

Questions That Must Be Asked to Evaluate LGBT Law and Policies for the Military

Military Culture Coalition

February 2011

Military Culture Coalition

Memo to: Chairman and Members, House Armed Services Committee

Re: Questions Re: The LGBT Law and Policy for the Military

On January 28, 2011, Under Secretary of Defense for Personnel & Readiness Clifford Stanley, together with Marine General James Cartwright, Vice Chairman of the Joint Chiefs of Staff, conducted a Pentagon news conference to announce Defense Department directives providing “Guidance” to the military service secretaries on ways to implement “Repeal of ‘Don’t Ask, Don’t Tell’ and Future Impact on Policy”

Congress rushed to repeal the 1993 law during the lame-duck session last December, following superficial hearings in the Senate and no House hearings at all on the findings of a Pentagon report on the subject that was released on November 30, 2010. Most observers have no idea how the new “non-discrimination” law and policies would work in actual practice. Some Pentagon officials may not know either. During the January 28 briefing, General Cartwright said this:

“I think if something unforeseen arises, it's important to understand that each of the service chiefs --- we'll do an assessment every two weeks. Each of the service chiefs will have access to us and to the secretary to say, ‘We just discovered something that we didn't anticipate.’ It's going to necessitate a pause or something like that. That will all be considered in the so-called calculus of when we go to the secretary and the chairman to certify. **And if there's an outstanding issue that we just didn't anticipate, we certainly would reserve the right for that service chief, one, to have a voice in it, and, two, to potentially be determinative of delaying activity.**” (Transcript, Department of Defense, emphasis added)

As this document demonstrates, there are scores of “outstanding issues” that the Department of Defense has failed to anticipate. Unrealistic promises, vague hopes, and flawed assumptions are no substitute for clarity, sound priorities, high standards, and empirical evidence that reflects actual military experience, not civilian or academic theories.

Due to a combination of political pressure and high level groupthink, plans to implement the new law are nevertheless moving ahead at reckless speed.

The Military Culture Coalition, an association of organizations that support sound personnel policies for our military, hereby calls on Congress to a) Submit comprehensive inquiries to the Secretary of Defense without delay and b) Schedule timely hearings on the attached questions and answers expanding on the report provided last November.

Until and unless this process on inquiry and oversight takes place, the repeal of Section 654, Title 10, USC, should not be “certified” as harmless or implemented regardless of the consequences. We hope that this compendium of questions is helpful in this process.

Military Culture Coalition

Questions Re the LGBT Law and Policy for the Military - Table of Contents -

Background and Overview

Issue No. 1: Over-Arching Purposes of the 1993 and New LGBT Laws

- a) *Findings and Legislative History of the 1993 Law* 2
- b) *Primary Purpose of the 1993 Statute and the New LGBT Law* 3

Issue No. 2: Practical Consequences of the New LGBT Law/Policy

- a) *Application, Exceptions, and Data* 3
- b) *Mandatory Cohabitation*..... 3
- c) *Requirement to Follow Orders* 4

Issue No. 3: Morale and Discipline

- a) *Enforcement of Personal Conduct Rules Both On- and Off-Base* 5
- b) *Personal Relationships - Consensual Conduct*..... 5
- c) *Personal Relationships - Non-Consensual Conduct* 6
- d) *Support for Persons Experiencing a Hostile Work Environment, Harassment or Abuse* 7

Issue No. 4: LGBT Training and Corollary “Zero Tolerance” Policies

- a) *LGBT Training to Define “Respect” for LGBT Personnel* 8
- b) *“Zero Tolerance” of Disagreement with Mandatory Training* 9

Issue No. 5: Military Effectiveness

- a) *Commanders’ Responsibilities for Enforcement of the LGBT Law*..... 10
- b) *Unit Cohesion - Horizontal*..... 10

c) <i>Unit Cohesion – Vertical</i>	11
d) <i>Cohesion – International Allied Forces</i>	12

Issue No. 6: Religious Liberty for Chaplains and People of Faith

a) <i>Personnel Evaluations to Enforce Acceptance of LGBT Personnel</i>	14
b) <i>Chaplain Personnel Losses</i>	15

Issue No. 7: Sustaining the All-Volunteer Force

a) <i>Recruiting</i>	16
b) <i>Retention & Personnel Losses</i>	17

Issue No. 8: Family, Social, and Medical Concerns

a. <i>Housing of Same-Sex Couples on Military Bases</i>	17
b. <i>Benefits for LGBT Personnel and Their Dependents</i>	18
c. <i>Military Events and Social Gatherings</i>	18
d. <i>Transgendered Personnel</i>	19
e. <i>HIV+ Personnel</i>	21

Issue No. 9: Anticipated Revisions in Military Law and Regulations

a) <i>Conflicts With Provisions of the Uniform Code of Military Justice (UCMJ)</i>	22
b) <i>Retroactive Implementation and “Special Status” for LGBT Personnel</i>	23
c) <i>Pending Litigation</i>	23

Issue No. 10: Other Arguments for Repeal of the Law

a) <i>Foreign Militaries</i>	24
b) <i>Number of Discharges</i>	25

Bottom Line Questions

Military Culture Coalition

Questions Re: The LGBT Law and Policy for the Military

Background and Overview:

On December 18, 2010, Congress rushed to pass “privileged,” stand-alone legislation (HR 2965) to repeal Section 654, Title 10, USC, often referred to as “Don’t Ask, Don’t Tell” (DADT). The legislation calls for delayed implementation 60 days after President Barack Obama, Defense Secretary Robert Gates, and Joint Chiefs Chairman Adm. Mike Mullen provide “certification” that the required implementation plan is “*consistent with the standards of military readiness, military effectiveness, unit cohesion, and recruiting and retention of the Armed Forces.*”

The certification requirement is essentially meaningless since all three officials already have advocated repeal of the law. It also falls short because it employs the undefined word “consistent,” instead of advocating high standards that *improve* the All-Volunteer Force.

The legislation is a blank-check surrender of policy-making authority to appointed Defense Department officials, mandating “non-discrimination” between heterosexuals and sexual minorities without specific definition of how the new policy would work in actual practice.

In 1993, there were twelve hearings and field trips conducted by House and Senate Armed Services Committee leaders. In 2010, advocates of repeal recklessly rushed the legislation through in the lame-duck session. The Senate had only superficial hearings, and the House had no opportunity for informed analysis and discussion of the Pentagon’s “Comprehensive Review Working Group” (CRWG) report.

Because the open-ended legislation does not mention exceptions, and because President Obama has associated the repeal bill with two White House celebrations of “LGBT Equality Month” in June 2009 and 2010, this analysis refers to the new policy that the administration plans to implement as the “LGBT law or policy” for the military. The general public has yet to understand the full consequences of the LGBT law, an unprecedented policy that opens the military to professed lesbian, gay, bisexual and, by implication, transgendered personnel.

On October 1, 2010, the Military Culture Coalition (MCC) followed up on a previous meeting by submitting to the Pentagon’s Working Group an extensive list of topics and issues that the CRWG report should address in their planned report to Congress.

The report released on November 30, 2010, however, included almost no references to the authoritative documents, opinions, and extensive bibliography that the MCC had submitted to the Pentagon Working Group. In most cases, issues of concern to the MCC were either missing from the report or addressed with flawed, unrealistic, or incomplete recommendations.

It is unfortunate that a number of legislators who had previously pledged not to vote for the repeal legislation before substantive hearings could take place nevertheless supported the reckless rush to impose the blank-check, undefined LGBT law.

