commercial urging people to exhort their elected representatives to uphold it. That ad will run in targeted congressional districts in March, to coincide with planned Senate Armed Services Committee hearings on the matter.

Military advocacy groups have also closed ranks. In late January, just as the issue was exploding across the nation's front pages, the 106,000-member Reserve Officers Association, which had passed a resolution in mid-1991 supporting the **gay** ban, happened to be staging its annual midwinter conference in Washington. While in town, members made a point of buttonholing lawmakers and their aides on behalf of the ban.



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"Meanwhile," retired Air Force Col. Walker Williams, deputy director of the association, said, "we're ginning up to do more grass-roots work during the six months" preceding the July 15 deadline that Clinton has set for Defense Secretary Les Aspin to draft an executive order ending the ban.

Late last November, the 382,000-member Retired Officers Association hired the Gallup Organization Inc. to poll its members, 83 per cent of whom said that they endorsed the ban. The association has been flacking those numbers on Capitol Hill, while issuing a "call-out" to its 450 chapters nationwide to telephone Congress and the White House and vent their views on the issue. "We also told them to write, too," retired Navy Capt. Donald E. Repass, a spokesman for the group, said, "to put on continued pressure."

On the opposing line of skirmish, the national gay and lesbian groups are now suiting up for battle. On Feb. 1, they staged two press conferences starring former military officers, among them retired Army Col. Lucian Truscott III and his son, retired Army Lt. Lucian Truscott IV, both of whom have published op-ed pieces criticizing the gay ban.

The Human Rights Campaign Fund has been contacting its members, urging them to lobby their lawmakers and meeting with aides to Senate Armed Services Committee chairman Sam Nunn, D-Ga., in hopes of ensuring that eloquent opponents of the ban get to testify at the March hearings.

The National Gay and Lesbian Task Force has mailed an "urgent action request" to its 26,000 members asking them to phone Capitol Hill, and has itself called some 2,000 gay and lesbian activists in all 50 states, urging them to stir up grass-roots support for repealing the ban.

A pivotal event in what promises to be a long, grueling season of lobbying will be the national gay march on Washington scheduled for April 25. If the march held in 1987 is any indication, hundreds of thousands of gays and lesbians will descend upon Washington. Many of them will be looking up their House Member.

Immediately after the election, "there was an understandable euphoria," Frank said in an interview. Gay groups "felt that Clinton's action was a given. They were deciding on dessert before we had cooked dinner."

"But it's by no means fatal," Frank said of the gay lobby's slow start. "We missed by a couple of weeks. It would have been better if people were hearing from both sides. But now we are organized."

GRAPHIC: Picture, no caption

LANGUAGE: ENGLISH



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Proceedings
October 1999
Pg. 39

Don't Ask, Don't Tell . . .

By Janice M. Graham

And don't expect it to hold up in court. Earlier this year, the U.S. Supreme Court refused for the fifth time to consider a legal challenge to the military's "don't ask, don't tell" policy, to determine whether it violates an individual's right to equal protection under the Fifth Amendment. But as public tolerance of gays grows and public policy continues to shift in their favor, the chances of military's policy surviving future court tests dwindle.

During his presidential campaign, Bill Clinton proposed to end the military's exclusion of homosexuals. Once he assumed office in 1993, however, he quickly retreated when faced with powerful opposition from the Joint Chiefs of Staff, supported by Senator Sam Nunn, chairman of the Senate Armed Services Committee. The debate intensified over the next several months, as Clinton's supporters touted the need to end the discrimination, and conservatives, military leaders, and many members of Congress declared that the presence of homosexuals would degrade military readiness.

Finally, in June 1993, a compromise was struck. Both sides agreed to codify a policy of "don't ask, don't tell," whereby homosexual orientation alone no longer is a disqualifier for military service. Gays may serve in the armed forces legally, but can be discharged for displaying homosexual behavior openly (USC para. 654(B)). The policy requires separation of a service member if the military determines the following:

That the member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts, unless there are further findings made and approved in accordance with procedures set forth in such regulations, that the member has demonstrated all of the following:

- * such conduct is a departure from the member's usual and customary behavior;
- * such conduct, under all the circumstances, is unlikely to recur;
- * such conduct was not accomplished by use of force, coercion, or intimidation;
- * under the particular circumstances of the case, the member's continued presence in the armed forces is consistent with the interests of the armed forces in proper discipline, good order, and morale; and
- * the member does not have a propensity or intent to engage in homosexual acts.
- * That the member has stated that he or she is a homosexual or bisexual, or words to that effect, unless there is a further finding, made and approved in accordance with procedures set forth in the regulations, that the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.
- * That the member has married or attempted to marry a person known to be of the same biological

sex.

