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Gays in the Military, 1993-1999 Part II [1]

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NATIONAL SECURITY COUNCIL
WASHINGTON, D.C. 20504

November 1, 1999

INFORMATION

MEMORANDUM FOR SAMUEL BERGER

FROM: HANS BINNENDIJK ^{HB}

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 and White House staff (Richard Socarides and Edward Correia). 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 criticism from conservative organizations, and that more might 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 (which may not be completely reliable) 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 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 engage in homosexual acts "create an unacceptable risk" and 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 tasked with implementing the policy and for those trying to live 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 RIGHTS ADVOCATES

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

- Increase training of Servicemembers on the policy, on harassment, and on the limits of gay investigations.
- Take additional steps to hold accountable those who inappropriately ask, pursue, or harass.
- 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 or inappropriately from use in administrative discharge boards.

A PRICE FOR FURTHER ACTION

An effort to strengthen the "don't ask, don't tell" policy by pursuing some or all of the above suggestions could prove extremely controversial, particularly with the Services and opponents of the policy on the Hill. One option is to set up an informal task force to consider more fully some of the suggestions made by rights activists. Legislative Affairs recommends that, at a minimum, we do nothing further on this issue until the Congress is out of session. Legal also recommends that you consult with the White House Counsel's office before taking action with respect to this policy.

Concurrences: NSC Legal; Legislative Affairs
in draft

REVISED 4-7-98 1pm

PENTAGON DON'T ASK / DON'T TELL REPORT

Background:

- The Pentagon will issue a report which shows a record number of discharges under the don't ask, don't tell policy. The report says this is because more service members are voluntarily "coming out."
- Secretary Cohen said yesterday that he believes the policy is working well.
- However, the report concedes that implementation of the policy "has posed a challenge to the services" and makes several recommendations which, if implemented, would curtail the ability of the military to pursue gay people in significant ways. These recommendations are consistent with the approach the gay groups have been calling for.

Talking Points:

- The report acknowledges that the policy has posed challenges to the Services and recommends several significant actions be taken to ensure that the policy is fairly implemented.
- Implicit in these recommendations is an acknowledgment that there is room for improvement and we applaud Secretary Cohen for his willingness to exercise the leadership required to see to it that this policy is fairly enforced.
- [If asked if the WH agrees with DOD's explanation for the increase in discharges]: I don't think you can generalize about such things. The important point is that clearly there is room for improvement in the implementation of the policy.

4-7-98

Socarides

6-1611

GAYS IN THE MILITARY

- The Administration's "don't ask, don't tell" policy is not only the right policy, but is greatly improved over the one it replaced:
 - It not only provides for more consistency within the Defense Department while maintaining high morale and unit cohesion which are so important for military readiness and effectiveness, but **it was also issued with the support of the Services and the Congress and has the force of law.**
 - It sets forth standards of military conduct that are consistent with traditional military practice and reflect the unique conditions of military service.

Q: Does the policy represent a failure to support your pledge to lift the ban on homosexuals in the military?

A: No, because no longer are individuals excluded from military service solely on the basis of their status. Rather, it ensures that American citizens who want to serve their country are able to do just that unless their conduct disqualifies them from doing so.

Q: Doesn't this policy still discriminate against homosexuals?

A: I believe that behavior can and should be strictly regulated in the military. The fact is that because of the requirement for maintaining good order and discipline, the rights of military personnel are necessarily more restricted than the rights of persons in civilian society.

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SUBJ: HOMOSEXUALS

1. THE PRESIDENT HAS ISSUED DIRECTIONS TO THE SECDEF RELATIVE TO HOMOSEXUALS IN THE MILITARY. THE TEXT OF THE WHITE HOUSE NEWS RELEASE FOLLOWS:

"THE PRESIDENT HAS DIRECTED THE SECRETARY OF DEFENSE TO CONDUCT A REVIEW OF THE CURRENT DEPARTMENT OF DEFENSE POLICY THAT EXCLUDES HOMOSEXUALS FROM MILITARY SERVICE AND PREPARE A DRAFT EXECUTIVE ORDER BASED UPON THAT REVIEW BY JULY 15, 1993.

CURRENT DEPARTMENT OF DEFENSE PERSONNEL POLICIES RELATED TO THIS ISSUE WILL REMAIN IN EFFECT AT LEAST THROUGH JULY 15, 1993 WHILE THE DEPARTMENT OF DEFENSE IS CONDUCTING THE REVIEW DIRECTED BY THE PRESIDENT, SUBJECT TO THE FOLLOWING GUIDANCE:

FIRST, QUESTIONS REGARDING SEXUAL ORIENTATION WILL BE REMOVED FROM FUTURE VERSIONS OF THE INDUCTION APPLICATION, AND WILL NOT BE ASKED IN THE INTERIM. THE BRIEFINGS ON MILITARY JUSTICE WHICH ALL RECRUITS ARE REQUIRED TO RECEIVE UPON ENTRY TO MILITARY SERVICE AND PERIODICALLY THEREAFTER UNDER ARTICLE 137 OF THE UNIFORM CODE OF MILITARY JUSTICE WILL INCLUDE A DETAILED EXPLANATION OF THE APPLICABLE LAWS AND REGULATIONS GOVERNING SEXUAL CONDUCT BY MEMBERS OF THE ARMED SERVICES.

SECOND, THE DEPARTMENT OF JUSTICE IS SEEKING CONTINUANCES IN PENDING COURT-CASES INVOLVING FORMER SERVICE MEMBERS WHO HAVE BEEN DISCHARGED ON THE BASIS OF HOMOSEXUALITY AND WHO ARE SEEKING REINSTATEMENT INTO MILITARY SERVICE. THE CONTINUANCES WOULD FREEZE THOSE CASES PENDING THE COMPLETION OF THE REVIEW DIRECTED BY THE PRESIDENT.

THIRD, COMMANDING OFFICERS WILL CONTINUE TO PROCESS CASES UNDER THE CURRENT CASES AND REGULATIONS RELATED TO HOMOSEXUALITY.

* CASES INVOLVING HOMOSEXUAL CONDUCT WILL BE PROCESSED THROUGH ACTUAL SEPARATION AND DISCHARGE IN ACCORDANCE WITH CURRENT POLICY.

* WHEN A CASE INVOLVES ONLY HOMOSEXUAL STATUS AND THE PERSON INVOLVED REQUESTS A DISCHARGE, THE PERSON WILL BE RELEASED FROM ACTIVE DUTY.

* CASES INVOLVING ACKNOWLEDGED HOMOSEXUAL STATUS BEING CONTESTED BY THE INDIVIDUAL WILL BE PROCESSED THROUGH ALL APPLICABLE STAGES, INCLUDING NOTICE OF THE BASIS FOR SEPARATION, HEARING BEFORE A BOARD OF OFFICERS, REVIEW OF THE BOARD'S RECOMMENDATIONS BY THE SEPARATION AUTHORITY, AND ACTION BY THE SEPARATION AUTHORITY TO DISCHARGE THE PERSON. IF DIRECTED BY THE ATTORNEY GENERAL, THE FINAL DISCHARGE IN THE CASES BASED ONLY ON STATUS WILL BE SUSPENDED UNTIL THE PRESIDENT ACTS ON THE RECOMMENDATIONS OF THE SECRETARY OF DEFENSE WITH RESPECT TO CURRENT POLICY. A MEMBER WHOSE DISCHARGE HAS BEEN SUSPENDED BY THE ATTORNEY GENERAL WILL BE SEPARATED FROM ACTIVE DUTY AND PLACED IN THE STANDBY RESERVE. INDIVIDUALS IN THE STANDBY RESERVE WOULD HAVE THE OPTION TO RETURN, UPON REQUEST, TO ACTIVE DUTY SHOULD THE CURRENT POLICY BE CHANGED. THOSE PERSONNEL WHOSE CASES HAVE NOT BEEN SUSPENDED WILL BE DISCHARGED.

* COMMANDING OFFICERS MAY, IN THE INTERESTS OF THE INDIVIDUAL OF THE UNIT CONCERNED, DIRECT CHANGES IN THE ASSIGNMENT OF PERSONNEL DURING THE COURSE OF SEPARATION PROCEEDINGS."

2. IT IS RECOGNIZED THAT THE PRESIDENT'S STATEMENT DOES NOT ANSWER ALL QUESTIONS WHICH MAY ARISE. IMPLEMENTING POLICY GUIDANCE IS BEING DEVELOPED BY OSD. AS SOON AS I HAVE ADDITIONAL GUIDANCE, I WILL GET IT TO YOU. IN THE MEANTIME, USE YOUR BEST JUDGEMENT AND EXPERIENCE TO DEAL WITH CASES WHICH ARISE.

3. SULLIVAN.

4. THIS MESSAGE EXPIRES 15 JUL 93.

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Keith

Statement for Release

Senator Sam Nunn

Chairman, Senate Armed Services Committee

July 19, 1993

Presidential Announcement of Policy Concerning
Service of Gay Men and Lesbians
in the Armed Forces

The President today announced his policy concerning the service of gay men and lesbians in the Armed Forces. My initial reaction is positive because the policy appears to set forth standards of military conduct that are consistent with traditional military practice and the interim policy which President Clinton announced on January 28, 1993.

I want to make sure, however, that the Armed Services Committee has a clear understanding of the basic policy, procedures, and guidelines. I intend to reserve my final judgment until the Committee has had the opportunity to review the details of the proposal and until the Committee receives testimony from Department of Defense officials.

I know that this has been a challenging issue for the President. He has deeply held views on the need to provide opportunities for all individuals to serve our Nation to the best of their capacity. The policy announced by the President and agreed to by the Secretary of Defense also reflects an appreciation for the unique conditions of military service, and for the fact that the rights of military personnel are necessarily different from the rights of persons in civilian society.

A detailed review of the policy issued today by the President undoubtedly will lead to a number of questions concerning interpretation and implementation. The Armed Services Committee will conduct a hearing on the President's announced policy on Tuesday, July 20, 1993, at 11:00 a.m. in Room 1000 of the Dirksen Senate Office Building. At that time, we will hear from the Secretary of Defense and the Joint Chiefs of Staff.

The Committee will accept written testimony from any individual or group wishing to submit matter for our consideration during Committee markup, Senate floor debate, or conference on the National Defense Authorization Act for Fiscal Year 1994.

PHOTOCOPY
PRESERVATION

Review of DOD's Implementation of the "don't ask, don't tell" Homosexuals in the Military Policy

D. Brian Peterman

This paper provides information on DOD's implementation of the "don't ask, don't tell" homosexuals in the military policy and offers recommendations on ways implementation can be improved. Information for this review came from DOD published reports, interviews with Rudy de Leon (Undersecretary of Defense for Personnel and Readiness), discussions with Richard Sacarides and Edward Correia of the White House staff, and information from the Servicemembers Legal Defense Network (SLDN), a private watchdog group. The topic is very complex and this paper is not intended to be a thorough legal brief. It is intended to briefly inform and offer suggestions.

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.

Comparison of Policy Recommendations and DOD Directives

1997 DOD Guidelines "Dorn memo"	1988 DOD Recommendations	1999 SLDN Recommendations	August 1999 DOD Policy Directives
	The "Dorn memo" should be reissued and widely distributed to the field.	Distribute the "Dorn memo" on anti-gay harassment and lesbian-baiting. The Services should move swiftly to get this guidance to everyone and conduct comprehensive training to prevent anti-gay harassment.	The "Dorn memo" was reissued. Directive requires that info be disseminated to all levels of command and is made part of the training program for law enforcement personnel, commanders, supervisors and entry level training.
Report of harassment is not cause to investigate person being harassed. Prompt investigation should be initiated into the harassment. Investigator should not solicit info on the sexual orientation of the harassed member.	DOD should issue guidance clarifying that consultation with higher HQ legal offices is recommended before initiating investigations into alleged homosexual conduct.	Military leaders should issue guidance on the policy's investigative limits and its intent to respect service members privacy; a major reason for violations is lack of knowledge of the rules.	Requires installation level staff judge advocates consult with senior legal officers at higher HQ prior to the initiation of an investigation into alleged homosexual conduct.
	The Service Inspectors General should make training of those charged with implementing the homosexual conduct policy a specific item of interest for inspection.	Train all service members on the limits to gay investigations.	Requires Service Inspectors General include as an item of interest the training of those charged with application and enforcement of the policy on homosexual conduct- i.e. commanders, attorneys and investigators.

Comparison of Policy Recommendations and DOD Directives

1997 DOD Guidelines "Dorn memo"	1988 DOD Recommendations	1999 SLDN Recommendations	August 1999 DOD Policy Directives
Directs commanders to hold accountable those that make threats or engage in threatening conduct.	When reissuing the "Dorn memo", make clear that harassment based on alleged or presumed sexual orientation is unacceptable and those that engage in such harassment will be held accountable.	Hold accountable those who ask, pursue or harass.	Statement by SECDEF at release, "I've made it clear there is no room for harassment or threats in the military." Actions will show if those breaking policy will be held accountable.
		Provide recourse to service members to stop improper investigations.	
		Require commanders to state in writing reasons for an investigation.	
	Found only one case where a doctor may have reported to a commander that one of his patients was a homosexual w/out the patient's permission.	Adopt rule of privacy for conversations with health care providers.	MCM changed by E.O. to establish a limited patient/client relationship w/ mental health care providers under limited circumstances in punitive cases.
	Issue guidance that pretrial agreements should generally not be used to obtain information on consensual sexual conduct.	Cease use of heavy-handed tactics in gay investigations.	
		Adopt an exclusionary rule so that evidence obtained illegally, as in a witch hunt, can be excluded at administrative discharge boards.	

Comparison of Policy Recommendations and DOD Directives

1997 DOD Guidelines "Dorn memo"	1988 DOD Recommendations	1999 SLDN Recommendations	August 1999 DOD Policy Directives
		Appoint a panel of experts to review the administrative separation process.	
	Issue guidance that commanders must obtain prior authorization from their Service Secretary for investigations in "coming out" cases if the investigation will involve anything other than asking questions of the service member or individuals whom the member names for purpose of corroboration.		Initiation of any 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 MilDep secretarial level.

Is the "don't ask, don't tell" policy for homosexuals in the military being fairly and effectively implemented by DOD?

- I. Introduction- A brief history of the policy
- II. Legal background- 10 USC 37, Sec.654. "Policy Concerning Homosexuality in the Armed Forces"
- III. DOD implementation of the statute-
 - A. UCMJ
 - B. DOD Directives
 - C. Policy Statements
 - D. **Statistics and Trends**
 - E. Policy Reviews
- IV. Positions of policy critics
 - A. Servicemembers Legal Defense Network
 - B. The Press
 - C. Other (Books, magazine articles, etc)
- V. Analysis and conclusions

Are CDRs doing inappropriate investigations

- DOD IG: any reports of complaints
- Self-proclaimed vs investigated.
- SLON (complaints: types for intel units)

- Trends for dismissal of homosexuals? Up or down? Reason?
- # of homosexuals who entered military + circumstances behind discharges
- Trend toward discharging those w/ unreported proclivities?
- Have mil officials become more intensely opposed in the last 5 years?
- How has the policy affected recent well publicized cases; i.e. Ft Campbell killing?
- What are military's arguments for opposing gays?
- No problems for unit cohesion in other countries that allow gays (check for gay harassment problems there?)

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.

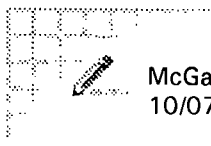
There is a fairly large body of published reports providing commentary on DOD's implementation of the "don't ask, don't tell" policy. One commentator observed that the "don't ask" part of the policy is not supported by the 1993 law and could therefore end with this Administration. This could leave service 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.



McGavock D. Reed
10/07/99 10:28:19 AM

Record Type: Record

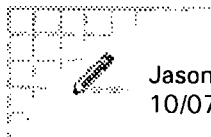
To: Charles Allen/NSC/EOP@EOP, Betsy Pimentel/NSC/EOP@EOP, James R. Fallin/NSC/EOP@EOP

cc:

Subject: Executive Order: Manual for Courts-Martial

hucj, Betsy, and Jim, Attached is the Courts-Martial order. Thank You, Mac

----- Forwarded by McGavock D. Reed/OMB/EOP on 10/07/99 10:25 AM -----



Jason H. Schechter
10/07/99 10:15:27 AM

Record Type: Record

To: See the distribution list at the bottom of this message

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Subject: Executive Order: Manual for Courts-Martial

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release

October 7, 1999

EXECUTIVE ORDER

- - - - -

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.

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(OVER)

(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

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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.

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(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 psycho-therapist 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.

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(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.

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(OVER)

(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.

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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.

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(OVER)

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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Message Sent To: _____

Los Angeles Times
October 13, 1999

Air Force Allowing Gays To Recant

Military: After a high rate of forced departures at Lackland base, officials are now permitting recruits to take back their statements on homosexuality.

By Paul Richter, Times Staff Writer

WASHINGTON--The Air Force has adopted a new approach to handling declarations of homosexuality that appears to be reversing a five-year surge in discharges of gay recruits.

Alarmed about a high rate of forced departures at the service's basic training center at Lackland Air Force Base in Texas, Air Force officials have begun permitting recruits to recant statements that they are homosexual.

Under the "don't ask, don't tell" policy adopted five years ago, recruits who publicly declare themselves to be gay must leave the service, while homosexuals who keep their orientation concealed may continue their careers.

Now, under a procedure put into effect in March, Air Force recruits may take back statements that they are gay as long as they do so within a few days of declaring their homosexuality.

They are also given an opportunity to explore the details of the "don't ask" policy with Air Force lawyers in confidential discussions that cannot legally be used against them. Air Force officials are then giving them a few more days to reconsider their statements before beginning formal discharge procedures.

The change grows out of concern that some recruits might be declaring they are homosexual because of misunderstandings about the "don't ask" policy and in response to the stresses of basic training.

In the first seven months since the new approach was adopted, the number of discharges of Lackland recruits went from 195 to 31.

The change is dramatic, said Jim Wolffe, special assistant to Air Force Secretary F. Whitten Peters. Now, "almost no one is being discharged for being gay at Lackland."

The Air Force has had a higher rate of such discharges than the other services because of the relatively large number of cases at Lackland.

The number of discharges for homosexuality from other Air Force bases has been flat or declining since the "don't ask" policy was instituted in November 1994, officials said.

Wolffe insisted that the changes at Lackland are procedural in nature and are consistent with the restrictions contained in the "don't ask" policy.

"There's no intention of having openly gay people serve at Lackland, or anywhere in the Air Force,"

he said.

He said that recruits are allowed to recant only in circumstances where they have made statements in private settings to individual training instructors or officers. The policy is not meant to apply to cases where recruits have made their declarations in a more public way--by holding hands with a member of the same sex, for example.

Officials of Service Members Legal Defense Fund, a gay-rights advocacy group in Washington, praised the initiative.

"This process appears to be a genuine effort to reduce the number of gay discharges," the group said in a letter sent Monday to Secretary Peters.

At the same time, the group said that it had found in a study of Lackland several shortcomings that could explain the training base's high numbers of discharges.

It faulted the base, which handles 30,000 recruits a year, for failing to explain the "don't ask" policy fully, allowing harassment of recruits for supposed homosexuality, neglecting to provide safe ways to resolve problems arising from the policy and for fashioning a system that had resulted in "virtually automatic discharges."

The new changes may come under critical scrutiny on Capitol Hill.

Rep. Stephen E. Buyer (R-Ind.), chairman of the House Armed Services personnel subcommittee, said that he will withhold judgment on the changes while he awaits an Air Force briefing.

But he said he is "almost dumbfounded" that the Air Force seems to be counseling recruits who say they are gay to lie subsequently about their orientation "so that the discharge numbers look better in the eyes of the gay community."

News of the Air Force's policy change comes as the Clinton administration is making several moves to improve the treatment of gays in the military.

Amid an outcry over the murder of a soldier in Kentucky believed to be gay, the Pentagon is instituting new procedures that place additional restrictions on investigations of suspected gay service members.

Only this month, President Clinton signed an executive order amending the military criminal code to add stiffer penalties to crimes motivated by hatred caused by the victim's sexual orientation, race, religion or ethnicity.

'Don't ask, don't tell' has become a

JANET E. HALLEY

We finally have reforms in the implementation of the compromise "don't ask, don't tell, don't pursue" policy meant to settle the issue of gays in the military. But the Clinton administration regulations continue to make the policy worse even than the statute adopted by Congress. Recent events implicitly confirm what critics have said all along: This policy is no compromise. It's outright anti-gay. Much of that can't be fixed without the cooperation of Congress. But any future president could take the following steps toward fairness without seeking new legislation:

- Restore "don't ask." This part of the supposed compromise never made it into the statute or the Clinton administration's implementing regulations. It appears only in informal "guidelines," where it is always coupled with a warning that it is unenforceable chit-chat. The new directives don't change that. Commanders can still ask service members whether they are gay whenever they please. "Don't ask" should be mandated and backed up with procedures for its enforcement.

- Narrow the grounds for discharging people. The

statute says that commanders must process service members for discharge if they "tell" or if they engage in bodily contacts that "manifest a propensity" to engage in same-sex erotic acts. But Clinton administration regulations still go way beyond that, requiring commanders to start proceedings against service members who have engaged in conduct that manifests a propensity.

Various military enforcers have decided that this could include having a gay friend, cutting your hair a certain way, or objecting to the "don't ask, don't tell" policy. This is a viciously antigay rule, allowing for arbitrary, even imaginary charges, and the new guidelines do nothing to alter it. The new president should stipulate that proceedings cannot begin without corroborated evidence of specifically sexual contact.

- Allow service members to challenge commanders' decisions to initiate discharge proceedings. Clinton administration regulations still allow commanders to decide unilaterally what conduct properly triggers discharge proceedings. If your commander thinks that you've manifested a propensity - bang! - you're in discharge

**Clinton co
but he**

vicious policy, here's how to fix it

proceedings, and you must be kicked out of the military unless you prove you have no propensity. You have no way of challenging that triggering decision. Commanders can be as arbitrary as they like. This is tyranny, not law. Service members should have standing to challenge every element of the case against them.

■ Reinstate "don't pursue." The new directives purport to limit investigations, but really they just clarify

**uld do it,
hasn't.**

who decides: commanders. Nor is it new to say they can consult top military lawyers. And we know what advice they will get. Navy lawyers have urged commanders to investigate a service member who has merely

come out as gay until they find evidence of same-sex acts. In one memo, Air Force lawyers advised that if investigators stumble on evidence implicating other service members, so much the better; commanders should "be creative" about how to run a witch hunt. The Marines' top lawyers have allowed commanders to hold suspected service members for up to 10 days without providing them with access to legal advice. It's time for substantive, not merely procedural, "don't pursue" rules.

■ Stop pretending that the policy is a good one. The Clinton administration has repeatedly misled the public and courts about "don't ask, don't tell." It pretends that the policy punishes service members "not for who they are but for what they do." The new directives hide ~~and~~ behind this tired old fig leaf yet again. But homosexual identity — not homosexual acts — really is the crucible to sue at every procedural moment.

