

## *Constructing the Co-Ed Military*

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*The following is an excerpt of an article published in an edition of the 14 Duke Journal Gender Law & Policy, 803 (May 2007), titled Gender, Sexuality and the Military. Elaine Donnelly is President of the Center for Military Readiness, an independent public policy organization that specializes in military personnel issues. (Note that in these excerpted paragraphs, footnote numbers are in sequence but different from those in the original document.)*

#### C. The 1993 Law Regarding Homosexual Conduct

A common thread in the debates about social policy in the military center on the institution's unique character, culture, and mission. The armed forces exist to defend the republic—a purpose that sets the military apart from all other institutions in the civilian world.

Advocates of allowing homosexuals to serve in the military almost always discuss the issue in terms of civil rights. But participation in the military is sometimes a duty; it is never a right. Title VII of the Civil Rights Act of 1964 does not apply to the military.<sup>1</sup>

The issue was discussed in a comprehensive law review article by Professor William A. Woodruff of the Norman Adrian Wiggins School of Law at Campbell University:

The armed forces are unique. In a government based upon the consent of the governed, the military is autocratic. In a society that treasures individual freedom, the soldier must conform and sacrifice individual freedom for mission accomplishment. In a country where the right to speak one's mind is paramount, the soldier is called upon to defend that right while not enjoying its full extent. To some, it is paradoxical that the defenders of freedom must forfeit their own freedom. Consider the mission of the military, however, and the paradox vanishes. The mission of the United Armed Forces is to fight and win our nation's wars. It takes an army to do that, not a debating society . . . .

Wars are won not by individuals, but by units functioning under extremely difficult circumstances . . . . In the final analysis, all military rules, regulations, policies, traditions, and customs are related to, and in some manner support, the ultimate goal of combat effectiveness.<sup>2</sup>

As famously articulated by the Supreme Court in *Goldman v. Weinberger*,

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1. See PRESIDENTIAL COMMISSION REPORT, *supra* note **Error! Bookmark not defined.**, at C-40 (Finding 1.32).

Title VII has not been legally applied to the military in recognition of the fact that its provision could impose constraints on the United States by which potential military opponents, not operating under the same constraints, might derive an advantage. Warfare is a supranational survival contest in which opposing sides vie for any advantage; unilateral policies adopted to promote principles other than military necessity may place the adopting party at increased risk of defeat.

*Id.*

2. William A. Woodruff, *Homosexuality and Military Service*, 64 UMKC L. REV. 121, 123-24 (Fall 1995). Prior to retiring from active duty in the Judge Advocate General's Corps, Professor Woodruff served as Chief of the Litigation Division in the Office of the Judge Advocate General, where he was responsible for defending the Army's interests in civil litigation, including litigation challenges to the homosexual exclusion policy. *Id.*

we have repeatedly held that the military is, by necessity, a specialized society separate from civilian society. The military must insist upon a respect for duty and a discipline without counterpart in civilian life, in order to prepare for and perform its vital role. . . . The essence of the military service is the subordination of the desires and interests of the individual to the needs of the service.<sup>3</sup>

The military guards individual rights, but it must be guided by different rules. This principle should inform all discussions about social policies, including the question of homosexuals in the military.

## 1. Congressional Oversight

### a. Clinton Vows to Repeal Department of Defense Regulations

The contemporary public debate about homosexuals in the military began in 1992, when former Arkansas Governor Bill Clinton challenged President George H.W. Bush for re-election. President Bush did not raise the issue much during the campaign, but homosexual activist groups contributed heavily to the campaign of Bill Clinton and Al Gore and expected Clinton to deliver on his promise to “lift the ban” on homosexuals in the military.<sup>4</sup>

Shortly after the election, on Veterans Day, President-elect Clinton vowed to deliver on his campaign promise and announced his intention to change policies that excluded homosexuals from the military.<sup>5</sup> At the time, the ban was not inscribed in law, but in Department of Defense directives that were adopted in 1981.<sup>6</sup> On January 29, 1993, the newly inaugurated president ordered the Department of Defense to cease asking “the question” about homosexuality, which used to appear on military induction papers.<sup>7</sup> This change was described as an “interim policy,” pending further review by Congress and the Defense Department.<sup>8</sup>

A storm of spontaneous opposition ensued. Many congressional offices needed extra staff to answer thousands of phone calls and letters protesting the president’s move, and it quickly became apparent that even a Congress controlled by the president’s own party would not permit the Administration to repeal the ban on homosexuals in the military

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3. 475 U.S. 503, 506–07 (1986) (alteration added; quotations, citations, and alteration omitted).

4. See J. Jennings Moss, *Clinton to Allow Gays in Military*, WASH. TIMES, Nov. 12, 1992, at A1; J. Jennings Moss, *Gays See Clinton Backing Agenda*, WASH. TIMES, Jan. 20, 1993, at A8.

5. See Bill Gertz, *Nunn Defies Clinton on Gays in Military*, WASH. TIMES, Nov. 16, 1992, at A1; Bill Gertz, *Clinton to Move Fast for Gays in the Military*, WASH. TIMES, Jan. 22, 1993, at A4; Chandler Burr, *Friendly Fire: How Politics Shaped Policy on Gays in the Military*, CAL. LAW., June 1994, at 54–55. In this article, Burr reported that about an hour after his swearing-in, President Clinton saw Rep. Gerry Studds (D-Mass.), one of two openly gay members of the House, in the Capitol rotunda. “[S]haking his hand, [President Clinton] said with deep conviction, ‘I’m going to do this, Gerry.’ ‘This’ was Clinton’s campaign promise to lift the ban on gay and lesbian soldiers in the military.” *Id.* (alteration added). A few weeks later, Clinton intimate Paul Begala was present at the inception of the Campaign for Military Service, an *ad hoc* coalition of the American Civil Liberties Union, People for the American Way, the National Organization for Women, and other groups that joined together to do the lobbying, public relations, and vote counting.

6. See Dep’t of Defense Directive No. 1332.14, *Enlisted Administrative Separations* (Jan. 15, 1981); Dep’t of Defense Directive No. 1332.30, *Separation of Regular Commissioned Officers*, at encl. 2 (Jan. 15, 1981); Woodruff, *supra* note 2, at 131–32 nn.56 & 60, *reprinted in* 32 C.F.R. pt. 41, app. A, ¶ (H). Both directives were republished in 1982. See also Memorandum from Deputy Secretary of Defense to Military Departments (Jan. 16, 1981) (“I am promulgating today a change to DoD Directive 1332.14 (Enlisted Administrative Separations), including a completely new Enclosure 8 on Homosexuality. The revision contains no change in policy. It reaffirms that homosexuality is incompatible with military service.”). Although these changes were put into place under the Carter administration, the directive on Enlisted Administrative Separation was again revised in 1982. See Dep’t of Defense Directive No. 1332.14, *Enlisted Administrative Separations* (Jan. 28, 1982), available at <http://dont.stanford.edu/regulations/regulation41.pdf>. The 1982 revision did not affect the policy on homosexuality. Nevertheless, the 1982 date has caused some to erroneously attribute this language to the Reagan administration.

7. Memorandum from President Clinton to the Secretary of Defense, *Ending Discrimination on the Basis of Sexual Orientation in the Armed Forces* (Jan. 29, 1993), available at <http://dont.stanford.edu/regulations/pres1-29-93.pdf>.