During the time before “certification” is accomplished, members of Congress should ask belated but still important questions about the findings and recommendations of the CRWG Report. The document includes useful information, but it is poorly-organized in two separately bound volumes that appear jumbled, intellectually arrogant, and sometimes contradictory.

Numerous issues are not discussed at all. And the fourteen “Situations” set forth at the end of the *Support Plan for Implementation*, which barely touch the surface of complexities involved with the LGBT law, are no substitute for coherent instruction and principled leadership.

Congress should ask the following questions, which are not easy, and conduct immediate hearings on the answers provided. If Pentagon officials cannot or will not provide specific answers, it is not fair to expect commanders in the field to do so. At all times members of Congress are entitled to ask the primary question repeatedly, “*How do these changes benefit or improve the All-Volunteer Force?*”

Issue No. 1: Over-Arching Purposes of the 1993 and New LGBT Laws

a) Findings and Legislative History of the 1993 Law

It is unfortunate that the CRWG report did not publish the text of the law, Section 654, Title 10, U.S.C., in full. Some of the statute’s fifteen findings are mentioned, but not the Sense of Congress clause that authorized the Secretary of Defense to reinstate inquiries regarding homosexuality that used to be on induction forms. (p. 22)

Nor did the report explain that the fifteen findings in Section 654, Title 10, USC define the primary purpose of the law: to preserve qualities such as good order, discipline, morale, and overall readiness, which are essential for a strong national defense.

Also missing from the report was an accurate summary of the 1993 legislative history, including a discussion of the significant difference between the law and the Defense Department’s convoluted “Don’t Ask, Don’t Tell” (DADT) administrative policy, which was promulgated by then-President Bill Clinton shortly after he signed the law.

- **Q:** Are all of the fifteen findings in the 1993 law now invalid?
- **Q:** Which ones are still valid, and why should they be eliminated now?
- **Q:** Since the DADT policy is administrative, why did the administration not exercise the legally-authorized option to drop DADT while improving understanding of the actual law?

b) *Primary Purpose of the 1993 Statute and the New LGBT Law*

Advocates of repealing the 1993 law usually advocate it in vague terms, such as “the right thing to do.”

- **Q:** What is the primary purpose of the recently approved “Don’t Ask, Don’t Tell’ Repeal Act of 2010,” which this paper will refer to as the LGBT (lesbian, gay, bisexual, transgendered) law for the military? (Please explain in terms of military necessity, not personal desires or “diversity.”)
- **Q:** How would implementation of the LGBT law/policy improve standards of military readiness, effectiveness, unit cohesion, and recruiting and retention in the military?

Issue No. 2: Practical Consequences of the New LGBT Law/Policy

a) *Application, Exceptions, and Data*

The CRWG Report recommends the accommodation of sexual minorities, without distinction, in all branches and communities of the armed forces. (pp. 87-88) The panel also recommended that authorities do not request, collect, or maintain information about sexual orientation of service members (CRWG Implementation Plan, hereinafter IP, p. 18)

- **Q:** Will revised Defense Department policies barring discrimination against sexual minorities permit any exceptions, i.e., for transgendered persons, transvestites, etc.? Please provide the rationale for any exceptions.
- **Q:** Will any of the service communities and programs, such as land combat battalions, be considered exempt from LGBT-inclusive policies? (For example, basic, advanced, and specialized Army Ranger, Navy SEAL and Special Operations Forces training programs and units, the military service academies, Army and Marine infantry, submarines, surface ships, aviation fighter squadrons, missile silos, Iraq/Afghanistan training teams, etc.
- **Q:** If different types of sexual expression no longer matter, and consensual LGBT conduct and lifestyles are equal to all others, what is the rationale for not having a check-off box on the induction forms indicating sexual preference? The information is necessary to evaluate the social experiment.

b) *Mandatory Cohabitation*

The CRWG Report recommends the cohabitation of all sexual orientation groups in living conditions offering little or no privacy. This mandate would “*prohibit the creation of separate bathroom and shower facilities based on sexual orientation.*” (IP, p. 18) The report repeats the recommendation with a rationale reflecting more concern for the sensitivities of LGBT personnel than “respect” for the views of the majority.

The report also makes unrealistic comparisons between civilian facilities such as athletic clubs and deployed military units, ignoring many differences that matter. For example, men and women are not required to share civilian gym locker rooms with persons of the opposite sex, or to share such facilities with same-sex persons for long periods of time. (pp. 140-141)

- **Q:** Are any exceptions from the cohabitation policy contemplated for the separate accommodation of heterosexuals and LGBT personnel in some environments but not others? Please provide the rationale, criteria, practical considerations, and costs of any such exceptions.
- **Q:** What is the rationale for drawing distinctions between a) Required housing of professed LGBT personnel in deployed military living facilities offering little or no privacy, and b) A similar policy housing heterosexual male and female personnel together in deployed living facilities offering little or no privacy?
- **Q:** What will Defense Department policy be with regard to the housing of transgendered persons in private quarters occupied by persons of the opposite biological sex?

c) Requirement to Follow Orders

The CRWG report suggests that local commanders could make adjustments for privacy in some circumstances, but provides no support for them to do so. On the contrary, the CRWG Implementation Plan declares that all servicemembers will remain “*obligated to follow orders that involve interaction with others who are gay or lesbian, even if an unwillingness to do so is based on strong, sincerely held, moral or religious beliefs.*” (IP, p. 50)

- **Q:** What rights will male and female personnel have if they disagree with the new LGBT policy for reasons of personal privacy or the desire for modesty in sexual matters?
- **Q:** What options will be available for the possible re-assignment of personnel who are not willing to expose themselves to LGBT personnel of the same sex in deployed small units on land or at sea, which offer little or no privacy for months at a time?
- **Q:** Will persons requesting reassignment for themselves or someone else due to sexual privacy concerns be subject to negative fitness reports and other career penalties?
- **Q:** If an LGBT person files charges against a local commander who makes adjustments that *respect* the feelings of the majority, which side will the Defense Department support?

Summary: Practical Consequences of LGBT Law and Policies

Given what is known about the normal human desire for privacy in sexual matters, why would policies requiring the constant cohabitation of mixed sexual orientation groups *not* undermine morale, discipline, and readiness, recruiting and retention? (Henceforth this paper will refer to the latter three qualities as the “three Rs.”) How would these changes *improve* the All-Volunteer Force?

Issue No. 3: Morale and Discipline

a) *Enforcement of Personal Conduct Rules Both On- and Off-Base*

The CRWG Report failed to mention the Supreme Court's 1969 *O'Callahan v. Parker* decision, in which the court authorized different application of personal conduct regulations depending on whether the offending action occurred on- or off-base. This created unworkable inconsistencies, which undermined basic principles of military culture.

In 1987, the *O'Callahan v. Parker* decision was overruled by the Supreme Court in the *Solorio vs. U.S.* case. The court's *Solorio* ruling upheld the right of the military to enforce conduct rules consistently and constantly, on- and off-base. This principle was codified in the 1993 law regarding homosexuals, Section 654, Title 10, U.S.C., particularly in findings (8), (9), and (10). Repeal of that law and its findings, therefore, could be construed as congressional revocation of these sound principles, which are essential for good order, discipline, morale, and unit cohesion in the unique environment of military life.