General Colin Powell, then Chairman of the Joint Chiefs of Staff, articulated the principal justification for this policy. Many straight soldiers, he stated, are uncomfortable serving with openly gay soldiers.¹ He was supported by commanders from all the services, who testified before Congress that allowing openly gay personnel to serve in the military would undermine morale and unit cohesion and erode good order and discipline.

Whatever the intended outcome of the policy of "don't ask, don't tell," the discharge rate for homosexuality—after declining steadily from 1983 to 1993—increased dramatically following its implementation. In 1994, the services discharged 597 members for homosexuality. By 1996, this number was up to 850; by 1998, it reached 1,145.² The discharge rate for homosexuals now is the highest it has been in ten years.

Critics of "don't ask, don't tell" call the rising discharge rates unacceptable and are charging that the new policy is a failure. The primary reason it has not worked, they believe, is that alleged violations of investigative procedures for service members are tolerated. In addition, rather than fostering greater tolerance of gays, the policy instead creates a charged atmosphere that leads to greater scrutiny of their private lives.

In examining the likelihood of a future change in policy concerning the status of gays in the military, legal precedents must be reviewed. It seems inevitable that the Supreme Court in time will decide that the issue involves compelling social policy and agree to a judicial review. It is equally important, however, to examine the moral and ethical arguments behind the prohibition on gays to determine whether they indeed have merit. Finally, the practical aspects of implementing any new policy pertaining to gays in the military must be considered.

The Legal Arguments behind "Don't Ask, Don't Tell"

"Don't ask, don't tell" has been challenged in several courts, with some upholding the policy and others striking it down. The most recent ruling by the U.S. Court of Appeals for the 2nd Circuit upheld the policy as constitutional. This was the fourth federal appeals court to do so. Specifically, this court unanimously concluded that the government's justification for the ban on homosexual relations—that it "promotes unit cohesion, enhances privacy, and reduces sexual tension"—albeit discriminatory, was sufficiently rational to be acceptable under the Constitution. The three-judge panel opined that allowing this double standard was within the usual deference the courts show to Congress and the executive branch in their management of the affairs of the military.

In the past, the degree of deference shown by the court often has been the deciding factor in a case. In the 1981 *Rostker v. Goldberg*, the court practiced extraordinary deference in deciding whether the Military Selective Service Act (MSSA)—which empowers the president to require the registration of every male citizen and male resident alien between the ages of 18 and 26—violated the equal protection clause by excluding women. During the court hearings, the Solicitor General emphasized the deference due Congress in the area of military affairs and national security. He argued that the court should scrutinize the MSSA only to determine if the distinction drawn between men and women bears a rational relation to some legitimate government purpose. The court decided that the decision to exclude women from registration was a sex-based classification "closely related to Congress's important purpose in authorizing registration" and therefore acceptable under the Constitution.

This rational basis test—in which the court decides only whether the state or federal government has a rational basis for passing the law—is the one often used in the past by the Supreme Court to decide cases of equal protection and due process. But the test now routinely applied to gender- and race-based discrimination cases involving due process and equal protection is the test of strict scrutiny. It is interesting to analyze the holding and supporting rationale in a case where the more stringent test

of strict scrutiny was used to determine the legality of excluding gays from the military.

In the 1989 *Watson v. United States Army*, the judge used the strict scrutiny test and ruled that the Army's policy of excluding bisexuals, gay men, and lesbians from the armed forces violated equal protection. The judge's argument followed the rationale used in Supreme Court gender and racial discrimination cases:

- * The group at issue suffered a history of purposeful discrimination.
- * The discrimination embodies a gross unfairness that is sufficiently consistent with the ideals of equal protection to term it invidious.
- * The group lacks effective political representation needed to protect itself from social and state prejudice.

The court found that sexual orientation does not impair a person's ability to perform well in the military, a point the Army did not dispute. It also found:

- * Classifications based on sexual orientation reflect prejudice and inaccurate stereotypes.
- * Sexual orientation, whether immutable or not, rests outside the conscious control or choice of the individual.
- * Gay people are a minority with whom the majority finds it difficult to empathize and understand.
- * When political organization of gays occurs, it frequently is met with public prejudice and unusual hostility.

In this case, the judge held that the Army did not provide the burden of proof required to justify excluding gays from the Army.