8. See *id.*

arbitrarily.<sup>9</sup> Then-Secretary of Defense Les Aspin formed an internal Military Working Group and charged the panel to come up with a suitable plan for accommodating homosexuals in the military by July 15, 1993.<sup>10</sup> The Joint Chiefs and military experts argued for continuation of the status quo, but task force members were under pressure from the White House and activist groups to devise a plan to accommodate gays in the military.

Feeling political backlash, in March 1993, President Clinton said at a news conference that he might consider a plan that would allow homosexuals in the military but restrict them from certain assignments. Self-identified homosexual Bob Hattoy, Associate Director of Presidential Personnel and an advisor to Clinton on the issue, flatly rejected that option.<sup>11</sup> The internal and public debate intensified when a coalition called the Gay, Lesbian, and Bisexual Military Freedom Project drew up a list of “recommendations” that left no doubt that activists would not be satisfied with the option of homosexuals serving in the military discreetly. The wish list included, *inter alia*: (1) an Executive Order to ban discrimination based on homosexual or bisexual orientation or conduct in the armed forces; (2) an end to all discharge procedures for homosexual orientation or conduct; (3) training programs on the acceptance of homosexual or bisexual personnel into the military, on the same basis as racial and gender issues; and (4) an official Defense Department committee, similar to the Defense Advisory Committee on Women in the Services (DACOWITS), to advise the Secretary on matters relating to homosexuals and bisexuals in the armed forces.<sup>12</sup> Some items on the wish list were partially granted by the Clinton Administration in 1994.<sup>13</sup>

Homosexual activist groups staged a large (though not as large as planned) rally in Washington, D.C., on April 25, 1993. Organizers promoted the march as what would be “the largest civil rights demonstration in [U.S.] history” and were disappointed when President Clinton did not promise to be there in person.<sup>14</sup> The event included bizarre

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9. See Michael Hedges, *Support for Gay Ban Seen as Spontaneous*, WASH. TIMES, Feb. 2, 1993, at A1; Rowan Scarborough & Ronald A. Taylor, *Clinton Seeks a Deal to Avoid Battle on Ban*, WASH. TIMES, Jan. 28, 1993, at A1. Veterans, conservative, and pro-family groups were relatively unprepared for the controversy because it had not been widely debated during the 1992 presidential race. Following extensive hearings, members of Congress and staff eventually formulated a legislative strategy.

10. Memorandum from the Military Working Group to the Secretary of Defense, Recommended DoD Homosexual Policy Outline (June 8, 1993). See also Peter Copeland, *Gay-Sex Video Set for Battle*, WASH. TIMES, Mar. 15, 1993, at A1; Rowan Scarborough, *Study Urges Ban on Overt Gays: Pentagon Report to Seek Compromise*, WASH. TIMES, May 21, 1993, at A1; Eric Schmitt, *Pentagon Speeds Plan to Lift Gay Ban*, N.Y. TIMES, Apr. 15, 1993, at A20; Rowan Scarborough, *Gay-Ban Supporters Seek Equal Time with Pentagon*, WASH. TIMES, May 25, 1993, at A3; Rowan Scarborough, *Aspin Policy Follows “Don’t Ask, Don’t Tell,”* WASH. TIMES, June 22, 1993, at A1. The Military Working Group did not meet with opponents of President Clinton’s plan until June 8, 1993—the date they submitted their policy outline to Secretary Aspin.

11. Richard H.P. Sia, *Top Military Officers Favor Gays Staying in Closet*, BALT. SUN, FEB. 23, 1993, available at <http://www.cs.cmu.edu/afs/cs.cmu.edu/user/scotts/bulgarians/joint-chiefs-ban.html>; Joyce Price, *Clinton Aide Rips Deal on Gay Ban*, WASH. TIMES, Mar. 25, 1993, at A1; Paul Bedard, *Clinton Softens Gay Plan*, WASH. TIMES, Mar. 24, 1993, at A1; Rowan Scarborough, *Senator Questions [Bernard] Nussbaum’s Role in Gay-Ban Case*, WASH. TIMES, Apr. 7, 1994, at A4.

12. See Rowan Scarborough, *Gay Rights Groups Ready Wish List for Military in Case Ban is Lifted*, WASH. TIMES, Feb. 10, 1993, at A1. The Gay, Lesbian, and Bisexual Military Freedom Project was a coalition of nine human rights and gay activist organizations, including: Gay, Lesbian, Bisexual Veterans of America; American Civil Liberties Union; American Psychological Association; the Human Rights Campaign Fund; National Gay and Lesbian Task Force; Military Law Task Force; National Lawyer’s Guild; Lambda Legal Defense and Educational Fund; and Queer Nation. See *id.*

13. On September 8, 1994, the Department of Defense co-sponsored a day long “Diversity Day Training Event” in Arlington’s Crystal City near the Pentagon with eighteen other government agencies. The program featured lectures, panel discussions, exhibits, workshops, and video presentations, including a video titled “On Being Gay.” *Id.*; see also Rowan Scarborough, *Navy Officers Balk at Pro-Gay Seminar*, WASH. TIMES, Sept. 8, 1994, at A1; Dep’t of the Navy, Memorandum for All Hands from the Cmdr. G.R. Stermer, Naval Sea Systems, Subj.: *Diversity Day 1994 Training Event*, Aug. 26, 1994. See also Elaine Donnelly, Heritage Foundation Lecture No. 522, *Social Experimentation in the Military* (Apr. 3, 1995) (transcript available at <http://www.heritage.org/Research/NationalSecurity/HL522.cfm>).

14. Gary Lee & Linda Wheeler, *Gay-Rights March Organizers Say 1 Million May Participate*, WASH. POST, Mar. 19, 1993, at A41 (alteration added); Joyce Price, *Possible Clinton No-Show Angers Gay March Leaders*, WASH. TIMES, Apr. 15, 1993, at

elements that were aired on C-SPAN, including some provocatively dressed marchers and a group holding up posters depicting President Clinton with a “Pinocchio” nose.<sup>15</sup> President Clinton did not show up at the rally, but he met in the Oval Office with a large group of organizers, who consulted frequently with officials from the Departments of Defense and Justice on legislative and legal strategies to advance the cause of homosexuals in the military.<sup>16</sup>

Members of the Joint Chiefs of Staff were in an awkward situation, but they did their best to resist the president’s original, radical plan without challenging his authority as Commander-in-Chief.<sup>17</sup> Following pressure from Secretary of Defense Les Aspin, all of the chiefs of staff were lined up behind President Clinton for a media event at Fort McNair, Washington, D.C., when President Clinton announced his “Don’t Ask, Don’t Tell” proposal on July 19, 1993.<sup>18</sup> Departing significantly from DoD directives in effect since 1981, President Clinton’s July 19 policy maintained 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.”<sup>19</sup>

#### b. *Congress Exercises Oversight Responsibilities*

Enactment of Clinton’s proposal appeared possible at first, but in response to political pressure, members of Congress became engaged. They exercised effective oversight by asking a lot of questions. For example, in May 1993, Senate Armed Services Committee Chairman Sam Nunn (D-Ga.) and Ranking Member John Warner (R-Va.) visited several ships and submarines at Naval Station Norfolk, Virginia. An Associated Press photo of that visit showed the senators crouched down to solicit the opinions of three men occupying cramped sleeping spaces in the torpedo room of the nuclear attack submarine USS *Montpelier*.<sup>20</sup> One gay activist leader called Nunn’s tour an “inflammatory spectacle,” while another denounced Sen. Nunn as a “bigot” for having any hearings at all.<sup>21</sup>

Various drafts of a “Don’t Ask, Don’t Tell” type proposal started to emerge and fire from both sides.<sup>22</sup> Proponents of gays in the military saw them as a betrayal of their justified

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A4; Joyce Price, *Clinton Plans Hookup to Gay-Rights Rally: Meets Leaders in Oval Office*, WASH. TIMES, Apr. 17, 1993, at A1; Cindy Loose, *Gay Activists Summon Their Hopes, Resolve*, WASH. POST, Apr. 18, 1993, at A1.