- **Q:** Will implementation plans permit consensual sexual relationships off-base but not on-base?
- **Q:** If so, why would the resulting situation be more acceptable than unworkable policies in effect under the previous *O'Callahan v. Parker* ruling?
- **Q:** If personal conduct rules are supposed to apply both on-base and off-base, what will the rationale be for that enforcement policy, given that Congress has voted to repeal Section 654, Title 10, U.S.C.?

b) *Personal Relationships - Consensual Conduct*

The CRWG Report recommends enforcement of personal conduct rules on an equal basis between hetero- and homosexual personnel. The case of Air Force Lt. Col. Victor Fehrenbach, a prominent activist for repeal of the 1993 law, exposes flaws in this policy. Fehrenbach solicited consensual sex from a civilian man on a gay-oriented website. Fehrenbach successfully refuted the civilian man's subsequent accusations of sexual assault, but discharge proceedings began when his homosexual conduct became a matter of public record. Fehrenbach is challenging his still-pending honorable discharge.

- **Q:** Will implementation plans permit short-term (casual) sexual conduct between adults (both military personnel and civilians) on an equal basis?
- **Q:** Following the example set in the Fehrenbach case, would a man who solicited a woman on a webpage for consensual sex be exempt from appropriate discipline on a basis equal or comparable to that of Fehrenbach?
- **Q:** What sort of guidance will the DoD provide to dispel confusion about appropriate same- and opposite-sex behavior that expresses sexuality, both on- and off-base? (For

example, holding hands and obvious public displays of affection, frequent phone calls, dancing at social events, etc.?)

- **Q:** Will implementation plans permit consensual behavior revealing same-sex attraction or relationships in environments shared by others that are open and not private?
- **Q:** Will implementation plans/regulations permit consensual behavior revealing same-sex attraction or relationships in military living quarters shared by others that offer little or no privacy; i.e., barracks, small tents while deployed, sleeping/berthing areas at sea, showers, sanitary facilities, etc.?
- **Q:** What is the definition of a “partner” or “committed relationship” for consensual activity? (For example, “one-night stand” contacts, partners that change frequently, partners that live together for a long time, etc.)
- **Q:** Will plans/regulations permit consensual long-term fraternization and sexual activity between unmarried same- or opposite-sex couples of the same or different ranks, in the same or different chains of command?
- **Q:** Taking into account current experience, what is the DoD’s estimate of annual increases in the number and costs of fraternization/misconduct cases, to include incidents involving male/male and female/female personnel of different ranks, in the same or different chains of command?
- **Q:** Given the Fehrenbach case and other apparent examples of different disciplinary standards for homosexuals, why should Congress expect higher standards of conduct under the LGBT law?

c) *Personal Relationships – Non-Consensual Conduct*

The CRWG Report recommends non-discrimination policies in the handling of non-consensual relationships, such as harassment, assault, or worse. The expectation is unrealistic, since the authors of the report seem to be depending on the “reluctance” of homosexuals to “out themselves,” particularly in field environments. (p. 126) The expectation that discretion in homosexual conduct will mitigate all problems (an ironic throwback to DADT), particularly in deployed combat units, is one of many rosy scenarios in the report that amount to wishful thinking.

- **Q:** Will implementation plans forbid or punish passive/aggressive behavior that conveys an unwelcome sexual message manifesting an individual’s sexual orientation, whether heterosexual or LGBT? (For example, the display of suggestive calendars, photographs, or pictures, or statements conveying an unwanted sexual message that in other locations might be considered part of a “hostile work environment.”)
- **Q:** Will plans/regulations forbid or punish physical approaches (short of touching, threats, or abuse) that convey an LGBT sexual message; i.e., behavior comparable to that

which constitutes a “hostile work environment” for women in the presence of men? (For example, verbal statements or approaches that heighten sexual tension, comments stated in jest that involve sexual topics, sexually suggestive nicknames and call signs, off-color slang or derogatory words, teasing that conveys an unwelcome sexual message, etc.)

d) *Support for Persons Experiencing a Hostile Work Environment, Harassment or Abuse*

The CRWG Report recommends that commanding officers and authorities handle issues of hetero- and homosexual misconduct on an equal basis, but does not mention the expected increase in incidents (both male/male and female/female), or the support systems that will be needed for additional persons complaining of problems associated with LGBT personnel.

- **Q:** It is expected that implementation plans will forbid or punish same- or opposite-sex advances or sexual liberties of any kind with subordinate personnel, trainees. What will subordinates be expected or allowed to do if the offending person is a homosexual commander in the subordinate person’s chain of command?
- **Q:** How will military commanders resolve “he said/he said” and “she said/she said” accusations regarding alleged misconduct resulting from the LGBT policy? (For example: apply disciplinary penalties, re-assign one or both parties, etc.)
- **Q:** Will implementation plans mandate provisions and provide funding for legal support for persons who experience and complain of unwelcome passive/aggressive approaches conveying a sexual message from persons of the same sex?
- **Q:** Will plans/regulations presume that the person complaining of inappropriate conduct by a homosexual person is truthful and deserving of support, in the same way that authorities consider women complaining of sexual abuse by men to be truthful victims who deserve support?
- **Q:** Will authorities consider the complainant’s attitudes to be suspect and possibly biased against LGBT personnel, and if so, would that determination be reason to disregard the complaint or label it “unsubstantiated,” or to order more sensitivity training for the complainant as the primary remedy?
- **Q:** Will plans/regulations provide funding to expand the availability of services to persons complaining of same-sex abuse or problems, in the same way that such services are provided to women complaining of opposite-sex abuse?
- **Q:** Will implementation plans provide support systems, including legal advice or defense, for persons who experience harassment, verbal coercion/threats, or pressure to engage in sexual activity with same-sex superiors or colleagues?
- **Q:** Will plans/regulations compile and publicly report on an annual basis the number of sexual misconduct incidents, both consensual and non-consensual, to include specific

designators regarding the gender of persons involved? (No personal information is required.) If not, why not?

- **Q:** Will plans/regulations protect the rights of personnel who are falsely accused of harassment or worse, regardless of the gender of the complainant and the accused?
- **Q:** What are the estimates of cost, time, and personnel needed to implement and enforce regulations regarding misconduct between persons of the same sex, both consensual and non-consensual, to include counseling and legal support services?
- **Q:** Given the number of officers removed from command of ships in recent years, most often due to sexual misconduct with persons of the opposite sex, what are the estimates of officers who might be removed from command for similar reasons involving persons of the same sex?

Over-Arching Question: Morale and Discipline

Given what is known about the complexities involved in dealing with issues of sexual misconduct of various kinds, why would these additional burdens on all personnel *not* undermine morale, discipline, and the three Rs, and how would these changes *improve* the All-Volunteer Force?

Issue No. 4: LGBT Training and Corollary “Zero Tolerance” Policies

a) LGBT Training to Define “Respect” for LGBT Personnel

The CRWG Report recommends a mandatory “three-tiered” education program, starting with judge advocates, recruiters, and chaplains, then leaders and military personnel in general, focusing on resistant combat troops, to change attitudes and opinions on implementation of the new LGBT law/policy. (IP pp. 25-27) The Implementation Plan adds that sexual misconduct will be dealt with “*swiftly and severely*,” but fails to recognize the confusion likely to result when changing standards conflict with extant provisions of the UCMJ. (IP, p. 11)

- **Q:** What type of training programs will the Defense Department use to prepare male and female personnel for routine exposure to LGBT personnel of the same sex in long-term living conditions offering little or no privacy? (Please provide details and samples of such curricula to include information about the authors of such programs, teacher manuals, consultants, outside lecturers, bibliography, training exercises, and records of “success” for such programs in other institutions implementing similar training.)
- **Q:** What type of training programs will the Defense Department use to change attitudes and to enforce the LGBT law/policy in personnel assigned to close combat units and submarines? (Please provide details and samples of such curricula to include information about the authors of such programs, teacher manuals, consultants, outside lecturers, bibliography, training exercises, and records of “success” for such programs in other institutions implementing similar training.)