The Clinton administration has further misled the public by avoiding formal promulgation of its implementing regulations. It has ducked the Administrative Procedure Act's public notice and comment period and its due process rules. Thus the regulations remain unpublished and few people know what they are or even how to find out. The regulations should undergo the rigors of the Administrative Procedures Act.

President Clinton wanted to end discrimination in the armed forces, but he has instead presided over the institutionalization of antigay animus. Many of the really bad things about "don't ask, don't tell" come not from the congressional statute but from his implementation of it. A new president can undo his mistakes.

Janet E. Halley is the author of "Don't: A Reader's Guide to the Military's Anti-Gay Policy."

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Article (09/28/1999) European Court Tells British To Let Gay Soldiers Serve

- LONDON -- *The European Court of Human Rights declared Monday that Britain's longstanding ban on **homosexuals** in the **military** was a violation of the basic human right to privacy.*

- ... *Britain will almost certainly be forced to allow openly gay men and women into the **military** for the first time, human-rights lawyers said. ...*

- ... *people who took their case to the European court after they were discharged from the **military** when their **homosexuality** was discovered. ...*

- ... *The Defense Ministry, which responded to the legalization of **homosexuality** in Britain some 30 years ago by forbidding gay men and lesbians to serve in the armed forces, said that as a result of the ruling, it would halt pending disciplinary cases involving **military** personnel suspected of being gay. But beyond that, it said the government would have to...*

- ... *Since the ban on **homosexuals** in the **military** was put into effect, at least 600 gay men and lesbians, by official count -- but...*

Article (09/27/1999) European Court To Rule Against MoD On Gays

- ... *Four former members of the Armed Forces who were dismissed for being **homosexual** are expected to win a landmark ruling by a European court today that the Ministry...*

- ... *manner in which they were dismissed, particularly the way they were explicitly questioned by the **military** police about their sexual practices, was a breach of individual privacy. ...*

- ... *All four were investigated when the services still had a policy of regarding **homosexuality** as a disciplinary offence requiring rigorous investigation by the **military** police. Since 1994 all such cases have been regarded as an administrative matter and dealt with more discreetly by commanding officers, although if suspected **homosexuals** refuse to own up about their sexual orientation they still face further inquiries. But the MoD said that the **military** police were brought in only if there had been a suspected criminal offence, such as...*

- ... *The European court is expected to rule that the **military** police investigation of the four contravened several articles of the European Convention on Human Rights...*

Article (09/07/1999) Feeling The Draft

- ... *Al Gore has announced his solution for the readiness problems in our **military**: a kinder, gentler "don't ask, don't tell" policy for **homosexuals** and lesbians. The vice president proffers this remarkable solution to the services' recruiting and ...*

- ... *"I don't think the changes in **military** policy are working the way they were intended to work," says Mr. Gore. Expressing concern for the 1,149 service members who were*

discharged last year for **homosexual** activity, Mr. Gore says he would like "to change that by working with **military** leaders to bring about an implementation of a strategy that's fairer." ...
 - ... tell." Then it was an increase in mixed-gender training and the dramatic expansion in "**Military** Occupational Specialties" open to women. Finally it was the extravagant deployment of an ever-smaller...

Article (09/03/1999) **At Unease**

- *At Unease: Don't: A Reader's Guide To The **Military's** Anti-Gay Policy* By Janet E. Halley
- *Don't: A Reader's Guide To The **Military's** Anti-Gay Policy*
- ... ask, don't tell" policy, Gorelick was asked to explain how someone alleged to be **homosexual** could establish that she was not, in fact, **homosexual**. Gorelick answered with an example: "In one instance a woman was alleged to have said...
- ... At that moment in the House hearings, you might suppose that the ban on **homosexuals** in the **military** would be in serious trouble. Is it really possible to imagine a trial in which a member of the American **military** has to defend herself against a charge of lesbianism by asking former boyfriends to testify on her behalf? What would the boyfriends be expected to say? Would they be subject to cross-examination? If the issue is whether the defendant is really **homosexual**, what particular questions might be asked, by way of resolving that contested issue? Surely--you...

Article (09/02/1999) **Military Service Is Not A Right**

- ***Military Service Is Not A Right** -- (Letter)*
- ***Military Service Is Not A Right***
- ... To the Editor: "Bigotry in the **Military**" (editorial, Aug. 30) correctly labels the **military's** policy on gay soldiers as discriminatory. There's no constitutional right to serve in the **military**, and the statutory **homosexual** ban is based on **military** necessity to maintain good order and discipline. For readiness reasons, the **military** also discriminates on the basis of such attributes as age, education, family status, physical fitness...

Article (09/01/1999) **Bringing 'Don't Ask' Up To Date**

- ... clarity to Congress' controversial "don't ask, don't tell, don't pursue" policy on **homosexuals** in the **military**. ...
- ... been easy for commanders to implement a policy that in some ways contradicts itself. The **military's** ban on openly gay uniformed personnel still stands, but those who do not voluntarily reveal their sexuality have a right under the "don't ask" policy to be protected from questioning, harassment or investigative probes about it. Confusion over what that means in day-to-day **military** life has left many gay soldiers worse off than before. ...
- ... questioned, according to Servicemembers Legal Defense Network, an advocate for gays and lesbians in the **military** which negotiated the new changes with Pentagon officials. ...
- ... those incidents that do occur. It requires high-level reviews of all investigations of alleged **homosexual** activities and mandatory training on anti-harassment guidelines for all troops, beginning with boot camp...

Article (08/30/1999) **To Some, 'Don't Ask, Don't Tell, Don't Pursue' Means, 'Do Harass, Do Ridicule, Do Act Violently'**

- ... the "don't ask, don't tell, don't pursue" policy on gays in the **military** is not working is an understatement. As the murder of a gay soldier last month in Fort Campbell, Ky., makes perfectly clear, **military** service can be outright deadly for gays. ...

- ... the first known incident of a hate crime based on sexual orientation at a US **military** base. ...
- But incidents of harassment, ridicule, and even violence are not so out of the ordinary in the **military's** culture of hostility toward gays. Consider these examples:
- ... During the last five years, staff attorneys at SLDN have helped more than 1,800 **military** personnel. Some of their clients have reported verbal gay bashing and threats on a daily...

Article (08/30/1999) Gore Touts Policy Of 'Compassion' For Gays In Military Advocates fairer 'don't ask, don't tell'

- Gore Touts Policy Of 'Compassion' For Gays In **Military**
- ... Vice President Al Gore says he would pressure the **military** to implement President Clinton's "don't ask, don't tell" policy "with more compassion" because too many **homosexuals** are being discharged. ...
- ... "I don't think the changes in the **military** policy are working the way they were intended to work," Mr. Gore said in the...
- "I would try to change that by working with **military** leaders to bring about an implementation strategy that's fairer."

Article (08/26/1999) Army May Discharge A Gay Lawmaker

- ... unusual investigations under the Clinton Administration's "don't ask, don't tell" policy toward **homosexuals** in the **military**. ...
- ... asking applicants about their sexual orientation, and commanders are forbidden to undertake investigations of suspected **homosexuality** unless there is significant evidence of **homosexual** conduct. ...
- ... On the other hand, **homosexuals** are forbidden to disclose their orientation in a public setting; indeed, their doing so is considered evidence of at least an intent to engage in **homosexual** acts. ...
- ... the fact that he was officially told he was under investigation and confronted by a **military** legal officer right after a three-day exercise earlier this month in Flagstaff. That meeting...
- ... to make sure the nation is aware of the dangers this policy creates for our **military** preparedness." ...

Article (08/24/1999) 'Don't Ask, Don't Tell' Change Has Few Fans

- A supposed clarification of the "don't ask, don't tell" policy on **military** service by **homosexuals** has bridged the gap between supporters and opponents of gay rights.
- ... Robert L. Maginnis, head of **military** affairs for the conservative Family Research Council, staunchly opposes any directive suggesting the **military's** gay ban is weakening. And he sees little to fear in the new directive...
- The new guidelines address two areas: the education of troops and investigations into suspected **homosexual** conduct.
- ... change was less important. Before 1994, investigations into the possibility a service member was a **homosexual** could have started based on rumors, he said. The 1994 regulations that implemented the congressionally...

Article (08/23/1999) Despite Reforms, 'Don't Ask, Don't Tell' Continues To Be Anti-Gay Military: The Way It Is Administered Just Makes Things Worse. The Next President Must Address The Failures.

- **Military: The Way It Is Administered Just Makes Things Worse. The Next President Must Address The Failures.**

- ... 't tell, don't pursue" policy meant to settle the issue of gays in the **military**. But the Clinton administration regulations continue to make the policy much worse even than the...

- ... start proceedings against service members who have engaged in conduct that manifests a propensity. Various **military** enforcers have decided that this could include having a gay friend, cutting your hair a...

- ... propensity--bang!--you're in discharge proceedings, and you must be kicked out of the **military** unless you prove you have no propensity. You have no way of challenging that triggering...

- ... just clarify who decides: commanders. Nor is it new to say they can consult top **military** lawyers. And we know what advice they will get. Navy lawyers have urged commanders to...

Article (08/18/1999) **'Don't Ask, Don't Tell' Reveals More Flaws**

- ... "policy is more proof that trying to compromise on the issue of gays in the **military** does not work. ...

- ... 't ask, don't tell" purportedly continues the long tradition of barring gays from the **military**, but those who do not discuss their sexuality may remain. Officers are barred from asking...

- ... the mess. He promised during the 1992 campaign to end discrimination against gays in the **military**, then backed off under pressure from Congress and agreed to the unworkable "don't ask..."

- ... all personnel, beginning in boot camp. Commanders also will be required to consult with senior **military** lawyers before opening an investigation of a person's sexual orientation to make sure that...

- ... As anecdote after anecdote shows, many **homosexual** men and women are valiantly serving their country, often in extraordinarily heroic ways. They should...

Article (08/18/1999) **Don't Ask, Don't Tell, Don't Think**

- ... THERE IS a big problem with the **military's** new anti-gay harassment guidelines, announced last week, to stop physical and verbal abuse against **homosexuals** in the **military**. The guidelines are seen as a response to the beating death last month of Army...

- ... an end to recruiters' and commanding officers' questions about sexual orientation, but also allows the **military** to discharge soldiers who say they are gay or engage in **homosexual** activity. The new guidelines mandate instruction during recruitment training and periodically thereafter, that would drill into the troops the news that harassment of **homosexuals** in the **military** is forbidden. The guidelines also call for special training for judges, lawyers and commanding officers...

Article (08/16/1999) **Navy Puts Catholic Group Out Of Chapel A**

chapter of the Knights of Columbus is displaced because it "discriminates."

- ... Knights of Columbus is restricted to Catholic men, I cannot permit you to operate" on **military** facilities, Capt. Jerome told Alexander Pitre Sr. in a letter. ...

- In 1995, the Supreme Court upheld the right of the Hibernians to exclude **homosexual** contingents from the parade.

- ...-duty personnel and their dependents and retirees and their dependents - in other words, card-carrying **military** members," the Navy official said. ...

Article (08/16/1999) **MONDAY, August 16, 1999**

- ... **ATTACK TAIWAN**. China has given the United States no indication it is about to take **military** action against Taiwan, according to the National Security Council spokesman. Elizabeth Farnsworth, PBS; Bob Schieffer...

- ... Friday updated it's "don't ask, don't tell" policy for gays in the **military**, to include sensitivity training for all troops. Elizabeth Farnsworth, PBS; Kevin Newman, ABC; Bob Schieffer...

- ... **NORTH KOREA SPENDING ON MILITARY INSTEAD OF FOOD**. Despite food aid from around the world, children in North Korea are...

- ... **MILITARY CONFLICT IN CHECHNYA INTENSIFYING**. Russia's new prime minister warned rebels in Chechnya Saturday they...

- ...; **ELIZABETH FARNSWORTH**. China has given the United States no indication it is about to take **military** action against Taiwan. According to National Security Council Spokesman David Leavy. He responded to reports...

Article (08/16/1999) **Soldiers' Stories**

- One soldier is dead, and another is about to be kicked out of the **military**. And I'm trying hard not to overdramatize the connection between the two.

- ..., was premeditated murder -- and likely a "hate crime" as well. Winchell was believed to be **homosexual**, and Pvt. Calvin Glover, the Fort Campbell, Ky., colleague charged with beating him to death...

- ... subject of an investigation that could result in a less-than-honorable discharge from the **military**. The offense? He violated the "don't ask, don't tell" rule that allows **homosexuals** to remain in the service so long as they don't publicly disclose their **homosexuality**; the **military** is forbidden to ask about their sexual orientation. ...

- ... And that, May believes, was Winchell's undoing. "The **military** as an institution teaches that gay people are unfit for **military** service." Isn't it likely, he wondered, that that institutional attitude filters down to people...

Article (08/16/1999) **Revised Rules On Gays In Military Displease Gay Rights Advocates**

- Revised Rules On Gays In **Military** Displease Gay Rights Advocates

- ... first major revision of guidelines for its "don't ask, don't tell" policy on **homosexuals** in the **military**, including a new requirement that commanders seek approval from senior civilian officials at the Pentagon...

- ... guidelines, the Pentagon ordered that commanders institute anti-harassment training at all levels of the **military**, beginning with basic training, and that low-level **military** lawyers consult with senior lawyers before opening an investigation of anyone suspected of being gay...

Article (08/11/1999) **Hate May Have Triggered Fatal Barracks Beating Slain Soldier Had Been Taunted on Base as Secret Emerged About His Sexuality**

- ... **FORT CAMPBELL, Ky., Aug. 10** – Pfc. Barry Winchell enjoyed being a soldier. He studied **military** manuals, relished the physical training. He was so accurate at firing a .50-caliber machine...

- ... would be the first known case of a soldier being killed at a U.S. **military** base because of his sexual preference in the five years since a new federal policy was adopted

toward gays in the **military**. ...

- ... - the Winchell case illustrates the deep-seated prejudices that continue to plague gays in the **military**. It also has placed the Army and Fort Campbell, home of the celebrated 101st Airborne...

- ... at Fort Campbell, which sprawls across the Kentucky-Tennessee border and has nearly 24,000 **military** personnel, have had little comment about the slaying. Maj. Pamela Hart, a spokeswoman for the...

Article (08/10/1999) **TUESDAY, August 10, 1999**

- ... **HATE CRIME ON MILITARY BASE**. An In Depth report on the murder of Private Barry Winchell, who was murdered in his barracks at Fort Campbell, possibly because he was a **homosexual**. Tom Brokaw, Lisa Meyers, NBC. ...

- Hate Crime on **Military** Base

- ... News In Depth tonight, and NBC News investigation. A soldier, a member of an elite **military** unit murdered in his barracks. The chief suspect, a fellow soldier. Soldier-on-soldier homicides are relatively rare. There are more than 460,000 men and women in the U.S. Army, and over the past five years, 39 soldiers were murdered in cases where the main suspect was another soldier. But tonight, new details about a brutal killing on a **military** base and what makes this especially shocking. Could be a hate crime. A caution, some...

Article (07/23/1999) **Disclaimer**

- ... message, put out by Tricare, the armed forces health care provider, stirred objections from some **military** people, who did not like its **homosexual** advocacy. They also said the message was inconsistent with the **military's** ban on open **homosexuality** in the ranks and presented contested theories as fact. ...

- The disclaimer states: "No health consumer information provided through the advice line takes precedence over established Department of Defense or **military** department policies."

Article (07/13/1999) **Military Adjusts To 'Don't Ask, Don't Tell'** In six years, views have softened toward homosexuality, but some still report bias. Still, Lieutenant Colonel Kruger doesn't agree with the views of his young soldiers and is uncomfortable with the homosexual lifestyle. He espouses the traditional military view that homosexuality is incompatible with the...

- **Military Adjusts To 'Don't Ask, Don't Tell'**

- ... once was for men and women in uniform. Citing an end to "witch hunts" for **homosexuals** and a new era of tolerance, **military** services believe the policy works. ...

- ... different beliefs," says Col. Robert Swann, chief legal officer at the Fort Jackson, S.C., **military** base. "All that the 'don't ask, don't tell' policy did was codify our..."

- ... Indeed, the softer attitude toward **homosexuality** extends into the rank and file at Fort Jackson. At a dining hall here, Sgt. 1st Class James Ruesch says it doesn't bother him if someone is **homosexual** "if they do their job. [But] if you start acting out, it's a problem..."

Article (06/15/1999) **A Pale Shadow Of Its Soviet Predecessor**

- ... In 1985, the Soviet **military** was the largest in the world and arguably the strongest. Six years later it was...

- ... How did this happen? How could such a powerful **military** collapse so quickly, without a war, resorting only to bitter outcries in the media against its domestic critics? The

short answer is "Gorbachev." Deep cuts in the **military** were, in his view, the only way to save the Soviet economy. Accordingly, he cornered the **military** and imposed huge reductions that it opposed. ...

- ... While succeeding in this effort, Gorbachev failed to realize that the **military** was the linchpin holding together about 100 national minorities, many with their own union or...

Article (05/07/1999) **Truth Also A Victim In Navy's Tragedy Report**

- ..., the official explanation sounded simple: A disgruntled young seaman, apparently acting to settle a thwarted **homosexual** affair on board, had sabotaged the guns. That seaman, Clayton Hartwig, had died on board...

- ... the family and friends of Hartwig. The Navy portrayed him as a poorly trained, vindictive **homosexual**. In fact, he was almost certainly none of those things. Thompson criticizes many journalists for...

- ... human sources with details picked up from previously secret documents. His own understanding of the **military**, supplemented by the knowledge of Navy and civilian experts appalled by the cover-up, leads to lengthy but clear explanations of the ship's operations. His research in **military** archives placed the operations of the USS Iowa in historical perspective. ...

Article (03/26/1999) **'Who Will Defend The Defenders?'**

- ... culture of drugs and Mafia-type corruption. These commentaries show the disintegration of the awesome **military** power wielded by what used to be the Soviet Union. Other, more sober accounts tend to focus on the logistical nightmare following Russia's large-scale redeployments in the 1990s. As its forces withdrew from Poland, Germany and the Baltic States, Russia had to absorb large numbers of often depleted or fragmented **military** formations. This was made especially difficult by Russia's lack of adequate barracks, training grounds...

- ... enemy has had on Western armed forces. Perhaps that's understandable. With a weakened Russian **military**, the post Cold War, East-West strategic situation is markedly less dramatic and, from a Western perspective, relatively easy to manage. Also, Western **military** establishments have not been subjected to the same logistical and organizational problems as those faced by the forces of the former Warsaw Pact. Western forces are, however, confronted by problems of a different kind--social and cultural problems that are eating away at both morale and effectiveness. A recent study published by the Social Affairs Unit in England ("Not Fit To Fight," 80 pages) identifies this new threat as coming not from outside aggression, but from within. Following the Cold War's end, American and British armed forces have gradually been falling victim to the political and social currents of the day. According to the study, "if certain secular developments are forced on the necessarily different world of the **military**, then the forces will not be fit to fight." ...

Article (03/19/1999) **Soviet Military Hits Skids Retired U.S. Army general offers an incisive history "Does this," Odom asks, "give you some sense of the milieu?"**

- Soviet **Military Hits Skids**

- The Collapse Of The Soviet **Military**

- ... director of the National Security Agency, is the author of *The Collapse of the Soviet Military* (Yale University Press, \$35), a meticulously researched account of how the once-mighty Soviet armed...

- ... The book will be of most interest to professional historians and **military** specialists. Early chapters especially, where Odom lays out the structure and philosophy of the Soviet **military**, will be heavy sledding for the general reader. ...

Article (03/18/1999) Military's Gays Speak Out 'Don't ask, don't tell' policy is criticized

- **Military's Gays Speak Out**
- ... Melnick was one of a handful of former **military** personnel asked to tell their story Monday at the National Press Club in Washington, D...
- ... The policy was adopted by the **military** shortly after Clinton became president. Under the policy, the **military** is not to ask **military** personnel what their sexual orientation is and **military** personnel should not volunteer their sexual orientation. Persons who have been discovered engaged in **homosexual** conduct are discharged from the **military**. ...

Article (03/16/1999) Military Still Said To Harass Gays Pentagon Disputes Legal Group's Report of Intimidation

- **Military Still Said to Harass Gays**
- **Military Still Said To Harass Gays**
- ... A legal group that represents gay men and women in the **military** accused the Pentagon yesterday of doing little to stop harassment against **homosexuals**, saying a climate of intolerance and hostility is driving more gay service members to abandon the **military**. ...
- ... Reports of **military** officials improperly asking service members about their sexual orientation or wrongly conducting inquiries into the sex lives of suspected **homosexuals** also rose from 583 to 934, the group said. ...

Article (03/15/1999) Gay Group's Study Finds Military Harassment Rising

- **Gay Group's Study Finds Military Harassment Rising**
- ... years after the Clinton administration adopted its "don't ask, don't tell" policy for **homosexuals** in the **military**, incidents of anti-**homosexual** harassment have increased in each of the armed services, according to a legal group that...
- ... some units so severe that many gay men and lesbians have been forced to abandon **military** service, in contradiction of the policy's aims. ...
- ... and lesbians to serve in the armed services, but it bars them from declaring their **homosexuality** or engaging in **homosexual** acts, like ceremonies signifying a couple's union. ...

Article (03/02/1999) Pentagon Line Gives Advice On Gay Life

- ... The Pentagon, which bars **homosexual** conduct in the ranks, is sponsoring a health advice line that tells **military** callers it is OK to be gay and that **homosexual** couples make just as good parents as traditional families. ...
- ... "Studies show that **homosexual** partners raise children just as well as anyone," states the telephone advice from Tricare, the...
- ... The recorded message on the "health care advice and education service" generally portrays **homosexuality** positively and depicts gays as victims. It says about 10 percent of the population is **homosexual**. ...

Article (02/04/1999) Gay Marine Featured In The New York Times Acted In Porno Films

- ... 28, 1998, in The New York Times Magazine, explored the difficulties of living a clandestine **homosexual** life within the "don't ask, don't tell" structure of the U.S. **military**. The

Marine in the article, who insisted on remaining anonymous, was identified in The Times...

Results complete.

Computed search: 30 files contain *homosexual and military*

Peterman, David (Brian) (DEFENSE)

From: WHSR
Sent: Sunday, October 03, 1999 1:18 AM
To: Domestic
Subject: clinton

Classification: UNCLASSIFIED
Distribution: None
Originator: UPI
Precedence: RUSH
TimeOfReceipt: 10/03/1999 05:17:54 UT

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(UPI Spotlight)

Clinton courts gay community

LOS ANGELES, Oct. 3 (UPI) President Clinton helped raise more than \$850,000 for Democratic campaigns Saturday night at a Los Angeles fund-raiser that organizers billed as the largest gay and lesbian political fund-raiser in history. The event gave the president a chance to mend fences with Democratic power broker David Mixner, a former adviser who broke with him after his "Don't Ask, Don't Tell" stand on gays in the military. Clinton told the group he wished "I could have done better" on gay rights issues, and promised Vice President Al Gore would champion their cause.