Adding the Moral and Ethical Debate

Generally, the court has not viewed sexual orientation as disadvantaging a class of people and has ruled using judicial deference. The government cannot imprison gays for their sexual preference (as opposed to sexual conduct), but it can discriminate against them civilly—especially in the armed forces, where the courts have a history of deferring to the executive and legislative branches. Thus, the military's need to maintain discipline and unit cohesion can render permissible within the military what is constitutionally impermissible outside it.³ Defenders of the "don't ask, don't tell" policy claim that the military is a special institution that holds itself to higher standards than those to which society in general adheres. In addition, soldiers asked to risk their lives for their comrades and for the overall plan of battle can achieve this level of altruistic behavior only through the intense bonding that occurs within a unit. The introduction of gays to the unit would undermine troop morale, disrupt the bonding experience, and upset the normal balance and cohesion—ultimately harming military readiness.

As further justification, military leaders have argued that the presence of gays in the armed forces increases risks to national security. They claim that homosexuals could be more easily coerced than heterosexuals into spying against their country, and they could be blackmailed over their personal lives more readily. In court, these types of arguments nearly always trigger the judicial response of deference because they rely on the hard-to-refute experience of military commanders. But are they truly rational and justifiable? Or are they irrational fears that merely reinforce prejudices and sanction a discriminatory policy?

To address the question, it is useful to review the testimony of General Colin Powell, one of the most highly regarded military leaders of his time. Throughout the gay policy debate in 1993, General Powell, presiding as Chairman of the Joint Chiefs of Staff, repeatedly asserted that a majority of heterosexual soldiers would be made uncomfortable by living and working in close quarters with openly gay colleagues. He testified that the presence of homosexuals would cause friction, resentment, and distrust within military units, destroying soldiers' ability to work and fight together.

Yet these are the same words used in the past to argue against racial integration; today they are being used to argue against women in combat.

Legal scholars often cite the similarities between the justification for racial segregation in the military prior to 1948 and the justification for opposing homosexuals in the military some 50 years later. In his congressional testimony, however, General Powell dismissed the comparison:

* Skin color is a benign, nonbehavioral characteristic. Sexual orientation is perhaps the most profound of human behavioral characteristics.

There is no scientific evidence, however, to confirm Powell's claim that sexual orientation is a behavioral characteristic. In fact, the factors that make a person prefer homosexual relations—regardless of one's views on whether it is chosen or innate—remain unknown. The latest effort to confirm scientific theories that some gay men inherit their homosexuality from their mothers failed to confirm a previous link. Many doctors, psychiatrists, and human genetics experts believe homosexual behavior is so complex that it is almost certainly under the control of many different genes and environmental factors.

The Road Ahead

During the 1998 Texas Republican Party convention, George W. Bush admonished his party's leadership about gay bashing and declared that "all individuals deserve to be treated with dignity and respect"—a declaration easy to make but difficult for many to practice. Indeed, one concern of military leaders and others who oppose homosexuals in the armed forces is that many heterosexuals, because of their belief that homosexuality is immoral, will be unable to treat known gays in the military with dignity and respect. Instead, these heterosexuals will be mean-spirited and divisive, causing the friction, resentment, and undermining of unit morale and cohesion so often predicted by military leaders.

In spite of much rhetoric to the contrary, this concern too was conveyed by military leaders during the debate on racial integration. Before 1948, the Defense Department adhered to a policy of race-based segregation in the military, with the primary justification being that integration would undermine unit cohesion and morale because white soldiers were uncomfortable and often hostile to black soldiers.⁴

It is clear that tolerance for gays within the military is low, but nationwide polling by the Clinton administration indicates that the opposite is true within the U.S. population as a whole. A steady shift in the attitudes of American citizens is evident in the support for equal protection in cases of employment and housing. In fact, polling of the American public by the administration indicates 70% support for Clinton's executive order prohibiting discrimination against gays by federal agencies.⁵ It may take another executive order by the president to end the prohibition of gays in the military, just as it took one to end racial segregation.⁶

In addition, recent Supreme Court rulings using strict scrutiny to end racial preferences in university admission policies are an indicator of the renewed emphasis on equal protection for all citizens and less tolerance for classification schemes. A Supreme Court review of "don't ask, don't tell" using strict scrutiny most likely would overturn the policy because its justification by the Defense

Department is not supportable in fact. The U.S. Constitution clearly dictates that the law cannot, either directly or indirectly, give effect to such private biases, because "the impact is even greater when it has the sanction of the law."⁷

