Center for Military Readiness
— Policy Analysis —
April 2010

New Defense Department Policy: "Don't Report, Don't Act"

DoD Elevates Political Promises Over Principle

On March 25, 2010, Defense Secretary Robert Gates and Adm. Mike Mullen, Chairman of the Joint Chiefs of Staff, unilaterally redefined the meaning and effect of the 1993 law regarding homosexuals in the military. Instead of honoring the statute's language and intent, which guard essential factors of military culture such as good order and unit cohesion, Secretary Gates and Chairman Mullen have substituted "fairness" as their primary goal.

The shift in priorities, made effective immediately, worsens confusion and abrogates the 1993 law, Section 654, Title 10, U.S.C., which clearly states that homosexuals are not eligible for military service. By making the law extremely difficult to enforce, apparently by design, the Gates/Mullen regulations have created a new form of institutional dishonesty that is even worse than Bill Clinton's administrative policy, "Don't Ask, Don't Tell." DADT encourages homosexuals to enlist even though they are not eligible for military service.

The Gates/Mullen policy departs even further from congressional findings in the law. Revised language and omissions suggest that local commanders should look the other way, pretend ignorance, or decline to act on credible information justifying discharges of persons who engage in homosexual conduct, evidenced by actions or statements.

If Secretary Gates really wanted to make the system more "fair," he could have exercised his legally-authorized option to drop the inconsistent DADT policy, which Congress never voted for. Instead, Secretary Gates and DoD General Counsel Jeh Johnson have crafted an even more convoluted "Don't Report, Don't Act" (DRDA) policy, which is riddled with contradictions and confusion that will undermine respect for the law.

The regulations and surrounding events conveyed the clear message that the administration has no interest in enforcing the law, and anyone who expresses dissent from the president's political promise to LGBT (lesbian, gay, bisexual transgendered) groups is putting his career at risk.

During the March 25 news conference Adm. Mullen betrayed weakness in the administration's position by over-reacting to a *Stars & Stripes* letter to the editor signed by Lt. Gen. Benjamin Mixon, the Army's Pacific Commander, in support of current law. Chairman Mullen accused Gen. Mixon of violating Army instructions, and invited him to *"vote with his feet."* The Army memorandum in question, however, did not preclude public expressions of support for current law, and the implied threat to the three-star general's career subsequently was withdrawn.

On March 31 Army Secretary John McHugh suggested that he would not discharge active duty personnel who tell him of their homosexuality. Within 24 hours McHugh had to retract his own impulsive statement.

Memo to Commanders: "Don't Report, Don't Act"

Changes in Defense Department regulations that were announced on March 25 revise several sections of two Defense Department Instructions (1332.14 and 1332.30). The documents set forth administrative procedures for the separation of homosexual personnel—enlisted and officers, Regular and Reserve. By setting up gratuitous barriers to responsible enforcement, and treating homosexual

personnel as if they are a special class, the new directives essentially redefine the purpose of the law as "fairness," rather than military necessity.

In a significant change, revisions stipulate that only a one-star general or admiral *"in the Service member's chain of command, in the grade of O-7 or higher, is authorized to initiate fact-finding inquiries involving homosexual conduct."* The new rules further state that the commander may conduct a fact-inquiry personally, or appoint someone *"in the grade of O-5 or higher, or civilian equivalent."* (Enclosure 5, p. 7)

There is no written stipulation that subordinate commanders, O-3 through O-6, are authorized or expected to forward credible information up the chain of command. Given political pressures from the Obama Administration, a company or field-grade commander who is told or discovers that a servicemember engages in homosexual conduct will have no incentive to investigate further.

How is the O-7 commander supposed to get requisite information on which he or she can act? Absent clarification, the new regulations suggest that lower-ranking officers have no obligation to do preliminary work to obtain credible information, and may face career penalties if they do. The new policy creates many black holes into which credible information will fall long before it gets to the O-7 commander.

By effectively tying the hands of subordinate commanders who are closest to the facts, the new "Don't Report, Don't Act" directives depart from sound principles of personnel management and military leadership. This makes sense only to activists who see the law as "unfair." In their minds, "fairness" requires *less enforcement* of the law.

