This an excerpt of a book chapter by CMR President Elaine Donnelly titled "Defending the Culture of the Military," **published in May 2010 by the Air Force University Press as part of a book titled *Attitudes Are Not Free: Thinking Deeply about Diversity in the U.S. Armed Forces*. Footnotes are in sequence but different from the original text, which begins on page 249. The chapter is available at http://books.google.com/books?id=-5FnvJEclewC&lpg=PP1&pg=PA249#v=onepage&q&f=false.**

Legislative History of Section 654, Title 10, U.S.C.

In 1993 Pres. Bill Clinton attempted to lift the ban on homosexuals in the military. It was one of the most contentious efforts of his administration, sparking months of intense debate. Following 12 legislative hearings and field trips, Congress passed a law codifying the pre-Clinton policy. That statute, technically named Section 654, Title 10, U.S.C.,[i] frequently is mislabeled "Don't Ask, Don't Tell." The statute clearly states that homosexuals are not eligible for military service, and federal courts have upheld it as constitutional several times.[ii]

Members of Congress seriously considered a concept known as "Don't Ask, Don't Tell," which Pres. Bill Clinton formally proposed on 19 July 1993. The proposal suggested that homosexuals could serve in the military as long as they didn't *say* they were homosexual. Congress wisely rejected the convoluted concept and did not write it into law.[iii]

Members recognized an inherent inconsistency that would render the proposed "Don't Ask, Don't Tell" policy unworkable and indefensible in court: If homosexuality is not a disqualifying characteristic, how could the armed forces justify dismissal of a person who merely reveals the presence of such a characteristic? Instead of approving such a legally questionable concept, Congress chose to codify Department of Defense (DOD) regulations that were in place long before Bill Clinton took office.[iv]

The resulting law, Section 654, Title 10, U.S.C., codified the long-standing DOD policy stating that homosexuals are not eligible for military service. Following extensive debate in both houses, the legislation passed with overwhelming, veto-proof bipartisan majority votes.[v] In writing this law, members wisely chose statutory language almost identical to the 1981 DOD directives regarding homosexual conduct, which stated "homosexuality is incompatible with military service." Those regulations had already been challenged and upheld as constitutional by the federal courts.[vi]

The 1993 statute was designed to encourage good order and discipline, not the situational dishonesty inherent in "Don't Ask, Don't Tell." Having rejected that concept, Congress chose instead to codify unambiguous findings and statements that were understandable, enforceable, consistent with the unique requirements of the military, and devoid of the First Amendment conundrums that were obvious in President Clinton's 19 July proposal.

Among other things, the law states that "military life is fundamentally different from civilian life," and standards of conduct apply "whether the member is on base or off base, and whether the member is on duty or off duty." It further notes that members of the armed forces must "involuntarily . . . accept living conditions and working conditions that are . . . characterized by forced intimacy with little or no privacy." Therefore, "the prohibition against homosexual conduct is *a long-standing element of military law that continues to be necessary* in the unique conditions of military service" (emphasis added).

These findings and statements are very different from the language proposed by Bill Clinton on 19 July 1993, which Congress did not write into law: "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."[vii]

A thorough search of media reports at the time reveals that there were few news stories reporting passage of the law, and those that did appear in print failed to report its language and meaning with accuracy. Those news accounts and contradictory DOD statements since then have confused the issue by erroneously suggesting that Congress voted for Pres. Bill Clinton's flawed proposal, known by the catch-phrase "Don't Ask, Don't Tell."[viii] The situation brings to mind a statement of Oliver Wendell Holmes, quoted by *National Review* editor Rich Lowry and others: "A good catchword can obscure analysis for 50 years."

Describing the law as a "compromise" and referring to it as "Don't Ask, Don't Tell" gave political cover to President Clinton, who had promised to lift the ban shortly after his election in 1992. In fact, due to overwhelming public opposition, President Clinton failed to deliver on his promise. The only compromise involved allowed the Clinton administration to continue its interim policy of not asking "the question" regarding homosexuality that used to appear on routine induction forms.[ix]

This politically expedient concession on a matter of process was ill-advised, but it did not nullify the language and substance of the actual law. The statute also includes language that authorizes the secretary of defense to reinstate the question about homosexuality at any time, without additional legislation.[x]

Differences between the Law and "Don't Ask, Don't Tell"

It is no accident that the vague phrase "sexual orientation," the key to Bill Clinton's original "Don't Ask, Don't Tell" proposal, does not appear anywhere in the law that Congress actually passed. Members of Congress recognized that the phrase would be difficult to define or enforce. Instead, the law is firmly based on conduct, evidenced by actions or statements.