Certainly from a practical standpoint it is easier to continue to deny known homosexuals the chance to serve in the military than it would be to incorporate them. Similarly, it would have been easier to continue to deny women access to combat-related assignments. But as the public becomes more tolerant of gays in the workplace and public policy continues to shift in their favor—as it did with women—it will become increasingly difficult for the military to justify their exclusion. If the military fails to adjust to this societal transformation it is more likely that what will compromise its readiness is not the presence of known homosexuals within its ranks but the behavior of military leaders in dealing with this issue. An organization designed and touted by its leaders to be representative of the general population cannot then select those individuals only within "accepted" classification groups.

As U.S. Judge Eugene Nickerson wrote about "don't ask, don't tell" in *Able v. U.S.*, "there can be no doubt that the purpose of the act is to foster or at least acquiesce in the prejudice of some heterosexuals" and a military "called on to fight for the principles of equality and free speech embodied in the U.S. Constitution should embrace those principles in its own ranks." Similarly, during one recent case concerning equal protection, the judge quoted Lewis Powell in the 1978 *Regents of the University of California v. Bakke*, "the guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to another."

Some sociologists claim that adherence to these ideals is not possible within a military that has grown too conservative and too comfortable with the norm to accept homosexuals among its ranks. It certainly is true that the conditions of combat preclude much privacy and that each time a new classification of people is added—blacks, women, ethnic groups—it stresses the system and temporarily disrupts unit cohesion. Yet the bedrock of military values is that the institution will take care of, and respect the dignity of, all citizens. By holding to this value—reinforced by strong leadership from the top down—the military has been able to overcome any difficulties in, and in the end prosper from, the incorporation of each new group.

We learned from the civil rights cases that these types of prejudice only delay the day when race, gender, national origin, and now sexual orientation will be insignificant factors and all that will be important is what the individual contributes to the mission of the military. Whether sexual orientation is an immutable characteristic or learned behavior is irrelevant. By all accounts, homosexuals as a group in the military are as dedicated and competent as are heterosexuals. Their continued service should be based on their professional performance and personal conduct. The record shows that the impact of misconduct, poor performance, drugs, and alcohol on unit cohesion and good order and discipline is far more adverse than that of homosexuality. If the history of equality in the armed forces serves to enlighten us about the future, one day we will reflect on the issue of gays in the military and wonder why we were so intolerant.

1. General Powell's testimony can be read in full in Fiscal Year 1993 Defense Budget: Hearings before the House Committee on the Budget, 102d Congress, 2d sess. 45 (1992).
2. The number of discharges from the military for homosexuality are compiled and released annually by the Department of Defense. The most recent report was released by the Pentagon on 22 January 1999. Further information can be obtained from the Servicemembers Legal Defense Network.
3. See holding and rationale in *Selland v. Cohen* (1997).
4. For histories of white resistance and the changed attitudes once desegregation occurred in 1948-54, see Richard Dalfiume, *Desegregation of the U.S. Armed Forces: Fighting on Two Fronts, 1939-1953* (Columbia: University of Missouri Press, 1969); Morris MacGregor Jr., *Integration of the Armed Forces 1940-1965* (Washington, DC: Center of Military History, U.S. Army: for sale by U.S.

Government Printing Office, 1981); and Bernard Nalty, *Strength for the Fight: A History of Black Americans in the Military* (New York: Free Press; London: Collier Macmillan, 1986).

5. Geneva Overholster, "Still Out of Bounds," *The Washington Post*, 6 April 1999.

6. In 1948, President Harry Truman ended racial segregation in the armed forces by executive order.

7. Quoted from the holding delivered by Chief Justice Warren in the landmark 1954 civil rights case *Brown v. Board of Education*.

Lieutenant Commander Graham retired from the Navy in 1998 and is a research associate at the Potomac Institute for Policy Studies in Rosslyn, Virginia, and a doctoral candidate at The George Washington University, School of Business and Public Management.