- **Q:** What is the estimated number of man-hours that will be needed to implement each phase of the three-tier training program?
- **Q:** What type of training and education will be required for family members and children in DoD family support programs, schools, and child care centers?
- **Q:** Given the controversies that have already surrounded LGBT curricula in civilian schools, which are likely to be even more controversial if introduced into Defense Department's educational system, will authorities make it possible for military families to have access to alternative education choices for their children, which do not mandate the use of LGBT curricula in classrooms and extra-curricular activities?

b) “Zero Tolerance” of Disagreement with Mandatory Training

The CRWG Report recommends mandatory training to teach “respect” for LGBT personnel. In his December 2 testimony, Adm. Mike Mullen said, *“There is no gray area here. We treat each other with respect, or we find another place to work, period.”* Such a policy could create a new “don’t tell” culture among personnel who are not comfortable with the LGBT law for any reason. In matters such as this the military does not do things half-way. “Zero tolerance” would result in career penalties and eventual separation of untold thousands of personnel who have no recourse but to *“find another place to work.”*

- **Q:** What types of disciplinary measures and penalties will apply to personnel, including but not limited to chaplains who object to training that promotes acceptance of the LGBT law/policy?
- **Q:** What is the estimated number of military commanders likely to suffer career-ending consequences for disagreement with the LGBT law and policies? (This should include the operational and readiness impact on units affected by losses of commanding officers and NCOs who disagree with LGBT training.)
- **Q:** What disciplinary policies will apply to military personnel who write books, articles, or letters to the editor, or post items on website blogs, which question or are critical of the new LGBT law/Policy?
- **Q:** What policies will apply to military service academies and war colleges with regard to the participation of civilians or guest lecturers who are known to disagree with the LGBT law/policy?

Over-Arching Question: LGBT Training and Corollary “Zero Tolerance Policies

Given the results of CRWG surveys showing strong opposition to repeal of the current law, how would the imposition of “zero tolerance” penalties for dissent *not* undermine morale, discipline, and the three Rs, and how would these policies *improve* the All-Volunteer Force?

Issue No. 5: Military Effectiveness

The CRWG Report makes much of “*leadership, training, and education*” as the answer to all expected problems, and claims that “*risks*” can be “*mitigated*” by employing the CRWG’s own implementation plan. The expectation implies that human beings are perfect—a presumption that is not supported by empirical evidence, defined as actual experience in the American military, not just theory or speculation.

The CRWG report also devotes several pages to colorful horizontal bar graphs purporting to show how “risk assessments” will be improved by applying the Working Group’s own “mitigation measures.” (pp. 97-118). This attempt to set up for “success” an unprecedented social experiment betrays more hubris than credibility.

a) *Commanders’ Responsibilities for Enforcement of the LGBT Law*

On page 11, the CRWG report mentions the “tools” that leaders should use to deal with “*inappropriate conduct*” and/or “*any situation concerning Service members who are intolerant or intractable in their behavior toward one another.*”

- **Q:** What is the definition of “tools” in this context?
- **Q:** How will the Defense Department structure personnel evaluations and reports to reward officers and NCOs in command of units that *do not* report problems with new LGBT law and associated policies?
- **Q:** Will career penalties be imposed on unit commanders who *do* report problems with the new LGBT law and associated policies?

b) *Unit Cohesion - Horizontal*

For purposes of this discussion the term “horizontal cohesion” refers to the bond of mutual trust that exists between servicemembers in a given unit. According to the classic Defense Department definition, which the CRWG essentially ignored, horizontal cohesion develops when individuals in a unit “*conform to group norms and behavior in order to ensure group survival and goals.*” Unit members “*become totally dependent on each other for the completion of their mission or survival; [and] group members must meet all standards of performance and behavior in order not to threaten group survival.*”

Cohesion does not refer to personal popularity or liking others who are homosexual. In fact, experts on unit cohesion recognize that close, emotional relationships between individuals, including romantic involvements, exclude all others and undermine cohesion in close combat units. The CRWG Report omits this discussion, and instead focuses on a largely civilian academic debate about “task” vs. “social” cohesion. (p. 99) It also relies on the dubious claim that since sexual tensions in small, close-knit combat units are expected to vanish when a threat occurs, there is no reason for concern about conditions at all other times. (p. 105)

By using an incorrect definition for cohesion, the CRWG report has misinterpreted survey responses and encouraged persistent, inaccurate news reports. A prime example is the claim that since 70% of military people said they have worked with and liked homosexual individuals, such feelings are a positive measure of unit cohesion and support for repeal of the 1993 law. That claim, based on an innocuous inquiry about personal relationships, misrepresented specific opinions expressed by military personnel elsewhere in the survey. The question did not measure military cohesion, properly defined. Nor did it ask respondents the key question: *Should the 1993 law be repealed or retained?*

- **Q:** What options will individuals in a given unit have when they are aware of problems associated with the LGBT policy, on either side of the spectrum ranging from romantic entanglements and unprofessional behavior on one side to real or perceived harassment or worse on the other side?
- **Q:** How will commanders restore discipline and horizontal unit cohesion when individuals in a given unit *do not* report problems associated with the LGBT policy, due to concerns about retaliation by peers or by superiors?
- **Q:** Will LGBT personnel in different chains of command be permitted to date each other, or to live with each other as “partners” in BOQ/BEQ housing? How would such a policy affect regulations regarding fraternization?
- **Q:** How will military commanders restore horizontal unit cohesion when exclusive emotional/romantic bonds between LGBT personnel interfere with unit cohesion?
- **Q:** Given recent CDC reports about much higher rates of HIV infection among men who have sex with men, how will military commanders establish or restore horizontal unit cohesion in deployable units that include male homosexual personnel?
- **Q:** If commanders find it necessary to remove personnel from close combat units due to breakdowns in cohesion, disciplinary problems, and tensions caused by implementation of the LGBT law, where will replacement troops come from?

c) *Unit Cohesion – Vertical*

For purposes of this discussion the term “vertical cohesion” refers to the bond of mutual trust that must exist between commanders at all levels and the troops that they lead. It does not refer to personal popularity or liking persons who are homosexual. The expectation that implementation of the CRWG plan will “mitigate” all problems disregards the extensive time and effort required to deal with intensely personal problems that are difficult to analyze in determining responsibility. The CRWG Report advocates “leadership” to achieve “success” in employing its own implementation plan, implying that a commander who reports problems might be held accountable for *poor* leadership when predictable problems occur.

- **Q:** What recourse will subordinate personnel have if they perceive that officials in their own chain of command are reluctant to act on reports and evidence of problems related to

the new LGBT Law, due to concerns that such reports might result in negative evaluations and jeopardy for their own careers?