15. Michael Hedges & J. Jennings Moss, “*The Queer ‘90s’: 300,000 March to Celebrate Rites with Demand for Rights*,” WASH. TIMES, Apr. 26, 1993, at A1; Ruth Fremson, Photo (Apr. 25, 1993) (showing estimated 300,000 marchers); Kenneth Lambert, Photo (Apr. 25, 1993) (showing Pinocchio signs); Michael Hedges, *Emotions Bared, Among Other Things*, WASH. TIMES, Apr. 26, 1993, at A1; Michael Hedges, *Were Marchers Just Too Far “Out”?*, WASH. TIMES, Apr. 27, 1993, at A1.

16. See Burr, *supra* note 5, at 57–61, 98–100.

17. See Sia, *supra* note 11; Detroit News Wire Services, *Top Brass: Rethink Gay Ban Lift*, DETROIT NEWS, Jan. 25, 1993, at A1.

18. See Grant Willis, *Don’t Ask, Don’t Tell, Don’t Pursue: Despite Compromise on Gay Ban, Congress Will Get the Last Word*, ARMY TIMES, Aug. 2, 1993, at 12.

19. See Dep’t of Defense Directive No. 1332.14, *Enlisted Administrative Separations*, at encl. 3 ¶ E3.A1.1.8.1.1 (1994), available at <http://www.dtic.mil/whs/directives/corres/pdf/133214p.pdf>; cf. Dep’t of Defense Instr. 5505.8, *Investigations of Sexual Misconduct by the Defense Criminal Investigative Organizations and Other DoD Law Enforcement Organizations*, at §§ 4, 6, & encl. 2 (2005), available at [http://www.dtic.mil/whs/directives/corres/pdf/i55058\\_012405/i55058p.pdf](http://www.dtic.mil/whs/directives/corres/pdf/i55058_012405/i55058p.pdf). The “Don’t Ask, Don’t Tell” concept announced by Clinton on July 19, 1993, formed the basis for congressional testimony by Defense Department officials, and for enforcement regulations announced on December 22, 1993, with DoD News Release No. 605-93, available at [http://www.sldn.org/binary-data/SLDN\\_ARTICLES/pdf\\_file/1100.pdf](http://www.sldn.org/binary-data/SLDN_ARTICLES/pdf_file/1100.pdf).

20. Steve Helber, Photo, ASSOCIATED PRESS, May 11, 1993.

21. Richard A. Ryan, *Senators Take Gay Battle to Sea*, DETROIT NEWS, May 11, 1993, at 1A.; Rowan Scarborough, *Witnesses Detail Risks of Lifting Ban*, WASH. TIMES, Mar. 30, 1993, at A1.

22. See Rowan Scarborough, *Furor Grows Over Gay-Ban Policy*, WASH. TIMES, June 23, 1993, at A1; Burr, *supra* note 5, at 56–57. Burr described the concerns of activist lawyer Chai Feldblum, who tried to achieve a significant (though limited) step in favor of gays in the military by going along with the original “compromise” reportedly agreed to by President Clinton and Sen. Sam Nunn. Under what Burr described as the “Clinton-Nunn political deal,” “service members who stated they were gay would be placed on inactive reserve, stripped of pay and benefits—essentially given a

expectations, while opponents criticized such proposals as incremental steps in the wrong direction. During this time both Houses held a total of twelve legislative hearings, which heard from diverse panels of experts and advocates on all sides of the issue.<sup>23</sup>

Immediately following President Clinton's announcement on July 19, 1993, the House and Senate Armed Services Committees heard testimony from several prominent officials, including Secretary of Defense Les Aspin, DoD General Counsel Jamie Gorelick, Joint Chiefs Chairman Gen. Colin Powell, the Chief of Staff of each of the services, and key members of the Pentagon's Military Working Group. Under close questioning, all gave candid answers that revealed serious flaws in the July 19 "Don't Ask, Don't Tell" concept; in both Houses of Congress, members started to question and doubt the wisdom of "Don't Ask, Don't Tell."<sup>24</sup> Then-Rep. James Talent (R-Mo.) commented,

when I listened to the Chiefs and the Secretary yesterday, what I basically heard them saying was that they had resolved this debate in favor of essentially keeping the old policy, . . . [but] [w]hen I read the policy as a totality . . . [it] doesn't seem consistent with what I understood the Secretary and the Chiefs have been saying about the policy.<sup>25</sup>

The sticking point was an inherent inconsistency that could be easily exploited by activist lawyers challenging the policy in court: If homosexuality is not a disqualifying characteristic, how can the armed forces justify dismissal of a person who merely reveals the presence of such a characteristic? Members of Congress recognized that such a policy would be unenforceable, unworkable, and indefensible in court.

With the exception of Clinton administration insiders trying to finesse what had become a hot-potato issue, and a few gay leaders who were willing to accept compromise in order to avoid codification of the ban on gays in the military,<sup>26</sup> there were no significant constituencies advocating passage of "Don't Ask, Don't

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suspended discharge. (Those found to have had sex were still expelled under the new terms, which, in Clinton's formulation, separated homosexual 'status' from homosexual 'conduct.')

*Id.* But attorney Chai Feldblum, an activist with the Campaign for Military Service Coalition, became "increasingly concerned" about Clinton's "status versus conduct" distinction, which the president repeated whenever he was asked about his forthcoming policy." She and fellow activist Tom Stoddard, who headed the Campaign for Military Service and met with Clinton at the White House on April 16, 1993, maintained that the distinction should be "status versus misconduct." They recognized that Clinton's "status versus conduct" concept was an "artificial distinction as unworkable as accepting left-handed soldiers while forbidding them from shooting left-handed." See Burr, *supra* note 5, at 56-57. Those opposed to gays in the military recognized the same anomaly.

23. See Woodruff, *supra* note 2, at 144. The Senate Armed Service Committee conducted hearings on the policy generally on March 29, 31, April 29, May 7, 10, and 11, 1993. *Id.* at 144 n.137 (citing *Policy Concerning Homosexuality in the Armed Forces: Hearings Before the S. Comm. on Armed Servs.*, 103d Cong., 1st Sess. 255-56 (1993)). Oversight hearings on the Administration's July 19, 1993, policy were held on July 20, 21, and 22, 1993. Woodruff, *supra* note 2, at 144 n.137 (citing *Policy Concerning Homosexuality in the Armed Forces: Hearings Before the S. Comm. on Armed Servs.*, 103d Cong., 1st Sess. 255-56 (1993)). Oversight hearings in the House were held July 21, 22, and 23, 1993. Woodruff, *supra* note 2, at 144 n.137 (citing *Assessment of the Plan to lift the Ban on Homosexuality in the Military: Hearings Before the Mil. Forces & Personnel Subcomm. of the S. Comm. on Armed Servs.*, 103d Cong., 1st Sess. (1993)).