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release

October 7, 1999

EXECUTIVE ORDER

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1999 AMENDMENTS TO THE MANUAL
FOR COURTS-MARTIAL, UNITED STATES

By the authority vested in me as President by the Constitution and the laws of the United States of America, including chapter 47 of title 10, United States Code (Uniform Code of Military Justice, 10 U.S.C. 801-946), in order to prescribe amendments to the Manual for Courts-Martial, United States, prescribed by Executive Order 12473, as amended by Executive Order 12484, Executive Order 12550, Executive Order 12586, Executive Order 12708, Executive Order 12767, Executive Order 12888, Executive Order 12936, Executive Order 12960, and Executive Order 13086, it is hereby ordered as follows:

Section 1. Part II of the Manual for Courts-Martial, United States, is amended as follows:

a. R.C.M. 502(c) is amended to read as follows:

"(c) Qualifications of military judge. A military judge shall be a commissioned officer of the armed forces who is a member of the bar of a Federal court or a member of the bar of the highest court of a State and who is certified to be qualified for duty as a military judge by the Judge Advocate General of the armed force of which such military judge is a member. In addition, the military judge of a general court-martial shall be designated for such duties by the Judge Advocate General or the Judge Advocate General's designee, certified to be qualified for duty as a military judge of a general court-martial, and assigned and directly responsible to the Judge Advocate General or the Judge Advocate General's designee. The Secretary concerned may prescribe additional qualifications for military judges in special courts-martial.

As used in this subsection "military judge" does not include the president of a special court-martial without a military judge."

b. R.C.M. 804 is amended by redesignating the current subsection (c) as subsection (d) and inserting after subsection (b) the following new subsection (c):

"(c) Voluntary absence for limited purpose of child testimony.

(1) Election by accused. Following a determination by the military judge that remote live testimony of a child is appropriate pursuant to Mil. R. Evid. 611(d)(3), the accused may elect to voluntarily absent himself from the courtroom in order to preclude the use of procedures described in R.C.M. 914A.

(2) Procedure. The accused's absence will be conditional upon his being able to view the witness' testimony from a remote location. Normally, a two-way closed circuit television system will be used to transmit the child's testimony from the courtroom to the accused's location. A one-way closed circuit television system may be used if deemed necessary by the military judge. The accused will also be provided private, contemporaneous communication with his counsel. The procedures described herein shall be employed unless the accused has made a knowing and affirmative waiver of these procedures.

(3) Effect on accused's rights generally. An election by the accused to be absent pursuant to subsection (c)(1) shall not otherwise affect the accused's right to be present at the remainder of the trial in accordance with this rule."

c. The following new rule is inserted after R.C.M. 914:

"Rule 914A. Use of remote live testimony of a child.

(a) General procedures. A child shall be allowed to testify out of the presence of the accused after the military judge has determined that the requirements of Mil. R. Evid. 611(d)(3) have been satisfied. The procedure used to take such testimony will be determined by the military judge based upon the exigencies of the situation. However, such testimony should normally be taken via a two-way closed circuit television system. At a minimum, the following procedures shall be observed:

(1) The witness shall testify from a remote location outside the courtroom;

(2) Attendance at the remote location shall be limited to the child, counsel for each side (not including an accused pro se), equipment operators, and other persons, such as an attendant for the child, whose presence is deemed necessary by the military judge;

(3) Sufficient monitors shall be placed in the courtroom to allow viewing and hearing of the testimony by the military judge, the accused, the members, the court reporter and the public;

(4) The voice of the military judge shall be transmitted into the remote location to allow control of the proceedings; and

(5) The accused shall be permitted private, contemporaneous communication with his counsel.

(b) Prohibitions. The procedures described above shall not be used where the accused elects to absent himself from the courtroom pursuant to R.C.M. 804(c)."

d. R.C.M. 1001(b)(4) is amended by inserting the following sentences between the first and second sentences:

"Evidence in aggravation includes, but is not limited to, evidence of financial, social, psychological, and medical impact on or cost to any person or entity who was the victim of an offense committed by the accused and evidence of significant adverse impact on the mission, discipline, or efficiency of the command directly and immediately resulting from the accused's offense. In addition, evidence in aggravation may include evidence that the accused intentionally selected any victim or any property as the object of the offense because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person."

e. R.C.M. 1003(b) is amended?*

(1) by striking subsection (4) and

(2) by redesignating subsections (5), (6), (7), (8), (9), (10), and (11) as subsections (4), (5), (6), (7), (8), (9), and (10), respectively.

f. R.C.M. 1004(c)(7) is amended by adding at end the following new subsection:

"(K) The victim of the murder was under 15 years of age."

Sec. 2. Part III of the Manual for Courts-Martial, United States, is amended as follows:

a. Insert the following new rule after Mil. R. Evid. 512:

"Rule 513. Psychotherapist-patient privilege.

(a) General rule of privilege. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the patient and a psychotherapist or an assistant to the psychotherapist, in a case arising under the UCMJ, if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition.