UPI- 10/03/99 01:17:50

Peterman, David (Brian) (DEFENSE)

From: WHSR
Sent: Sunday, October 03, 1999 2:33 AM
To: Domestic
Subject: clinton

Classification: UNCLASSIFIED
Distribution: None
Originator: UPI
Precedence: RUSH
TimeOfReceipt: 10/03/1999 06:33:02 UT

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(UPI Focus)

Clinton mends fences ingay community

LOS ANGELES, Oct. 3 (UPI) President Clinton Saturday told gay rights activists he wished "we could have done better" on gay rights issues during his administration and said Vice President Al Gore has been "a terrific" advocate of their cause.

Clinton likened hate crimes against homosexuals in America to ethnic strife in Rwanda and elsewhere in the world and called on Americans to set aside prejudice and recognize "basic humanity."

"It is ironic that at the dawn of a new millennium...the largest problem we've got is primitive, age-old fear and hatred and dehumanization of the 'other' people who aren't like us," Clinton said.

He spoke Saturday at a Beverly Hills gala billed as the largest gay and lesbian political fund raiser in history. The black-tie event drew at least 1,000, including California Gov. Gray Davis. Actresses Ellen DeGeneres and Anfe Heche attended the fund-raiser, which netted an estimated \$850,000 for Democratic congressional campaigns. It was sponsored by the group Access Now for Gay and Lesbian Equality the first gay rights group to give then-candidate Bill Clinton an endorsement during his 1992 campaign.

The event gave Clinton a chance to mend fences with Democratic activist David Mixner, a former adviser who broke ties with the president in 1993 after his "Don't Ask, Don't Tell" policy on gays in the military. The two embraced on stage their first encounter in six years and Mixner said despite the "rough road" at times, "we chose a good one in '92."

Clinton left the ANGLE event and moved on to the next special interest soiree, a Hollywood fund raiser hosted by director Rob Reiner, which raised another \$550,000 for the Democratic National Committee.

Clinton's weekend swing along the West Coast has raised more than \$2 million in the past two days. The trip concludes late Sunday night, after two more Los Angeles fund-raisers, when he is scheduled to return to Washington.

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UPI- 10/03/99 02:32:54

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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GENERAL SERVICES ADMINISTRATION

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.

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.

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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.

LEVEL 3 - 21 OF 92 STORIES

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BYLINE: Cass R. Sunstein

BODY:

Don't: A Reader's Guide to the

Military's Anti-Gay Policy

by Janet E. Halley

(Duke University Press, 159 pp., \$14.95)

In 1993, jamie gorelick, general counsel of the Department of Defense, testified before a subcommittee of the House Armed Services Committee. Defending President Clinton's new "don't ask, don't tell" policy, Gorelick was asked to explain how someone alleged to be **homosexual** could establish that she was not, in fact, **homosexual**. Gorelick answered with an example: "In one instance a woman was alleged to have said that she was a lesbian. She came in and said essentially that the statement had been misunderstood.... And actually, she introduced evidence--she brought in boyfriends who testified essentially that she was heterosexual--and the conclusion was reached that she would be retained." Gorelick offered this illustration to show how accused members could prove their heterosexuality and defend themselves against losing their job.

At that moment in the House hearings, you might suppose that the ban on **homosexuals** in the **military** would be in serious trouble. Is it really possible to imagine a trial in which a member of the American military has to defend herself against a charge of lesbianism by asking former boyfriends to testify on her behalf? What would the boyfriends be expected to say? Would they be subject to cross-examination? If the issue is whether the defendant is really **homosexual**, what particular questions might be asked, by way of resolving that contested issue? Surely--you might suppose--Gorelick's commendably candid response would raise doubts about the legitimacy of the policy that she was attempting to defend. Yet there was no visible reaction to Gorelick's anecdote. It was as if the proceeding that she described was perfectly acceptable, a matter of common sense, entirely routine.

Since 1982, the Department of Defense had maintained a policy requiring separation of any servicemember deemed to be "**homosexual**," defined as "a person, regardless of sex, who engages in, desires to engage in, or intends to engage in **homosexual** acts." (Branches of the **military** had set out similar bans for decades before.) In 1991, in his campaign for the presidency, Bill Clinton made this



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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 very first week in office, however, the Joint Chiefs of Staff (including the immensely popular Colin Powell) threatened to resign in protest over any such effort, and George Mitchell, the Senate Majority Leader, told Clinton that there were seventy votes against the President's proposed decision. This was the beginning of the "don't ask, don't tell" policy (sometimes called "don't ask, don't tell, don't pursue")-- a compromise reached among the White House, the Joint Chiefs, and the Senate opposition.

Two documents eventually emerged: a new Defense Department policy and a new statute, the latter putting a ban on **homosexual** conduct into federal legislation for the first time. The governing regulations, continuing on the books, begin by proclaiming that "homosexuality is incompatible with military service. The presence in the military environment of persons who engage in **homosexual** conduct or who, by their statements, demonstrate a propensity to engage in **homosexual** conduct, seriously impairs the accomplishment of the **military** mission." A **homosexual** is defined exactly as before. Separation from the service will come from either **homosexual** conduct or statements indicative of homosexuality. A member of the service may be discharged if he has stated that he is **homosexual** or bisexual, "unless there is a further finding that the member is not a **homosexual** or bisexual." **Homosexual** acts will result in discharge unless there are further findings--unless it is shown, among other things, that the conduct is unlikely to recur (the "queen for a day" exception) and that (despite the acts in question) the soldier does not desire or intend to engage in **homosexual** acts. At the same time, the new policy announces that commanders would not ask members of the service about their sexual orientation; there would be no "asking" and no "pursuit." The Department of Defense also recognizes that "individuals with a **homosexual** orientation have served with distinction in the armed services of the United States." Sexual orientation is not a bar to service without conduct; but a statement of homosexuality counts as conduct.

Later in 1993, Congress enacted a statute, growing out of the new Pentagon policy but significantly less protective of **gay** and **lesbian** servicemembers. The statute--it is the first actual law on the subject--is rooted in a congressional finding 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." Under the statute, members must be separated from the armed forces under two circumstances. The first is "conduct," and here the statute is essentially the same as the Defense Department policy, but with an important proviso: a **homosexual** act is not merely same-sex erotic bodily contact, but also "any bodily contact which a reasonable person would understand to demonstrate a propensity or intent to engage in a" same-sex sexual act. The second is when a member "tells," and here the statute is more complicated.

The statute says that if a service member makes a statement that "he or she is a **homosexual** or bisexual," discharge must follow, unless there is a "further finding" that he or she "is not a person who engages in, attempted to engage in, has a propensity to engage in, or intends to engage in **homosexual** acts." Under the Defense Department directive implementing this statute, moreover, a "statement by a member that demonstrates a propensity or intent to engage in **homosexual** acts is grounds for separation not because it reflects the member's



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sexual orientation but because the statement indicates a likelihood that the member engages in or will engage in **homosexual** acts." Sexual orientation itself "is considered a personal and private matter," and not a bar to continued service.

What accounts for the shift from the old policy to the new one, and then to the new statute? What is the meaning of this shift? Janet Halley attempts to answer these questions not on the basis of interviews or conventional investigative techniques, but with close readings of the new policy and law, and with an exhaustive examination of the public record (hearings, press conferences, speeches, congressional debates). Halley thinks that this system is "much, much worse than its predecessor," and that a principal culprit is the Department of Justice, which, in her view, is the likely source of "the most alarming innovation in the new policy--a new set of rules that allows **homosexual** conduct to be inferred from supposed **homosexual** status."

Halley's target--what she means to challenge as false, indeed fraudulent-- is the widespread view that the new policy is more lenient than the old one, and that there has been a large-scale shift from discharging servicemembers for their "status" toward discharging them for their "conduct." Much of her discussion is dedicated to showing that the new rule does not bar status-related discharges--that status plays a large if sometimes subtle role under the new policy, in large part by requiring accused members to defend their heterosexual status. The result of all this is a kind of culture of surveillance, in which members must avoid giving anyone a hint of "conduct that manifests a propensity."

Halley acknowledges that unlike the new policy, the old policy was explicitly based on status, authorizing "military officials to determine not only what servicemembers did but what they desired and intended, all with the aim of determining who they were." President Clinton attempted to obtain a departure from this policy; having been blocked in his effort to lift the ban, he sought to shift regulatory attention from status to conduct. Thus Secretary of Defense Les Aspin explained that the purpose of the revision was to focus attention on "not what they are, but what they do," and President Clinton insisted publicly that "the emphasis should be always on people's conduct, not their status." After Congress enacted the statute, many people, including Clinton and Aspin, claimed that it merely reiterated and codified the new Defense Department policy, embodying the shift from status to conduct.

Halley thinks that this is all quite misleading, even a form of deceit. To be sure, the president "had no choice" but to retreat, and **homosexual** status alone (whatever that may mean) is no longer a basis for separation from military service. "But the 1993 revisions, even if they do not target people on the basis of their status, are nevertheless deeply, pervasively, and creatively ascriptive." Perhaps the most important point is that the "Clinton administration did introduce several elements of more or less simple conduct regulation, but Congress ... eliminated every single one of them in favor of heavily status-inflected revisions."

For one thing, Congress refused to recognize, as did the Defense Department, that **homosexuals** had served, and are serving, with distinction in the military. (Many military officials, including Colin Powell, so testified before Congress.) For another, Congress rejected Clinton's proposal to focus exclusively on sexual



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misconduct, and it showed no interest in his (fairly radical) suggestion that the grounds of sexual misconduct should be applied without regard to sexual orientation. Thus Congress refused to follow the Defense Department's suggested policy requiring commanders to investigate allegations of sodomy "in an even-handed manner without regard to whether the conduct alleged is heterosexual or homosexual."

Congress also defined homosexual acts to include not only bodily contact "for the purpose of satisfying sexual desires," but also bodily contact which a reasonable person would understand to demonstrate a "propensity or intent to engage in" acts designed to satisfy sexual desires. (Might this include hugging or holding hands?) And finally Congress also refused to require "don't ask" in the statute itself. The consequence has been that the "don't ask" idea--the only remaining trace of protection for gay and lesbian service members--is the current executive branch policy, but it is not the law, and it may be changed by another administration.

Halley thinks that Clinton was able to seek only "the appearance, not the reality, of a 'don't ask' reform." Even under the Defense Department policy, a range of indirect questions can be--and are--asked about sexual orientation, without violating the ban on direct questions. In any case, both the policy and the statute allow an investigation to result from "any evidence of conduct that manifests a propensity to engage in homosexual conduct." As we shall see, commanding officers have a great deal of discretion to interpret this phrase.

One of halley's most interesting discussions involves the post-1993 emphasis on this idea of "propensity," a genuine innovation, not to be found in any predecessor provision. With some interesting and suggestive (though not at all conclusive) sleuthing, Halley attributes the innovation to the Department of Justice. What is the underlying idea here? Halley identifies two possibilities, which she labels "the actuarial model" and the "psychometric model." Under the actuarial model, the idea of propensity points simply to a statistical likelihood: "detecting people with a propensity is merely a prudent way of identifying servicemembers who are likely to engage in harmful conduct and getting them out of the military before they can actually harm its essences." Under the psychometric model, by contrast, a "propensity" is not a statistical matter but "an inner, intrinsic, even natural or innate characteristic." This model "attributes a pathological personal trait to each individual homosexual." Halley believes that the "psychometric model of homosexual propensity is a hidden premise of the actuarial model," and that the result of the focus on "propensity" is to obliterate any simple distinction between status and conduct.

Attorney General Janet Reno, among others, has claimed that the law is concerned only with conduct because members have an "opportunity to rebut" a presumed propensity to act; but Halley thinks that this is "particularly disingenuous." The reason is that the presumption--based on statements or other evidence of "propensity"--imposes on accused members a "heavy handicap," thus achieving "substantive outcomes under the guise of a merely technical change in procedure." The system of presumption-and-rebuttal also produces a high degree of arbitrariness, as individual commanding officers have considerable discretion to decide what statements and what acts show a "propensity."

The definition of homosexual acts at work here includes bodily contact which (in the words of the 1993 law) "a reasonable person would understand to



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demonstrate a propensity or intent to engage in" erotic, same-sex bodily contacts. Halley thinks that this is "the most important innovation" of the 1993 reforms. Who is this reasonable person, and what inferences are diverse (and reasonable?) people permitted to draw? Halley contends that members must "imagine a lexicon of conduct-that-my-commander-thinksto-manifest-a-propensity." To counteract the threat of discharge, therefore, "acting viciously anti-gay is probably the best way" to provide insulation against suspicion.

All this seems to me a bit of hyperbole on Halley's part; but in practice the results have been a mess. Compare two cases, both of which involved actual trials. In one case, Air Force Captain Richard Richenberg testified that he had recently realized that he was **homosexual**, but that he had not engaged in, and he did not intend to engage in, prohibited conduct. Richenberg made a sharp distinction between **homosexual** "attraction" and "doing it," and said that he disapproved of casual sex on moral grounds, and added that at the time when he considered himself heterosexual, he had honored his belief that sexual intercourse should not occur until marriage. But he was discharged, with the trial court saying that it "is of no constitutional significance that the plaintiff may in fact have no propensity to engage in **homosexual** conduct." By way of contrast, consider the servicemember who said that he was a "**homosexual**," that he had "feelings toward men and women" but "sexual feelings" only for women, and that he had decided not to engage in same-sex conduct because he feared "catching a disease." In this case it was held that he had rebutted the presumption and could retain his job. The two cases exemplify a set of extremely messy results.

For Halley, the most general problem is that "if you have been found to have engaged in conduct that manifests a propensity to engage in same-sex erotic acts, you are going to be discharged unless you can prove that you have no such propensity," and to prove that, "you need to prove your status." The result is that "heterosexuality prevails" under the policy--at the expense, in practice, of **homosexuals**, who are at risk of discharge, and of heterosexuals, who are at risk of false accusation. This, then, is Halley's basic analysis of "don't ask, don't tell": that it is not a shift from status to conduct, and not a safe refuge for discreet **homosexual** service members, but a recipe for widely variable and improvised diagnoses of "propensities," and a system that ties "status to conduct and conduct to status in surprising, devious, ingenious, and perverse ways."

An obvious issue arises. Is the policy constitutional? In a brief discussion, Halley notes that the Constitution is taken to prevent government from punishing people for their "status" alone, and many of the constitutional challenges insist that discrimination has occurred "based on their status, not their conduct." But Halley thinks that this strategy "is an insult to the personal sexual dignity of most servicemember clients." She wants those who challenge the policy to accept, even to "revel in" the (hardly surprising) fact that "self-identified **homosexuals** do engage in more same-sex erotic conduct than those who identify otherwise." She would also like courts to strike down the policy under either the First Amendment or the Equal Protection Clause.

Courts might conclude, for example, that "the 'don't tell' rules regulate speech according to its content, without excuse when the content itself--**homosexual** status--is expressly permitted." Or they could conclude "that it is irrational," and hence violative of the equal protection clause, "to protect



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against conduct-based harm to **military** effectiveness when **homosexuals** engage in the conduct but not when heterosexuals do, or when open **homosexuals** rather than closeted ones do it." More broadly, courts "could observe that unit cohesion, privacy in the barracks and the showers, and sexual tranquility are eroded, not promoted, by the policy's joint legitimization of servicemembers' homophobic sensibilities and of secretive **homosexual** presence in the **military**." Thus Halley simultaneously challenges a leading strategy of **gay** rights organizations (to contest the policy as "status" regulation) and urges courts to invalidate the policy on a variety of constitutional grounds.

This is a clear, careful, and illuminating account of the various shifts in the substance of the policy, and of who lost (mostly **gay** rights advocates and Clinton) and who gained (mostly supporters of the old policy). Halley also shows, quite convincingly, that while the new policy does not target status "alone," it is hopelessly inadequate to describe it as a regulation of conduct rather than status. Indeed, her discussion of the "propensity" issue is a tour de force. For anyone interested in the "don't ask, don't tell" policy, this is an excellent place to start. But there are problems.

Halley's discussion is very much focussed on public texts, and her analysis is above all a textual analysis, with comparatively little discussion of the real-world effects of the 1993 revisions and their predecessor. Owing to the limitations of her textual focus, I do not believe that Halley establishes her claim that the new policy is "much, much worse than its predecessor," or even worse at all. It is not easy to see how the new approach, or for that matter any approach, can be worse than one that requires discharge of anyone "who engages in, desires to engage in, or intends to engage in **homosexual** acts." Perhaps the new policy is more misleading, more deceptive, more unpredictable, more confusing; but is it really worse than a policy that requires discharge of anyone who desires or intends to engage in **homosexual** acts?

To answer this question, we need to know more, and not only more about texts. What have been the trends for dismissal of **homosexuals** from the **military**? Are the numbers going down or up? To the extent that they are changing, to what extent is the reason for the change the policy itself? Halley offers extremely little statistical evidence about the empirical questions, and this is a large omission. In fact, the data support her basic position. From 1982 to 1994, there was a decline every year in the number of people discharged for homosexuality: 1,998 in 1982, 1,660 in 1985, 996 in 1989, 730 in 1992, 682 in 1993, and 617 in 1994. Yet the numbers have gone up steadily since that time: 757 in 1995, 858 in 1996, 997 in 1997, and 1,145 in 1998--the largest number since 1987.

But all this still does not tell the whole story. To evaluate these discouraging numbers, it would be valuable to know the number of **homosexuals** who have entered the **military** at various points--and also to know the circumstances of the discharges in various periods. Were the discharges in 1982-1990 systematically different from those in the last five years? Has there been a greater trend toward discharging people based on un rebutted "propensities"? Have relevant military officials become more intensely opposed to **homosexuals** in the last five years? Halley does not discuss these matters.

Nor does she deal much with the series of abuses, recently acknowledged by the Pentagon, that have followed on the heels of the policy. These abuses have included various forms of intimidation and harassment--some of them cases in



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which service members complaining of harassment have found themselves, rather than their harassers, under investigation. In a widely publicized event, a soldier rumored to be gay was recently killed with a baseball bat at Fort Campbell, Kentucky. It is far from clear whether these events are a product of the new policy; what is clear is that the new policy has not prevented them. The Defense Department has recently announced guidelines designed to prevent the most egregious abuses, but it remains to be seen whether these guidelines will do much good.

Perhaps the greatest oddity of Halley's instructive book is that, while her main goal is to show that the new policy is not based on "conduct," she also believes that the policy would be little better if it were in fact based only on conduct. She thinks, plausibly, that a policy based only on conduct would be an insult to the dignity of homosexual servicemembers. And this point is connected to another surprising feature of the book: Halley's thin discussion of the underlying questions of policy and law. We get little sense of why the military was so strongly resistant to Clinton's proposal--of what interests underlie the military's reluctance to lift the ban entirely, and of whether those interests are legitimate. Halley shows that those who sought some kind of ban believe that "unit cohesion" is at risk from open homosexuality, and that recruitment and morale would be endangered if soldiers were aware that they were serving with homosexuals, partly because people must live in such close quarters. It is clear that Halley finds these arguments weak, but she does not analyze them in any detail.

The relevant anxieties take several forms. The first is that sexual relationships and sexual impositions--above all, involving superiors--are intolerable in the military setting. A prime concern is sexual harassment. To be sure, there is an irony in seeing the law of sexual harassment invoked by people not normally so enthusiastic about that law; some defenders of the policy seem to fear that homosexual men will frequently treat heterosexual men the same way that heterosexual men sometimes treat women, and they are eager to protect heterosexual men against that kind of treatment. Undoubtedly many people do believe that sexual harassment is intolerable, and that all steps should be taken to ensure that it does not occur in the military setting. If sexual impositions create the difficulty, however, then the natural solution is to ban sexual impositions of any kind, not to forbid gays and lesbians from serving their country.

Perhaps the problem is not sexual harassment, but sexual relations. Perhaps the military setting is incompatible with even voluntary sexual relations among members of the service, at least when they must work together in close quarters. But if this is so--and it certainly seems reasonable to think that it is so--then the solution is to ban the relevant relations. Indeed, current policy imposes restrictions on "fraternization," and any such restrictions could be applied to homosexual relationships.

Perhaps the strongest argument against a true reform of this discriminatory policy--and what really seems to underlie the idea of "unit cohesion"--is that even without sexual harassment and sexual relations, it would be very hard for many young men and women to know that they are serving with open gays and lesbians. Of course there is, in the military, a degree of segregation between young men and young women, partly to prevent the kinds of entanglements,



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tensions, and misunderstandings that might genuinely undermine military preparation and effectiveness. The ban on open homosexuality is designed to prevent the same sorts of difficulties. And if the lifting of that ban really would hurt morale and recruitment, and cause serious internal problems, it would not be so easy for outsiders to dismiss the military's underlying concern. When Colin Powell and other members of the Joint Chiefs of Staff resisted President Clinton's initiative in 1993, this was their fundamental objection. And there is a genuine interest in sexual privacy as well, raised most vividly, perhaps, in the context of communal barracks and showers.

Yet this argument is not without its own problems. If some young people find it hard to work in close quarters with homosexuals, this is often because of a form of ignorance and prejudice (and sometimes hatred) that is not ordinarily a legitimate basis for denying people employment opportunities. Giving into these feelings tends to perpetuate and to ratify them. The argument also depends on highly speculative empirical claims about the harmful effects of a nondiscriminatory policy. It is important to remember that an exceptionally wide range of countries do not exclude homosexuals from the armed services. There are no bans, no analogues to "don't ask, don't tell," and apparently no problems for "unit cohesion" in Denmark, Norway, Finland, Belgium, Spain, the Netherlands, France, Canada, Germany, Switzerland, Sweden, and Israel. Nor must we look abroad for similar evidence. Gays and lesbians fought for their country in World War II, the Korean War, and the Vietnam War, and their military records show that they served the nation as well, on average, as heterosexuals.

To be sure, sexual privacy is a legitimate interest, and perhaps a nondiscriminatory policy would require special efforts to protect privacy. But if military commanders were genuinely committed to make nondiscrimination work, it is hard to imagine that such a policy would create serious problems. Does this mean, then, that courts should strike down "don't ask, don't tell," as Halley urges, under the First Amendment or the Equal Protection Clause? There are hard questions here. The military imposes a wide range of legitimate restrictions on the speech of servicemembers, and in the military context it does not violate the First Amendment to use statements as evidence of conduct, if the conduct is independently unacceptable. If the military forbids the use of cocaine, it is perfectly entitled to take a member's statement, "I like to use cocaine," as evidence of cocaine use; indeed, there would be no First Amendment problem with taking the statement, "I am a cocaine user," or "I would like to use cocaine," as evidence of an intention or a propensity to use cocaine, at least if the member is permitted a rebuttal. The "don't ask, don't tell" policy reaches somewhat further, but when combined with the general power of the military to regulate speech by members of the service, this point is probably sufficient to defeat a First Amendment challenge.