Absent unusual circumstances, a person who says that he is homosexual is presumed to engage in the conduct that defines what homosexuality is. Using the same logic, a person who says he is a philanthropist is presumed to give away money—the

conduct that defines what a philanthropist is. It is not necessary for an individual to be "caught in the act" for the eligibility law to apply.

The law should have been given a name of its own, such as the "Military Personnel Eligibility Act of 1993." Differences between the law and the Clinton administrative policy explain why opposing factions are critical of "Don't Ask, Don't Tell." Even though Congress rejected the concept in 1993, with good reason, the Clinton administration imposed it on the military anyway in the form of enforcement regulations that were announced in December 1993. Those expendable regulations, unfortunately, remain in effect today.[xi]

In 1996 the US Court of Appeals for the Fourth Circuit said in a ruling upholding the constitutionality of the law that the Clinton administration's enforcement policies ("Don't Ask, Don't Tell") were not consistent with the statute that Congress actually passed (Section 654, Title 10, U.S.C.).[xii] The Clinton administration disregarded the Court of Appeals and perpetuated deliberate confusion by retaining the inconsistent "Don't Ask, Don't Tell" policy in DOD enforcement regulations.[xiii]

Problems with the "Don't Ask, Don't Tell" Administrative Policy

President Clinton's convoluted "Don't Ask, Don't Tell" regulations were and still are inefficient and contrary to sound policy. In the civilian world it would be tantamount to a state law forbidding store and bar owners to check ID before selling liquor to younger customers. Such a law would force the proprietor of a bar to assume the risk that if an underage customer drives and accidentally kills someone on the way home, the proprietor will be held liable. That risk is reduced by the posting and enforcement of signs stating "We Check ID."[xiv]

Properly enforced liquor control laws protect the public interest even if some 18-year-olds successfully conceal or lie about their age and some adults do not ask for proof. It would not be accurate to claim, however, that the age of customers is "personal and private," and state law allows 18-year-olds to drink alcohol as long as they do not *say* they are underage.

This is, however, how the "Don't Ask, Don't Tell" policy works. It forbids the Department of Defense to include on induction forms a routine inquiry regarding homosexuality that would help to determine eligibility for military service.

The omission of that question and the lack of consistent, accurate information regarding the law mislead potential recruits about their eligibility to serve. Homosexualist leaders,[xv] who want government power to impose their agenda on the military, are well aware of what the law actually says and are a large part of this problem.

Groups such as the Servicemembers Legal Defense Network (SLDN) and the Human Rights Campaign (HRC) constantly attack the wrong target—an administrative policy that Congress did not inscribe in law. Their multimillion-dollar public relations campaign exploits human interest stories demonstrating problems that members of Congress

predicted when they rejected Bill Clinton's 19 July 1993 "Don't Ask, Don't Tell" proposal. Many personal dilemmas could have been avoided if the Department of Defense clearly explained to potential inductees the meaning of the 1993 Eligibility Law.

Many well-meaning people who may not understand the issues involved are opposed to the convoluted "Don't Ask, Don't Tell" policy or think it needs to be reviewed. They are correct—Congress did not vote for the Clinton "sexual orientation" policy and the secretary of defense should have exercised the option to drop it long ago. "Don't Ask, Don't Tell" diversions, however, should not preclude objective discussion of the consequences of repealing the 1993 Eligibility Law.

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[i]. National Defense Authorization Act (NDAA) for Fiscal Year (FY) 1994, Pub. L. no. 103–60, § 571, 107 Stat. 1547, 1670, (1993), codified at 10 U.S.C. § 654, reprinted in appendix. The 1993 law codified long-standing DOD regulations adopted in January 1981. See Elaine Donnelly, "Constructing the Co-Ed Military," *Journal of Gender Law & Policy* (Duke University) 14 (May 2007), hereafter cited as Duke *Law Journal*, 906–10. The article is available in full at http://www.law.duke.edu/shell/cite.pl?14+Duke+J.+Gender+L.+&+Pol%27y+815l.