(b) Definitions. As used in this rule of evidence:

(1) A "patient" is a person who consults with or is examined or interviewed by a psychotherapist for purposes of advice, diagnosis, or treatment of a mental or emotional condition.

(2) A "psychotherapist" is a psychiatrist, clinical psychologist, or clinical social worker who is licensed in any state, territory, possession, the District of Columbia or Puerto Rico to perform professional services as such, or who holds credentials to provide such services from any military health care facility, or is a person reasonably believed by the patient to have such license or credentials.

(3) An "assistant to a psychotherapist" is a person directed by or assigned to assist a psychotherapist in providing professional services, or is reasonably believed by the patient to be such.

(4) A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional services to the patient or those reasonably necessary for such transmission of the communication.

(5) "Evidence of a patient's records or communications" is testimony of a psychotherapist, or assistant to the same, or patient records that pertain to communications by a patient to a psychotherapist, or assistant to the same for the purposes of diagnosis or treatment of the patient's mental or emotional condition.

(c) Who may claim the privilege. The privilege may be claimed by the patient or the guardian or conservator of the patient. A person who may claim the privilege may authorize trial counsel or defense counsel to claim the privilege on his or her behalf. The psychotherapist or assistant to the psychotherapist who received the communication may claim the privilege on behalf of the patient. The authority of such a psychotherapist, assistant, guardian, or conservator to so assert the privilege is presumed in the absence of evidence to the contrary.

(d) Exceptions. There is no privilege under this rule:

(1) when the patient is dead;

(2) when the communication is evidence of spouse abuse, child abuse, or neglect or in a proceeding in which one spouse is charged with a crime against the person of the other spouse or a child of either spouse;

(3) when federal law, state law, or service regulation imposes a duty to report information contained in a communication;

(4) when a psychotherapist or assistant to a psychotherapist believes that a patient's mental or emotional condition makes the patient a danger to any person, including the patient;

(5) if the communication clearly contemplated the future commission of a fraud or crime or if the services of the psychotherapist are sought or obtained to enable or aid anyone to commit or plan to commit what the patient knew or reasonably should have known to be a crime or fraud;

(6) when necessary to ensure the safety and security of military personnel, military dependents, military property, classified information, or the accomplishment of a military mission;

(7) when an accused offers statements or other evidence concerning his mental condition in defense, extenuation, or mitigation, under circumstances not covered by R.C.M. 706 or Mil. R. Evid. 302. In such situations, the military judge may, upon motion, order disclosure of any statement made by the accused to a psychotherapist as may be necessary in the interests of justice; or

(8) when admission or disclosure of a communication is constitutionally required.

(e) Procedure to determine admissibility of patient records or communications.

(1) In any case in which the production or admission of records or communications of a patient other than the accused is a matter in dispute, a party may seek an interlocutory ruling by the military judge. In order to obtain such a ruling, the party shall:

(A) file a written motion at least 5 days prior to entry of pleas specifically describing the evidence and stating the purpose for which it is sought or offered, or objected to, unless the military judge, for good cause shown, requires a different time for filing or permits filing during trial; and

(B) serve the motion on the opposing party, the military judge and, if practical, notify the patient or the patient's guardian, conservator, or representative that the motion has been filed and that the patient has an opportunity to be heard as set forth in subparagraph (e)(2).

(2) Before ordering the production or admission of evidence of a patient's records or communication, the military judge shall conduct a hearing. Upon the motion of counsel for either party and upon good cause shown, the military judge may order the hearing closed. At the hearing, the parties may call witnesses, including the patient, and offer other relevant evidence. The patient shall be afforded a reasonable opportunity to attend the hearing and be heard at the patient's own expense unless the patient has been otherwise subpoenaed or ordered to appear at the hearing. However, the proceedings shall not be unduly delayed for this purpose. In a case before a court-martial composed of a military judge and members, the military judge shall conduct the hearing outside the presence of the members.

(3) The military judge shall examine the evidence or a proffer thereof in camera, if such examination is necessary to rule on the motion.

(4) To prevent unnecessary disclosure of evidence of a patient's records or communications, the military judge may issue protective orders or may admit only portions of the evidence.

(5) The motion, related papers, and the record of the hearing shall be sealed and shall remain under seal unless the military judge or an appellate court orders otherwise."

b. Mil. R. Evid. 611 is amended by inserting the following new subsection at the end:

(d) Remote live testimony of a child.