24. See Woodruff, *supra* note 2, at 149-50 (citing *Policy Concerning Homosexuality in the Armed Forces: Hearings Before the S. Comm. on Armed Servs.*, 103d Cong., 1st Sess. 255-56 (1993); *Assessment of the Plan to lift the Ban on Homosexuality in the Military: Hearings Before the Mil. Forces & Personnel Subcomm. of the S. Comm. on Armed Servs.*, 103d Cong., 1st Sess. (1993)). Senators on both sides of the aisle, including SASC Chairman Sam Nunn (D-Ga.) and Dan Coats (R-Ind.), expressed concern that the courts would "find inconsistencies in the policies as written," and interpret them in a way that would hinder the goal of maintaining military effectiveness and unit cohesion. *Id.* at 150.

25. *Id.* (quoting *Assessment of the Plan to lift the Ban on Homosexuality in the Military: Hearings Before the Mil. Forces & Personnel Subcomm. of the S. Comm. on Armed Servs.*, 103d Cong., 1st Sess. (1993)) (alteration added).

26. Jim Abrams, Associated Press, Nunn, Frank Trade Jobs Over Gays, DETROIT NEWS, May 31, 1993, at 1A; Rick Maze, Frank Talk About Compromise: Gay Congressman Backs "Don't Ask, Don't Tell" To Avert Gay-Ban Law, ARMY TIMES, May 31, 1993, at 8 [hereinafter Maze, Frank Talk About Compromise]. These articles reported on a version of "Don't Ask, Don't Tell," proposed by Rep. Barney Frank (D-Mass.), which would have drawn a line between "on-base" and "off-base" behavior. The proposal was seen as a way to provide "political cover" to Clinton, but gay activists rejected it. Marvin Liebman of the radical group Queer Nation, for example, said in response, "We will not accept compromise. We will not tolerate appeasement." See Maze, Frank Talk About Compromise, *supra*.

Tell” by Congress. Following extensive floor debate in both Houses, Congress rejected President Clinton’s “Don’t Ask, Don’t Tell” proposal with overwhelming, veto-proof bipartisan majorities.<sup>27</sup> Instead, Congress passed a law that continued the pre-Clinton (1981) policy of excluding homosexuals from the military.<sup>28</sup> In so doing, members wisely chose language almost identical to the 1981 DoD Directives regarding homosexuality, which had already been challenged and upheld as constitutional by the federal courts.<sup>29</sup> Congress allowed President Clinton’s “interim policy” of not asking questions of inductees regarding homosexuality to stand—with the provision that a future Secretary of Defense can restore such questions, without additional legislation, if the needs of the service require it.<sup>30</sup>

Legislation dealing with intensely controversial issues does not become law by accident. In this case, Congress codified the policy in place long before Clinton took office. Contrary to frequent misstatements of the law then and now, there is no way that bipartisan, veto-proof majorities would have passed a law making it “easier” for homosexuals to serve. Rep. Steve Buyer (R-Ind.), then-Chairman of the HASC Personnel Subcommittee, underscored the point in a December 16, 1999, memorandum to his colleagues:

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.<sup>31</sup>

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27. On Sept. 9, 1993, the Senate approved language in the FY 1994 Defense Authorization bill that codified the homosexual ban, using language almost identical to that in the Defense Department directive that had been in place since 1981. *See supra* note 6 and accompanying text. 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 Sept. 9, 1993, on a bipartisan sixty-three to thirty-three vote. S. amend. 783 to S. 1298, 103d Cong. (1993). On Sept. 28, the House rejected a similar amendment, sponsored by Rep. Martin Meehan (D-Mass.) and Rep. Patricia Schroeder (D-Colo.), which would have stricken the Senate-approved language and expressed the sense that the issue should be decided by the President and his advisors. H. amend. 315 to H.R. 2401, 103d Cong. (1993). The Meehan/Schroeder amendment was defeated on a bipartisan roll-call vote, 264 to 169. *Id.*; *see also* Rowan Scarborough, *Schroeder, Meehan Hope to Alter Compromise on Gays in Military*, WASH. TIMES, Sept. 8, 1993, at A4; Rowan Scarborough, *Gay-Ban Deal Nearer to Becoming Law*, WASH. TIMES, Sept. 29, 1993, at A4; Rowan Scarborough, *Senators Reaffirm Gay Ban: Boxer’s challenge rejected by 63–33*, WASH. TIMES, Sept. 10, 1993, at A1.

28. *See* National Defense Authorization Act for Fiscal Year 1994, Pub. L. No 103-160, § 571, 107 Stat. 1547, 1670 (1993) (codified at 10 U.S.C. § 654 (2000)) (reprinted *infra* Appendix A).

29. *See* *Dronenberg v. Zech*, 741 F.2d 1388 (D.C. Cir. 1984); *Ben-Shalom v. Marsh*, 881 F.2d 454 (7th Cir. 1989); *see also* Scarborough, *Senators Reaffirm Gay Ban*, *supra* note 27.

30. *See* Pub. L. No. 103-160, § 571(d), 107 Stat. at 1673 (reprinted *infra* Appendix A).

31. Memorandum from Rep. Steve Buyer to Members of the Republican Conference (Dec. 16, 1999), *available at* [www.cmrlink.org/cmrrnotes/buyer121699.pdf](http://www.cmrlink.org/cmrrnotes/buyer121699.pdf).

### c. *Conditional Compromise*

In the course of debate, 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.<sup>32</sup>

The House Report also discussed the possibility of accommodating homosexuals, provided that they refrain from homosexual acts:

[A]ny 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.<sup>33</sup>

Instead of codifying the legally questionable “Don’t Ask, Don’t Tell” concept, Congress chose to adopt unambiguous 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 July 19 proposal.

The only concession made during this process in 1993 was omission of “the question” about homosexuality, which President Clinton had eliminated with his January 29, 1993, “interim policy.”<sup>34</sup> Congress nevertheless authorized restoration of routine inquiries about homosexuality by a future Secretary of Defense,<sup>35</sup> who can (and should) restore “the question” without additional legislation. This concession did not nullify the language of the law itself, but it allowed the Congress, which was controlled by the Democrats at the time, to give political cover to President Clinton by calling the plan a “compromise” and referring to it as “Don’t Ask, Don’t Tell.” The politically expedient strategy has caused problems ever since.

Widespread misunderstandings about the rationale and meaning of the law have continued for four major reasons. First, in 1993, major media inaccurately reported that Congress had passed Clinton’s “compromise” plan to accommodate homosexuals in the military, known as “Don’t Ask, Don’t Tell.” Reports did not note that the statute actually said something quite different: “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.”<sup>36</sup> Second, President Clinton had an interest in *appearing* to deliver on his campaign promise to lift the ban on gays in the military, even though he had not done so. Disregarding the legal mandate to provide documents and briefings that “set forth” the provisions of the law, in December 1993, Clinton issued enforcement regulations

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32. S. REP. NO. 103-112, at 284 (1993) (maintaining that it would be “irrational . . . to develop military personnel policies on the basis that all gays and lesbians will remain celibate”).

