



CMR Notes

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Why the Difference is Important

The Homosexual Exclusion Law vs. the Clinton “Don’t Ask, Don’t Tell” Policy

Al Gore’s San Francisco Military

One of the most contentious issues of the 1990s—President Bill Clinton’s attempt to lift the ban on homosexuals in the military—has reappeared in the new century. During a January 5 presidential debate, Vice President Al Gore rocked the Pentagon by saying he would apply a “litmus test” to potential appointees to the Joint Chiefs of Staff. Those who do not agree with Gore’s policy regarding homosexuals serving openly in the military would be excluded from consideration. Under that standard, retired Marine Gen. Charles Krulak would have never become commandant.

Every president has a right to expect loyalty from officers executing military orders. But Gore and his rival for the Democratic nomination, former Senator Bill Bradley, are demanding far more than that. Officers aspiring to high rank would have to salute, in advance, the social agenda of liberal civilian activists, while disregarding what is known about military culture and human sexuality.

They would also have to disobey the homosexual exclusion law enacted by Congress in 1993. From the beginning, the Clinton administration has tried to circumvent that law with problematic “don’t ask, don’t tell”

Issues of concern to the Center for Military Readiness have become increasingly prominent in the news. Questions asked in the non-partisan CMR 2000 Presidential Candidate Survey have come up repeatedly during nationally televised debates in Iowa, New Hampshire, South Carolina and Michigan.

Statements made in December by Hillary Clinton, who is expected to run for the Senate in New York, confirmed that liberals are eager to pander to homosexual activists and campaign contributors, who demand radical change in the culture of the military. The armed forces are a prime venue for social engineering, because uniformed people must follow orders, under civilian control, without visible dissent.

Gay rights groups continue to promote their most radical goals by employing political intimidation and election year opportunism to the maximum degree. They are also crafting a new polemic campaign that focuses on and exploits the brutal murder last July of Army Pfc Barry Winchell, an alleged homosexual, at Fort Campbell, KY.

The renewed push is fueled by widespread confusion about the law that was passed by Congress in 1993, as opposed to the Clinton policy, which is usually identified with the catch-phrase “don’t ask, don’t tell.” Many news reports and commentaries don’t even mention the statute. Others erroneously report that the president’s “don’t ask, don’t tell” policy is “now enshrined in law.” *NY Times*, Dec. 25, 1999)

The truth is that the “don’t ask, don’t tell” policy, as proposed by President Clinton on July 19, 1993, was never passed by Congress. The concept is nevertheless embodied in Defense Department regulations, known as “the policy,” which are inconsistent with the law.

Prof. Charles Moskos, the respected military sociologist who proposed the “don’t ask, don’t tell” idea in 1993, noted in a recent article that “*The Pentagon policies are, in fact, somewhat more lenient than the language of the statute.*” (*Wall Street Journal*, Dec. 16, 1999)

In 1996, the Fourth Circuit of Appeals recognized the difference in a ruling that denied the appeal of Navy Lt. Paul G. Thomasson, a professed homosexual. In that 9-4 decision, U.S. District Judge Michael Luttig wrote this about the exclusion law: “*Like the pre-1993 [policy] it codifies, [the statute] unambiguously prohibits all known homosexuals from serving in the military...*” The judge added that the Clinton Administration “*fully understands*” that the law and Defense Department enforcement regulations are inconsistent, and has engaged in “*repeated mischaracterization of the statute itself...*”

The distinction explains why factions on both sides of the issue are

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critical of “don’t ask, don’t tell.”

Contrary to normal logic, it does not follow that if Hillary Clinton, Al Gore, Bill Bradley, and **Rep. Barney Frank** (D-MA) are *against* “don’t ask, don’t tell,” supporters of the ban should be *for* it. Rather, those who favor the ban on homosexuals in the military should support the 1993 law that was passed by Congress, not the Clinton policy that attempts to circumvent it. The next commander in chief will have no obligation to retain Clinton’s executive policies, but he will have the responsibility to enforce the law.