- **Q:** How will military commanders restore diminished trust and vertical unit cohesion among subordinates who perceive a lack of support when they report concerns about problems associated with the LGBT policy?
- **Q:** How will military commanders restore diminished trust and vertical unit cohesion when same-sex relationships are known to exist between persons of different rank in the same or different chains of command?
- **Q:** How will military commanders restore diminished trust and vertical cohesion when anyone who expresses opinions critical of LGBT policies are accused of “discriminatory” (anti-gay) attitudes that require negative fitness reports and other career penalties?
- **Q:** How will evaluation systems correct the appearance of bias when LGBT commanders condone questionable behavior by gay subordinates?

d) Cohesion – *International Allied Forces*

The CRWG acknowledges that LGBT personnel assigned to serve in countries that criminalize homosexual conduct may be at greater legal risk. According to an Army Psychological Operations officer asked to comment on the consequences of repeal, Al Qaida and Islamic extremists could inflate the issue into viral propaganda against the American military. Other than suggesting briefings on the problem, the report recommended no solution. (p. 147)

Directives for the military services released on January 28, 2011, said there would be no changes in assignment policies, and that service members assigned to serve in “*countries in which homosexual conduct is prohibited or restricted will abide by the guidance provided to them by their local commanders.*”

- **Q:** Will LGBT troops be deployed to countries where homosexuality is severely punished as a crime, and there is no status of forces agreement (SOFA) in place?
- **Q:** What would the effect on military readiness be if the above-referenced “guidance provided by local commanders” in Middle Eastern countries creates widespread inconsistency and confusion with regard to LGBT personnel?
- **Q:** With the ACLU standing ready to file suit, what would happen to a local commander who tries to enforce uniformity by telling gay soldiers not to *act* gay? (So much for eliminating policies that make people to “lie” in order to stay in the military.)
- **Q:** Will the Defense Department devote scarce time and resources to provide LGBT training to allies in countries where homosexual conduct is prohibited?

- **Q:** How will military commanders establish or protect horizontal cohesion in military training teams (MTTs) that are assigned to train foreign troops in countries where homosexual conduct is illegal and subject to severe punishment?

Over-Arching Question: Military Effectiveness

Given the complexities of training and leadership in combat, why would these additional burdens on combat leaders *not* undermine morale, discipline, and the three Rs, and how would these changes *improve* the All-Volunteer Force?

Issue #6: Religious Liberty for Chaplains and People of Faith

The CRWG Implementation Plan recommends punishments for “*resistance*,” a policy that would impose “zero tolerance” on anyone who disagrees with the new policy for any reason, including “*moral or religious beliefs*.” (IP, pp. 50-51) The report says that chaplains will be expected to show “*respect*” to all, but concedes that on a number of issues affecting chaplains, “*boundaries are not always clearly defined*.” (IP, p. 11 and p. 80)

“Respect” for others is a reasonable expectation, but unintended affronts interpreted as “disrespect” frequently spark litigation involving the ACLU. It is not enough to suggest that complaints about unacceptable speech are unlikely to succeed. Such charges often end military careers, even if accusations are baseless.

The Alliance Defense Fund notes that the CRWG’s recommended complaint resolution system, in which the local chain of command resolves disputes on an *ad hoc* basis, could lead to inconsistencies, self-censorship, and a “chill” on religious speech. (p. 14 and pp. 137-138) Since commanders can be punished for failure to prosecute discrimination or harassment complaints (IP, p. 51), it is very likely that even baseless charges will be exhaustively investigated, causing turbulence and personnel losses at all levels.

In September 2010 over sixty high-ranking veteran military chaplains sent a formal letter to the CRWG that described numerous instances where legally normalizing homosexual behavior has resulted in significant losses of religious liberty. The CRWG effectively disregarded these concerns. The recommended direction of “respect,” it seems, runs only one way.

The CRWG disregarded suggestions that it should recommend religious liberty protections, which are common in civilian law. Instead, the CRWG and one of its leaders, Under Secretary of Defense for Personnel & Readiness Clifford Stanley, have recommended no changes in policy.

This position contrasts sharply with the sworn affidavit that Mr. Stanley filed with the Ninth Circuit Court of Appeals last fall in *Log Cabin Republicans v. Gates*. In that case the government argued that repeal of the law would require the changing of “*dozens*” of regulations, including those protecting the “*rights and obligations of the Chaplain corps*,” to avoid “*significant disruption of the force*.” (See Docket Entry 3-6, ¶¶ 21, 26)

The CRWG report and implementation plan further state that chaplains will be expected to minister to persons of all faiths. This is standard professional practice, which is not in dispute. (CRWG Report p. 134-156, IP, p. 31) The problem raised by the LGBT law is that chaplains are not required to *endorse* certain life choices, such as abortion or adultery, which traditions of most major faiths consider to be immoral. The LGBT law, though, effectively seeks to require endorsement of homosexual and bisexual behavior through non-discrimination provisions.

a) *Personnel Evaluations to Enforce Acceptance of LGBT Personnel*

Chaplains, whose role requires teaching and serving from the unique vantage point of their religious convictions, have reason for concern about career penalties for stating their views. The implementation plan recommends that chaplains and other counselors teach acceptance of LGBT policies among families as well as troops. (IP, p. 25) The expectation presents obvious problems for chaplains, especially those involved in marriage strengthening programs such as the Army's *Strong Bonds*.

- **Q:** Will chaplains of all faiths face career penalties if they defer performing same-sex ceremonies to someone else?
- **Q:** Will chaplains of all faiths be required to hire LGBT assistants for ministry activities, or suffer career penalties for failing to do so?
- **Q:** Will chaplains of all faiths be required to conduct religious services with other clergy who are homosexual, or suffer career penalties if they fail to do so?
- **Q:** Will chaplains of all faiths be required to conduct diversity training programs that promote LGBT conduct as equivalent to heterosexual conduct, or will there be a right to refuse such responsibilities in educational programs? If they do have a right to refuse such responsibilities, will they suffer career penalties for exercising it?
- **Q:** Will chaplains be subject to career penalties for making statements in any counseling role, such as the Army's *Strong Bonds*, which counsel avoidance of homosexuality or support the traditional definition of marriage?
- **Q:** What will the Defense Department position be with regard to religious exemption provisions to protect religious freedom for chaplains and service members?
- **Q:** Will the Defense Department and military services structure personnel evaluation or fitness reports to impose career penalties on chaplains and personnel who do not support the new LGBT policy due to religious convictions?
- **Q:** What policies will apply to chaplains, visiting clergy and/or lay visitors who are known to disagree with the LGBT policy, with regard to their participation in lectures, public prayer events, or presentations on Defense Department or military installations?

b) Chaplain Personnel Losses

During testimony before the Senate Armed Services Committee on December 2, CRWG Co-Chairman Jeh Johnson said that the Pentagon expects an undetermined number of chaplains having moral conflicts with LGBT policies and associated duties to leave the service. The CRWG also suggested that a chaplain who is not able to “reconcile” their beliefs with requirements of the LGBT law may request the withdrawal of endorsement by his or her religious community, which “*would trigger an administrative separation.*” (IP, p. 57)

The CRWG report claimed, “*none [of the ecclesiastical endorsing agencies] stated that it would withdraw its endorsements for military chaplains if the law were repealed.*” A contradictory statement appears in the next sentence: “*A significant portion of the respondents did suggest that a change in policies resulting in chaplains’ free exercise of religion or free speech rights being curtailed would lead them to withdraw their endorsement.*” (p. 135)

It is difficult to explain how the first statement can co-exist with the second one, since freedom to express religious views would be limited to “religious ministry.” The statement also fails to mention that the open-ended letter sent by the CRWG to chaplain endorsers in April 2010 did not even *ask* a specific question about withdrawing endorsements. Nevertheless, according to sources cited by the Alliance Defense Fund, the vast majority of chaplain endorsing agencies who responded to the CRWG’s letter were opposed to repeal.

The official survey of the troops did not ask questions about religious liberty. Nor did it record the views of chaplains, who were lumped into a category with medical personnel and military lawyers. These facts magnify the importance of the “significant portion” of respondents to the CRWG’s open-ended letter, who said that they would withdraw chaplain endorsements if (when) the LGBT law chills religious liberty for chaplains and people of faith.