33. H.R. REP. NO. 103-200, at 288 (1993).

34. See Memorandum from President Clinton to the Secretary of Defense, *supra* note 7.

35. See *supra* note 27 and accompanying text.

36. 10 U.S.C. § 654(a)(13) (1993). See *supra* note 27. *The New York Times* and *The Washington Post* stayed uncharacteristically silent on the historic House vote that occurred on September 28, 1993. A thorough search of contemporaneous news accounts reveals only two reports on the House vote for Senate-passed legislation codifying long-standing Defense Department regulations banning homosexuals from the military. See Michael Ross, *House Backs Modified Ban on Gays in Armed Forces*, L.A. TIMES, Sept. 29, 1993, at A11; Rowan Scarborough, *Gay-Ban Deal Nearer to Becoming Law*, WASH. TIMES, Sept. 29, 1993, at A4. Neither of these reports quoted key legislative language making it clear that the statute does not authorize accommodation of homosexuals in accordance with Clinton’s controversial “Don’t Ask, Don’t Tell” proposal. The only “compromise” involved was administrative, not substantive, since the law authorizes a reinstatement of the induction form “question” regarding homosexuality at any time.

that implement his original proposal, “Don’t Ask, Don’t Tell”—even though Congress had rejected that concept as unworkable.<sup>37</sup> Third, the law passed by Congress is widely misunderstood because no one gave it a distinctive and appropriate name. Absent a name of its own, the law that Congress passed was frequently misidentified with the catchphrase “Don’t Ask, Don’t Tell,” which is easier to remember than the utilitarian “Public Law 103-160” or “Title 10, United States Code, Section 654.” And fourth, there was no individual author or descriptive “short title” for the legislation because the statutory language came directly from Defense Department regulations, which were promulgated in 1981.<sup>38</sup>

To clarify the difference between the law regarding homosexual conduct and President Clinton’s “Don’t Ask Don’t Tell” enforcement policy, this Article hereinafter will refer to P.L. 103-160, Section 654, Title 10 as the 1993 law regarding homosexual conduct in the military, or “The Military Personnel Eligibility Act of 1993.”

d. *The Purpose of the “Military Personnel Eligibility Act of 1993.”*

Referring to 10 U.S.C. § 654 as the “Military Personnel Eligibility Act of 1993” is appropriate because the language of the law that Congress actually passed makes it clear that homosexuals are *not eligible* for service in the armed forces. It restates the rationale of the 1981 DoD Directives almost word for word,<sup>39</sup> and sets forth fifteen points in support of the principle that homosexuality is incompatible with military service.<sup>40</sup>

Prof. Woodruff explained the rationale behind the 1981 DoD Directives, which was carried over into the statute passed by Congress in 1993:

The [1981] policy was an exclusion policy premised upon the policy determination that “homosexuality is incompatible with military service.” . . . The policy operated on the logical conclusion that as a class, homosexuals engaged in or were likely to engage in homosexual activity. In order to reduce, if not eliminate, the instances of homosexual activity in military units, the policy excluded from service the category most closely associated with homosexual activity: homosexuals.<sup>41</sup>

The law states, “there is no constitutional right to serve in the armed forces,” and affirms that military life is fundamentally different from civilian life.<sup>42</sup> Military society “is characterized by its own laws, rules, customs, and traditions, including numerous restrictions on personal behavior that would not be acceptable in civilian society.”<sup>43</sup> Military standards of conduct “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.”<sup>44</sup>

The law also distinguishes itself from the July 19 “Don’t Ask, Don’t Tell” policy by affirming “[t]he prohibition against homosexual conduct is a long-standing element of military law that continues to be necessary in the unique circumstances of military service.”<sup>45</sup>

The 1981 policy required separation of persons found to be engaging in homosexual acts, but also those who disclosed by their own statements that they were homosexuals

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37. See *supra* note 31.

38. See 10 U.S.C. § 654 (1993); S. REP. NO. 103-112, at 263-97 (1993); H.R. REP. NO. 103-200, at 287-90 (1993).

39. See *supra* note 6 and accompanying text.

40. Woodruff, *supra* note 2, at 135-42.

41. *Id.* at 132-33 (citation omitted; alteration added).

42. 10 U.S.C. § 654(a)(2), (a)(8) (reprinted *infra* Appendix A).

43. *Id.* § 654(a)(8)(B) (reprinted *infra* Appendix A).

44. *Id.* § 654(a)(10) (reprinted *infra* Appendix A).

45. *Id.* § 654(a)(13) (reprinted *infra* Appendix A) (alteration added).

within the meaning of the DoD Directives.<sup>46</sup> The statute does the same.<sup>47</sup> Prof. Woodruff explained:

The admission of homosexuality placed the soldier in an excluded class; a class defined by conduct or the propensity to engage in conduct the military determined was inimical to good order, morale, unit cohesion, and ultimately, combat effectiveness. Because the definition of homosexual was tied to sexual conduct rather than to amorphous concepts of sexual tendencies, preferences, or orientation, the policy presumed that one who claimed to be a homosexual has, will, or was likely to engage in the conduct that defines the class.<sup>48</sup>

As was the case with the 1981 Directives, the 1993 homosexual conduct law allows a military person to “rebut the presumption” of homosexual conduct, but only under narrow circumstances—i.e., a service member says or does something entirely out of character while intoxicated, or to escape military service. In general, however:

Discharging soldiers based solely upon their self-identification as a homosexual without additional evidence of homosexual conduct avoided the necessity for intrusive investigations and inquiries into the soldiers’ sexual practices. Furthermore, because it is reasonable to believe homosexuals will engage in the conduct that defines the class, discharging those who claim to be homosexuals served the goal of preventing the disruption and adverse impact upon unit readiness, morale, and discipline that homosexual conduct within the military environment causes.<sup>49</sup>

The “Military Personnel Eligibility Act” recognized the need for military people to be always ready for possible deployment worldwide to a combat environment. The statute also respects the power of sexuality and the desire of human beings for sexual modesty, even when they must accept living conditions offering little or no privacy.

In gender-neutral terms, the law states that *persons* living in conditions of “forced intimacy” should not have to expose themselves to *persons* who might be sexually attracted to them.<sup>50</sup> To the greatest extent possible, the same principle applies to the housing of men and women in the military.

Prof. Woodruff noted that the statute’s findings reveal several important principles that remain unchanged and support the statute’s legitimacy:

First, Congress was acting pursuant to a clear grant of constitutional power to establish the qualifications and conditions of service in the military. Second, American society demands unique rules that may not be the same as those found in other countries or in civilian society. Third, Congress made clear the statutory policy was aimed at creating and preserving military effectiveness and cohesion. Noticeably absent from the findings section is any indication that military readiness was being balanced against the individual interests of homosexuals who wished to serve. In other words, combat effectiveness, not accommodation of homosexuals, either individually or as a class, was the purpose of the statute. Fourth, Congress set out the factual predicate for the long-standing professional military judgment that homosexuality is incompatible with military service and carried that principle forward into the new law. Both the House and Senate reports specifically note that the statute recognizes and adopts the principle that homosexuality is incompatible with military service.<sup>51</sup>

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46. See *supra* note 6 and accompanying text.

47. See 10 U.S.C. § 654(b)(2) (reprinted *infra* Appendix A).

48. Woodruff, *supra* note 2, at 134.

49. 10 U.S.C. § 654(b)(1)(A)–(D).

50. *Id.* at § 654(a)(11), (12).