LEGISLATIVE HISTORY OF THE STATUTE: A REVIEW

Liberals keep complaining that “don’t ask, don’t tell” does not “work.” Work to do what? If the goal is to allow homosexuals to serve, Clinton’s “don’t ask, don’t tell” permissive regulations do not go far enough. But if the purpose of the law is to preserve military morale, discipline and readiness for combat—and it is—the “don’t ask, don’t tell” policy/regulations go too far.

To help clarify matters, the Center for Military Readiness is pleased to review the events of 1993 and the legislative history of the law. Both provide context and understanding of an important debate that will continue throughout the millennium year.¹

1. What is “don’t ask, don’t tell,” and when was it proposed?

In the 1992 presidential election, homosexual activist groups contributed more than \$3 million to the Clinton/Gore campaign. Shortly after his inauguration, President Bill Clinton acted quickly to deliver on his campaign promise to lift the ban on homosexuals in the military. As a first step, Clinton ordered the Defense Department to cease asking “the question” about homosexuality that used to appear on military induction papers.

The general public reacted with spontaneous, unorganized outrage. Many congressional offices needed

extra staff to answer thousands of phone calls and letters protesting the president’s move.

Homosexual activist groups staged a large and bizarre rally in Washington D.C. on April 25, 1993. The Center for Military Readiness sponsored an educational conference on the subject at the Dirksen Senate Office Building on May 15. The policy conference involved many prominent military and legal experts, leaders of veterans and pro-defense groups, plus members of Congress and staff who became actively engaged in the controversy.

Throughout the summer, the **House** and **Senate Armed Services Committees** conducted extensive hearings and field trips to hear testimony on the likely consequences of changing the policy.

At the Pentagon, then-Secretary of Defense **Les Aspin** formed a **Military Working Group**, and charged the panel to come up with a suitable plan. The task force, which met behind closed doors, was not free to dissent from the President’s intent to lift the ban. The only question before them was “how,” not “if” the homosexual ban should be lifted.

At the time, the ban was not inscribed in law, but in Defense Department regulations that were adopted in 1981. The Joint Chiefs and military experts argued for continuation of the status quo, but task force members were under constant pressure from the White House to devise a plan that would accommodate gays in the military.²

The result was a “compromise” proposal, dubbed “don’t ask, don’t tell.” President Clinton, flanked by members of the Joint Chiefs of Staff, presented the concept to the nation on July 19, 1993, at **Fort McNair**, VA. During several days of hearings that followed, the House and Senate Armed Services Committees gave careful consideration to the president’s plan, but also exercised their oversight responsibility by asking incisive questions.

2. Did Congress adopt the president’s “don’t ask, don’t tell” proposal?

No. Congress rejected key elements of the president’s July 19 plan, primarily because the Joint Chiefs, Defense Secretary Aspin, and then-General Counsel **Jamie Gorelick** gave candid answers that revealed serious flaws in the plan. Having heard their testimony and that of military experts and diverse organizations during 12 days of hearings from March to July, members of Armed Services Committees were not convinced that the “don’t ask, don’t tell” concept would be clear, enforceable, and defensible in court.

Congress therefore proposed and passed a law that extended the military’s long-standing exclusion policy. The statute restates and codifies, almost word for word, elements of Defense Department rules that were in effect since 1981—long before Clinton took office. The language was considered legally sound, because it had already been found constitutional several times in federal court.³

Contrary to revisionist accounts in the *New York Times* and other major newspapers, there is no way that a bipartisan veto-proof majority would have passed a law making it “easier” for homosexuals to serve. **Rep. Steve Buyer** (R-IN), Chairman of the House Armed Services Personnel Subcommittee, issued a memorandum on December 16, 1999, which underscores the point:

“Although some would assert that section 654 of Title 10, US Code...embodied the compromise now referred to as ‘Don’t Ask, Don’t Tell,’ there is no evidence to suggest that the Congress believed the new law to be anything other than a continuation of a firm prohibition against military service for homosexuals that had been the historical policy.

“The law, as well as accompanying legislative findings and explanatory report language, makes absolutely clear that known homosexuals, identified based on acts or self admission, must be separated from the military. After extensive testimony and debate, the

Congress made a calculated judgment to confirm the continued bar to the service of homosexuals in the military. The case supporting the Congressional position is well documented and compelling.