- **Q:** What is the estimated number of chaplains and personnel who are likely to decline re-enlistment due to unacceptable policies implementing the new LGBT law?
- **Q:** What is the estimated number of chaplains who would be subject to negative personnel evaluations/reports and career-ending penalties, due to disagreement with policies implementing the new LGBT law?

Over-Arching Question: Religious Liberty for Chaplains and People of Faith

Given the positive impact of chaplains on morale, especially among deployed forces, how would policies that reduce the number of chaplains or reduce religious freedom *not* undermine morale, discipline, and the three Rs, and how would these changes *improve* the All-Volunteer Force?

Issue No. 7: Sustaining the All-Volunteer Force

The CRWG report included but downplayed troubling findings in the Defense Department’s official survey of the troops: “*Nearly 60% of respondents in the Marine Corps and in Army combat arms said they believed there would be a negative impact on their unit’s effectiveness in*

this context; among Marine combat arms the number was 67%.” (p. 74) The CRWG Report does not include any information indicating that propensity to serve or retention in the military would improve among potential recruits.

a) Recruiting

The DoD CRWG received but did not recognize in its report a formal statement on this issue signed by 1,167 retired Flag & General Officers for the Military—51 of whom had achieved four-star rank. The officers’ statement in support of the 1993 law expressed serious concern that repeal would *“undermine recruiting and retention, impact leadership at all echelons, have adverse effects on the willingness of parents who lend their sons and daughters to military service, and eventually break the All-Volunteer Force.”*

The report cited a RAND report that predicted a 7% drop in likelihood to enlist if current policy were repealed, but nevertheless relied on better results from a reworded poll that dropped the word “openly” from a question asking about gays and lesbians serving in the military. This was highly misleading, since omission of the word “openly” changes the question significantly. The report claimed that current strong recruiting numbers will continue due to the weak economy, and again claimed that a policy of not asking applicants about their sexual orientation—a “mitigation measure” amounting to a new version of “Don’t Ask, Don’t Tell”—would help to retain satisfactory recruiting numbers. (pp. 107-108)

On December 21, 2010, the AP reiterated reports that nearly one in four potential military recruits have failed military exams or are physically unqualified. Given present and future recruiting challenges for the All-Volunteer Force, the panel’s apparent lack of concern about the consequences of LGBT law on recruiting was short-sighted and irresponsible.

Finally, the report maintained that existing service contracts will prevent significant personnel losses. (p. 110) All of these unconvincing arguments were based on the dubious notion that application of the panel’s own “mitigation measures” would keep recruiting numbers high.

- **Q:** Please provide Defense Department or military service-sponsored surveys tracking the attitudes or potential recruits indicating that policies allowing gays and lesbians to serve *openly* would *improve* recruiting or propensity to serve in the military.
- **Q:** Please provide any Defense Department or military service-sponsored surveys indicating that gays and lesbians serving *openly* would *increase* support for military service among parents and others who *influence* potential recruits on career decisions.
- **Q:** How will the Defense Department measure and report data on the effect of the new LGBT Law and associated policies on recruiting potential or success?
- **Q:** Please provide survey information measuring the propensity to serve among the LGBT population of military service age.

b) *Retention & Personnel Losses*

Responses to the CRWG Survey indicated that more than a third of experienced close combat troops would decline re-enlistment or consider leaving the armed forces. (CRWG Survey, Appendix J, p. 53, and Appendix L, p. 47) The gradual loss of so many combat troops and what the report described as “only 12%” of families likely to decline re-enlistment could put remaining troops in greater danger, and ultimately *break* the All-Volunteer Force. (p. 4, 69)

- **Q:** Using the most specific survey responses resulting from the CRWG survey of military personnel in close combat units, what is the estimated number of such troops who are likely to decline re-enlistment or consider ending their careers if the military allows gays and lesbians to serve openly in the military?
- **Q:** Using the most specific survey responses resulting from the CRWG survey of military families, what is the estimated potential loss of such families who decline re-enlistment and leave short of a full career if the armed forces accommodate open and professed gay and lesbian personnel in all branches and communities of military service?
- **Q:** Will exit interviews include specific questions seeking opinions on the effect of the LGBT law and associated policies on the service member’s decision to leave?

Over-Arching Question: Sustaining the All-Volunteer Force

Given what is known about the small size of the cohort of young people who are qualified for induction into the armed forces, why would additional burdens on recruiters *not* undermine morale, discipline, and the three Rs, and how would these changes *improve* recruiting and retention of experienced personnel and families in the All-Volunteer Force?

Issue No. 8: Family, Social, and Medical Concerns

Sections of the CRWG Report that discuss family, health, and legal issues raise many thorny questions that remained unanswered, except to suggest ways to circumvent the Defense of Marriage Act (DOMA) by bureaucratically recognizing “committed partners” of the same sex. (IP, pp. 54-55) Reporters asked questions on this within hours of the legislation’s signing.

a) *Housing of Same-Sex Couples on Military Bases*

The CRWG Report does not recommend the extension of all family benefits to same-sex couples, but it does recognize that serious legal questions would arise if same-sex couples do not receive the same benefits as opposite-sex couples.

- **Q:** How will military bases accommodate same-sex couples on military bases in states that *do not* recognize same-sex relationships such as marriages or civil unions?
- **Q:** How will military bases accommodate same-sex couples on military bases in states that *do* recognize same-sex relationships such as marriage or civil unions?

- **Q:** Please describe any alternative designations that the Department of Defense might use to accommodate same-sex “committed partners.”
- **Q:** What will the position of the Department of Defense be on retention or repeal of the Defense of Marriage Act?
- **Q:** What will the position of the Defense Department be on the adoption of unrelated children by same-sex LGBT couples?
- **Q:** If the Defense Department approves same-sex adoptions, will it follow State Department policies that replace “father” and “mother” with gender-neutral terms?
- **Q:** What will the Defense Department policy be with regard to overnight or long-term living arrangements for same-sex and heterosexual couples in war zones, with or without recognized status as partners?

b) *Benefits for LGBT Personnel and Their Dependents*

During testimony before the Senate Armed Services Committee on December 2, Defense Secretary Gates expressed concern about the cost of extending various family benefits to same-sex couples and their families, but did not provide specific information on costs that will draw scarce funds from other family support accounts. Suggestions for bureaucratic re-definitions of same-sex partners to circumvent the DOMA would increase pressure to repeal it all together. This would defy strong public opinion, as expressed by the voters in more than 30 states, in support of marriage defined exclusively as the union of one man and one woman. (IP, pp. 54-55)

- **Q:** Will the Defense Department authorize or require the full range of housing, medical, family separation and education benefits for same-sex partners, other sexual minorities, and their dependents, with or without officially recognized status? (Please provide breakdown for each.)
- **Q:** What are the estimated costs of extending housing, medical, family separation and education benefits to LGBT partners who have officially-recognized status?
- **Q:** What are the estimated costs of extending housing, medical, family separation and education benefits to LGBT partners who *do not* have officially-recognized status, and their dependents? (Please provide breakdown for each.)
- **Q:** What will the DoD policy be with regard to military transportation access and benefits for LGBT partners who do or do not have officially-recognized status?

c) *Military Events and Social Gatherings*

The CRWG Survey downplayed concerns about housing that accommodates same-sex couples, though it did acknowledge that in general responses from servicemembers were twice as likely to

be negative on repeal than positive. (p. 121) Questions asked of family members did not even ask about the full range of cultural changes that would follow implementation of the LGBT law and associated education policies.