51. Woodruff, *supra* note 2, at 153 (citations omitted).

The “Military Personnel Eligibility Act” defines homosexual conduct but avoids using the vague phrase “sexual orientation.” As explained by Professor Woodruff:

Significantly, Congress did not say that “sexual orientation” was a private matter or that it was a benign, non-disqualifying factor. The law did not define “sexual orientation” or try to artificially separate homosexual orientation from homosexual conduct. . . . Equally as important, Congress made no mention of passing a law to accommodate homosexuals or creating a situation where they could serve under color of law like the July 19, [1993,] policy contemplated.<sup>52</sup>

It is unfortunate that constant, inaccurate references to the law as “Don’t Ask, Don’t Tell” have perpetuated confusion about its meaning. As a result of this mislabeling, many young people who are homosexual are being misled about their eligibility to serve.

## 2. Enforcement Regulations Inconsistent with the Law

### a. The “Don’t Ask, Don’t Tell” Policy/Enforcement Regulations

President Clinton signed the “Military Personnel Eligibility Act” on November 30, 1993, as part of the National Defense Authorization Act for Fiscal Year 1994.<sup>53</sup> Two months later, he released enforcement regulations, known as the “Don’t Ask, Don’t Tell” policy, which are inconsistent with the law.<sup>54</sup> It is significant to note that the DoD news release announcing regulations to enforce 10 U.S.C. § 654 made reference to the “Don’t Ask, Don’t Tell” policy announced by President Clinton on July 19, 1993. The release and accompanying documents claimed that the enforcement regulations were “consistent” with the law, but they were actually written to implement Clinton’s “Don’t Ask, Don’t Tell” proposal, which was not “consistent” with the law at all.<sup>55</sup> Few members of the media noticed (or chose to write about) the glaring discrepancy, which has been the source of confusion and controversy ever since.<sup>56</sup>

Prof. Charles Moskos, the respected military sociologist who proposed the “Don’t Ask, Don’t Tell” idea in 1993, noted in a *Wall Street Journal* article that “[t]he Pentagon policies are, in fact, somewhat more lenient than the language of the statute.”<sup>57</sup> Indeed, the key passage in the Clinton Administration’s inconsistent interpretation of the law, as stated in this regulatory language, was an attempt to redefine its meaning to fit Clinton’s July 19, 1993, proposal: “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.”<sup>58</sup>

The December 22, 1993, news release, an overview, and a memorandum from Defense Secretary Les Aspin to the Service Secretaries directing them to implement the new policy, which referred to “the policy as announced by President Clinton on July 19, 1993,”<sup>59</sup> simply overlooked the fact that Congress had foreseen problems with that concept and rejected it. The plain language of the statute is not based on the vague phrase “sexual orientation.” It is based on conduct.<sup>60</sup>

In effect, the DoD attempted to help Clinton deliver on his campaign promise to gay activists by simply redefining the law and calling it “Don’t Ask, Don’t Tell.” The

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52. *Id.* at 154–55 (citations omitted; alteration added).

53. Pub. L. 103-160, § 571, 107 Stat. 1670 (1993) (codified at 10 U.S.C. § 654 (2000) (reprinted *infra* Appendix A)).

54. See *infra* note 19 and accompanying text.

55. See DoD News Release No. 605-93, *supra* note 19 (announcing regulations to “implement the policy that was announced by President Clinton in July”; claiming that the new directives were “fully consistent with the National Defense Authorization Act for Fiscal Year 1994”).

56. Rowan Scarborough, *Joint Chiefs Were Muzzled on Gay Policy*, WASH. TIMES, Jan. 3, 1994, at A1.

57. Charles Moskos, *Don’t Knock “Don’t Ask, Don’t Tell,”* WALL ST. J., Dec. 16, 1999, at A22 (alteration added).

58. See Dep’t of Defense Directive No. 1332.14, *supra* note 19, at encl. 3 ¶ E3.A1.1.8.1.1.

59. See DoD News Release No. 605-93, *supra* note 19.

60. Woodruff, *supra* note 2, at 168 n.255.

Pentagon also failed to comply with the legal requirement that entering servicemembers should be informed of the law, 10 U.S.C. § 654, which excludes homosexuals from the military. A subsequent amendment to the DoD Directives changed the wording of the quoted sentence slightly but still used the phrase “sexual orientation,” which Congress pointedly had not used in the statutory language because it was so vague. The Clinton administration’s regulatory interpretation reads: “A person’s sexual orientation is considered a personal and private matter, and is not a bar to service entry or continued service unless manifested by homosexual conduct in the manner described in paragraph B.8.b., below.”<sup>61</sup> Current briefing materials and training manuals still do not include the actual text of the law, or accurate summaries of its meaning. Instead, instructional materials keep repeating the “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.”<sup>62</sup>

b. *The United States Court of Appeals for the Fourth Circuit*

In 1996, the United States Court of Appeals for the Fourth Circuit looked beyond the “Don’t Ask, Don’t Tell” catch-phrase and recognized the difference between Clinton’s policy and the law.<sup>63</sup> In a nine-to-four decision that denied the appeal of Navy Lt. Paul G. Thomasson, a professed homosexual who wanted to stay in the Navy, U.S. 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 . . . .”<sup>64</sup> 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 . . . .”<sup>65</sup>

Actually overruling the DoD enforcement regulations was not within the purview of the Court. Still, the Fourth Circuit’s decision in *Thomasson*, affirming the constitutionality of the law, should have prodded the Administration to correct inconsistencies in its administrative policy. But this was the Clinton Administration, which was fully committed to accommodating homosexuals in the military, one way or another.

c. *Confusion Caused by “Don’t Ask, Don’t Tell”*

The difference between what should be called the “Military Personnel Eligibility Act” and the Clinton enforcement policy explains why factions on both sides of the issue are critical of “Don’t Ask, Don’t Tell.” Even though Congress rejected, with good reason, the “Don’t Ask, Don’t Tell” concept in 1993, the Clinton Administration inscribed it in enforcement regulations that remain in effect today.

Activists keep complaining that “Don’t Ask, Don’t Tell” does not work. The most relevant question is, “work to do what?” If the goal is to allow homosexuals to serve, Clinton’s permissive “Don’t Ask, Don’t Tell” regulations do not go far enough. But if the goal is to preserve military morale, discipline, and readiness for combat (and it is), then the Clinton policy goes too far—in the wrong direction.

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61. See Dep’t of Defense Directive No. 1332.14, *supra* note 19, at encl. 3 ¶ E3.A1.1.8.1.1.

62. See, e.g., Center for Military Readiness, Army Comic Book Misrepresents Law on Gays in the Military (Jan. 14, 2002), <http://www.cmrlink.org/Hmilitary.asp?docID=112> (describing an Army comic book titled “Dignity and Respect: A Training Guide on Homosexual Conduct Policy”); Joel P. Engardio, *The Adventures of Capt. GayMan*, S.F. NEWS WEEKLY, Aug. 22, 2001, available at <http://www.sfweekly.com/2001-08-22/news/the-adventures-of-capt-gayman/print>; Office of the Chief of Public Affairs, U.S. Army, *Questions and Answers About Army’s Policy on Homosexual Conduct*, HOT TOPICS, Winter 2000, at 6, available at <http://www.army.mil/soldiers/HotTopics/winter00.pdf>.

63. *Thomasson v. Perry*, 80 F.3d 915 (4th Cir. 1996).