(1) In a case involving abuse of a child or domestic violence, the military judge shall, subject to the requirements of subsection (3) of this rule, allow a child victim or witness to testify from an area outside the courtroom as prescribed in R.C.M. 914A.

(2) The term "child" means a person who is under the age of 16 at the time of his or her testimony. The term "abuse of a child" means the physical or mental injury, sexual abuse or exploitation, or negligent treatment of a child. The term "exploitation" means child pornography or child prostitution. The term "negligent treatment" means the failure to provide, for reasons other than poverty, adequate food, clothing, shelter, or medical care so as to endanger seriously the physical health of the child. The term "domestic violence" means an offense that has as an element the use, attempted use, or threatened use of physical force against a person and is committed by a current or former spouse, parent, or guardian of the victim; by a person with whom the victim shares a child in common; by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian; or by a person similarly situated to a spouse, parent, or guardian of the victim.

(3) Remote live testimony will be used only where the military judge makes a finding on the record that a child is unable to testify in open court in the presence of the accused, for any of the following reasons:

(A) The child is unable to testify because of fear;

(B) There is substantial likelihood, established by expert testimony, that the child would suffer emotional trauma from testifying;

(C) The child suffers from a mental or other infirmity; or

(D) Conduct by an accused or defense counsel causes the child to be unable to continue testifying.

(4) Remote live testimony of a child shall not be utilized where the accused elects to absent himself from the courtroom in accordance with R.C.M. 804(c)."

Sec. 3. Part IV of the Manual for Courts-Martial, United States, is amended as follows:

a. Insert the following new paragraph after paragraph 100:

100a. Article 134?*(Reckless endangerment)

a. Text. See paragraph 60.

b. Elements.

(1) That the accused did engage in conduct;

(2) That the conduct was wrongful and reckless or wanton;

(3) That the conduct was likely to produce death or grievous bodily harm to another person; and

(4) That under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

c. Explanation.

(1) In general. This offense is intended to prohibit and therefore deter reckless or wanton conduct that wrongfully creates a substantial risk of death or serious injury to others.

(2) Wrongfulness. Conduct is wrongful when it is without legal justification or excuse.

(3) Recklessness. "Reckless" conduct is conduct that exhibits a culpable disregard of foreseeable consequences to others from the act or omission involved. The accused need not intentionally cause a resulting harm or know that his conduct is substantially certain to cause that result. The ultimate question is whether, under all the circumstances, the accused's conduct was of that heedless nature that made it actually or imminently dangerous to the rights or safety of others.

(4) Wantonness. "Wanton" includes "reckless," but may connote willfulness, or a disregard of probable consequences, and thus describe a more aggravated offense.

(5) Likely to produce. When the natural or probable consequence of particular conduct would be death or grievous bodily harm, it may be inferred that the conduct is "likely" to produce that result. See paragraph 54c(4)(a)(ii).

(6) Grievous bodily harm. "Grievous bodily harm" means serious bodily injury. It does not include minor injuries, such as a black eye or a bloody nose, but does include fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, and other serious bodily injuries.

(7) Death or injury not required. It is not necessary that death or grievous bodily harm be actually inflicted to prove reckless endangerment.

d. Lesser included offenses. None.

e. Maximum punishment. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 1 year.

f. Sample specification. In that _____ (personal jurisdiction data), did, (at/on board -- location)(subject-matter jurisdiction data, if required), on or about _____ 19__, wrongfully and recklessly engage in conduct, to wit: (he/she)(describe conduct) and that the accused's conduct was likely to cause death or serious bodily harm to _____."

Sec. 4. These amendments shall take effect on 1 November 1999, subject to the following:

a. The amendments made to Military Rule of Evidence 611, shall apply only in cases in which arraignment has been completed on or after 1 November 1999.

b. Military Rule of Evidence 513 shall only apply to communications made after 1 November 1999.

c. The amendments made to Rules for Courts-Martial 502, 804, and 914A shall only apply in cases in which arraignment has been completed on or after 1 November 1999.

d. The amendments made to Rules for Courts-Martial 1001(b)(4) and 1004(c)(7) shall only apply to offenses committed after 1 November 1999.

e. Nothing in these amendments shall be construed to make punishable any act done or omitted prior to 1 November 1999, which was not punishable when done or omitted.

f. The maximum punishment for an offense committed prior to 1 November 1999, shall not exceed the applicable maximum in effect at the time of the commission of such offense.

g. Nothing in these amendments shall be construed to invalidate any nonjudicial punishment proceeding, restraint, investigation, referral of charges, trial in which arraignment occurred, or other action begun prior to 1 November 1999, and any such nonjudicial punishment, restraint, investigation, referral of charges, trial, or other action may proceed in the same manner and with the same effect as if these amendments had not been prescribed.