“...Those that claim that the Don’t Ask, Don’t Tell policy has failed simply do not understand the underlying law. The prospect of a homosexual openly serving in the military was never contemplated by the Congress and any policy that suggests that the military should be receptive to the service of homosexuals is in direct violation of the law.” (Emphasis in original)

3. Why did Congress reject “don’t ask, don’t tell”?

Because members recognized that the concept was unworkable. The most problematic element of the president’s proposal was a statement that *“Sexual orientation is considered a personal and private matter, and homosexual orientation is not a bar to service entry or continued service unless manifested by homosexual conduct...”*⁴ (Emphasis added)

Despite intense pressure from the White House, that statement was deliberately left out of the law. Congress recognized an inherent inconsistency that could be easily exploited by lawyers challenging the policy in court: *If homosexual orientation is not a disqualifying characteristic, then how could authorities justify dismissal of a person who merely reveals the presence of such a characteristic?*

Instead of codifying such a legally-questionable concept, Congress chose to adopt unambiguous statements that were understandable, enforceable, consistent with the unique requirements of the military, and devoid of First Amendment conundrums that were obvious in the “don’t ask, don’t tell” proposal. The actual text of the law, excerpted on this page, is dramatically different than the permissive statement desired by Bill Clinton.

4. Shouldn’t the law apply only to conduct, not status as a homosexual?

The exclusion law is based on conduct. Unlike the convoluted “don’t ask, don’t tell” concept, which tried to draw artificial distinctions based on

“status” or “orientation,” Congress concluded that it is entirely reasonable to presume that persons who *say* they are homosexuals engage in the conduct that *defines* homosexuality.

The statute directs that members of the armed forces shall be separated

A LAW WORTHY OF SUPPORT

The following are excerpts of **Public Law 103-160, Section 654, Title 10**—the homosexual exclusion law passed by both houses of Congress in 1993 with veto-proof, bi-partisan majorities.⁵ The flawed cornerstone principle of “don’t ask, don’t tell,” to the effect that homosexual orientation is not a bar to military service, is conspicuously absent. Instead, the plain meaning of the law and legislative history affirmed the classic principle that **“Homosexuality is incompatible with military service.”** (See Senate and House Reports, pages 293 and 287, respectively.)

Sect. (a)(2) - (a)(7): “There is no constitutional right to serve in the armed forces. Pursuant to the powers conferred by section 8 of article I of the Constitution...it lies within the discretion of the Congress to establish qualifications for and conditions of service in the armed forces...One of the most critical elements in combat capability is unit cohesion, that is, the bonds of trust among individual service members that make the combat effectiveness of a military unit greater than the sum of the combat effectiveness of the individual unit members.

Sect. (a)(8) “Military life is fundamentally different from civilian life.... the military community, while subject to civilian control, [must]exist as a specialized society...characterized by its own laws, rules, customs, and traditions, including numerous restrictions on personal behavior, that would not be acceptable in civilian society.”

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

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

Sect. (a)(12): ...members of the armed forces [must] involuntarily...accept living conditions and working conditions that are often spartan, primitive, and characterized by forced intimacy with little or no privacy.

Sect. (a)(13)-(a)(15) “The prohibition against homosexual conduct is a long-standing element of military law that continues to be necessary in the unique circumstances of military service. The armed forces must maintain personnel policies that exclude persons whose presence in the armed forces would create an unacceptable risk to the armed forces’ high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability....The presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk...” (Emphasis added throughout)

The full text of the statute is posted on the CMR website, www.cmrlink.org.

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from the service if they have engaged in homosexual conduct, or indicate that they have a propensity to engage in such conduct by stating that they are homosexual or bisexual. A person who does not engage in that conduct does not fit the definition of a homosexual, or identify himself accordingly.

Under the pre-Clinton policy as well as the 1993 statute, this logical presumption is "rebuttable," but only under extremely narrow circumstances; i.e., a service member says or does something entirely out of character while intoxicated, or to escape military service. (See Sect. (b)(1)(A) through (D) of the law, and Senate Report, p. 290.)