Despite the policy's regulation of "telling," the real question is not one of free speech. It is whether homosexuals have been denied the equal protection of the laws. As Halley acknowledges, and as recent courts have emphasized, members of the service are not entitled to the same rights as civilians. When the military is involved, courts should be extremely cautious about rejecting the considered judgments of the elected branches of government. But it is one thing to adopt a general posture of deference; it is quite another for courts to permit the government to exclude, to stigmatize, and to humiliate a class of citizens whose members have long served the nation with distinction.



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In the aftermath of a large number of documented abuses, the Defense Department is now embarking on an effort to ensure against harassment, violence, and witch-hunts--to provide anti-harassment training and to require investigations to be launched only on the basis of solid evidence. But even if the reforms make things better, there is something farcical and bizarre, and more than slightly Orwellian, about this earnest and highly publicized effort to ensure that people will be investigated, as acknowledged or practicing homosexuals, only if there is actual evidence that they are, in fact, acknowledged or practicing homosexuals. The most fundamental problem with the policy is not the occasional abuses, egregious as some have been, but its very core.

The best solution would be for Congress, which has an independent obligation to the Constitution, to reject the "don't ask, don't tell" policy on equal protection grounds, and to work with the military to accommodate its concerns. But this is one of the exceedingly rare cases, I think, in which courts would be justified in invalidating a military practice under the Constitution.

In 1992, in *Sex and Reason*, Richard Posner observed that "it is terrible to tell people they are unfit to serve their country, unless they really are unfit, which is not the case here." Since he wrote those words, more than 5,056 members of the American military have been discharged under "don't ask, don't tell," a number of them after being placed under oath and asked, before a trier of fact, whether they have a "propensity" to be interested in men, women, or both. Numerous other members of the military, now serving their country and prepared to risk their lives on its behalf, face a similar fate. The "don't ask, don't tell" policy is an atrocity. The sooner we are rid of it, the better.

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New Republic
September 6, 1999
Pg. 41

At Unease

Don't: A Reader's Guide To The Military's Anti-Gay Policy
By Janet E. Halley, Duke University Press, 159 pp., \$14.95

By Cass R. Sunstein

In 1993, Jamie Gorelick, general counsel of the Department of Defense, testified before a subcommittee of the House Armed Services Committee. Defending President Clinton's new "don't ask, don't tell" policy, Gorelick was asked to explain how someone alleged to be homosexual could establish that she was not, in fact, homosexual. Gorelick answered with an example: "In one instance a woman was alleged to have said that she was a lesbian. She came in and said essentially that the statement had been misunderstood.... And actually, she introduced evidence--she brought in boyfriends who testified essentially that she was heterosexual--and the conclusion was reached that she would be retained." Gorelick offered this illustration to show how accused members could prove their heterosexuality and defend themselves against losing their job.

At that moment in the House hearings, you might suppose that the ban on homosexuals in the military would be in serious trouble. Is it really possible to imagine a trial in which a member of the American military has to defend herself against a charge of lesbianism by asking former boyfriends to testify on her behalf? What would the boyfriends be expected to say? Would they be subject to cross-examination? If the issue is whether the defendant is really homosexual, what particular questions might be asked, by way of resolving that contested issue? Surely--you might suppose--Gorelick's commendably candid response would raise doubts about the legitimacy of the policy that she was attempting to defend. Yet there was no visible reaction to Gorelick's anecdote. It was as if the proceeding that she described was perfectly acceptable, a matter of common sense, entirely routine.

Since 1982, the Department of Defense had maintained a policy requiring separation of any servicemember deemed to be "homosexual," defined as "a person, regardless of sex, who engages in, desires to engage in, or intends to engage in homosexual acts." (Branches of the military had set out similar bans for decades before.) 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 very first week in office, however, the Joint Chiefs of Staff (including the immensely popular Colin Powell) threatened to resign in protest over any such effort, and George Mitchell, the Senate Majority Leader, told Clinton that there were seventy votes against the President's proposed decision. This was the beginning of the "don't ask, don't tell" policy (sometimes called "don't ask, don't tell, don't pursue")-- a compromise reached among the White House, the Joint Chiefs, and the Senate opposition.

Two documents eventually emerged: a new Defense Department policy and a new statute, the latter putting a ban on homosexual conduct into federal legislation for the first time. The governing regulations, continuing on the books, begin by proclaiming that "homosexuality is incompatible with military service. The presence in the military environment of persons who engage in homosexual conduct or who, by their statements, demonstrate a propensity to engage in homosexual conduct, seriously impairs the accomplishment of the military mission." A homosexual is defined exactly as before. Separation from the service will come from either homosexual conduct or statements

indicative of homosexuality. A member of the service may be discharged if he has stated that he is homosexual or bisexual, "unless there is a further finding that the member is not a homosexual or bisexual." Homosexual acts will result in discharge unless there are further findings--unless it is shown, among other things, that the conduct is unlikely to recur (the "queen for a day" exception) and that (despite the acts in question) the soldier does not desire or intend to engage in homosexual acts. At the same time, the new policy announces that commanders would not ask members of the service about their sexual orientation; there would be no "asking" and no "pursuit." The Department of Defense also recognizes that "individuals with a homosexual orientation have served with distinction in the armed services of the United States." Sexual orientation is not a bar to service without conduct; but a statement of homosexuality counts as conduct.

Later in 1993, Congress enacted a statute, growing out of the new Pentagon policy but significantly less protective of gay and lesbian servicemembers. The statute--it is the first actual law on the subject--is rooted in a congressional finding 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." Under the statute, members must be separated from the armed forces under two circumstances. The first is "conduct," and here the statute is essentially the same as the Defense Department policy, but with an important proviso: a homosexual act is not merely same-sex erotic bodily contact, but also "any bodily contact which a reasonable person would understand to demonstrate a propensity or intent to engage in a" same-sex sexual act. The second is when a member "tells," and here the statute is more complicated.

The statute says that if a service member makes a statement that "he or she is a homosexual or bisexual," discharge must follow, unless there is a "further finding" that he or she "is not a person who engages in, attempted to engage in, has a propensity to engage in, or intends to engage in homosexual acts." Under the Defense Department directive implementing this statute, moreover, a "statement by a member that demonstrates a propensity or intent to engage in homosexual acts is grounds for separation not because it reflects the member's sexual orientation but because the statement indicates a likelihood that the member engages in or will engage in homosexual acts." Sexual orientation itself "is considered a personal and private matter," and not a bar to continued service.

What accounts for the shift from the old policy to the new one, and then to the new statute? What is the meaning of this shift? Janet Halley attempts to answer these questions not on the basis of interviews or conventional investigative techniques, but with close readings of the new policy and law, and with an exhaustive examination of the public record (hearings, press conferences, speeches, congressional debates). Halley thinks that this system is "much, much worse than its predecessor," and that a principal culprit is the Department of Justice, which, in her view, is the likely source of "the most alarming innovation in the new policy--a new set of rules that allows homosexual conduct to be inferred from supposed homosexual status."

Halley's target--what she means to challenge as false, indeed fraudulent-- is the widespread view that the new policy is more lenient than the old one, and that there has been a large-scale shift from discharging servicemembers for their "status" toward discharging them for their "conduct." Much of her discussion is dedicated to showing that the new rule does not bar status-related discharges--that status plays a large if sometimes subtle role under the new policy, in large part by requiring accused members to defend their heterosexual status. The result of all this is a kind of culture of surveillance, in which members must avoid giving anyone a hint of "conduct that manifests a propensity."

Halley acknowledges that unlike the new policy, the old policy was explicitly based on status, authorizing "military officials to determine not only what servicemembers did but what they desired and intended, all with the aim of determining who they were." President Clinton attempted to obtain a departure from this policy; having been blocked in his effort to lift the ban, he sought to shift regulatory attention from status to conduct. Thus Secretary of Defense Les Aspin explained that the purpose of the revision was to focus attention on "not what they are, but what they do," and President

Clinton insisted publicly that "the emphasis should be always on people's conduct, not their status." After Congress enacted the statute, many people, including Clinton and Aspin, claimed that it merely reiterated and codified the new Defense Department policy, embodying the shift from status to conduct.

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For one thing, Congress refused to recognize, as did the Defense Department, that homosexuals had served, and are serving, with distinction in the military. (Many military officials, including Colin Powell, so testified before Congress.) For another, Congress rejected Clinton's proposal to focus exclusively on sexual misconduct, and it showed no interest in his (fairly radical) suggestion that the grounds of sexual misconduct should be applied without regard to sexual orientation. Thus Congress refused to follow the Defense Department's suggested policy requiring commanders to investigate allegations of sodomy "in an even-handed manner without regard to whether the conduct alleged is heterosexual or homosexual."

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Attorney General Janet Reno, among others, has claimed that the law is concerned only with conduct because members have an "opportunity to rebut" a presumed propensity to act; but Halley thinks that this is "particularly disingenuous." The reason is that the presumption--based on statements or other evidence of "propensity"--imposes on accused members a "heavy handicap," thus achieving

"substantive outcomes under the guise of a merely technical change in procedure." The system of presumption-and-rebuttal also produces a high degree of arbitrariness, as individual commanding officers have considerable discretion to decide what statements and what acts show a "propensity."

The definition of homosexual acts at work here includes bodily contact which (in the words of the 1993 law) "a reasonable person would understand to demonstrate a propensity or intent to engage in" erotic, same-sex bodily contacts. Halley thinks that this is "the most important innovation" of the 1993 reforms. Who is this reasonable person, and what inferences are diverse (and reasonable?) people permitted to draw? Halley contends that members must "imagine a lexicon of conduct-that-my-commander-thinksto-manifest-a-propensity." To counteract the threat of discharge, therefore, "acting viciously anti-gay is probably the best way" to provide insulation against suspicion.

All this seems to me a bit of hyperbole on Halley's part; but in practice the results have been a mess. Compare two cases, both of which involved actual trials. In one case, Air Force Captain Richard Richenberg testified that he had recently realized that he was homosexual, but that he had not engaged in, and he did not intend to engage in, prohibited conduct. Richenberg made a sharp distinction between homosexual "attraction" and "doing it," and said that he disapproved of casual sex on moral grounds, and added that at the time when he considered himself heterosexual, he had honored his belief that sexual intercourse should not occur until marriage. But he was discharged, with the trial court saying that it "is of no constitutional significance that the plaintiff may in fact have no propensity to engage in homosexual conduct." By way of contrast, consider the servicemember who said that he was a "homosexual," that he had "feelings toward men and women" but "sexual feelings" only for women, and that he had decided not to engage in same-sex conduct because he feared "catching a disease." In this case it was held that he had rebutted the presumption and could retain his job. The two cases exemplify a set of extremely messy results.

For Halley, the most general problem is that "if you have been found to have engaged in conduct that manifests a propensity to engage in same-sex erotic acts, you are going to be discharged unless you can prove that you have no such propensity," and to prove that, "you need to prove your status." The result is that "heterosexuality prevails" under the policy--at the expense, in practice, of homosexuals, who are at risk of discharge, and of heterosexuals, who are at risk of false accusation. This, then, is Halley's basic analysis of "don't ask, don't tell": that it is not a shift from status to conduct, and not a safe refuge for discreet homosexual service members, but a recipe for widely variable and improvised diagnoses of "propensities," and a system that ties "status to conduct and conduct to status in surprising, devious, ingenious, and perverse ways."

An obvious issue arises. Is the policy constitutional? In a brief discussion, Halley notes that the Constitution is taken to prevent government from punishing people for their "status" alone, and many of the constitutional challenges insist that discrimination has occurred "based on their status, not their conduct." But Halley thinks that this strategy "is an insult to the personal sexual dignity of most servicemember clients." She wants those who challenge the policy to accept, even to "revel in" the (hardly surprising) fact that "self-identified homosexuals do engage in more same-sex erotic conduct than those who identify otherwise." She would also like courts to strike down the policy under either the First Amendment or the Equal Protection Clause.

Courts might conclude, for example, that "the 'don't tell' rules regulate speech according to its content, without excuse when the content itself-- homosexual status--is expressly permitted." Or they could conclude "that it is irrational," and hence violative of the equal protection clause, "to protect against conduct-based harm to military effectiveness when homosexuals engage in the conduct but not when heterosexuals do, or when open homosexuals rather than closeted ones do it." More broadly, courts "could observe that unit cohesion, privacy in the barracks and the showers, and sexual tranquility are eroded, not promoted, by the policy's joint legitimization of servicemembers' homophobic sensibilities and of secretive homosexual presence in the military." Thus Halley simultaneously challenges a leading strategy of gay rights organizations (to contest the policy as "status" regulation) and urges courts to invalidate the policy on a variety of constitutional grounds.

This is a clear, careful, and illuminating account of the various shifts in the substance of the policy, and of who lost (mostly gay rights advocates and Clinton) and who gained (mostly supporters of the old policy). Halley also shows, quite convincingly, that while the new policy does not target status "alone," it is hopelessly inadequate to describe it as a regulation of conduct rather than status. Indeed, her discussion of the "propensity" issue is a tour de force. For anyone interested in the "don't ask, don't tell" policy, this is an excellent place to start. But there are problems.

Halley's discussion is very much focussed on public texts, and her analysis is above all a textual analysis, with comparatively little discussion of the real-world effects of the 1993 revisions and their predecessor. Owing to the limitations of her textual focus, I do not believe that Halley establishes her claim that the new policy is "much, much worse than its predecessor," or even worse at all. It is not easy to see how the new approach, or for that matter any approach, can be worse than one that requires discharge of anyone "who engages in, desires to engage in, or intends to engage in homosexual acts." Perhaps the new policy is more misleading, more deceptive, more unpredictable, more confusing; but is it really worse than a policy that requires discharge of anyone who desires or intends to engage in homosexual acts?

Q's { To answer this question, we need to know more, and not only more about texts. What have been the trends for dismissal of homosexuals from the military? Are the numbers going down or up? To the extent that they are changing, to what extent is the reason for the change the policy itself? Halley offers extremely little statistical evidence about the empirical questions, and this is a large omission. In fact, the data support her basic position. From 1982 to 1994, there was a decline every year in the number of people discharged for homosexuality: 1,998 in 1982, 1,660 in 1985, 996 in 1989, 730 in 1992, 682 in 1993, and 617 in 1994. Yet the numbers have gone up steadily since that time: 757 in 1995, 858 in 1996, 997 in 1997, and 1,145 in 1998--the largest number since 1987.

Q's { But all this still does not tell the whole story. To evaluate these discouraging numbers, it would be valuable to know the number of homosexuals who have entered the military at various points--and also to know the circumstances of the discharges in various periods. Were the discharges in 1982-1990 systematically different from those in the last five years? Has there been a greater trend toward discharging people based on unrebutted "propensities"? Have relevant military officials become more intensely opposed to homosexuals in the last five years? Halley does not discuss these matters.

Q's { Nor does she deal much with the series of abuses, recently acknowledged by the Pentagon, that have followed on the heels of the policy. These abuses have included various forms of intimidation and harassment--some of them cases in which service members complaining of harassment have found themselves, rather than their harassers, under investigation. In a widely publicized event, a soldier rumored to be gay was recently killed with a baseball bat at Fort Campbell, Kentucky. It is far from clear whether these events are a product of the new policy; what is clear is that the new policy has not prevented them. The Defense Department has recently announced guidelines designed to prevent the most egregious abuses, but it remains to be seen whether these guidelines will do much good.

Perhaps the greatest oddity of Halley's instructive book is that, while her main goal is to show that the new policy is not based on "conduct," she also believes that the policy would be little better if it were in fact based only on conduct. She thinks, plausibly, that a policy based only on conduct would be an insult to the dignity of homosexual servicemembers. And this point is connected to another surprising feature of the book: Halley's thin discussion of the underlying questions of policy and law. We get little sense of why the military was so strongly resistant to Clinton's proposal--of what interests underlie the military's reluctance to lift the ban entirely, and of whether those interests are legitimate. Halley shows that those who sought some kind of ban believe that "unit cohesion" is at risk from open homosexuality, and that recruitment and morale would be endangered if soldiers were aware that they were serving with homosexuals, partly because people must live in such close quarters. It is clear that Halley finds these arguments weak, but she does not analyze them in any detail.

The relevant anxieties take several forms. The first is that sexual relationships and sexual impositions--above all, involving superiors--are intolerable in the military setting. A prime concern is sexual harassment. To be sure, there is an irony in seeing the law of sexual harassment invoked by people not normally so enthusiastic about that law; some defenders of the policy seem to fear that homosexual men will frequently treat heterosexual men the same way that heterosexual men sometimes treat women, and they are eager to protect heterosexual men against that kind of treatment. Undoubtedly many people do believe that sexual harassment is intolerable, and that all steps should be taken to ensure that it does not occur in the military setting. If sexual impositions create the difficulty, however, then the natural solution is to ban sexual impositions of any kind, not to forbid gays and lesbians from serving their country.

Perhaps the problem is not sexual harassment, but sexual relations. Perhaps the military setting is incompatible with even voluntary sexual relations among members of the service, at least when they must work together in close quarters. But if this is so--and it certainly seems reasonable to think that it is so--then the solution is to ban the relevant relations. Indeed, current policy imposes restrictions on "fraternization," and any such restrictions could be applied to homosexual relationships.

Perhaps the strongest argument against a true reform of this discriminatory policy--and what really seems to underlie the idea of "unit cohesion"--is that even without sexual harassment and sexual relations, it would be very hard for many young men and women to know that they are serving with open gays and lesbians. Of course there is, in the military, a degree of segregation between young men and young women, partly to prevent the kinds of entanglements, tensions, and misunderstandings that might genuinely undermine military preparation and effectiveness. The ban on open homosexuality is designed to prevent the same sorts of difficulties. And if the lifting of that ban really would hurt morale and recruitment, and cause serious internal problems, it would not be so easy for outsiders to dismiss the military's underlying concern. When Colin Powell and other members of the Joint Chiefs of Staff resisted President Clinton's initiative in 1993, this was their fundamental objection. And there is a genuine interest in sexual privacy as well, raised most vividly, perhaps, in the context of communal barracks and showers.

Yet this argument is not without its own problems. If some young people find it hard to work in close quarters with homosexuals, this is often because of a form of ignorance and prejudice (and sometimes hatred) that is not ordinarily a legitimate basis for denying people employment opportunities. Giving into these feelings tends to perpetuate and to ratify them. The argument also depends on highly speculative empirical claims about the harmful effects of a nondiscriminatory policy. It is important to remember that an exceptionally wide range of countries do not exclude homosexuals from the armed services. There are no bans, no analogues to "don't ask, don't tell," and apparently no problems for "unit cohesion" in Denmark, Norway, Finland, Belgium, Spain, the Netherlands, France, Canada, Germany, Switzerland, Sweden, and Israel. Nor must we look abroad for similar evidence. Gays and lesbians fought for their country in World War II, the Korean War, and the Vietnam War, and their military records show that they served the nation as well, on average, as heterosexuals.

To be sure, sexual privacy is a legitimate interest, and perhaps a nondiscriminatory policy would require special efforts to protect privacy. But if military commanders were genuinely committed to make nondiscrimination work, it is hard to imagine that such a policy would create serious problems. Does this mean, then, that courts should strike down "don't ask, don't tell," as Halley urges, under the First Amendment or the Equal Protection Clause? There are hard questions here. The military imposes a wide range of legitimate restrictions on the speech of servicemembers, and in the military context it does not violate the First Amendment to use statements as evidence of conduct, if the conduct is independently unacceptable. If the military forbids the use of cocaine, it is perfectly entitled to take a member's statement, "I like to use cocaine," as evidence of cocaine use; indeed, there would be no First Amendment problem with taking the statement, "I am a cocaine user," or "I would like to use cocaine," as evidence of an intention or a propensity to use cocaine, at least if the member is permitted a rebuttal. The "don't ask, don't tell" policy reaches somewhat further, but when

combined with the general power of the military to regulate speech by members of the service, this point is probably sufficient to defeat a First Amendment challenge.

Despite the policy's regulation of "telling," the real question is not one of free speech. It is whether homosexuals have been denied the equal protection of the laws. As Halley acknowledges, and as recent courts have emphasized, members of the service are not entitled to the same rights as civilians. When the military is involved, courts should be extremely cautious about rejecting the considered judgments of the elected branches of government. But it is one thing to adopt a general posture of deference; it is quite another for courts to permit the government to exclude, to stigmatize, and to humiliate a class of citizens whose members have long served the nation with distinction.

In the aftermath of a large number of documented abuses, the Defense Department is now embarking on an effort to ensure against harassment, violence, and witch-hunts--to provide anti-harassment training and to require investigations to be launched only on the basis of solid evidence. But even if the reforms make things better, there is something FARCical and bizarre, and more than slightly Orwellian, about this earnest and highly publicized effort to ensure that people will be investigated, as acknowledged or practicing homosexuals, only if there is actual evidence that they are, in fact, acknowledged or practicing homosexuals. The most fundamental problem with the policy is not the occasional abuses, egregious as some have been, but its very core.

The best solution would be for Congress, which has an independent obligation to the Constitution, to reject the "don't ask, don't tell" policy on equal protection grounds, and to work with the military to accommodate its concerns. But this is one of the exceedingly rare cases, I think, in which courts would be justified in invalidating a military practice under the Constitution.

In 1992, in *Sex and Reason*, Richard Posner observed that "it is terrible to tell people they are unfit to serve their country, unless they really are unfit, which is not the case here." Since he wrote those words, more than 5,056 members of the American military have been discharged under "don't ask, don't tell," a number of them after being placed under oath and asked, before a trier of fact, whether they have a "propensity" to be interested in men, women, or both. Numerous other members of the military, now serving their country and prepared to risk their lives on its behalf, face a similar fate. The "don't ask, don't tell" policy is an atrocity. The sooner we are rid of it, the better.

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Homosexuality within the **military** is an issue in search of a comparative metaphor. Whenever organizational change is proposed, as in the case with the issue of homosexuality in the **military**, we tend to explain the issue by saying that it is "just like" another issue that we have tried to solve in the past. Such metaphors allow us to change policy because we can see the issue in relation to something else. In all discussions of **homosexuals** in the **military**, comparative metaphors have stood at center stage. Thus major arguments regarding dropping the ban against known **homosexuals** is wrapped around the importance of metaphor.

Perhaps the most common theme in the discussion of changing **military** policy regarding **homosexuals** is grounded in metaphors that relate to the history of blacks in the **military**. Although the female metaphor is also sometimes invoked, the black experience has emerged as the major comparative metaphor. Many arguments in favor of dropping the ban are prefaced by the comment, "Just like the blacks." The racial metaphor (blacks) also brings the issue of homosexuality into the arena of civil rights, or the right to be a part of the **military** regardless of one's background. For Americans, the racial metaphor and the constitutional issue have been presented many times as metaphors for people who have been oppressed and excluded from the mainstream.