No wonder an unidentified soldier told a gay website reporter that the new plan is an *"ingenious"* way to make the law *"virtually un-enforceable."* The goal is not faithful execution of the law; the goal is to make it harder to discharge anyone for homosexuality.

The purpose of the exercise is pure politics, not military necessity. The Department of Defense has released no numbers or data indicating that commanders have abused their power by targeting discrete gays in the military. Homosexuality, which is usually revealed by voluntary admissions, accounts for less than 1% of discharges.

The administration nevertheless has elevated for high-level scrutiny only the discharges of homosexuals, who are not even eligible for military service. The special treatment suggests hyper-sensitivity to political goals, including President Obama's campaign promises to activists of the LGBT Left.

"Third Parties" and Other Exclusions

The new "Don't Report, Don't Act" policy devotes considerable attention to the credibility of sources of information, implying that discharges resulting from "third party" revelations are inherently "unfair" and unacceptable. The resulting policy clearly conflicts with the first finding in current law, which recognizes that the U. S. Constitution assigns to Congress authority over military policies, and the second finding, *"There is no constitutional right to serve in the armed forces."*

In particular, authorities will deem information "credible" only if it comes from a *"reliable person,"* who is defined as *"someone who would be expected to provide accurate information."* Fair enough. But the new DoD restrictions will invite gay activist lawyers to question the motives of anyone providing information about a servicemembers' eligibility to serve.

The new rules exclude, for example, information from *"A person with a motive to seek revenge against or to cause personal or professional harm to persons suspected of being homosexual generally;"* or *"A person with a prior history of conflict with the Service member."*

Also excluded is *"Information provided by a Service member in the course of seeking professional assistance for domestic or physical abuse sustained by the Service member or by a member*

of his or her household." (p. 9, emphasis added)

These micro-managing restrictions go far beyond the standard instructions that trial judges give to military and civilian jurors in civil and criminal trials. Instead of giving examples of "unreliable" witnesses, judges give jurors general guidance on what factors to consider in discharging their duty to determine who is telling the truth. Jurors can believe all, some, or none of the testimony of any witness, using common sense and other factors they use in ordinary life to determine whom to believe.

The stakes at a court-martial are considerably higher than the determination of an administrative discharge. The Defense Department has nevertheless mandated more "fairness" for homosexuals than standards of credibility applied to everyone else. It will not be difficult for gay activist lawyers to use such exclusions to impede discharges of professed homosexual personnel. For example:

a) The *"revenge" and "history of conflicts"* loopholes, combined with the restrictions on information gathered in domestic violence cases, could result in the administrative retention of an ineligible homosexual servicemember with a history of domestic abuse. His attorney would simply attack the credibility of a domestic violence victim who has a *"history of conflicts"* with the gay servicemember and a *"motive for revenge."*

b) The new regulations acknowledge that under the 1993 law, a person who marries or attempts to marry a person of the same sex is not eligible for military service. But what if someone questions the "source" of that information? In a recent case reported by the AP (March 13), local police discovered that under permissive Iowa law, Air Force Sgt. Jene Newsome had married a woman whom the police were investigating in an unrelated matter. The police reported the same-sex marriage to the local commander, who investigated and acted on the information.

   ACLU lawyers are challenging Newsome's discharge, claiming that it was "unfair." Newsome was "outed" by local police who, the ACLU claims, were "seeking revenge" due to the sergeant's non-cooperation in the investigation of her partner. Never mind that the mere fact of Newsome's public "I do" in Iowa was sufficient evidence to justify discharge. In a future case under the new "Don't Report, Don't Act" rules, a local commander would be deterred from investigating further or forwarding information to the O-7 level.

The new DRDA policy undermines the law by making it virtually unenforceable. Although the regulations deal with administrative matters only, in actual practice the perceived pressure to do nothing could carry over into disciplinary matters, offering little or no support to military personnel who experience inappropriate behavior involving persons of the same sex.