Congress considered whether the armed forces should be required to assume the risk that homosexuals would remain celibate. The Senate Report addressed the issue directly: *"It would be irrational...to develop military personnel policies on the basis that all gays and lesbians will remain celibate....[W]hen a person indicates that he or she has a propensity or intent to engage in homosexual acts, the armed forces are not required to wait until the person engages in that act before taking personnel action."* (p. 284)

The House Report also discussed the possibility of accommodating homosexuals, provided that they refrain from homosexual acts: *"...any effort to create as a matter of policy a sanctuary in the military where homosexuals could serve discreetly and still be subject to separation for proscribed conduct would be a policy inimical to unit cohesion...and discipline, unenforceable in the field, and open to legal challenge."* (p. 288)

5. What sort of compromise did Congress accept?

In 1993, Democrats were in control of Congress. **Sen. Sam Nunn**, then-Chairman of the Senate Armed Services Committee, approved the law codifying the ban, but also provided political cover for the president. Members of the media were allowed to report, inaccurately, that Congress had

approved the president's "don't ask, don't tell" proposal. That legend persists to this day.

In truth, the only concession that Congress made was to continue Clinton's interim order to omit "the question" regarding homosexuality that used to appear on military induction papers.⁶ But the law also includes a provision that permits reinstatement of appropriate questions, by a future Secretary of Defense, at any time.

As explained by Congressman Buyer in his December 16 memo:

"The only element of the November 1993 law that could be considered a compromise was the suspension of the long-standing military policy of asking recruit candidates if they were homosexual before entering service. On a personal note, I have reservations about the suspension of asking the question because I believe it is disingenuous and creates a misunderstanding that is a disservice to the homosexual recruit candidate and the military."

6. What is wrong with the current "don't ask, don't tell" policy?

Laws passed by Congress are enforced with executive regulations. In this case, President Clinton's enforcement directives, i.e., "the policy," include permissive elements that are conspicuously absent from the law.

The problematic enforcement rules were announced on December 22, 1993, by then-Defense Secretary Les Aspin. As noted in the January, 1994, *CMR Report*, Secretary Aspin's news release referred not to the law, but to *"the policy as announced by President Clinton on July 19, 1993."* Major news organizations failed to notice that the most important terms of the law, as excerpted on page 3, were left out or contradicted by prominent statements in the "don't ask, don't tell" regulations. In effect, the Department of Defense has attempted to subvert the law by simply redefining it.

This is a blatant violation of the 1993 law, which stipulates that entering

servicemembers should be informed of applicable laws regarding sexual conduct. Current briefing materials and training manuals still do not include the actual text of the law, or accurate summaries of its meaning. Instead, they keep repeating a slightly revised version of the rejected "don't ask, don't tell" mantra: *"Sexual orientation is considered a personal matter and is not a bar to military service unless manifested by homosexual conduct."*

As a result, many young people, who happen to be homosexual, are being misled about their eligibility to serve. There is also reason to believe that heterosexual trainees may be citing the exclusion law as an excuse to escape military obligations.⁷

Restoration of "the question" would help to reduce confusion about the military's requirements, and save millions in training costs (about \$35,000 per recruit), that are lost for each first-term serviceman or woman who leaves the service.

7. What about harassment and violence against homosexuals?

Contrary to exaggerated claims by activist groups, more than 80% of those discharged since the law was enacted left the service not because of "witch hunts" rooting them out, but because of voluntary statements admitting homosexuality. According to a 1998 Defense Department Task Force report, there were only four cases of anti-homosexual harassment reported since 1994. Two of those cases involved anonymous letters that could not be traced.⁸

The brutal murder of a suspected homosexual soldier, Pfc. Barry Winchell, is being cited as evidence that more must be done to end "hate crimes" and harassment of homosexuals. The confessed killer, **Pvt. Calvin Glover**, assaulted Winchell in the barracks with a baseball bat on July 4, several hours after Winchell had beaten him in a drunken brawl.