64. *Id.* at 937 (Luttig, J., concurring).

65. *Id.* at 939.

Describing the law as “Don’t Ask, Don’t Tell” effectively slanders the statute. The result is widespread confusion and inconsistent enforcement. Whether intended or not, the unnecessary confusion gives an advantage to activists who want to repeal both the policy and law, in order to achieve the goal of open homosexuality in the military.

When President George W. Bush took his oath of office in 2001, he assumed the obligation to enforce all laws, including the 1993 law regarding homosexual conduct. President Bush is not obligated to retain the enforcement regulations of his predecessor. Because the “Don’t Ask, Don’t Tell” regulations are inconsistent with the law, President Bush should have directed the Secretary of Defense, early in his administration, to eliminate and replace them with enforcement regulations that include the language and truly reflect the intent of the statute.

The Department of Justice has successfully defended the constitutionality of the law in several cases, but the Bush Administration has done little to improve understanding and enforcement of the law. Unnecessary confusion has continued since December 1994, even though the “Military Personnel Eligibility Act of 1993” mandates “Entry Standards and Documents” and “Required Briefings” that accurately describe the language and meaning of the statute.<sup>66</sup>

That mandate could be fulfilled by simply providing to potential enlistees and military personnel the actual text of the law and its legislative history, as set forth concisely in the House and Senate Reports issued in support of the 1993 legislation. This would help to clear up widespread confusion about potential enlistees’ eligibility to serve, and be a significant improvement over the convoluted instructional materials prepared by the Department of Defense to explain Bill Clinton’s inexplicable “Don’t Ask, Don’t Tell” Policy. Activist groups and the Department of Defense should stop misleading young people about their eligibility to serve in the military. Practicing homosexuals are among many groups of people who may serve their country in many ways but who remain ineligible to serve in uniform.<sup>67</sup>

### 3. Campaign to Repeal the Law

#### a. Legal Efforts Post-Lawrence v. Texas

On June 26, 2003, in the controversial *Lawrence v. Texas* decision,<sup>68</sup> the Supreme Court overturned *Bowers v. Hardwick*<sup>69</sup> and invalidated a Texas law regarding private, consensual sodomy.<sup>70</sup> The decision excited homosexual activist groups because several members of the Court quoted foreign court rulings that had been cited in an *amicus* brief filed by the United Nations’ High Commissioner for Human Rights, Mary Robinson.<sup>71</sup>

The Robinson *amicus* brief cited one such ruling, handed down by the European Court of Human Rights in Strasbourg, France, which upheld gay rights in Ireland. In 1996, the same European Court quoted by Justice Kennedy in the *Lawrence* decision ordered Britain to repeal all restrictions on homosexuals in the military.<sup>72</sup> In a January

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66. See 10 U.S.C. § 654 (c)–(d) (2000) (reprinted *infra* Appendix A).

67. Henry Levins, *Military Bans Go Far Beyond Gays*, ST. LOUIS POST-DISPATCH, Feb. 8, 1993.

68. 539 U.S. 558 (2003).

69. 478 U.S. 186 (1986).

70. *Lawrence*, 539 U.S. at 578 (“*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.”).

71. See *id.* at 573; Brief of Mary Robinson, Amnesty International U.S.A., Human Rights Watch, Interights, the Lawyers Committee for Human Rights, and Minnesota Advocates for Human Rights as Amici Curiae Supporting Petitioners at 10, *Lawrence v. Texas*, 539 U.S. 558 (2004) (No. 02-102), 2003 WL 164151.

72. See *Lustig-Prean and Beckett v. United Kingdom*, 29 Euro. Ct. H.R. 548, 587 (1999) (finding that plaintiffs were wrongly discharged “on the grounds of their homosexuality”); *Smith & Grady v. United Kingdom*, 29 Eur. H.R. Rep. 493, 523 (1999) (finding that the applicants were denied “respect for their private lives” when dismissed from military service on the grounds of their homosexuality).

2003 treatise posted on the website of Human Rights Watch,<sup>73</sup> the \$14 million international activist group signaled its intent to use both European Court decisions and international law as battering rams to bring down all restrictions on open homosexual service in the military.<sup>74</sup>

The Bush Administration vigorously and successfully defended the law, resulting in three legal victories in 2006. *Cook v. Rumsfeld*, filed by the Servicemembers Legal Defense Network on behalf of twelve former servicemembers, was dismissed by U.S. District Judge George A. O'Toole, Jr., on April 24, 2006.<sup>75</sup> Also, in April 2006, U.S. District Judge George Schiavelli dismissed a lawsuit brought by the Log Cabin Republicans on behalf of anonymous past and present servicemembers, due to a lack of names in the complaint.<sup>76</sup> And on July 26, 2006, U.S. District Judge Ronald B. Leighton dismissed a challenge filed in Washington by an Air Force Reserve nurse and lesbian, Maj. Margaret Witt.<sup>77</sup>

All courts are unpredictable, but the 1993 homosexual conduct law should continue to withstand constitutional challenge for four basic reasons: (1) the federal courts have historically ruled with “deference to the military” in such matters; (2) unlike the circumstances of *Lawrence*, there is no such thing as “privacy” in the military; (3) the validity of the statute regarding homosexual conduct does not hinge on the overturned *Bowers* precedent; and (4) the 1993 exclusion law and the Uniform Code of Military Justice (UCMJ) ban on sodomy applies to men and women in precisely the same way, so “equal protection” is not a valid issue.

Opening the military to professed homosexuals remains a key goal of a determined activist movement, which has worked relentlessly to repeal the homosexual conduct law since 1993. For purposes of clarity in future cases, it would help to administratively repeal the “Don’t Ask, Don’t Tell” regulations, while faithfully enforcing the 1993 homosexual conduct law.<sup>78</sup>

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73. *Human Rights Watch: Defending Human Rights Worldwide*, <http://www.hrw.org>. See also *Lawrence v. Texas: Constitutional Right to Privacy of Gays and Lesbians in the United States*, July 2, 2003, available at <http://www.hrw.org/press/2003/07/hrw-amicusbrief.htm>.

74. See Human Rights Watch, Human Rights News, U.S. Military’s “Don’t Ask, Don’t Tell” Policy Panders to Prejudice (Jan. 23, 2003) [hereinafter Human Rights Watch News Release], available at <http://www.hrw.org/press/2003/01/us012303.htm>; HUMAN RIGHTS WATCH, UNIFORM DISCRIMINATION: THE “DON’T ASK, DON’T TELL” POLICY OF THE U.S. MILITARY 38-45 (Jan. 2003) [hereinafter HUMAN RIGHTS WATCH: UNIFORM DISCRIMINATION], available at <http://www.hrw.org/reports/2003/usa0103/USA0103.pdf>.

75. See 429 F. Supp. 2d 385 (D. Mass. 2006) (granting government’s motion to dismiss), *reh’g denied*, 2006 WL 2559766, No. 04-12546-GAO, slip op. at \*1 (D. Mass. Sept. 5, 2006), *appeal argued sub nom.*, *Cook v. Gates*, No. 06-2313 (1st Cir. argued Mar. 7, 2007). See also Denise LaVoie, *Judge Tosses “Don’t Ask, Don’t Tell” Suit*, ASSOCIATED PRESS, Apr. 12, 2006, available at <http://abcnews.go.com/US/print?id=1885164>; Shelly Murphy, *“Don’t Ask, Don’t Tell” Suit Dismissed*, BOSTON GLOBE, Apr. 25, 2006, at B1; Associated Press, *Gay Veterans Challenge “Don’t Ask,”* AIR FORCE TIMES, Nov. 14, 2006, available at <http://www.airforcetimes.com/print.php?f=1-292925-2356305.php>.