WILLIAM J. CLINTON

THE WHITE HOUSE,
October 6, 1999.

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THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release

October 7, 1999

STATEMENT BY THE PRESIDENT

I have signed an executive order amending the Manual for Courts-Martial, which sets out procedures for criminal trials in the armed forces. The amendments make a number of desirable changes to modernize the rules of evidence that apply to court-martial proceedings and to take into account recent court decisions. These changes have been recommended by a committee of experts representing all the military services.

There are four principal changes. First, the new rules provide that evidence that a violent crime was a hate crime may be presented to the sentencing authority as an aggravating factor in the determination of the appropriate sentence. As in the case of laws that apply in civilian courts, this rule sends a strong message that violence based on hatred will not be tolerated. In particular, the rules provide that the sentencing authority may consider whether the offense was motivated by the victim's race, color, religion, national origin, ethnicity, gender, disability or sexual orientation.

Second, the rules provide special procedures for cases in which there are allegations of child abuse and children are called to testify. The new rules allow for televised testimony from a location other than the courtroom and provide for other special procedures to make it as easy as possible for children who are witnesses to testify completely and accurately. These provisions are similar to those applied in most civilian courts.

Third, the order adds a new evidentiary rule to court-martial proceedings providing that most statements to a psychotherapist are privileged. The purpose of this change is to encourage candid confidential communications between patients and mental health professionals. It is similar to a privilege that is recognized by the federal courts and courts of virtually all states. The privilege is not absolute and the exceptions make clear that communications must still be disclosed when

necessary for the safety and security of military personnel and in other compelling cases.

Finally, the new rules create the offense of reckless endangerment as an additional crime under the Uniform Code of Military Justice. This offense is similar to that found in most state codes.

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New York Times
October 7, 1999

Clinton Adds Stiffer Penalties To Military Code For Bias Crimes

By John M. Broder

WASHINGTON -- President Clinton on Wednesday signed an executive order amending the military criminal code to add stiffer penalties for crimes motivated by hatred based on the victim's race, religion, ethnicity or sexual orientation.

The order also creates a confidentiality privilege in criminal matters for service members' conversations with psychotherapists.

Both changes have long been pushed by advocates for gay and lesbian members of the military, who said that reports of violent crimes against gay service members had been rising and that they thought harsher penalties would be a deterrent.

Advocates for gay service members had also complained that therapists had been turning in gay and lesbian service members who sought counseling about their sexuality, resulting in their discharges from the military.

The effect of both provisions, which are amendments to the Pentagon's manual for courts-martial, is to improve incrementally the difficult climate for gay men and lesbians in the military. The psychotherapist privilege softens slightly the "don't ask, don't tell" policy to allow men and women to confide their homosexuality to a therapist in certain circumstances without risking immediate separation from the service.

But the new rule applies only to criminal proceedings and does not insure confidentiality in administrative actions, which are the ordinary mechanism for discharging acknowledged homosexuals from the military.

The Defense Department had recommended both changes after discussions with the Servicemembers Legal Defense Network, a Washington group that represents soldiers who are prosecuted or harassed because of their perceived sexual orientation.

C. Dixon Osburne, a founder of the network, called the establishment of the therapist privilege a "step forward that doesn't go nearly far enough."

Osburne said that although military psychotherapists were not required to alert commanders to a service member's statements of homosexuality many did.

"When you eliminate the safe space of the therapist, which as a civilian would be held in confidence, you create an environment that is deleterious to the military," Osburne said. "The limited privilege is a good first step, but does not address situations in the administrative system, only in the criminal system."

The hate-crimes sentencing provision comes in the wake of the slaying in July of an Army private at

Fort Campbell, Ky., because he was thought to be homosexual.

The soldier, Pfc. Barry Winchell, was beaten with a baseball bat. An Army private was charged in the attack.

The change in the courts-martial code was in process before the killing, a White House official involved in the policy said.

The official said stiffer penalties for crimes that were motivated by bias could serve as a deterrent against violence not only against gay service members, but also against racial and religious minorities and the disabled.

"This is something we have worked on for more than two years," Osburne said. "It is unfortunate it has to come in the wake of the murder of a soldier at Fort Campbell and escalating reports of harassment service-wide."