Evidence of Glover's hostile attitude toward Winchell, who was involved with a male transsexual nightclub entertainer, was a factor in his trial and

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sentencing to life in prison. Leadership problems at that base should be called into question, but there is no need for additional legislation to stop harassment or murderous assaults—of anyone—in the barracks.

Activists seeking to promote the homosexual lifestyle are reportedly planning to politicize the tragic death of Pfc. Winchell. Members of Congress and candidates at all levels should not be intimidated. Misinformation, confusion, and polemics such as this serve the purpose of those who want to weaken and ultimately repeal the exclusion law.

¹ For a comprehensive analysis of legislative history and constitutional principles embodied in the 1993 law, see *"Homosexuality and Military Service,"* by **William A. Woodruff**, Professor of Law, Norman Adrian Wiggins School of Law, Campbell University. This and an accompanying article by former Army **Maj. Melissa Wells-Petry** appear in a symposium published in the *University of Missouri-Kansas City Law Review*, Vol. 64, Fall 1995.

² The Military Working Group granted early, closed-door access to a coalition of homosexual activist groups called the **Campaign for Military Service**. Opposing groups, including CMR, asked for and were granted time with the DoD task force, but later learned that the panel's recommendations had already been written.

³ P.L. 103-160 was included in the National Defense Authorization Act for Fiscal Year 1994, and signed by the president on Nov. 30, 1993. Details of legislative intent are set out in Senate Report 103-112, pp. 263-297, July 27, 1993, and House Report 103-200, pp. 287-290, July 30, 1993.

⁴ Secretary of Defense News Release, No. 605-93, Dec. 22, 1999. President Clinton announced general outlines of his proposal on July 19, 1993, which formed the basis for the Defense Department's congressional testimony and subsequent policy/regulations.

⁵ On Sept. 9, 1993, the Senate rejected an amendment offered by **Sen. Barbara Boxer**, (D-CA), who tried to strike language in the 1994 Defense Authorization bill that codified the homosexual ban. The roll-call vote was 63-33. On Sept. 28, the House rejected a similar amendment by **Rep. Martin Meehan** (D-MA). According to the **National Security Council**, the roll-call vote was 264-169.

⁶ Routine inquiries, which help to determine eligibility to serve, deal with age, educational background, possible arrest or criminal records, physical disabilities, chronic health problems, and

other factors relevant to military service.

⁷ At **Lackland AFB** in San Antonio, for example, discharges for homosexuality escalated and exceeded those of the other services. In 1999, however, Lackland officials greatly reduced the number of discharges by checking the credibility of statements made by trainees claiming to be homosexual.

⁸ News Release, No. 158-98, "DoD Releases Report of Review of Implementation of Homosexual Conduct Policy," p. 6.



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enforcement regulations, known as "the policy," which were never passed by Congress. Assuming that civilian Pentagon appointees would have to meet the same litmus test, leadership positions would soon be occupied by a select few who personally support Gore's gay agenda, and are willing to say so in congressional testimony.

Since flag officers rise from junior ranks, the Gore litmus test would apply at all levels of command. Those who refuse to pledge allegiance to the homosexual agenda would be denied promotion and forced to resign. Forget about recruiting shortages and personnel losses that are devastating the volunteer force. President Al Gore would practice deliberate discrimination against uniformed people who harbor religious or traditional values.

Republicans used to rail against "**San Francisco Democrats.**" Now the vice president says he wants to place America's national security in the hands of a **San Francisco Military**, led by officers and civilian appointees who pass muster with homosexual activists.

In essence, President Gore would misuse officers under his command to fulfill campaign promises to well-heeled special interest groups. Not since Bill Clinton used junior officers to serve hors d'oeuvres at the White House has the nation seen such an outrageous affront to the dignity of military officers.