- **Q:** What sort of training programs will be presented to families, including children, to improve acceptance of LGBT personnel on military bases?
- **Q:** What will the Defense Department policy be regarding LGBT personnel as coaches or counselors for military family events with children, to include sports and other activities?
- **Q:** Will LGBT personnel be eligible for employment at Defense Department child care centers?
- **Q:** What will the Defense Department policy be regarding LGBT personnel at family-oriented social and athletic events to include codes for acceptable male and female attire?
- **Q:** What will the Defense Department policy be regarding adult-oriented social events and dinners, to include codes for acceptable male and female attire?
- **Q:** What will the Defense Department policy be regarding special “LGBT Diversity Day” celebrations or events comparable to observances of June as “LGBT Equality Month” that occurred at the White House in 2009 and 2010?”
- **Q:** Some entertainment acts feature edgy gay-oriented humor. What will the Defense Department policy be with regard to such performances on military bases?

d) *Transgendered Personnel*

The CRWG Implementation Plan claimed that “*Transgender and transsexual individuals are not permitted to join the Military Services. The repeal of DADT has no effect on these policies.*” (IP, p. 71) Use of the present tense, however, is somewhat misleading.

By framing this as an “equal opportunity” or “civil rights” issue, the Defense Department has laid the groundwork for successful lawsuits by LGBT activists such as the Transgender American Veterans Association (TAVA) and activist attorneys with the ACLU Lesbian, Gay, Bisexual, Transgender Project. (In November 2010 the ACLU LGBT Project filed suit in New Mexico, seeking full compensation for servicemembers discharged over the past six years due to “Don’t Ask, Don’t Tell.”) The Michael D. Palm Center issued a 2008 report on TAVA concerns, which are generally supported by leading LGBT activist groups such as the Human Rights Campaign.

The Defense Department’s recommended “non-discrimination” policy does not provide any rationale for treating transgendered personnel differently. Nor did the President exclude the transgender cause when twice celebrating June as “LGBT Equality” month in 2009 and 2010. Directives released on January 28 say that rules regarding dress and appearance will be “sexual orientation neutral.”

But some observers believe that sexual expression can take many forms, and the idea that men should wear men's clothes, and vice versa, is unfair "stereotyping." Some individuals take hormones and undergo surgery to change their gender "assignment." One of the pro-repeal individuals who demonstrated at the White House gate in 2010 was a transgendered former Navy man wearing a Navy woman's uniform.

Given the administration's advocacy of this issue as a matter of "civil rights," the Defense Department will have to be consistent, or justify any exceptions to regulations permitting different forms of consensual sexual expression. (Additional varieties of consensual sexual alliances that are the subject of litigation in Canada, a nation that has legalized same-sex marriage, are beyond the scope of these inquiries.)

- **Q:** Will recruiters be required to induct transgendered persons or individuals who desire "gender reassignment" treatment and surgery? If not, what would the rationale be?
- **Q:** What will the Defense Department policy be with regard to uniform differences, exceptions, or alterations for men transitioning to female appearance and women transitioning to male appearance?
- **Q:** What will the Defense Department policy be with regard to military medical services and medications for transgendered personnel, to include hormone treatments and surgery to change sexual appearance and identity for personnel seeking gender "re-assignment?"
- **Q:** What is the estimated annual cost of providing such services to transgendered personnel and those seeking gender "re-assignment?"
- **Q:** What will the Defense Department policy be with regard to the housing of transgendered biological males living with females, and vice versa?
- **Q:** Will a man who shows up for duty in a regulation female uniform, or a woman in a man's uniform, be considered appropriately dressed? What would be the rationale for denying that opportunity on an equal basis to male and female cross-dressers or transgenders?
- **Q:** Will the military services allow a man to wear only approved male garb on-base, but female dress off-base? If so, how does this affect the principle that military regulations apply both on-base and off-base, 24/7?
- **Q:** Will the military services allow LGBT individuals or couples to participate in social events dressed in ways that reflect their sexuality, in the same way that women dress to please men?

e) *HIV+ Personnel*

The CRWG report calls for continuation of the current policy re HIV+ personnel, mandating that they be retained for as long as they are able, but in non-deployable status. During combat missions, all personnel are considered potential blood donors for others who are wounded and in need of an immediate transfusion. The report mentions that new recruits are tested and HIV testing is required every two years, but that is not reassuring in view of the most recent report from the Centers for Disease Control and Prevention. (p. 112)

According to the CDC, one in five sexually active gay and bisexual men have the HIV virus, and nearly half of those do not know they are infected. The same report noted that the rate of new HIV diagnoses among males who engage in sex with males (MSM) in the U.S. is more than 44 times that of other men, and the MSM behavior group is the only risk group in which new HIV infections are increasing. (Centers for Disease Control and Prevention, AP, September 23, 2010)

- **Q:** Does the Defense Department intend to continue policies that exempt HIV+ personnel from deployment, while retaining them in the military for as long as they are able to serve in non-deployable status?
- **Q:** Based on the latest report of the Centers for Disease Control & Prevention, and the expected increase in male homosexual servicemembers, what is the estimated annual number of LGBT personnel likely to become non-deployable if diagnosed as HIV+?
- **Q:** Using the same figures, what is the anticipated annual cost of medical services and treatment for personnel who are diagnosed as HIV+ and become undeployable?
- **Q:** Given generous policies that cover long-term medical care for HIV+ personnel who cannot be deployed, what is the expected long-term cost of benefit incentives that have the effect of drawing even more recruits (male homosexuals) who would be at higher risk of HIV infection resulting in non-deployable status? (Please include projected costs for training, replacement troops who are deployable, medical benefits, etc.)
- **Q:** If servicemembers become infected with HIV due to military blood transfusions or the failure of an HIV + partner to admit HIV + status, will that be considered a service-related disability eligible for long-term medical care?

Over-Arching Question: Family, Social, and Medical Concerns

In view of the importance of retaining families, why would the introduction of LGBT personnel and school curricula on military bases *not* undermine morale, discipline, and the three Rs, and how would these changes *improve* the All-Volunteer Force?

Issue No. 9: Anticipated Revisions in Military Law and Regulations

The new LGBT law would be on a collision course with existing UCMJ provisions regarding personal conduct, but the CRWG Report provides only a superficial discussion of likely or proposed legislative or regulatory changes that would be required to achieve consistency.

a) Conflicts With Provisions of the Uniform Code of Military Justice (UCMJ)

Implementation of the LGBT law would create inconsistency and conflict with provisions and regulations regarding sexual conduct that currently exist in the military's unique code of conduct, the UCMJ. Such changes would have the effect of eliminating or lowering some standards to accommodate consensual homosexual conduct. (IP, p. 19)

For example, the CRWG Report recommended equal discipline for adultery if one of the partners is gay, but did not explain how this would work, since same-sex marriages are not recognized by the military due to the DOMA. (p. 139) Most activists for gays in the military also support repeal of what they call "antiquated" rules regarding adultery.

On January 28, 2011, Under Secretary of Defense for Personnel & Readiness Clifford L. Stanley, together with Joint Chiefs Vice Chief Gen. James Cartwright, USMC, conducted a news conference to release directives outlining expectations for implementation of the LGBT Law, which they called "Repeal of Don't Ask Don't Tell." The directives indicated that servicemembers would not be subject to separation solely for "*legal homosexual acts....*" The word "legal" contradicts the UCMJ.

This position, which may have been premised on the *Lawrence v. Texas* decision overturning all laws barring consensual sodomy, is quite different from one that the Department of Justice made in legal briefs filed in the Log Cabin Republicans case. In legal documents, the government argued that *Lawrence*, a criminal case, did not affect the UCMJ prohibition for several reasons, including the lack of personal privacy in the military. The Justice Department also cited the principle of judicial deference, and the Supreme Court's refusal to review another case decided after the *Lawrence* decision, which upheld the law. The apparent reversal is unexplained.