Scholars of **military** institutions, for the most part, have not developed systematic theories that address homosexuality in the American **military**; nor have they placed the issue of homosexuality into the "oppressed-group" metaphor. But Charles Moskos, the eminent **military** sociologist, published a major article in the Winter 1993 issue of The Wilson Quarterly entitled "From Citizens' Army to Social Laboratory." This article informed the debate by showing how the **military** addressed the issue of the integration of blacks and females into its ranks. Although it did not speak specifically of the importance of metaphors, the paper did argue that the issue of black and female integration into the **military** was different, along many dimensions, from the issue of homosexuality. Thus his work was comparative and informative, and brings the issue into the domain of scholars who study **military** institutions.



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The Military and Social Integration

For scholars of **military** institutions, the issue of homosexuality falls under the general research area of the **military** as a vehicle for social integration. This field of research examines the role of the **military** around the globe in bringing diverse groups within its ranks and providing them with skills that can be transferred to civilian society. Thus the **military**, although an institution whose main duty is the controlled use of violence, has played a role that involves social inclusion of groups throughout the world.

One of the most interesting ironies about **military** institutions is that despite their "undemocratic structure," they have served as the major force for the social inclusion of excluded groups. **Military** organizations have traditionally brought diverse populations together in one common mold and made them work toward a common goal. Indeed, the **military** as an institution, though not perfect, performs this task much better than civilian institutions.

The role of the **military** as a vehicle for social integration of diverse groups has been studied in both developed and developing countries, and represents some of the most interesting comparative work in the field of political science, sociology, and history. Morris Janowitz, father of **military** sociology, combined the concepts of the **military** as a vehicle for social integration and of modernization of society. According to Janowitz, the **military** plays a significant role in the socialization and education of diverse ethnic groups and in the process forges them into a homogeneous army. In many cases, he argued, the **military** is the last and best resort for those who are on the bottom of the socioeconomic ladder in society - those without skills and education.

While in the service, they receive training and skills that can be applied in the civilian sector following discharge. More importantly, they learn how to interact with bureaucratic structures and, in some cases, manage large numbers of people. It is through this process that the **military** contributes directly to the integration of the citizen into the economic, social, and political spheres of the state.

In the United States, the experience of blacks has been the acid test for the role of the **military** as a vehicle for social integration. Although blacks have fought in all wars and armed conflicts (including those predating the Revolutionary War), they had to "fight" for the right to do so. This is in stark contrast to other groups who arrived on American shores, and simply joined the **military**, albeit sometimes with a degree of difficulty. Blacks had such a tough time because the question of the **military** as a vehicle for social integration is tied to a larger question: should groups that are political and social outcasts be allowed to bear arms?

The literature from the Revolutionary period shows the colonists constantly reminding themselves that arming blacks, and slaves, might make the slaves their masters. Thus the history of blacks in the **military** is tied to the fear of what might happen to civilian society if they were armed. Of course, the early colonists had a general fear of standing armies and their ideal was to secure a civilian government. But in the general atmosphere of civil-military relations, the feat of arming blacks was always a consideration during the early period of America.



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Although the black experience is often held up as a model of "successful" social integration, it must be pointed out that it was achieved as a result of manpower needs. It was not done for the mere purpose of an experiment in race relations. When we say blacks in the **military** from an historical perspective, we are speaking of blacks who were male and non-homosexuals (if they were homosexual, then they were excluded from **military** service when it was instilled in the code of **military** justice). Thus during the Revolutionary period, free blacks were excluded from service until the British offered them their freedom if they fought on the side of the Crown. George Washington then told Congress that it was necessary for blacks to participate in this war. Not until near the end of the Civil War, when manpower became short, were blacks allowed to join the fight against the Confederacy.

This pattern was continued in the period of the two world wars. With the exception of the Revolutionary War and Spanish-American War, black participation took place in segregated units, a situation that reflected race relations in the civilian sector. In 1948 President Truman issued Executive Order 9981 which officially ended segregation in the **military**. At the end of the Korean War, desegregation started and by the time of the Vietnam conflict it had become reality.

Some have called the struggle to fight by black Americans an ironic step forward, since they died in large numbers. But the major point is that the group that was an outcast in the general society was brought into the **military** for manpower, not for social experimental purposes. But the fact that the social integration of blacks was done for manpower purposes should not overshadow the success that the **military** has had in the area of race relations.

This is especially true when the experience is viewed in relation to the civilian society, a comparison that is always made by scholars of **military** institutions when this issue is discussed. The effectiveness of the American **military** as a vehicle for the social integration of diverse groups is traced to its unique structure, its separateness from society, its strict hierarchical nature, and its practice of enforced close contact between groups around work and resident situations. Also, the **military**, more than any other institution in society, has placed great importance on merit, not ascription in determining advancement and rewards.

Thus for the last four decades, blacks in the **military** have perceived of themselves as having better opportunities for advancement than they would have had in civilian society. In addition, since the First World War, the income of black veterans has exceeded the income of black non-veterans. This has also been found to be true for white veterans, although the effect is the exact opposite - non-veterans earn more than veterans - for the Vietnam War.

Of course, millions of veterans received educational benefits after the Second World War. But the **military** did not bring them in so they could teach them skills; the skills were simply a by-product of **military** service. Although the **military** is not perfect when it comes to race relations, when opportunities are considered, it serves as an excellent vehicle for social integration of black Americans.

Can the same framework for examining the **military** as a vehicle for social



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integration be utilized in the case of **homosexuals** in the **military**? Can we draw parallels between diverse ethnic or religious groups and **homosexuals**? The answer has to be no. Nowhere in the world is there an analogous situation with **homosexuals** vis-a-vis the **military** as a vehicle for social integration. Men and women who engage in **homosexual** behavior do not make up a separate racial or ethnic group; they do not have a history of all emerging from a common continent (there is no country called **homosexual** land), but rather are found throughout all populations. Thus what the American **military** and Clinton are considering is the outward acceptance of a behavior that is well established among all racial and ethnic groups.

Although the **homosexual** behavior of men and women is accepted in many small Western **military** organizations, the emphasis is on behavior, not ethnicity. It is very important to understand that in the 1940s, when the **military** was desegregated, it was done with black men who were known to be heterosexuals. Black **homosexuals**, because the code of **military** justice does not sanction sodomy, were not allowed to participate if they were known to be **homosexuals**. It is also important to point out that the early participation of blacks, prior to the All-volunteer Force, related to was done by black males, not black females.

Another point that must be reiterated is that nowhere in the world has the **military** been set up to solve issues of social behavior. As noted above, this is especially true of blacks in America. In all wars and conflicts, beginning with colonial conflicts with Native Americans, blacks were called up whenever a shortage of **military** manpower arose. The fact that they were integrated in the 1940s does not mean that the major mission of the **military** was to see if blacks and whites could get along. The **military's** major mission is protecting the country, fighting wars, and maintaining its manpower. The social integration that did take place was due to **military** needs, a by-product.

It is thus a major fallacy to compare **homosexuals** with a racial group with a history of exclusion from the **military** and other institutions in American society. In order to understand this point, we must examine the arguments which hold that **homosexuals** as a group are similar to racial groups, especially those of African descent. There is no history of white ethnic groups being excluded from the U. S. **military**. The arguments also pertain to women of all races and ethnic groups.

The power of metaphor is at the very core of the discussion of **homosexuals** and **military** policy. As is always the case with issues relating to a group seeking admission to an institution from which they were previously excluded, commentators search for metaphors that would show the group's experience as the same as that of other groups. In this case, the perhaps most widely used comparison is "just like the blacks." But, as noted above, a group defined by specific behavior cannot be compared to a major racial group. **Homosexual** behavior does not have a comparative metaphor in American society. In fact, the issue of social change relating to homosexuality must be divorced from issues relating to the history of blacks in America. President Clinton's executive order concerning **homosexuals** in the **military**, if issued, will create a new metaphor, different from any already existing in our society.

There have been many "movements" in history with the purpose of bringing an issue to such a high profile that leaders of major institutions were forced to confront it and change or alter laws that were deemed oppressive. In the United



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States, such movements have traditionally aimed at the attainment of some higher ideal guaranteed by the Constitution and at making this ideal apply to all individuals regardless of their race, sex, or national origin.

Whatever the movement, its leaders, activists, and commentators have always used appropriate metaphors to help people understand why it was important to change a policy. Thus our learning process and change process depend on the power of the metaphor that is brought to the situation. All learning, and preparation for the acceptance of a new idea, it seems, is grounded in the acceptance of a metaphor. Examples of powerful metaphors appear throughout history. During slavery black Americans leaned heavily on the Jewish experience of biblical days when Jehovah freed his people from bondage. The idea was that just as God freed the Jews from the Egyptians, it was right and just, and expected, that God would intervene on behalf of the blacks and free them from their Southern slave masters. On the other hand, the slave masters, too, evoked the biblical metaphor to justify the institution of slavery.

Perhaps the master of the biblical metaphor was Martin Luther King, Jr. He utilized religious metaphors to get at the heart of the consciousness of white Americans. For example, in the early days of the modern civil rights movement, he was criticized for being an outsider agitator that created racial tension in cities in the south. In his famous Letter from a Birmingham Jail, he noted that just as the Apostle Paul left his little village of Tarsus and carried the gospel of Jesus Christ to practically every hamlet and city of the Graeco-Roman world, so was he compelled to carry the gospel of freedom beyond his particular home town.

Another strong metaphor that has influenced the world is Holocaust, the destruction of European Jewry by the Germans during the Second World War. When a policy appears to inhibit human freedom in America, or anywhere in the world, the metaphor of the Hitler regime is invoked to remind us of the horrible results of such a policy. Thus when hate groups such as the Ku Klux Klan engage in anti-Semitic behavior we are reminded that they are engaging in Nazi-type behavior; this is a powerful metaphor of oppression and intolerance of a religious and racial group.

It is this power of metaphor which proponents of change in the military policy of homosexual exclusion are trying to put in motion. **Homosexuals**, the argument goes, are in a long line of groups that have demanded acceptance by the **military** and their experience can be understood by recalling the experience of previously oppressed groups. But how does such a metaphor stand up to reality? Can we see the experience of people who are **homosexual** in light of the black experience? Can we look back at the black experience of the 1940s and see the gay/lesbian experience of today?

The debates on the subject that took place before Bill Clinton became president reflected the fact that this was an issue in search of a historical comparative metaphor. General Colin Powell, then chairman of the Joint Chiefs of Staff, made it clear that he and the other Joint Chiefs would continue to take the position that the presence of **homosexuals** in the **military** was prejudicial to good order and discipline. He further noted that this had nothing to do with the performance of **homosexuals** in the **military**.

Many people were astounded by General Powell's stance because he is black



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and thus had taken a position in opposition of a group that sought full "integration" into the military "just like the blacks." But Powell scoffed at the idea that the historical suffering and exclusion of blacks could serve as a metaphor for changing the official policy of excluding homosexuals from the military. Powell's position allows us to explore systematically why it makes logical sense, and how previously excluded whites who have a certain lifestyle trivialize the black experience through metaphor so that they can "advance," rather than examining a lifestyle within its own historical tradition.

The comparison of homosexuality with race depends on situations that may appear similar but are quite different. They are similar in that many people reacted against black participation in the military because they did not want to be near them. For example, in 1942, when the desegregation of the military was underway (not the exclusion from the military because blacks have served in the military since the inception of the country), the Secretary of the Navy noted the following:

Men on board ship live in particularly close association; in their messes, one man sits beside another; their hammocks or bunks are close together; in their common tasks such as those of a gun crew, they form a closely knit highly coordinated team. How many white men would chose, of their own accord, that their closest associates in sleeping quarters, at mess, and in gun's crew should be another race? How many would accept such conditions, if required to do so, without resentment and just as a matter of course? The General Board believes that if the issue were forced, there would be a lowering of contentment, teamwork and discipline in the service.

Many such comments were made in the period when desegregation was taking place in the military. At first glance these ideas seem synonymous with those expressed about the participation of homosexuals today. But when examined closely, the situation is quite different. It is without a doubt that there were white homosexuals, albeit unknown, in the Navy of that day. As a matter of fact, there were probably white homosexuals who opposed the desegregation of the military, no less than the rest of American society. Let us not forget that J. Edgar Hoover, the head of the FBI and a reputed homosexual, was one of Martin Luther King's worst enemies.

People who accept the analogy between blacks and homosexuals usually do so for political reasons. Although racial groups do organize for political purposes, the emphasis is on shared racial characteristics, not shared lifestyles. It should be quite clear that persons of European, African, Asian, or Mongolian descent who are attracted sexually to other people of the same sex are just a diversity of people with a certain sexual lifestyle. A white homosexual is just a white man with a different sexual lifestyle, and a black lesbian is simply a black woman with a different lifestyle. For white gays or white lesbians to compare themselves with the blacks as a racial group violates the rules of comparative analysis. One cannot compare an achieved behavior that runs through all racial groups with an ascribed characteristic like race.

A related point is that when someone says, blacks and homosexuals, they automatically leave out blacks who are homosexuals. This is true of many groups that develop a political agenda and then make unrealistic comments that ground their experience in the history of blacks. The idea of common oppression with blacks is not only fallacious, it trivializes the entire history of suffering that blacks have experienced because of their outward racial characteristics;



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characteristics which cannot be hidden as one goes through life. Because this trivialization is done quite often, it is necessary to explore exactly why it is trivial.

As early as the 1960s, a literature developed which addressed the "student as nigger" (white students). People of European descent, who voluntarily attended college and graduate school, saw themselves in the same metaphoric light as people who had been denied access to public facilities and generally to equal opportunities under the law. In the 1970s the women's (white) movement produced a literature that described "women as niggers."

More recently, in the literature of the women's movement (white females) comparisons have been made between housework and slave labor. Thus one is comparing the experience of free white females to people who were placed in ships like logs and forced to make the long, hot journey from Africa to the Americas. Although white and black women share many problems, the experiences specific to white females have dominated the literature to such an extent that when one says blacks and women, black women are left out of the equation. This problem has been systematically addressed by Gloria T. Hull, Patricia Bell Scott and Barbara Smith in their book *All the Women Are White and All the Blacks Are Men But Some of Us Are Brave*.

Recently smokers and people who are obese have organized to say that they have being discriminated against "just like the blacks." One cannot say that people with certain non-racial characteristics have not been discriminated against. But there is a difference in discrimination based on behavior and the governmental program of discrimination that dictated the systematic differential treatment of blacks, and that continue to affect many members of that group. Groups with certain kinds of behavior seeking to establish a commonality of oppression with blacks should be asked the simple question: "Where did these people drink water during the days of segregation?" If the answer is that they drank from the "Whites Only" fountain, instead of the "Coloreds Only" fountain, then their oppression should be seen in a different historical light than that of black Americans. Smokers can simply stop smoking if they want to alleviate the effects of discrimination. The trivialization of the black experience, which can most clearly be seen in the issue of **gays** in the **military**, has a long tradition in America.

When one understands that this is a behavioral situation, then one understands that in the **military** African-Americans who are **homosexuals** are also excluded; just as blacks who smoke can also be discriminated against. One can also understand Colin Powell's position because the exclusion is based on a certain kind of behavior. This position is also not surprising to those who understand that there is a segment of blacks that is very conservative when it comes to behavior issues. The idea that blacks should support every change in behavior, simply because they have a history of being excluded based on race, is not only illogical but represents a misapplication of metaphor. Reading of the literature and attendance of major black institutions make clear that **homosexual** behavior is not accepted in the black community. This does not mean that there are no blacks who engage in this behavior. It simply means that the community as a whole does not accept this lifestyle; people have not stood up and legitimated it as an acceptable tradition.

Comparing **homosexuals** to blacks is comparing a lifestyle with a race: an



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achieved characteristic with one that is ascribed; a choice in expressed lifestyle with one that is by and large not a choice. We must remember that it does not matter if a behavior is determined at birth or if it is learned, it is still behavior. Certainly there is more choice about one's sexuality than about one's race. But given the lack of appreciation of the obvious, it is necessary to spend some time looking at the history of this lifestyle.

It is also important to understand that blacks were totally segregated in civilian life before they (black heterosexual males) were integrated into the **military**. They were excluded from opportunity structures that were as varied as all white medical schools and all white movie studios in Hollywood. This certainly is not the case for **homosexuals** (especially those who are white) today. White **homosexuals** are well represented in all professions and have had the same opportunity as other white persons to take advantage of the varied existing opportunity structure. When the **military** was being racially desegregated, it actually provided opportunities for blacks that were unheard of within the civilian sector. For **homosexuals**, this would not be the case, because of their general integration into the civilian sector and their unknown participation in the **military** already.

In America, the most powerful metaphors conjure up the black experience for a comparison. The question is not whether a group has problems in society, but whether or not the metaphor of oppression should be used in order to effect significant changes in the laws of institutions. In the case of **homosexuals** in the **military**, the racial metaphor should not be utilized for the making of public policy.

Searching for a Metaphor

One of the challenges of the "gay rights movement" then is to find a metaphor that will allow people to see their experience in relation to others who have experienced discrimination in the **military**. Since homosexuality is a behavior, it seems fitting to look to other kinds of behavior for an appropriate metaphor. If one were to collate the research on male and female homosexuality, one would find that it has always been described as behavior that involves relations with the same sex. Sometimes this behavior is described in the literature simply as attraction to the other sex; sometimes it occurs because people, such as prisoners, are isolated from members of the opposite sex. This literature also tells us that many individuals experiment with this behavior without choosing to make it a permanent part of their lifestyle. But in addition to being a behavior, it is classified as a behavior that is deviant.

Since it has been classified as deviant behavior, it traditionally has appeared in sociology textbooks in the same section as prostitution, alcoholics, and mental disorders. Usually there is a section on how such disorders emerge from the social structure or family. In psychiatry, homosexuality is regarded as a condition that can be treated, but the wish to change is the most important prerequisite for successfully changing the behavior. This kind of behavior has been documented throughout human history, from the ancient Egyptians to the present, and **homosexuals** are known to have made significant contributions to the world. In America, they have served their country and have held the highest positions in government. This is especially true for those of European origin. Black **homosexuals**, like all blacks, have had a different experience in the workplace.



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Although this is true, one cannot say that American society has accepted homosexuality, that it has been removed from the deviant behavior category to the acceptable category. One cannot say that the bishop of a church, and church members, can stand on the balcony during a church dance and say, "Don't Bob and John look good together." Homosexual marriages, although they do happen, always create a stir within communities. But it is also true that though many people may recognize a fellow worker as "gay," it is viewed as his own business, especially if matters of sexuality are kept private.

Although all behaviors are not the same, Clinton must make this decision about the exclusion of homosexual lifestyle on the basis of a behavior, albeit complicated, in which men and women engage. What the president is dealing with, and I am sure that he is aware of it, is the politicization of sexual behavior. If policy makers were to attempt to specify who is a homosexual, to specify gender vis-a-vis this behavior, they would have a very complicated task ahead of them. The line between masculinity and femininity is a fine one. No one has understood this better than R.W. Connell. In an article that appeared in the December 1992 issue of The American Sociological Review, he notes:

Some groups of openly gay men emphasize masculinity as part of their culture. Closeted gay men enjoy the general advantages of masculine gender and even effeminate gay men may draw economic benefits from the overall subordination of women. In our culture, men who have sex with men are generally oppressed, but they are not definitively excluded from masculinity. Rather, they face structurally induced conflicts about masculinity - conflicts between their sexuality and their social presence as men about the meaning of their choice of sexual object and in their construction of relationships with women and with heterosexual men. Out of these conflicts have come unusually sharp observations of heterosexual men and pioneering movements in sexual politics.

It is thus possible to see that there are men who engage in homosexual activity who do not see themselves as homosexuals at all, but draw their strength from the traditional male role in society.

Seen in this light, changing policies concerning homosexuality is similar to changing policies concerning many other behaviors. We must understand, however, that while homosexual behavior is seen as correct and natural to many people, and simply tolerated by others, it belongs to the group of metaphors that address behavior. Thus a son (or a daughter) who announces to his parents that he is a homosexual informs them of a behavioral lifestyle. Parents understand that it is a type of behavior that is being revealed, and sometimes seek to make the son or daughter rethink whether to persist in this behavior. There is no instance in which an offspring has revealed to his parents that he now belongs to a race different from that of his parents.

The issue therefore cannot be based on arguments about civil rights and the denial of civil rights. Putting the gay issue squarely in the behavior category also means that men and women receive their basic civil rights in America from birth, and that in America basic civil rights have varied more along racial lines than religious and European-ethnic lines. It also means that because of certain kinds of behavior, certain privileges are taken away from people. Thus the challenge is how to change the attitude of the general population about this type of sexual behavior.



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Although homosexuality can be placed in the category of behavior metaphors, it represents a special moral case. If metaphors provide us with examples of similar situations, seeing one thing in relation to another so that we can develop policy, most unaccepted behaviors cannot be related to homosexuality. Certainly one cannot say, "just like people who smoke, **homosexuals** are seeking to be accepted by the larger society." Nor can we say that **homosexuals** are just like people in the 1960s who smoked marijuana and argued that it was all right to do so and that drug laws should be changed; then **homosexuals** are saying that we should change the sexual laws in the **military**. Nor can we say that **homosexuals** are like the mentally ill or those who secretly love pornography. Put simply, it is difficult to relate **homosexual** behavior to the many other types of problematic social behaviors for which government has tried to develop public policy.

One must conclude that there is no metaphor from which to learn when it comes to addressing acceptance of homosexuality, especially in the **military**. We are basically a secular society that turns to old religious principles when this issue is considered. We have not solved the problem of cultural morality. It is an issue that makes one rethink the fundamental principles of what is accepted from a moral point of view. The issue of morality runs through all racial groups, with elements of the religious black population being perhaps the most conservative of all on homosexuality. Thus, if Clinton changes the policy that bans known **homosexuals** from the **military**, he will create a **military** metaphor for many kinds of sexual behaviors that exist in society. The creation of this metaphor would mean that other institutions, whether religious, private, or public, could point to the **military** and say that because of its implementation there, it should be implemented here. The president could make conduct which has traditionally been unbecoming to conduct that is becoming. If he decides to drop the ban on known **homosexuals**, the **military** would be known for its policy of allowing known **homosexuals** to openly display their lifestyle. This will mean taking a behavior issue, which has been controversial in society, and making it acceptance.

If the president changes the **gay** policy, the **military** can be expected to develop plans to make the change. After all, the president is commander-in-chief, and we live under civilian, not **military** rule. As a commander of a major **military** installation informed me over dinner, "If the president delivers the executive order, the **military** will become the greatest **gay** rights organization in America." There is no doubt that this would create a new metaphor on the landscape of comparative experiences in America.