The Joint Chiefs and subordinate officers must take an oath to give their honest, professional opinion on military matters, prior to the making of policy. Trust in the integrity of the officer corps would be shattered by any attempt, explicit or implied, to skew those opinions with litmus tests colored by domestic politics. Politicizing the officer corps would thoroughly *demoralize* the military, and demonstrate the full definition of that word that appears in the American Heritage dictionary: "*To undermine the confidence or morale of; To disorder, or confuse; To debase the morals of, or corrupt.*"

Public relations spin cannot mitigate the impact of the vice president's jaw-dropping statement. Promotable officers have already gotten the message, and they know what it means. The Gore litmus test would not end with accommodation of professed homosexuals in the military. To make the plan "work," appointees would be expected to support a host of collateral policies, such as same-sex domestic partnership privileges and gay pride events on military bases.

A legion of PC police would be needed to shape a gay-friendly military force. When inevitable discipline problems occur, loyal officers would have to blame the troops—never the commander in chief. Stepped-up "sensitivity training," conducted by gay "diversity" specialists, of course, would become a growth industry. Activist lawyers, eager to represent unhappy gays in uniform, would make millions in "public interest" attorney fees.

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Nervous Democrats keep trying to downplay Al Gore's remarks, and some conservatives seem inexplicably ready to join them. On CNN, for example, **Tucker Carlson** of the *Weekly Standard* referred to the "inconsequential" Gore controversy as a "tiny boutique issue."

On the campaign trail, Texas **Governor George W. Bush** called himself "a don't ask, don't tell man," without explaining what that means. And **Sen. John McCain**, who says he opposes open homosexuality in the military, would nevertheless retain contrary Clinton regulations that could be repealed with a stroke of the pen.

The **Republican National Committee** produced a quick television spot that criticizes the vice president's comments, but does not explain why retired Army **Gen. Colin Powell** would not measure up to Gore's litmus test. The unique culture of the military, which is incompatible with homosexual demands, needs to be defended with confidence and conviction, not timid commercials.

Presidential and congressional candidates, regardless of party, should pledge support for the constitutionally sound exclusion law, which was passed by Congress in 1993 with overwhelming, bi-partisan majorities. To lessen confusion and improve enforcement, the next Secretary of Defense should be instructed, as authorized under current law, to restore "the question" about homosexuality that used to appear on military induction forms.

The next president should also scrap Bill Clinton's convoluted "don't ask, don't tell" regulations, which are inconsistent with the statute. Then the president and Congress should concentrate on restoring the strength, morale and readiness of the volunteer force.

Election campaigns are supposed to clarify matters of important public policy, instead of confusing them.

Can't the political "experts" recognize a true national defense issue when they see one?

★★★★★

President's Comments

by Elaine Donnelly

Voters Should Apply Their Own "Litmus Test"

Homosexuals are free to serve their country, but not necessarily in uniform. Servicemen and women sacrifice their personal freedom, and frequently live in conditions that involve forced intimacy and little or no privacy. It is unfair for ultra-liberal civilians, such as Rep. Barney Frank (D-MA) and Rep. Jerrold Nadler, (D-NY) to demand that military people should have to expose themselves involuntarily to persons who might be sexually attracted to them.

Advocates of open homosexuality frequently resort to insults and playing the race card. Gen. Colin Powell, former Chairman of the Joint Chiefs of Staff, dealt with that in a 1992 letter to former Rep. Patricia Schroeder (D-CO): "Skin color is a benign, non-behavioral characteristic. Sexual orientation is perhaps the most profound of human behavioral characteristics. Comparison of the two is a convenient but invalid argument."

In response to an arrogant ruling last September by the European Court of Human Rights, the armed forces of Great Britain are now preparing to admit open homosexuals. The defense minister is expected to draw up

personal conduct rules that are "equivalent" between same- and opposite-sex couples. The concept is unenforceable, and implementation will probably worsen Britain's current military personnel shortages.

America's 1993 law has already withstood several constitutional challenges, but it is at risk. A future court might decide to strike Clinton's illegal "don't ask, don't tell" regulations, and take down the law at the same time. Since Congress has not held the executive accountable for violating congressional intent, the next president should act swiftly to reaffirm the law.

Presidential candidates must understand and confront the threat behind Vice President Al Gore's astonishing "litmus test" comment, which is too extreme to be taken back. Voters must insist that candidates pay attention to this issue, and settle for nothing less. ■



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