- **Q:** What will the position of the Defense Department be with regard to repeal of Article 125 of the UCMJ, which forbids the conduct that defines homosexuality?
- **Q:** What will the position of the Defense Department be with regard to repeal provisions in the UCMJ that regulate other types of consensual behavior, including adultery and "conduct unbecoming," in order to achieve equal treatment between heterosexual and LGBT personnel?
- **Q:** What recourse will subordinate personnel have if they are aware that LGBT superiors are engaging in conduct contrary to personal conduct provisions of the UCMJ?
- **Q:** Will the Defense Department drop regulations and policies that govern personal conduct both on-base and off-base?

b) *Retroactive Implementation and “Special Status” for LGBT Personnel*

The CRWG report recommended that servicemembers separated due to homosexual conduct be considered for re-accession, and may “petition for redress” under existing procedures. (IP, p. 23) It did not recommend that sexual orientation become a “protected class” eligible for special treatment, together with race, color, religion, sex, and national origin. (pp. 13-14). The panel contradicted that statement, however, by allowing comparison of this issue to previous civil rights causes. (pp. 81-88).

The same denial of “protected class” status was included in Defense Department directives issued on January 28, 2011, but it was followed by a recommendation that Military Equal Opportunity (MEO) training be revised, due to the expected inclusion of LGBT personnel. (IP, p. 31) Equivocation on the special status of LGBT personnel is likely to invite litigation and sweeping decisions by activist judges, not deter them. Since enactment of the 1993 law was an official act of Congress, it is very possible that other forms of retroactive compensation will be granted to persons denied induction or promotions due to the 1993 law and associated policies, either administratively or by court order.

- **Q:** Please provide more detail on the recommendation that the Defense Department allow retroactive enlistment or re-enlistment for LGBT personnel.
- **Q:** Will the services grant promotions, pay, and other benefits to otherwise-qualified formerly-discharged homosexual individuals, on a retroactive basis?
- **Q:** If promotions are granted to otherwise qualified personnel on a retroactive basis, what will the impact on morale and unit cohesion be when others are displaced by those promotions?
- **Q:** What will the Defense Department do to achieve sufficient numbers to create a “critical mass” of LGBT personnel or promotions to high rank? (For example, “diversity metrics” or “affirmative action” (read, quotas) to encourage the recruiting, retention, and promotion of LGBT personnel in all military communities.)
- **Q:** Will personnel records record “sexuality statistics” in order to encourage the promotion of LGBT personnel to higher levels, including flag rank?

c) *Pending Litigation*

In 2008 the U.S. Court of Appeals for the Ninth Circuit handed down a ruling in a case brought by former Air Force nurse Maj. Margaret Witt. The Ninth Circuit directed the lower U.S. District Court in San Diego, CA, to apply an unusual standard of review higher than the “rational basis” test that should have applied. In that ruling, the Ninth Circuit directed the government to prove that Maj. Witt, as an individual, was causing problems in her unit due to her homosexual conduct. (pp. 26-27) The Department of Justice, including then-Solicitor General Elena Kagan, considered the Ninth Circuit’s ruling to be incorrect and “strange.”

The procedural ruling disregarded Supreme Court precedents, and shifted policy-making power to the judiciary, the branch of government least qualified to make policy for the military. If the Justice Department had filed a timely petition for review, the Supreme Court probably would have overruled the Ninth Circuit's ruling, which was inconsistent with all other circuits. The government failed to do so, however, and the controversial Ninth Circuit ruling in the *Witt* case remains unchallenged to date.

In September 2010 a federal judge in Tacoma, WA, reinstated Witt, but the Justice Department has filed an appeal. If the government does not challenge the Ninth Circuit procedural ruling in *Witt*, federal judges within the Ninth Circuit could cite that precedent in handing down rulings that presume to make policy for the military on *any* issue, not just gays in the military. The CRWG Report fails to explain the most important issue:

- **Q:** What will the positions of the Department of Defense and the Department of Justice be with regard to a petition for Supreme Court review of the Ninth Circuit's unusual ruling in the *Witt* case?
- **Q:** Will the Department of Defense and the Justice Department permit federal judges to effectively make policy for the military, under the problematic procedural ruling of the Ninth Circuit Court of Appeals in the *Witt* case?

Over-Arching Question: Anticipated Changes in Military Law & Regulations

Given the complexities of such matters, why would legal controversies resulting from the new LGBT law and associated policy *not* undermine morale, discipline, and the three Rs, and how would the threat of court interference in military affairs *improve* the All-Volunteer Force?

Issue No. 10: Other Arguments for Repeal of the Law

a) *Foreign Militaries*

The CRWG report mentioned that their assessments were “informed” by the experience of foreign allies, but the two paragraphs provided little information on what was learned from the approximately 25 out of 200 nations of the world that permit service by homosexuals, to limited degrees. The report also mentioned that in those countries, there have been no assessments of matters such as unit cohesion. (pp. 89-92) This admission calls into question claims that there have been few or no problems in countries that have professed homosexuals in their militaries.

- **Q:** Are there any other allied nation in the world that shoulders the same burdens as the American military in terms of force strength, responsibilities to engage in deliberate offensive action (combat) against an enemy, average length of deployments, military and civilian cultures, voluntary service vs. conscription, etc.?
- **Q:** Are there militaries of potential adversaries that accommodate professed LGBT personnel in conditions of deployment and engagement comparable to ours? (For

example, current insurgent adversaries in the Middle East, the armed forces of China, North Korea, Iran, etc.)

- **Q:** Were Middle Eastern allies asked about the advisability of introducing professed homosexuals into military training teams in Afghanistan or Iraq? How did they respond?

b) Number of Discharges

Records of discharges of homosexual personnel since 1994 have consistently shown that numbers have been extremely small—approximately 1/3 of 1 percent. The most recent report confirmed once again that discharges for other reasons have occurred four times as often for both pregnancy and parenthood and six times as often for weight standard violations.

- **Q:** Given the small number of discharges occurring due to homosexual conduct, why would the Department of Defense trade this small number of personnel losses for the significant losses, both voluntary and involuntary, projected to result from imposition of the LGBT law?
- **Q:** How will the Defense Department measure and report data on the effect of the new LGBT Law and associated policies on the retention of individuals and families—particularly those with more than ten years in service?

Over-Arching Question: Other Arguments

Given the cumulative weight of problems that the Defense Department admits would have to be “mitigated” with a speculative “implementation plan,” how would repeal of the 1993 law and imposition of the LGBT law and policies *not* undermine recruiting, retention, discipline, morale and overall readiness of the All-Volunteer Force?

Bottom-Line Questions

Q: Given the pre-emptive decision not to gather statistical information about the sexual orientation of inductees or current military personnel, how will the consequences of this social experiment be evaluated—not just in terms of “diversity,” but in terms of military necessity?

Q: Putting aside political promises and objectives, what justifies the imposition of predictable burdens on military men and women without significant benefits in terms of recruiting, retention, discipline, morale and overall readiness of the All-Volunteer Force?

Q: How will this unprecedented social experiment benefit or *improve* the All-Volunteer Force?

* * * * *

This document was prepared by the Center for Military Readiness, an independent non-partisan public policy organization that specializes in military/social issues, on behalf of the Military Culture Coalition, which includes leading organizations that support retention of the current law, Section 654, Title 10, U.S.C. More information is available at www.cmrlink.org, www.flagandgeneralofficersforthemilitary.com, and www.militaryculturecoalition.com.