Because of the **military's** mission, there are questions pertaining to the influence of known **homosexuals** on issues of morale, privacy, and cohesion. These questions were asked when blacks entered the **military** because they definitely had never been in an integrated **military**. When the roll was called, all of the faces were Caucasian. Thus one could ask questions about the impact of race on morale, privacy, and cohesion. Certainly these questions should be asked about homosexuality. But in asking them we find ourselves in a situation of irony; a situation in which reality has always differed from appearance.

In a recent conversation, a veteran, who is also a **military** sociologist, noted that although she was from a large metropolitan area, she had never been approached by a lesbian until she entered the **military**. She concluded, fifteen



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years ago, that this was an excellent place for lesbians to work and live. She spoke of the complicated messages and code names people used to make sure that the people with whom they were interacting were "o.k." and would not get them thrown out of the **military**. She observed this behavior throughout the ranks. This does not mean that all women soldiers (this was prior to the sexually integrated All-Volunteer Force) were lesbians, but she did perceived a significant number of such women.

In *Conduct Unbecoming*, a book that confuses the racial metaphor with homosexuality, but is otherwise a good history of this behavior in the **military**, Randy Shilts also discusses the various ways in which **homosexuals** have practiced their sexual behavior in the **military**. Commanders have looked the other way. Homosexuality was part of the culture of enlisted men as well as commissioned officers, and elaborate networks for **homosexual** contact were developed. Thus the irony is that although homosexuality is against the **military** code of justice, **homosexuals** have been a part of the institution for generations. During my service in the Army, which included the Vietnam tour and state-side duty, people were quite aware of fellow soldiers who were **homosexuals**. People were also aware of, a spoke often about, the different communication systems that people used to make sure that they did not become known. Of course, many soldiers have tried to fake homosexuality during basic training to get out of the **military** and return to civilian society.

Although we do not have data on issues such as the impact of known homosexuality on privacy, cohesion, and morale, there is no doubt that open homosexuality will have an impact on these issues. **Military** sociologists understand that the **military** has not solved many of the issues that evolved when women soldiers were integrated into its ranks. (As a matter of fact, the issues of privacy and morale that revolve around women and men soldiers are probably more problematic than the homosexuality issue could ever be.)

In interviews with soldiers of all ranks, conducted by myself and two other **military** sociologists at a major Army base in Texas, these were found to be general attitudes: 1) both men and women soldiers (who are not **homosexuals**) do not mind working with known lesbians and **homosexuals**, but they have reservations about living with them - both males and females place a great deal of emphasis on privacy; 2) many believe that if known **homosexuals** openly display their lifestyle, morale will be affected in units; 3) men are less likely to accept the idea of changing the policy on homosexuality in the **military** than women (black men appear the most conservative group on this issue); 4) many oppose a change of policy that would permit known **homosexuals** to openly practice their lifestyle in the **military** because of the special nature and task of the institution.

Although these results are preliminary, one can predict that a change in policy will affect cohesion and morale. But how, and under what circumstances these issues will become significant can only be answered by research. For example, if serving in the **military** is just another job with a commute home after work, then the effect of homosexuality on cohesion and morale may not be significant. But if people have to live together in close contact after duty hours, then the effect may be significant.

Finally, we can ask what are the implications for **military** recruitment if the ban against known **homosexuals** is dropped? Since the country's inception,



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race, perhaps the most divisive continuous force, has dominated the statistics on who participated in military organizations. We also know that since the end of the draft, military service has not been on the top of the list for the youths of America. All research points to the fact that middle class youths have, for the most part, stayed out of the enlisted ranks. There is also a race effect, with blacks being represented in some branches of the service in percentages far above their percentage in the larger society. As a matter of fact, the argument has been made that there are too many blacks in the All-Volunteer Force.

Given that military service can be partly linked to opportunities in the civilian society, one might speculate that black homosexuals and lesbians will take advantage of the change in policy when it occurs. This would follow a pattern that has been seen in the past. When the military officially opened opportunities to women, it was black women who responded in great numbers. During the period of the All-Volunteer Force, the percentage of black women in the Army at the enlisted level has been around 48 percent because opportunities in the military were often better than in the civilian sector. Following this logic, one might also expect white homosexuals who are not middle-class to take advantage of new opportunities without fear of reprisals. Put another way, a change in policy might have interesting implications for the racial composition of the military.

Bill Clinton's campaign promise that he would drop the ban on known homosexuals in the military also has its irony. The president belongs to a generation of privileged youths who refused to serve during the Vietnam era. Certainly many people opposed that war at the time, including some of those who did answer the call to serve. Responding to the call to serve was not based on an evaluation of the war, but on the historical concept of service to one's country. In an interesting kind of way, the president can now change a policy to allow individuals to do something that he never did: serve his country in a military uniform.

If President Clinton changes the policy on homosexuals in the military, he will not bring a new, hitherto excluded group into its ranks, but rather will create a policy that accepts a certain kind of behavior that has always been present in the military, albeit unofficially. In doing so, he will create a metaphor to be utilized by other major institutions that have not accepted open homosexuality.

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New York Times
Sept. 2, 1999

Military Service Is Not A Right

To the Editor: "Bigotry in the Military" (editorial, Aug. 30) correctly labels the military's policy on gay soldiers as discriminatory. There's no constitutional right to serve in the military, and the statutory homosexual ban is based on military necessity to maintain good order and discipline. For readiness reasons, the military also discriminates on the basis of such attributes as age, education, family status, physical fitness and drug use.

As one who served on the Pentagon task force that wrote the policy, I know that "'don't ask, don't tell" was a compromise that pleased neither side. The Pentagon's new guidelines will further politicize the policy.

Let's stop the charade. Discard the Clinton compromise and follow the law, which upholds the longstanding principle that homosexuality is incompatible with military service.

Robert L. Maginnis, Washington, Aug. 30, 1999
The writer is a senior director at the Family Research Council.

To the Editor: "Bigotry in the Military" (editorial, Aug. 30) says that discharge data show that the climate remains "hostile" to gay military personnel.

However, you do not point out that many Pentagon officials believe that the discharges for violations of the "don't ask, don't tell" policy have increased, in large part, because many service members, gay and straight, are using the policy as a quick way to break their contracts.

Life in the new military is stripped of pleasure and replete with increasingly personal, invasive and picayune regulations. Service member are expected to do more with less and to tolerate pay scales that have fallen 13.5 percent behind pay for comparable civilian work. Walking up to one's commanding officer and saying, "Lieutenant Colonel, did I ever tell you I'm gay?" begins to seem a small price.

Stephanie Gutmann, Wallingford, Vt., Aug. 30, 1999

To the Editor: Re "Bigotry in the Military" (editorial, Aug. 30): The mission of the military is to defend the country with minimum casualties. It is not to conduct social experimentation or correct societal problems. Extensive, continuous training, good order and strict discipline are prerequisites. Any compromises of these elements decrease the chances for success.

It has been found, and I have witnessed, that practicing homosexuals destroy unit cohesion, compromise command respect and reduce war-fighting capability, thereby putting all personnel at greater risk. These are facts that cannot be altered by wishful thinking, social engineering or edicts.

Richard S. Reade, Setauket, N.Y., Aug. 30, 1999
The writer is a retired Navy carrier pilot.

Editor's Note: The editorial referred to appeared in the *Current News Early Bird*, August 30, 1999.

Chicago Tribune
August 31, 1999

Bringing 'Don't Ask' Up To Date

After five years of failure and at least one tragic death, the Pentagon finally has brought some badly needed strength and clarity to Congress' controversial "don't ask, don't tell, don't pursue" policy on homosexuals in the military.

It has not always been easy for commanders to implement a policy that in some ways contradicts itself. The military's ban on openly gay uniformed personnel still stands, but those who do not voluntarily reveal their sexuality have a right under the "don't ask" policy to be protected from questioning, harassment or investigative probes about it. Confusion over what that means in day-to-day military life has left many gay soldiers worse off than before.

The bludgeoning death of Army Pfc. Barry L. Winchell in his barracks at Fort Campbell, Ky., in July offers a particularly tragic example of what can go terribly wrong. Two sergeants testified in the resulting court martial that they were aware of daily harassment against Winchell, but took no steps to intervene. They also testified that they asked Winchell if he was gay. That violated the "don't ask" policy.

Pentagon figures confirm that discharges of gay service personnel have almost doubled from 617 in 1994, when the policy was introduced, to 1,145 last year. Past victims of harassment sometimes have found they could not report it without having their own sexuality questioned, according to Servicemembers Legal Defense Network, an advocate for gays and lesbians in the military which negotiated the new changes with Pentagon officials.

The update announced by Defense Secretary William Cohen is intended to strengthen enforcement of the policy, curb reported increases in anti-gay harassment and improve reporting procedures for those incidents that do occur. It requires high-level reviews of all investigations of alleged homosexual activities and mandatory training on anti-harassment guidelines for all troops, beginning with boot camp.

More than two years ago a high-level memo recommended most of the changes that Pentagon chiefs now have announced. What a pity that it appears to have taken a murder to spur Pentagon officials into action.

More questions remain. Pentagon officials should move quickly to clarify, for example, exactly what the new training should and will entail. The new policy comes too late to help Pvt. Winchell, but it can help protect the rights of others while also helping the military to achieve its goal of good order and discipline.

New York Times
August 30, 1999

Bigotry In The Military

The Defense Department's new guidelines on the "don't ask, don't tell" policy may reduce some of the worse abuses against homosexuals in the military. But it does not cure the fundamental injustice of a policy that discriminates against homosexuals by forcing them to hide their sexual orientation and by punishing the truthful with expulsion.

Last year, the department issued a report showing that the number of gay soldiers being forced out of the military had risen sharply since adoption of the "don't ask, don't tell" policy in 1994. That policy was a compromise between the White House, which wanted to end all discrimination against homosexuals, and opponents in the Senate and the military who wanted to continue the longstanding ban on homosexuals in the armed forces. Under the compromise, openly gay people are still barred from the armed services. But they are allowed to serve if they do not talk openly about their sexual orientation, and commanders are barred from asking troops if they are gay.

The compromise policy was supposed to increase privacy and end witch hunts. Yet the data show that the climate remains as hostile to gay military personnel as ever, if not more so. Last year, 1,145 service members were discharged for homosexuality, compared with 997 in 1997 and 617 in 1994. Worse, harassment seems not to have diminished. In July a soldier at Fort Campbell, Ky., was beaten to death with a baseball bat, allegedly because he was gay.

The new guidelines would require that all military personnel receive anti-harassment training in boot camp and throughout their careers. Special training would be given to commanders and law enforcement officers. The guidelines recommend that military lawyers consult with senior legal officers at headquarters before initiating investigations into allegations of homosexuality.

In the very few cases where recoupment of military benefits is at issue, investigations into a service member's sexual orientation would require approval from the highest levels of the service. The guidelines would also require that inspectors general in each branch of the armed services review whether commanders and investigators are being trained properly.

More training clearly is needed at all levels. In some cases, victims who report anti-gay harassment have found themselves being investigated and subsequently drummed out of the service rather than the harassers. The new guidelines remind commanding officers that they are not to take this attack-the-victim approach, a glaring sign of how poorly some commanders have carried out the policy.

But better training will not prevent absurd outcomes. The case of Steve May, a Republican state legislator in Arizona, shows how irrational the policy is. Mr. May, who is gay, made reference to his own sexual orientation while debating a bill in the Arizona House dealing with health insurance benefits for domestic partners. He also happens to be an officer in the Army Reserve. He is now under investigation and may be discharged from the military for publicly revealing his homosexuality.

Defense Secretary William Cohen has said that the policy on homosexuals in the military will be carried out fairly and that harassment will not be tolerated. But the policy, by labeling homosexuals an unacceptable threat to order and discipline, reinforces anti-gay hatreds that lead to harassment and violence. The ill-conceived "don't ask, don't tell" policy was supposed to insure that gay soldiers

would be treated more humanely. The record after five years shows that the policy is not protecting qualified individuals from being forced out.

Better guidelines will not improve a policy that at its core tolerates and promotes bigotry.

Washington Times
August 28, 1999
Pg. 1

Gore Touts Policy Of 'Compassion' For Gays In Military

Advocates fairer 'don't ask, don't tell'

By Andrew Cain, The Washington Times

Vice President Al Gore says he would pressure the military to implement President Clinton's "don't ask, don't tell" policy "with more compassion" because too many homosexuals are being discharged.

Mr. Gore's comments appear to conflict with an Aug. 13 Pentagon statement that "for the most part, the policy has been properly applied and enforced."

Mr. Gore addressed the issue in an interview with the Advocate, a national magazine for homosexuals.

"I don't think the changes in the military policy are working the way they were intended to work," Mr. Gore said in the Sept. 14 issue, which hits newsstands Tuesday.

"The statistics may be reflecting some phenomenon I don't understand," Mr. Gore said, "but the easiest explanation is that it's not being implemented in a way that fully reflects the spirit of the policy."

"I would try to change that by working with military leaders to bring about an implementation strategy that's fairer."

The Pentagon announced Aug. 13 that it will require the 1.36 million members of the armed forces to undergo anti-harassment training to make sure the military fairly enforces its ban on homosexuals.

The Servicemembers Legal Defense Network - a group that defends homosexuals in the armed forces - notes that 1,149 persons were discharged for homosexuality last year, compared with 667 in 1994.

"Back in '93 there were supposed to be investigative limits under 'don't ask, don't tell, don't pursue,' " C. Dixon Osburn, co-director of SLDN, said yesterday.

"Commanders continue to ask and pursue and harass" homosexuals, leading to "violation after violation after violation of the policy," he said. "Gay discharges have soared" as a result, he said.

Mr. Gore is not suggesting a change in policy, Mr. Osburn said.

"He would like to make sure the commanders are actually following the rules."

The increasing discharges of homosexuals do not indicate a "witch hunt," said Robert Maginnis, a military analyst at the Family Research Council. Eighty percent of the discharges for homosexuality occur because a member of the armed forces concedes homosexuality, he said.

"A lot of people are declaring themselves gay to get out" of the military, he said, a phenomenon Mr. Maginnis called "the Klinger effect," referring to Max Klinger, the corporal on the TV show "M*A*S*H" who wore a dress in hopes he would be kicked out of the Army.

Defense Secretary William S. Cohen said in an Aug. 13 statement that the department "is determined to implement the homosexual conduct policy with fairness to all concerned."

His statement followed the bludgeoning death of Army Pfc. Barry L. Winchell in his barracks at Fort Campbell, Ky. Homosexual groups say fellow soldiers harassed Pfc. Winchell for months because they suspected he was homosexual.

In the interview with the Advocate, Mr. Gore reiterated his opposition to homosexual "marriage."

"I'm in favor of legal protections for domestic partnership, but I'm not in favor of changing the institution of marriage as it is presently understood - between a man and a woman," Mr. Gore said.

Rowan Scarborough contributed to this article.

Boston Globe
August 29, 1999

Pg. E4

To Some, 'Don't Ask, Don't Tell, Don't Pursue' Means, 'Do Harass, Do Ridicule, Do Act Violently'

By Chuck Colbert

To say that the "don't ask, don't tell, don't pursue" policy on gays in the military is not working is an understatement. As the murder of a gay soldier last month in Fort Campbell, Ky., makes perfectly clear, military service can be outright deadly for gays.

While the fact-finding continues, one soldier has been charged with premeditated murder in the killing of Private First Class Barry L. Winchell, 21, who was bludgeoned to death with a baseball bat. Winchell's roommate, who is said to have egged on the assailant, has also been charged with being a principal to premeditated murder and acting as an accessory to the fact.

As the evidence mounts, the beating and murder look more and more like a hate crime. If that's true, Winchell's death would be the first known incident of a hate crime based on sexual orientation at a US military base.

But incidents of harassment, ridicule, and even violence are not so out of the ordinary in the military's culture of hostility toward gays. Consider these examples:

Antigay harassment, which has been on the rise for five years, more than doubled in 1998 - up 120 percent from the previous year - according to the Servicemembers Legal Defense Network, or SLDN, an independent legal aid and watchdog organization.

During the last five years, staff attorneys at SLDN have helped more than 1,800 military personnel. Some of their clients have reported verbal gay bashing and threats on a daily, even hourly, basis, according to an annual report, released by the organization last March.

"Asking" and "pursuing" violations of the policy have also increased for the fifth year, according to SLDN. The organization documented 511 such incidents during 1998, up from 359 reported the previous year.

Overall, the number of gay discharges (1,149) in 1998 is the highest in a decade - up 86 percent since 1993, the year before Congress and the president approved "don't ask, don't tell, don't pursue," which went into effect on Feb. 28, 1994. That means that the Pentagon fired three to four people every day for being lesbian, gay, or bisexual. Those pink slips have cost the tax-paying public \$130 million over the past five years.

So, what are the president, a Democrat, and the secretary of defense, a Republican - the two people ultimately responsible for the implementation and enforcement of "don't ask, don't tell, don't pursue" - doing about the violations and the policy's skyrocketing costs? Two weeks ago, the Defense Department released a couple of policy directives "intend[ed] to improve application of the homosexual conduct policy."

The new directives require, for the first time, antigay harassment training at all levels of the armed forces, beginning with basic training of recruits. The directives also recommend that lower-level legal officers consult with, and get approval from, more senior lawyers before opening an investigation of anyone suspected of being gay.

But these directives represent no fundamental change in policy and are still much too little - and much too late for Winchell, his family, and friends.

While the new training requirement has received the lion's share of media attention, the latest target of "don't ask, don't tell, don't pursue," a Republican state legislator and Army reserve officer from Arizona, sees right through the military's nonsense and double-think: "First, we're going to indoctrinate our soldiers to believe that homosexuals are inferior and a threat because of this policy, and then we're going to indoctrinate them into believing that gays shouldn't be harassed," Steve May told The New York Times last week.

May did active duty in the Army and then entered the reserve. Elected to the Arizona Legislature last November, he became outspokenly critical of a failed bill that would have barred the use of public funds for same-sex domestic-partner health benefits. In the process he came out publicly.

May's public self-outing is what triggered an investigation by the Army because under "don't ask, don't tell, don't pursue" gays are not permitted to disclose their sexual orientation in public settings.

Granted this case is as unlikely as it is unusual, but "don't ask, don't tell, don't pursue" does not take into account the way real gay people live their lives, either in military service or public office. But more important, who really believes those directives will fundamentally change the hostile climate that makes it so unsafe for gay and lesbian service members?

Several days before the Defense Department issued the new guidelines, military officials at Fort Campbell heard testimony concerning Winchell's death. Sworn testimony revealed that because of his perceived sexual orientation, Winchell faced daily harassment for four to six months before he was murdered - and that superiors knew about it but took no steps to stop it. Winchell's section leader reportedly testified he had been part of an investigation seeking to find if Winchell was gay.

Such blatant abuses and violations of "don't ask, don't tell, don't pursue" indicate a pathetic policy.

As he issued the new directives, Defense Secretary William S. Cohen declared, "I've made it clear there is no room for harassment or threats in the military. The department is determined to implement the homosexual conduct policy with fairness to all concerned."

Try using those lines on the parents and friends of Private First Class Winchell. And ask yourself: Will the new Defense Department directives really be enough to save the future Private Winchells of our armed forces?

Chuck Colbert of Cambridge was a surface warfare officer in the Navy from 1981 to 1985. He is on the board of the National Lesbian and Gay Journalists Association.

New York Times
September 28, 1999

European Court Tells British To Let Gay Soldiers Serve

By Sarah Lyall

LONDON -- The European Court of Human Rights declared Monday that Britain's longstanding ban on homosexuals in the military was a violation of the basic human right to privacy.

The unanimous decision by the European court, based in Strasbourg, France, means that Britain will almost certainly be forced to allow openly gay men and women into the military for the first time, human-rights lawyers said.

"Politically the government, which has made human rights part of its manifesto, cannot be seen to be ignoring the policy of the European court," said Di Luping, a lawyer for Liberty, a human-rights organization. Ms. Luping represented two of the four people who took their case to the European court after they were discharged from the military when their homosexuality was discovered.

The Defense Ministry, which responded to the legalization of homosexuality in Britain some 30 years ago by forbidding gay men and lesbians to serve in the armed forces, said that as a result of the ruling, it would halt pending disciplinary cases involving military personnel suspected of being gay. But beyond that, it said the government would have to review the decision and decide how to proceed.

"This government, like all governments, has to accept the rulings of the European Court of Human Rights," said the defense secretary, Lord Robertson. "The detail of this complex judgment and the practical implications are presently being studied. We will be looking at it quickly, thoroughly, and making our recommendation speedily."

Since the ban on homosexuals in the military was put into effect, at least 600 gay men and lesbians, by official count -- but possibly thousands more -- have been discharged unfairly because of their sexuality, said Steve Johnston, chairman of Rank Outsiders, a support group for gay members of the armed forces.

"People who serve or who elect to serve their country," he said, "do so with the commitment that the ultimate sacrifice might be to give up their lives for their country. They don't join the navy or the army or the air force to find same-sex partners."

The case before the European court, which serves as a court of last resort for Europeans, much as the Supreme Court does for Americans, concerned four people: Ms. Luping's clients and two others. All were dismissed from the military in the mid-1990s after their homosexuality was disclosed.

Graeme Grady, an intelligence officer with the Royal Air Force who was married and the father of two children, was discovered going to a counseling group for gay married men. Jeanette Smith, an air force nurse, was dismissed after her relationship with a civilian woman was revealed by an anonymous tip. Duncan Lustig-Prean was a supply officer on a naval ship whose superior officer received an anonymous letter alleging that he was gay. And John Beckett, a weapons engineer mechanic in the navy, confessed his homosexuality to the chaplain on his ship.

Armed with glowing reports from superior officers about their conduct and professionalism, the four appealed the dismissals to the British courts, but their applications were rejected. In 1996, they took their cases to the European court.

Defending its policy in Strasbourg, the British government argued that the presence of gay men and lesbians in the military depressed morale, incited anti-gay prejudice and disrupted people's ability to do their jobs. It pointed to a survey it conducted in 1996 in which a preponderance of members of the armed services polled said they did not want to serve with homosexuals.

The issue has been a hotly contested one in Britain, and the Defense Ministry has always made clear that it believes, as its guidelines say, that homosexuality is incompatible with military service.

"This is not only because of the close physical conditions in which personnel often have to live and work, but also because homosexual behavior can cause offense, polarize relationships, induce ill-discipline and as a consequence, damage morale and unit effectiveness," the guidelines say.

But the court, composed of judges from Britain, Cyprus, France, Lithuania, Austria, Norway and Albania, was not convinced. In a 7-0 judgment, it ruled that the Defense Ministry had violated Article 8 of the European Convention on Human Rights, which says that "everyone has the right to respect for his private and family life, his home and his correspondence."

Britain has no American-style bill of rights or written constitution, but along with 40 other countries, it has signed the European Convention on Human Rights, which obliges it to abide by the court's rulings, even to the extent of changing its laws if necessary. Previous cases have forced Britain to end corporal punishment in state schools and to give greater rights to prisoners and people suspected of terrorism.