[ii]. Jody Feder. "'Don't Ask, Don't Tell': A Legal Analysis," *Congressional Research Service Report* 7-5700, R40795, 2 September 2009.

[iii]. Legislative history clearly shows that members of Congress did not intend to accommodate professed homosexuals in the military. See 103rd Congress, House Report 103-200, NDAA for FY 1994, 287. Rep. Steve Buyer (R-IN), then-chairman of the House Armed Services Committee (HASC) Personnel Subcommittee, underscored the point in a 16 December 1999 Memorandum for Members of the Republican Conference, "Policy Regarding the Present Ban on Homosexuals in the Military": "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." See document available at http://cmrlink.org/problemgays.asp, and Duke *Law Journal*, 905–8.

[iv]. Section 654, Title 10, U.S.C., and Duke *Law Journal*, 904–7.

[v]. The FY 1994 NDAA codified language almost identical to that in DOD directives promulgated in 1981. An amendment offered by Sen. Barbara Boxer (D-Cal.), which would have allowed the president to decide policy regarding gays in the military, was defeated on 9 September 1993, on a bipartisan 63 to 33 vote. On 28 September the House rejected a similar amendment, sponsored by Rep. Martin Meehan (D-MA) and Rep. Patricia Schroeder (D-CO), which would have stricken the Senate-approved language and expressed the sense that the issue should be decided by the president and his advisors. The Meehan/Schroeder amendment was defeated on a bipartisan roll-call vote, 264 to 169.

[vi]. See extensive analysis in the University of Missouri-Kansas City *Law Review* article by Campbell University law professor William A. Woodruff, "Homosexuality and Military Service," 64 UMKC L. Rev. 121, 123–24 (Fall 1995). Also Section 654, Title 10, U.S.C., and Duke *Law Journal*, 903–10. Professor Woodruff is a leading expert on the issue of homosexuals in the military.

[vii]. Duke *Law Journal*, 908–11.

[viii]. Official spokesmen continue to suggest, erroneously, that homosexuals are eligible for military service if they do not *say* they are homosexual. Statutory language requires briefings and educational materials to clarify the meaning and intent of the law, but the Department of Defense has failed to comply with this provision. See Section 654, Title 10, U.S.C., "Required Briefings." Also Duke *Law Journal*, 907–8.

[ix]. David E. Burrelli. "'Don't Ask, Don't Tell': The Law and Military Policy on Same-Sex Behavior," *Congressional Research Service Report* 7-5700, R40782, 14 August 2009, hereafter cited as *CRS Report*, 14 August 2009, 1–5.

[x]. Duke *Law Journal*, 900-908.

[xi]. See DOD Release No. 605-93, Dec. 22, 1993. The DOD News Release announcing enforcement regulations primarily referred to the "Don't Ask, Don't Tell" policy announced by President Clinton on 19 July 1993, not the language and meaning of Section 654, Title 10. The unnoticed discrepancy has been the source of confusion and controversy ever since.

[xii]. In a 9-4 decision that denied the appeal of Navy Lt Paul G. Thomasson, a professed homosexual who wanted to stay in the Navy, US Circuit Judge Michael Luttig wrote about the exclusion law: "Like the pre-1993 [policy] it codifies, [the statute] unambiguously prohibits all known homosexuals from serving in the military." Judge Luttig added that the Clinton administration "fully understands" that the law and DOD enforcement regulations are inconsistent and has engaged in "repeated mischaracterization of the statute itself."

[xiii]. Pres. George W. Bush could have rescinded the Clinton regulations with a stroke of the pen, but did not do so, for reasons unknown.

[xiv]. CDR Wayne L. Johnson, Judge Advocate General's Corps, Navy, retired, notes that the same principle of effective enforcement applies even if there are some underage individuals who are more mature and trustworthy than some 21-year-olds who are legally permitted to purchase alcohol.

[xv]. The term is taken from a July 2008 Dutch newspaper commenting on gay issues in that country. There are homosexuals who are not homosexualists and activist heterosexuals who are.