Campbell University School Law Professor William Woodruff, a former Army Colonel and Judge Advocate, questions the message behind the new regulations:

> *"I think it strange that we trust 23 year old platoon leaders with responsibility for millions of dollars of military equipment and the very lives of subordinates in combat operations but question their maturity and judgment in deciding whether to conduct an inquiry into whether a soldier is homosexual. I have no problem with the discharge authority being at the O-7 level in order to have some consistency across the services on the discharge question, but making the whole process start and stop at the O-7 level is inefficient, inconsistent with other administrative and criminal inquiries, and likely to encourage non-reporting of situations that clearly violate 10 USC 654."*

More Exceptions and Equivocations:

The discussion of "third-party outings" began in May 2009 when Secretary of Defense Robert Gates was asked about the case of Lt. Col. Vincent Fehrenbach, an Air Force weapons systems officer based at Mountain Home AFB in Idaho. Fehrenbach, whose discharge for homosexuality is still pending, appeared on national television to claim "unfair" treatment because he had been "outed" by an"acquaintance." That person turned out to be a young man that Fehrenbach had solicited for sex on a

gay website.

According to a September 2009 *Idaho Statesman* article quoting the police report, after sharing a hot tub with Fehrenbach the younger man accused the officer of rape. Fehrenbach beat the charge by proving that the encounter was consensual, but Air Force officials began discharge proceedings that were justified due to his homosexual conduct—not to mention his poor judgment.

Even before the new rules, gay activist lawyers of the Servicemembers Legal Defense Network (SLDN) were complaining that Fehrenbach's discharge was "unfair" because he was "outed" by a "third party." If the new standard is "fairness" rather than the actual meaning of the law, why not let him continue his career? Fehrenbach's public statement may preclude that option, but similar cases in the future could be handled differently, lowering standards for everyone and defining discipline down.

Such forbearance would clearly violate the 1993 law, which applies *"at all times…whether the member is on base of off base, and whether the member is on duty or off duty."* (Finding #10) It would also increase pressure to eliminate inconsistent provisions of the Uniform Code of Military Justice (UCMJ), which activists also have targeted for repeal.

Confusion Taken to Extremes

A glossary definition of credible evidence on page 13 of the new rules strikes the words *"(for example, hand-holding or kissing, in most circumstances)."* Common sense would argue that a local commander still could cite such behavior as credible evidence of homosexuality, but the Defense Department's omission of specific language suggests that it no longer considers such behavior to fit the definition of *"bodily contact that a reasonable person would understand to demonstrate a propensity or intent to engage in such an act."*

The resulting relaxed standard increases the possibilities for suspended enforcement, extending beyond confusion into the realm of absurdity. For example:

- If a soldier goes on MSNBC-TV to confess that he is homosexual, what happens if the O-7 was not tuned in to see his statement, which the local commander would be reluctant to report up the chain of command? Would the O-7 have to catch the admission on a YouTube link?
- What about a sailor who places on his desk pictures of himself kissing his male partner? Does the display count only if the O-7 happens to walk by, sees the photo, and decides to initiate discharge proceedings under the law? Or does the striking of the regulatory "hand-holding, kissing" language preclude even an O-7 from acting on what the photograph clearly suggests?
- What about military social events? Even suggestive same-sex hand-holding and dancing become a gray area. If the goal is "fairness" for gays in the military, almost anything goes.

So much for faithful enforcement of the 1993 law. Under the new regulations, gay activist lawyers will have no problem using significant loopholes to keep an ineligible person in uniform. In a few months the administration will point to the predictable result—retention of professed homosexuals in the military—as "evidence" that the law should be repealed without further delay.

On several occasions Defense Secretary Gates has referenced President Obama's stated opinions as if they are legal mandates. But no president has the power to use administrative regulations to redefine a duly-enacted law, cutting out Congress and the people they represent. Congressmen and senators should recognize an affront to Congress when they see one.

Military men and women are about to be used in an involuntary social experiment, paying a high and possibly irrevocable price for the president's political promises to the LGBT Left. Responsible members of both parties should step forward to clarify the situation and to reaffirm support for the 1993 law.