In this case the European court found the investigations of the applicants' sexuality, which included searches of their possessions and detailed interrogations of them and others by military police officers about specific and highly personal aspects of their sexual practices, to be particularly intrusive. The court said this "constituted a direct interference with the applicants' right to respect their private lives."

Nor was the court swayed by the Defense Ministry's contention that members of the armed forces do not want to serve with homosexuals.

"These negative attitudes cannot, of themselves, be considered by the court to amount to sufficient justification for the interference with the applicants' rights outlined above, any more than similar negative attitudes toward those of a different race, origin or color," the ruling said.

The four people whose cases were the subject of Monday's ruling said they were gratified by the result, and hope the Defense Ministry will lift the ban on homosexuals as soon as possible.

"I'm absolutely thrilled with the decision," Ms. Smith told Sky News, comparing the effort to keep gay men and lesbians out of the military to earlier efforts to ban people from other groups. "They weren't happy when women joined the forces, or ethnic minorities and blacks and different religious groups. I can't see why we can't be accepted in, either."

London Times
September 27, 1999

European Court To Rule Against MoD On Gays

By Michael Evans, Defence Editor

Four former members of the Armed Forces who were dismissed for being homosexual are expected to win a landmark ruling by a European court today that the Ministry of Defence violated their human rights.

However, the ruling in favour of Jeanette Smith, a former RAF nurse, Graeme Grady, an ex-RAF administrator, Lieutenant-Commander Duncan Lustig-Prean, formerly of the Royal Navy, and John Beckett, an ex-naval rating, will not lead to any change in the Government's policy for at least two years, MoD sources said.

The judgment by the European Court of Human Rights is expected to rule that the manner in which they were dismissed, particularly the way they were explicitly questioned by the military police about their sexual practices, was a breach of individual privacy.

All four were investigated when the services still had a policy of regarding homosexuality as a disciplinary offence requiring rigorous investigation by the military police. Since 1994 all such cases have been regarded as an administrative matter and dealt with more discreetly by commanding officers, although if suspected homosexuals refuse to own up about their sexual orientation they still face further inquiries. But the MoD said that the military police were brought in only if there had been a suspected criminal offence, such as a sexual assault.

The European court is expected to rule that the military police investigation of the four contravened several articles of the European Convention on Human Rights, based on a wide interpretation of all forms of discrimination, including cases of sexual orientation.

Although the ruling will mean that the MoD will have to pay thousands of pounds in compensation, the court is not expected to order the scrapping of Britain's policy of banning homosexuals from serving in the Armed Forces. It is believed to be more likely that the MoD will be told to review its policy. The Government is committed to a review when Parliament next debates the Armed Forces Bill, but that is not until 2001. A similar order to reassess the policy was made by the Appeal Court in 1995, but the ban remained, partly because there was strong support for it within the Armed Forces.

Today's judgment will increase the pressure on the Government to change the legislation, although it will be up to MPs in a free vote. In the past decade about 60 men and women each year have been dismissed for being homosexual or lesbian; currently 80 ex-servicemen and women have lodged unfair dismissal cases against the MoD at employment tribunals.

Washington Times
Sept. 6, 1999
Pg. 17

Feeling The Draft

By Oliver North

Al Gore has announced his solution for the readiness problems in our military: a kinder, gentler "don't ask, don't tell" policy for homosexuals and lesbians. The vice president proffers this remarkable solution to the services' recruiting and retention problems in an interview in the Sept. 14 edition of the Advocate, a national journal for the "gay" community.

"I don't think the changes in military policy are working the way they were intended to work," says Mr. Gore. Expressing concern for the 1,149 service members who were discharged last year for homosexual activity, Mr. Gore says he would like "to change that by working with military leaders to bring about an implementation of a strategy that's fairer."

Fairer to whom? Fairer to a special interest group to which this administration has pandered since coming to office, or fairer to the country that requires its government to "provide for the common defense"?

Unfortunately, we know the answer. For the last six-and-a-half years, the 1.4 million young men and women of our armed forces have been treated like lab rats in a radical social experiment. First it was "don't ask, don't tell." Then it was an increase in mixed-gender training and the dramatic expansion in "Military Occupational Specialties" open to women. Finally it was the extravagant deployment of an ever-smaller number of soldiers, sailors, airmen and Marines around the world like pawns on a chessboard. The result: recruiting and retention shortfalls in the Army, Navy and Air Force that are creating potentially catastrophic readiness problems.

House Armed Services Committee Chairman Floyd Spence, South Carolina Republican, has described the shortage of military personnel to be "a desperate situation that keeps getting worse." The committee reports the Army will have a deficit of more than 10,000 soldiers this year; the Air Force will fall 2,500 recruits (and 1,400 pilots) below its goal; and the Navy will be short 22,000 sailors. Only the Marines, who are "looking for a few good men," will hit their target this year. Mr. Gore's solution - a better "don't ask, don't tell" policy - isn't the answer. Neither is the Pentagon's twofold response: more women and bribery.

Proponents of more women in the military point to the fact that only 14 percent of the force is female - whereas more than half of Americans are of the "gentle sex." Yet, despite the vociferous advocacy of feminists in the Clinton-Gore Pentagon for putting women into ground combat units and aboard submarines, there remains widespread public resistance to the United States becoming the first nation to send its wives and daughters into the line of fire.

Recognizing that trying to fill the ranks of an all-volunteer military with homosexuals, lesbians and women may not suffice to replenish the personnel voids, the Pentagon has decided to appeal to America's youth with emotion. Not patriotism. Not Douglas MacArthur's "Duty, Honor, Country." Instead, they are trying Greed. The Congress finally passed a much overdue 4.8 percent pay raise. They also approved a menu of re-enlistment bonuses, hefty "bounties" for enlisting critical skills and generous cash premiums for those in key billets who stay beyond their obligated service. But in a

thriving economy, even cold, hard cash may not be enough. Last year, the Air Force, faced with a mass-exodus of young pilots, tried to staunch the hemorrhage with money - and failed. The commercial airlines simply outbid the Pentagon.

Absent a major reversal in the U.S. economy, efforts to recruit and retain military personnel based on financial incentives alone are doomed to failure. Money alone won't make up for countless "peacekeeping" deployments and near-endless family separations in a force that is today, 60 percent married. Increasing the size of the military would decrease the burden - but with the exception of the Marines, the services can't meet current personnel goals. So how can we find enough young Americans willing to serve?

Strangely enough, the answer is in an institution that is quietly slated to disappear: the Selective Service System. Before their August recess, the House Appropriations Committee approved termination of the 59-year-old agency as a "cost-saving" measure because no American has been "drafted" for more than a quarter of a century.

Why not? The nation needs a fighting force, so why not use the Selective Service System to find them? Anecdotal evidence from today's military offers thousands of examples of young men who decided to volunteer after they went to register on their 18th birthdays. But even if the Selective Service System isn't going to be used to meet our "peacetime" readiness needs, why take one more step toward unilateral disarmament?

And finally, why should a Republican Congress send to the president who once dodged the draft a bill that would kill the draft?

Oliver North is a nationally syndicated columnist.

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Defense Intelligence Agency

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."

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.

Wolffe 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," Wolffe 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 Wolffe 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.

CAPT

Poterman NSC

From LTC(P)
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Changes to Appendix 22, the Analysis accompanying the Military Rules of Evidence

(Part III MCM)

(a). Mil. R. Evid. 501. The analysis to Mil. R. Evid. 501 is amended—

(1) by striking:

"The privilege expressed in Rule 302 and its conforming Manual change in Para. 121, is not a doctor-patient privilege and is not affected by Rule 501(d)."

(2) by adding at the end:

"1999 Amendment. The privileges expressed in Rule 513 and Rule 302 and the conforming Manual change in R.C.M. 706, are not physician-patient privileges and are not affected by Rule 501(d)."

(b). Mil. R. Evid. 513. The analysis to Mil. R. Evid. is amended by inserting after the analysis of Mil. R. Evid. 512, the following:

"1999 Amendment. Military Rule of Evidence 513 establishes a psychotherapist-patient privilege for investigations or proceedings authorized under the Uniform Code of Military Justice. Rule 513 clarifies military law in light of the Supreme Court decision in *Jaffee v. Redmond*, 518 U.S. 1, 116 S. Ct. 1923, 135 L.Ed.2d 337 (1996). *Jaffee* interpreted Federal Rule of Evidence 501 to create a federal psychotherapist-patient privilege in civil proceedings and refers federal courts to state laws to determine the extent of privileges. In deciding to adopt this privilege for courts-martial, the committee balanced the policy of following federal law and rules, when practicable and not inconsistent with the UCMJ or MCM, with the needs of commanders for knowledge of certain types of information affecting the military. The exceptions to the rule have been developed to address the specialized society of the military and separate concerns that must be met to ensure military readiness and national security. See *Parker v. Levy*, 417 U.S. 733, 743 (1974); *U.S. ex rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955); *Dept. of the Navy v. Egan*, 484 U.S. 518, 530 (1988). There is no intent to apply Rule 513 in any proceeding other than those authorized under the UCMJ. Rule 513 was based in part on proposed Fed. R. Evid. (not adopted) 504 and state rules of evidence.

"Rule 513 is not a physician-patient privilege. It is a separate rule based on the social benefit of confidential counseling recognized by *Jaffee*, and similar to the clergy-penitent privilege. In keeping with American military law since its inception, there is still no physician-patient privilege for members of the Armed Forces. See the analyses for Rule 302 and Rule 501.

"(a) General rule of privilege. The words "under the UCMJ" in this rule mean Rule 513 applies only to UCMJ proceedings, and do not limit the availability of such information internally to the services, for appropriate purposes.

"(d) Exceptions. These exceptions are intended to emphasize that military commanders are to have access to all information, and that psychotherapists are to readily provide information necessary for the safety and security of military personnel, operations, installations, and equipment."]

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Article (09/28/1999) European Court Tells British To Let Gay Soldiers Serve

- LONDON -- *The European Court of Human Rights declared Monday that Britain's longstanding ban on **homosexuals** in the **military** was a violation of the basic human right to privacy.*

- ... *Britain will almost certainly be forced to allow openly gay men and women into the **military** for the first time, human-rights lawyers said. ...*

- ... *people who took their case to the European court after they were discharged from the **military** when their **homosexuality** was discovered. ...*

- ... *The Defense Ministry, which responded to the legalization of **homosexuality** in Britain some 30 years ago by forbidding gay men and lesbians to serve in the armed forces, said that as a result of the ruling, it would halt pending disciplinary cases involving **military** personnel suspected of being gay. But beyond that, it said the government would have to...*

- ... *Since the ban on **homosexuals** in the **military** was put into effect, at least 600 gay men and lesbians, by official count -- but...*

Article (09/27/1999) European Court To Rule Against MoD On Gays

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- ... *The European court is expected to rule that the **military** police investigation of the four contravened several articles of the European Convention on Human Rights...*

Article (09/07/1999) Feeling The Draft

- ... *Al Gore has announced his solution for the readiness problems in our **military**: a kinder, gentler "don't ask, don't tell" policy for **homosexuals** and lesbians. The vice president proffers this remarkable solution to the services' recruiting and ...*

- ... *"I don't think the changes in **military** policy are working the way they were intended to work," says Mr. Gore. Expressing concern for the 1,149 service members who were*

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 - ... tell." Then it was an increase in mixed-gender training and the dramatic expansion in "**Military** Occupational Specialties" open to women. Finally it was the extravagant deployment of an ever-smaller...

Article (09/03/1999) **At Unease**

- *At Unease: Don't: A Reader's Guide To The **Military's** Anti-Gay Policy* By Janet E. Halley
 - *Don't: A Reader's Guide To The **Military's** Anti-Gay Policy*
 - ... ask, don't tell" policy, Gorelick was asked to explain how someone alleged to be **homosexual** could establish that she was not, in fact, **homosexual**. Gorelick answered with an example: "In one instance a woman was alleged to have said...
 - ... At that moment in the House hearings, you might suppose that the ban on **homosexuals** in the **military** would be in serious trouble. Is it really possible to imagine a trial in which a member of the American **military** has to defend herself against a charge of lesbianism by asking former boyfriends to testify on her behalf? What would the boyfriends be expected to say? Would they be subject to cross-examination? If the issue is whether the defendant is really **homosexual**, what particular questions might be asked, by way of resolving that contested issue? Surely--you...

Article (09/02/1999) **Military Service Is Not A Right**

- **Military Service Is Not A Right** -- (Letter)
 - **Military Service Is Not A Right**
 - ... To the Editor: "Bigotry in the **Military**" (editorial, Aug. 30) correctly labels the **military's** policy on gay soldiers as discriminatory. There's no constitutional right to serve in the **military**, and the statutory **homosexual** ban is based on **military** necessity to maintain good order and discipline. For readiness reasons, the **military** also discriminates on the basis of such attributes as age, education, family status, physical fitness...

Article (09/01/1999) **Bringing 'Don't Ask' Up To Date**

- ... clarity to Congress' controversial "don't ask, don't tell, don't pursue" policy on **homosexuals** in the **military**. ...
 - ... been easy for commanders to implement a policy that in some ways contradicts itself. The **military's** ban on openly gay uniformed personnel still stands, but those who do not voluntarily reveal their sexuality have a right under the "don't ask" policy to be protected from questioning, harassment or investigative probes about it. Confusion over what that means in day-to-day **military** life has left many gay soldiers worse off than before. ...
 - ... questioned, according to Servicemembers Legal Defense Network, an advocate for gays and lesbians in the **military** which negotiated the new changes with Pentagon officials. ...
 - ... those incidents that do occur. It requires high-level reviews of all investigations of alleged **homosexual** activities and mandatory training on anti-harassment guidelines for all troops, beginning with boot camp...

Article (08/30/1999) **To Some, 'Don't Ask, Don't Tell, Don't Pursue' Means, 'Do Harass, Do Ridicule, Do Act Violently'**

- ... the "don't ask, don't tell, don't pursue" policy on gays in the **military** is not working is an understatement. As the murder of a gay soldier last month in Fort Campbell, Ky., makes perfectly clear, **military** service can be outright deadly for gays. ...

- ... the first known incident of a hate crime based on sexual orientation at a US **military** base. ...

- But incidents of harassment, ridicule, and even violence are not so out of the ordinary in the **military's** culture of hostility toward gays. Consider these examples:

- ... During the last five years, staff attorneys at SLDN have helped more than 1,800 **military** personnel. Some of their clients have reported verbal gay bashing and threats on a daily...

Article (08/30/1999) Gore Touts Policy Of 'Compassion' For Gays In Military Advocates fairer 'don't ask, don't tell'

- Gore Touts Policy Of 'Compassion' For Gays In **Military**

- ... Vice President Al Gore says he would pressure the **military** to implement President Clinton's "don't ask, don't tell" policy "with more compassion" because too many **homosexuals** are being discharged. ...

- ... "I don't think the changes in the **military** policy are working the way they were intended to work," Mr. Gore said in the...

- "I would try to change that by working with **military** leaders to bring about an implementation strategy that's fairer."

Article (08/26/1999) Army May Discharge A Gay Lawmaker

- ... unusual investigations under the Clinton Administration's "don't ask, don't tell" policy toward **homosexuals** in the **military**. ...

- ... asking applicants about their sexual orientation, and commanders are forbidden to undertake investigations of suspected **homosexuality** unless there is significant evidence of **homosexual** conduct. ...

- ... On the other hand, **homosexuals** are forbidden to disclose their orientation in a public setting; indeed, their doing so is considered evidence of at least an intent to engage in **homosexual** acts. ...

- ... the fact that he was officially told he was under investigation and confronted by a **military** legal officer right after a three-day exercise earlier this month in Flagstaff. That meeting...

- ... to make sure the nation is aware of the dangers this policy creates for our **military** preparedness." ...

Article (08/24/1999) 'Don't Ask, Don't Tell' Change Has Few Fans

- A supposed clarification of the "don't ask, don't tell" policy on **military** service by **homosexuals** has bridged the gap between supporters and opponents of gay rights.

- ... Robert L. Maginnis, head of **military** affairs for the conservative Family Research Council, staunchly opposes any directive suggesting the **military's** gay ban is weakening. And he sees little to fear in the new directive...

- The new guidelines address two areas: the education of troops and investigations into suspected **homosexual** conduct.

- ... change was less important. Before 1994, investigations into the possibility a service member was a **homosexual** could have started based on rumors, he said. The 1994 regulations that implemented the congressionally...

Article (08/23/1999) Despite Reforms, 'Don't Ask, Don't Tell' Continues To Be Anti-Gay Military: The Way It Is Administered Just Makes Things Worse. The Next President Must Address The Failures.

- **Military:** *The Way It Is Administered Just Makes Things Worse. The Next President Must Address The Failures.*

- ... 't tell, don't pursue" policy meant to settle the issue of gays in the **military**. But the Clinton administration regulations continue to make the policy much worse even than the...

- ... start proceedings against service members who have engaged in conduct that manifests a propensity. Various **military** enforcers have decided that this could include having a gay friend, cutting your hair a...

- ... propensity--bang!--you're in discharge proceedings, and you must be kicked out of the **military** unless you prove you have no propensity. You have no way of challenging that triggering...

- ... just clarify who decides: commanders. Nor is it new to say they can consult top **military** lawyers. And we know what advice they will get. Navy lawyers have urged commanders to...

Article (08/18/1999) 'Don't Ask, Don't Tell' Reveals More Flaws

- ... "policy is more proof that trying to compromise on the issue of gays in the **military** does not work. ...

- ... 't ask, don't tell" purportedly continues the long tradition of barring gays from the **military**, but those who do not discuss their sexuality may remain. Officers are barred from asking...

- ... the mess. He promised during the 1992 campaign to end discrimination against gays in the **military**, then backed off under pressure from Congress and agreed to the unworkable "don't ask...

- ... all personnel, beginning in boot camp. Commanders also will be required to consult with senior **military** lawyers before opening an investigation of a person's sexual orientation to make sure that...

- ... As anecdote after anecdote shows, many **homosexual** men and women are valiantly serving their country, often in extraordinarily heroic ways. They should...

Article (08/18/1999) Don't Ask, Don't Tell, Don't Think

- ... THERE IS a big problem with the **military's** new anti-gay harassment guidelines, announced last week, to stop physical and verbal abuse against **homosexuals** in the **military**. The guidelines are seen as a response to the beating death last month of Army...

- ... an end to recruiters' and commanding officers' questions about sexual orientation, but also allows the **military** to discharge soldiers who say they are gay or engage in **homosexual** activity. The new guidelines mandate instruction during recruitment training and periodically thereafter, that would drill into the troops the news that harassment of **homosexuals** in the **military** is forbidden. The guidelines also call for special training for judges, lawyers and commanding officers...

Article (08/16/1999) Navy Puts Catholic Group Out Of Chapel A

chapter of the Knights of Columbus is displaced because it "discriminates."

- ... Knights of Columbus is restricted to Catholic men, I cannot permit you to operate" on **military** facilities, Capt. Jerome told Alexander Pitre Sr. in a letter. ...

- In 1995, the Supreme Court upheld the right of the Hibernians to exclude **homosexual** contingents from the parade.

- ...-duty personnel and their dependents and retirees and their dependents - in other words, card-carrying **military** members," the Navy official said. ...

Article (08/16/1999) **MONDAY, August 16, 1999**

- ... **ATTACK TAIWAN**. China has given the United States no indication it is about to take **military** action against Taiwan, according to the National Security Council spokesman. Elizabeth Farnsworth, PBS; Bob Schieffer...

- ... Friday updated it's "don't ask, don't tell" policy for gays in the **military**, to include sensitivity training for all troops. Elizabeth Farnsworth, PBS; Kevin Newman, ABC; Bob Schieffer...

- ... **NORTH KOREA SPENDING ON MILITARY INSTEAD OF FOOD**. Despite food aid from around the world, children in North Korea are...

- ... **MILITARY CONFLICT IN CHECHNYA INTENSIFYING**. Russia's new prime minister warned rebels in Chechnya Saturday they...

- ...; **ELIZABETH FARNSWORTH**. China has given the United States no indication it is about to take **military** action against Taiwan. According to National Security Council Spokesman David Leavy. He responded to reports...

Article (08/16/1999) **Soldiers' Stories**

- One soldier is dead, and another is about to be kicked out of the **military**. And I'm trying hard not to overdramatize the connection between the two.

- ..., was premeditated murder -- and likely a "hate crime" as well. Winchell was believed to be **homosexual**, and Pvt. Calvin Glover, the Fort Campbell, Ky., colleague charged with beating him to death...

- ... subject of an investigation that could result in a less-than-honorable discharge from the **military**. The offense? He violated the "don't ask, don't tell" rule that allows **homosexuals** to remain in the service so long as they don't publicly disclose their **homosexuality**; the **military** is forbidden to ask about their sexual orientation. ...

- ... And that, May believes, was Winchell's undoing. "The **military** as an institution teaches that gay people are unfit for **military** service." Isn't it likely, he wondered, that that institutional attitude filters down to people...

Article (08/16/1999) **Revised Rules On Gays In Military Displease Gay Rights Advocates**

- Revised Rules On Gays In **Military** Displease Gay Rights Advocates

- ... first major revision of guidelines for its "don't ask, don't tell" policy on **homosexuals** in the **military**, including a new requirement that commanders seek approval from senior civilian officials at the Pentagon...

- ... guidelines, the Pentagon ordered that commanders institute anti-harassment training at all levels of the **military**, beginning with basic training, and that low-level **military** lawyers consult with senior lawyers before opening an investigation of anyone suspected of being gay...

Article (08/11/1999) **Hate May Have Triggered Fatal Barracks Beating Slain Soldier Had Been Taunted on Base as Secret Emerged About His Sexuality**

- ... **FORT CAMPBELL, Ky., Aug. 10** – Pfc. Barry Winchell enjoyed being a soldier. He studied **military** manuals, relished the physical training. He was so accurate at firing a .50-caliber machine...

- ... would be the first known case of a soldier being killed at a U.S. **military** base because of his sexual preference in the five years since a new federal policy was adopted

toward gays in the **military**. ...

- ... - the Winchell case illustrates the deep-seated prejudices that continue to plague gays in the **military**. It also has placed the Army and Fort Campbell, home of the celebrated 101st Airborne...

- ... at Fort Campbell, which sprawls across the Kentucky-Tennessee border and has nearly 24,000 **military** personnel, have had little comment about the slaying. Maj. Pamela Hart, a spokeswoman for the...

Article (08/10/1999) **TUESDAY, August 10, 1999**

- ... **HATE CRIME ON MILITARY BASE**. An In Depth report on the murder of Private Barry Winchell, who was murdered in his barracks at Fort Campbell, possibly because he was a **homosexual**. Tom Brokaw, Lisa Meyers, NBC. ...

- Hate Crime on **Military** Base

- ... News In Depth tonight, and NBC News investigation. A soldier, a member of an elite **military** unit murdered in his barracks. The chief suspect, a fellow soldier. Soldier-on-soldier homicides are relatively rare. There are more than 460,000 men and women in the U.S. Army, and over the past five years, 39 soldiers were murdered in cases where the main suspect was another soldier. But tonight, new details about a brutal killing on a **military** base and what makes this especially shocking. Could be a hate crime. A caution, some...

Article (07/23/1999) **Disclaimer**

- ... message, put out by Tricare, the armed forces health care provider, stirred objections from some **military** people, who did not like its **homosexual** advocacy. They also said the message was inconsistent with the **military's** ban on open **homosexuality** in the ranks and presented contested theories as fact. ...

- The disclaimer states: "No health consumer information provided through the advice line takes precedence over established Department of Defense or **military** department policies."

Article (07/13/1999) **Military Adjusts To 'Don't Ask, Don't Tell'** In six years, views have softened toward homosexuality, but some still report bias. Still, Lieutenant Colonel Kruger doesn't agree with the views of his young soldiers and is uncomfortable with the homosexual lifestyle. He espouses the traditional military view that homosexuality is incompatible with the...

- **Military** Adjusts To 'Don't Ask, Don't Tell'

- ... once was for men and women in uniform. Citing an end to "witch hunts" for **homosexuals** and a new era of tolerance, **military** services believe the policy works. ...

- ... different beliefs," says Col. Robert Swann, chief legal officer at the Fort Jackson, S.C., **military** base. "All that the 'don't ask, don't tell' policy did was codify our..."

- ... Indeed, the softer attitude toward **homosexuality** extends into the rank and file at Fort Jackson. At a dining hall here, Sgt. 1st Class James Ruesch says it doesn't bother him if someone is **homosexual** "if they do their job. [But] if you start acting out, it's a problem..."

Article (06/15/1999) **A Pale Shadow Of Its Soviet Predecessor**

- ... In 1985, the Soviet **military** was the largest in the world and arguably the strongest. Six years later it was...

- ... How did this happen? How could such a powerful **military** collapse so quickly, without a war, resorting only to bitter outcries in the media against its domestic critics? The

short answer is "Gorbachev." Deep cuts in the **military** were, in his view, the only way to save the Soviet economy. Accordingly, he cornered the **military** and imposed huge reductions that it opposed. ...

- ... While succeeding in this effort, Gorbachev failed to realize that the **military** was the linchpin holding together about 100 national minorities, many with their own union or...

Article (05/07/1999) **Truth Also A Victim In Navy's Tragedy Report**

- ..., the official explanation sounded simple: A disgruntled young seaman, apparently acting to settle a thwarted **homosexual** affair on board, had sabotaged the guns. That seaman, Clayton Hartwig, had died on board...

- ... the family and friends of Hartwig. The Navy portrayed him as a poorly trained, vindictive **homosexual**. In fact, he was almost certainly none of those things. Thompson criticizes many journalists for...

- ... human sources with details picked up from previously secret documents. His own understanding of the **military**, supplemented by the knowledge of Navy and civilian experts appalled by the cover-up, leads to lengthy but clear explanations of the ship's operations. His research in **military** archives placed the operations of the USS Iowa in historical perspective.

...

Article (03/26/1999) **'Who Will Defend The Defenders?'**

- ... culture of drugs and Mafia-type corruption. These commentaries show the disintegration of the awesome **military** power wielded by what used to be the Soviet Union. Other, more sober accounts tend to focus on the logistical nightmare following Russia's large-scale redeployments in the 1990s. As its forces withdrew from Poland, Germany and the Baltic States, Russia had to absorb large numbers of often depleted or fragmented **military** formations. This was made especially difficult by Russia's lack of adequate barracks, training grounds...

- ... enemy has had on Western armed forces. Perhaps that's understandable. With a weakened Russian **military**, the post Cold War, East-West strategic situation is markedly less dramatic and, from a Western perspective, relatively easy to manage. Also, Western **military** establishments have not been subjected to the same logistical and organizational problems as those faced by the forces of the former Warsaw Pact. Western forces are, however, confronted by problems of a different kind--social and cultural problems that are eating away at both morale and effectiveness. A recent study published by the Social Affairs Unit in England ("Not Fit To Fight," 80 pages) identifies this new threat as coming not from outside aggression, but from within. Following the Cold War's end, American and British armed forces have gradually been falling victim to the political and social currents of the day. According to the study, "if certain secular developments are forced on the necessarily different world of the **military**, then the forces will not be fit to fight." ...

Article (03/19/1999) **Soviet Military Hits Skids** Retired U.S. Army general offers an incisive history "Does this," Odom asks, "give you some sense of the milieu?"

- Soviet **Military** Hits Skids

- The Collapse Of The Soviet **Military**

- ... director of the National Security Agency, is the author of *The Collapse of the Soviet Military* (Yale University Press, \$35), a meticulously researched account of how the once-mighty Soviet armed...

- ... The book will be of most interest to professional historians and **military** specialists. Early chapters especially, where Odom lays out the structure and philosophy of the Soviet **military**, will be heavy sledding for the general reader. ...

Article (03/18/1999) Military's Gays Speak Out 'Don't ask, don't tell' policy is criticized

- **Military's Gays Speak Out**
- ... Melnick was one of a handful of former **military** personnel asked to tell their story Monday at the National Press Club in Washington, D...
- ... The policy was adopted by the **military** shortly after Clinton became president. Under the policy, the **military** is not to ask **military** personnel what their sexual orientation is and **military** personnel should not volunteer their sexual orientation. Persons who have been discovered engaged in **homosexual** conduct are discharged from the **military**. ...

Article (03/16/1999) Military Still Said To Harass Gays Pentagon Disputes Legal Group's Report of Intimidation

- **Military Still Said to Harass Gays**
- **Military Still Said To Harass Gays**
- ... A legal group that represents gay men and women in the **military** accused the Pentagon yesterday of doing little to stop harassment against **homosexuals**, saying a climate of intolerance and hostility is driving more gay service members to abandon the **military**. ...
- ... Reports of **military** officials improperly asking service members about their sexual orientation or wrongly conducting inquiries into the sex lives of suspected **homosexuals** also rose from 583 to 934, the group said. ...

Article (03/15/1999) Gay Group's Study Finds Military Harassment Rising

- **Gay Group's Study Finds Military Harassment Rising**
- ... years after the Clinton administration adopted its "don't ask, don't tell" policy for **homosexuals** in the **military**, incidents of anti-**homosexual** harassment have increased in each of the armed services, according to a legal group that...
- ... some units so severe that many gay men and lesbians have been forced to abandon **military** service, in contradiction of the policy's aims. ...
- ... and lesbians to serve in the armed services, but it bars them from declaring their **homosexuality** or engaging in **homosexual** acts, like ceremonies signifying a couple's union. ...

Article (03/02/1999) Pentagon Line Gives Advice On Gay Life

- ... The Pentagon, which bars **homosexual** conduct in the ranks, is sponsoring a health advice line that tells **military** callers it is OK to be gay and that **homosexual** couples make just as good parents as traditional families. ...
- ... "Studies show that **homosexual** partners raise children just as well as anyone," states the telephone advice from Tricare, the...
- ... The recorded message on the "health care advice and education service" generally portrays **homosexuality** positively and depicts gays as victims. It says about 10 percent of the population is **homosexual**. ...

Article (02/04/1999) Gay Marine Featured In The New York Times Acted In Porno Films

- ... 28, 1998, in The New York Times Magazine, explored the difficulties of living a clandestine **homosexual** life within the "don't ask, don't tell" structure of the U.S. **military**. The

Marine in the article, who insisted on remaining anonymous, was identified in The Times...

Results complete.

Computed search: 30 files contain *homosexual and military*

New York Times
August 26, 1999
Pg. 1

Army May Discharge A Gay Lawmaker

By James Sterngold

PHOENIX -- By his own account, Steve May knew from the time he was in his early teens that he wanted to be a politician, specifically a conservative Republican politician. He carefully built his life, he says, to shape an attractive resume, from his decision to enter R.O.T.C. in college and then serve as an Army officer to his efforts at building a track record as a small-business man, helping run his family's herbal-tea and natural-foods company here.

It worked. May served with distinction as a lieutenant on active duty in the Army and then entered the Reserve, and last November he was elected to the State Legislature, to represent the affluent, conservative district where he had grown up.

Everything seemed to be going just right until this winter, when the usually affable and measured 27-year-old May bitterly spoke his mind in the Arizona House, this time not as a Republican legislator, a Mormon or a soldier, but as an openly gay man.

He denounced an ultimately failed bill that would have barred the use of public funds to pay for health benefits of same-sex partners, and also attacked the legislation's conservative sponsor, Representative Karen S. Johnson, a fellow Republican who had condemned homosexuals as immoral.

May's remarks were widely quoted here and were followed by a cover article in Phoenix New Times, an alternative magazine, that discussed everything from his youthful realization that he is gay to how he had met and dated his companion, who lives with him. The upshot was that he not only angered many conservatives in his party by suggesting that Ms. Johnson was bigoted but also brought on himself one of the more unusual investigations under the Clinton Administration's "don't ask, don't tell" policy toward homosexuals in the military.

Under that policy, recruiters are barred from asking applicants about their sexual orientation, and commanders are forbidden to undertake investigations of suspected homosexuality unless there is significant evidence of homosexual conduct.

On the other hand, homosexuals are forbidden to disclose their orientation in a public setting; indeed, their doing so is considered evidence of at least an intent to engage in homosexual acts.

Col. John R. Hawkins 3d, the spokesman for the Army Reserve, acknowledges that an investigation of May is under way, to determine whether his remarks are grounds for discharge.

Colonel Hawkins says the inquiry should come as no surprise, given the public nature of the case.

"I don't think that the individual has been, shall we say, keeping this under wraps, as to his sexual orientation," the colonel said.

In addition, May, who was first "outed" as gay when he ran unsuccessfully for the State Senate three

years ago, faces the possibility that the increased publicity about his homosexuality, as well as his scuffling with party leaders, will hurt his chances of winning re-election next year.

May said he had never hidden his sexual orientation; in fact, he joined the board of the Log Cabin Republicans, a nationwide organization of gay party members, after his State Senate run.

But he always chose to identify himself with other issues, like education, rather than gay rights.

Then, after long doing everything "right," he says, he faced a perhaps inevitable choice when he heard gay men denounced during the health-benefits debate in February as disease-ridden dangers to the family who were doomed to ghastly early deaths.

During his outburst in the House, he acknowledged that it might have been politically wiser to keep quiet.

"But when you attack my family," said May, whose father was once a bishop in the conservative Mormon Church, "and you steal my freedom, I will not sit quietly in my office.

This Legislature takes my gay tax dollars, and my gay tax dollars spend the same as your straight tax dollars. If you're not going to treat me fairly, don't take my money."

That was followed by a string of newspaper articles, and later a confrontation with the Army in which he was informed of the investigation against him.

The sheer volume of May's public remarks on the matter makes this a highly unusual case, said Stacey Sobel, a senior attorney at the Service Members Legal Defense Network, an organization based in Washington that advises troops who are faced with inquiries about their sexual orientation. Ms. Sobel said that in some instances, the "don't ask, don't tell" policy had been pursued so aggressively by commanders that comments made by a soldier in entirely private conversations had, when disclosed, been used as a basis for discharge.

"Because what he's said has been published in newspapers," Ms. Sobel said of May, whom she has been advising, "it can be considered credible information, and that passes their test for what can be used against him."

Other factors that make the case unusual, she said, are that it involves an elected official -- the only one she knows of who is a target of such an investigation -- and that it is aimed at a reservist rather than an active-duty soldier.

May says the absurdity of the policy and his situation is evident in the fact that he was officially told he was under investigation and confronted by a military legal officer right after a three-day exercise earlier this month in Flagstaff. That meeting, he said, came shortly after he had been told that he might be taking command of the transportation company in which he serves.

"This isn't about gay rights," May maintained.

"It's about the security of the nation. The issue for me as a policy maker is I want to make sure the nation is aware of the dangers this policy creates for our military preparedness."

Even as the military faces continuing shortages in personnel, the policy on homosexuals, which was supposed to protect them from harassment, has resulted in growing numbers' being discharged, according to Pentagon figures: last year 1,145 members of the armed services were discharged for homosexuality, up from 997 in 1997 and 617 in 1994, when the "don't ask, don't tell" policy took effect.

Earlier this month the Pentagon, faced with gay rights groups' mounting criticism over those numbers, announced that it was revising the guidelines for carrying out the policy. The guidelines will require that many of the inquiries like the one undertaken against May be conducted by senior officers. Among the other provisions are that troops receive anti-harassment training throughout their careers, beginning with boot camp.

Gay rights groups, and May himself, say the changes do not go far enough.

"First we're going to indoctrinate our soldiers to believe that homosexuals are inferior and a threat because of this policy, and then we're going to indoctrinate them into believing gays shouldn't be harassed," May said. "It doesn't make any sense."

May said other lawmakers had told him that some of his new political enemies, from the right wing of his own party, had spurred the Army investigation by alerting the service to his public remarks. One Republican, Jeff Groscost, the Speaker of the House, denied that accusation and said May had only his own candor to blame.

"My question was, How could you expect that not to have made it to the Army?" said Groscost, who fought several tough legislative battles against May this spring and has become one of his critics.

The case could well threaten the political career of one of the few openly gay officials in the country elected to state or national positions. There are three openly gay or lesbian members of the United States Congress, and 34 acknowledged gay, lesbian or bisexual officials elected at the state level, according to the Gay and Lesbian Victory Fund, a group that supports homosexual candidates. Of those 34 state officials, the organization says, only one is a Republican, May.

To some members of May's party, the fundamental problem seems to be his sudden outspokenness more than his sexual orientation itself. Although May says he has been open about his sexuality with his family and friends since he was 18, he did not discuss it in public until he was "outed" by another Republican when he ran for the State Senate in 1996.

It is not clear why the Army did not pick up on the issue then.

May says that the episode worried him at the time but that he chose to address his homosexuality only when others raised it. In his campaign last year, he says, he adopted the same policy, never denying his homosexuality but not raising it himself. That seemed to satisfy some party leaders, at least for a time.

"Steve May is a pretty good guy, to tell you the truth," said Mike Minnaugh, the Republican state chairman, who is a resident of May's district, in the wealthy eastern section of Phoenix.

"As an individual, I do not endorse homosexual relationships -- it goes against my beliefs -- but I do respect his rights. As long as he doesn't go and talk a lot about his homosexuality, he can continue to get elected."

Minnaugh added, though, that if a heterosexual Republican candidate with equally conservative credentials were to run against May in the primary next year, "that would be very difficult."

And Speaker Groscost said that "if there's a politically attractive challenger, Steve could have some trouble."

"I'm not sure that he ran before as an openly gay legislator," the Speaker said. "There's a small chink in that armor."

May says he is concerned that the party may not support his re-election. (He is already working to raise a campaign war chest of \$100,000 on his own, a huge sum for a state race here.) The experience, he says, has shaken his belief in the party machine, though not in the party's traditional values.

"I've always been Republican," May said. "I believe in the core Republican principles. I also happen to be gay. But the party has been hijacked by theocratic fascists."

The only other openly gay member of the Legislature, Representative Ken Chevront, a Democrat, says that in this conservative state, he was surprised at May's outspokenness concerning his homosexuality.

"He's young," Chevront said. "And all of a sudden he heard this stuff being said about gays. He dealt with it differently than I do."

May says he had no choice.

"The voters want you to be honest," he said. "I'd rather just say, 'It's none of your business.' But you can't get away with that anymore."

Army Times
August 30, 1999
Pg. 13

'Don't Ask, Don't Tell' Change Has Few Fans

By Nick Adde

A supposed clarification of the "don't ask, don't tell" policy on military service by homosexuals has bridged the gap between supporters and opponents of gay rights.

Both sides of the debate think the Aug. 13 announcement of a new directive on homosexuals is meaningless and a disappointment.

Michelle Benecke, co-director of the Servicemembers' Legal Defense Network, complained the new guidelines do not end harassment of gay service members and "witch hunts" of suspected gays.

Robert L. Maginnis, head of military affairs for the conservative Family Research Council, staunchly opposes any directive suggesting the military's gay ban is weakening. And he sees little to fear in the new directive.

Both believe Defense Secretary William S. Cohen's latest directive has not really changed anything.

"It's too little, too late," said Benecke, an attorney and ex-Army artillery officer who founded SLDN to help service members threatened by commanders and peers because of questions surrounding their sexuality.

"I really don't see a policy change," said Maginnis, a West Point graduate and retired lieutenant colonel.

The directives were issued in the wake of the furor surrounding the July 5 murder of Army Pfc. Barry Winchell at Fort Campbell, Ky. Authorities believe the two soldiers charged in the killing of Winchell acted largely because they believed their victim was gay.

The new guidelines address two areas: the education of troops and investigations into suspected homosexual conduct.

Guidelines call for criminal investigations to be limited to following up allegations based on some evidence instead of just rumor, and direct that investigations be cleared through higher commands. They also make it more difficult for service members to claim homosexuality as a means to get out of the service. Discharges for homosexuality require approval from the service secretary.

The new guidelines call on commanders to quickly investigate reports of harassment or threats against any troops.

In terms of education, the guidelines order revisions in training about sexual orientation beginning at basic training.

Benecke said the guidelines should have been issued two years ago. "Instead, Pentagon officials

chose to stall while anti-gay harassment rose 120 percent."

But Maginnis thought the change was less important. Before 1994, investigations into the possibility a service member was a homosexual could have started based on rumors, he said. The 1994 regulations that implemented the congressionally ordered "don't ask, don't tell" policy created a criminal-like standard, he said. "This is a reminder that threats and harassment are not enough to start an investigation."

Congress passed "don't ask, don't tell" in 1994 as a compromise measure with the Clinton administration. The policy kept intact a bar against service by homosexuals but curbed the military's ability to intrude into personal lives.

Maginnis said he is "disturbed" but not surprised by the guideline that requires service secretaries to approve all service members' discharges based solely on statements that they are gay. "I can't think of any other kind of separation, especially for junior people, that requires this kind of scrutiny," said Maginnis. "It's a slap in the face for local commanders."

Elaine Donnelly, president of the conservative Center for Military Readiness, agreed. "Why does a local commander face a mandate like this? The incentive is to not do anything," Donnelly said.

"It would have made more sense for the Defense Department to do what Congress invited them to do, which is reinstate the question" regarding sexual preference that was once posed to all potential recruits, she said.

Asking recruits about their sexual orientation ended in 1994 with the implementation of "don't ask, don't tell."

Maginnis said the new direction is "a backhanded way" of getting laws against hate crimes, spreading in state and local governments, to apply in the military. "But the military has plenty of laws that address these types of problems anyway."

Benecke disagrees. "While I welcome Secretary Cohen's statement that there is no room for threats and harassment in the military, the real test is if he will hold commanders in the field accountable for stopping" those incidents, she said.

"People who take the same oath, the same risks, and perform the same duties ought to be treated the same," Benecke said, "with respect and dignity."

The Winchell case, Benecke said, illustrates the consequences of failing to act against harassment.

Winchell's "sergeants testified that they launched an investigation against him based on a rumor that a soldier went to a gay bar. That was four months before he was murdered, and they did nothing to stop it. All those actions violated " 'don't ask, don't tell, don't pursue' " she said.

Both Maginnis and Donnelly have harsh words for Winchell's killers, but believe Cohen's new guidelines are little more than a political reaction to the incident.

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Despite Reforms, 'Don't Ask, Don't Tell' Continues To Be Anti-Gay

Military: The Way It Is Administered Just Makes Things Worse. The Next President Must Address The Failures.

By Janet E. Halley

We finally have reforms in the implementation of the compromise "don't ask, don't tell, don't pursue" policy meant to settle the issue of gays in the military. But the Clinton administration regulations continue to make the policy much worse even than the statute adopted by Congress. Recent events implicitly confirm what critics have said all along: This policy is no compromise. It's outright anti-gay.

Much of that can't be fixed without the cooperation of Congress. But any future president could take the following steps toward fairness without seeking new legislation:

- * Restore "don't ask." This part of the supposed compromise never made it into the statute or the Clinton administration's implementing regulations. It appears only in informal "guidelines," where it is always coupled with a warning that it is unenforceable chit-chat. The new directives don't change that. Commanders can still ask service members whether they are gay whenever they please. "Don't ask" should be mandated and backed up with procedures for its enforcement.

- * Narrow the grounds for discharging people. The statute says that commanders must process service members for discharge if they "tell" or if they engage in bodily contacts that "manifest a propensity" to engage in same-sex erotic acts. But Clinton administration regulations still go way beyond that, requiring commanders to start proceedings against service members who have engaged in conduct that manifests a propensity. Various military enforcers have decided that this could include having a gay friend, cutting your hair a certain way or objecting to the "don't ask, don't tell" policy. This is a viciously anti-gay rule, allowing for arbitrary, even imaginary charges and the new guidelines do nothing to alter it. The new president should stipulate that proceedings cannot begin without corroborated evidence of specifically sexual contact and seek repeal of the propensity clause.

- * Allow service members to challenge commanders' decisions to initiate discharge proceedings. Clinton administration regulations still allow commanders to decide unilaterally what conduct properly triggers discharge proceedings. If your commander thinks that you've manifested a propensity--bang!--you're in discharge proceedings, and you must be kicked out of the military unless you prove you have no propensity. You have no way of challenging that triggering decision. Commanders can be as arbitrary as they like. This is tyranny, not law. Service members should have standing to challenge every element of the case against them.

- * Reinstate "don't pursue." The new directives purport to limit investigations, but really they just clarify who decides: commanders. Nor is it new to say they can consult top military lawyers. And we know what advice they will get. Navy lawyers have urged commanders to investigate a service member who has merely come out as gay until they find evidence of same-sex acts. In one memo, Air

Force lawyers advised that if investigators stumble on evidence implicating other service members, so much the better; commanders should "be creative" about how to run a witch hunt. The Marines' top lawyers have allowed commanders to hold suspected service members for up to 10 days without providing them with access to legal advice. It's time for substantive, not merely procedural, "don't pursue" rules.

* Stop pretending the policy is a good one. The Clinton administration has repeatedly misled the public and courts about "don't ask, don't tell." It pretends that the policy punishes service members "not for who they are but for what they do." The new directives hide behind this tired old fig leaf yet again. But homosexual identity--not homosexual acts--really is the crucial issue at every procedural moment.

The Clinton administration has further misled the public by avoiding formal promulgation of its implementing regulations. It has ducked the Administrative Procedure Act's public notice and comment period and its due process rules. Thus also the regulations remain unpublished, and few people know what they are or even how to find out. The regulations should undergo the rigors of the APA.

President Clinton wanted to end discrimination in the armed forces, but he has instead presided over the institutionalization of anti-gay animus. Many of the really bad things about "don't ask, don't tell" come not from the congressional statute but from his implementation of it. A new president can undo his mistakes.

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