76. *Log Cabin Republicans v. United States*, No. 04-08425 (C.D. Cal. Mar. 2006) (dismissing complaint for lack of standing), *refiled sub nom.*, *Nicholson v. United States*, No. 04-08425 (C.D. Cal. May 2, 2006). See also Bob Egelko, *Suit Challenging “Don’t Ask” Dismissed for Lack of Names*, S.F. CHRON., Apr. 5, 2006, at B2.

77. *Witt v. U.S. Air Force*, 444 F. Supp. 2d 1138 (W.D. Wash. 2006), *appeal docketed*, No. 06-35644 (9th Cir.). See also Gene Johnson, Associated Press, *ACLU Plans to Appeal Ruling on 19-Year AF Veteran*, SEATTLE POST-INTELLIGENCER (online ed.), July 27, 2006, [http://seattlepi.nwsourc.com/local/278980\\_suit27.html](http://seattlepi.nwsourc.com/local/278980_suit27.html).

78. In *Able v. United States*, U.S. District Judge Eugene H. Nickerson struck down both the law and the “Don’t Ask, Don’t Tell” policy because Justice Department lawyers failed to justify numerous anomalies in the policy/enforcement regulations. See *Able v. United States*, 968 F. Supp. 850, 858-61 (E.D.N.Y. 1997), *rev’d*, 155 F.3d 628 (2d Cir. 1998). For example, the lawyers could not explain why the military could say that a certain characteristic (homosexuality) is unacceptable, but persons may join or stay in the military as long as they do not say they are homosexual. See 968 F. Supp. at 858-61. The Second Circuit Court of Appeals later upheld the law, see 155 F.3d at 628, but such an outcome is by no means assured in the future. To reduce that risk, the Clinton Administration’s “Don’t Ask, Don’t Tell” regulations, announced on December 22, 1993, should be administratively dropped.

### b. *Legislative Strategy*

Rep. Marty Meehan (D-Mass.), whose amendment to strike the law regarding homosexual conduct was defeated overwhelmingly in 1993,<sup>79</sup> introduced legislation to repeal the statute in March 2005<sup>80</sup> and again in March 2007.<sup>81</sup> When first introduced, the bill gained a total of 122 co-sponsors, but did not make it past the House Armed Services Committee.<sup>82</sup> Meehan is now Chairman of the House Armed Services Oversight and Investigations Subcommittee. The number of co-sponsors has increased on Meehan's bill, but many of the members signing on seem primarily critical of "Don't Ask, Don't Tell," the Clinton administration's policy and regulations that are inconsistent with the 1993 law.<sup>83</sup>

There is no need for legislation to repeal the problematic enforcement regulations known by the catch-phrase "Don't Ask, Don't Tell." President Bush or the Secretary of Defense can eliminate that Clinton-era policy with a stroke of the pen. The statute is another matter, requiring an act of Congress to change the "Military Personnel Eligibility Act" that a Democratic Congress passed in 1993 with a veto-proof majority. Nothing has changed that would justify the turmoil that would occur in and outside of Congress if Meehan's legislation were seriously considered or passed.

### c. *Public Relations Campaign*

The only thing that has changed since 1993 is an illusion of momentum for repeal of the law created by a skilled and persistent public relations campaign that began in 2003, the tenth anniversary of passage of the law. The campaign was energized by the Supreme Court's decision in the *Lawrence v. Texas*,<sup>84</sup> which the Servicemembers Legal Defense Network predicted would help them to win the *Cook* case.<sup>85</sup>

Every four to six weeks, homosexual activist groups have generated some sort of "news" event, which usually gets national coverage when it appears (almost always) in the Associated Press and major papers such as the *New York Times* and the *Washington Post*. These stories, which rarely describe the law accurately, usually focus on "celebrity" (military) endorsers or human-interest stories, such as homosexuals who used to be in the military or gay students trying to enlist in the military.<sup>86</sup> Other student groups have protested the homosexual conduct law by trying to keep recruiters or ROTC units off of high school and college campuses—sometimes with anti-military demonstrations.<sup>87</sup>

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79. H. amend. 316 to H.R. 2401, 103d Cong. (1993) (voting record available at <http://clerk.house.gov/evs/1993/roll460.xml>).

80. See H.R. 1059, 109th Cong., 1st Sess. (Mar. 2, 2005). See also Deborah Funk, *Lawmaker Pitches Bill to Let Gays Openly Serve*, AIR FORCE TIMES, Mar. 21, 2005.

81. H.R. 1246, 110th Cong., 1st Sess. (Feb. 28, 2007). See also Ted McKenna, "Don't Ask Don't Tell" Repeal Faces Long Odds, PR WEEK USA, Mar. 2, 2007, at 2.

82. H.R. 1059, 109th Cong., 1st Sess. (Mar. 2, 2005) (co-sponsors and status available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:h.r.01059>).

83. See McKenna, *supra* note 81.

84. 539 U.S. 558 (2003).

85. See Human Rights Watch News Release, *supra* note 73.

86. See, e.g., Joseph A. Slobodzian, *Walk-In Test Confirms Military's Gay Ban*, PHILA. INQUIRER, Aug. 2, 2006, available at [http://calbears.findarticles.com/p/articles/mi\\_kmtpi/is\\_200608/ai\\_n16603720](http://calbears.findarticles.com/p/articles/mi_kmtpi/is_200608/ai_n16603720). The "Right to Serve" campaign of Soulforce, located in Lynchburg, Virginia, has organized visits to recruiting stations by homosexual men or women who say they want to enlist. See Soulforce, Right to Serve, <http://www.soulforce.org/righttoserve> (last visited Apr. 14, 2007). Camera crews and reporters are invited to witness the contrived events, which consume the time of recruiters and usually portray them in a negative light.

87. See Joe Chenelly, *Frontline, Recruiters Stay Away: Protest Prompts Office Closing*, ARMY TIMES, May 30, 2005, at 3; Campus Antiwar Network, Open Letter from to SFSU President Corrigan (Apr. 19, 2006), [http://www.traprockpeace.org/campus\\_antiwar\\_network/index.php/2006/04/](http://www.traprockpeace.org/campus_antiwar_network/index.php/2006/04/) ("On Friday, April 14, [2006.] ten SFSU students protested military recruitment at the university's career fair. . . . You should be proud of students who will not condone hate against their peers by a homophobic and sexist military." (alteration added)).

Activist groups also have visited the military service academies<sup>88</sup> and publicized an award given by the U.S. Military Academy's Department of English to a cadet writing a paper advocating the inclusion of gays in the military.<sup>89</sup> In 2004 and 2005, a San Francisco-based group of Naval Academy graduates calling itself "USNA Out" (later changed to the "Castro Chapter") unsuccessfully demanded official recognition for a group of homosexual alumni.<sup>90</sup>

The public relations campaign has been advanced most often by periodic releases of various "studies," reports, or polls produced, sponsored, or influenced by the University of California, Berkeley-based Center for the Study of Sexual Minorities in the Military (CSSMM), now called the Michael D. Palmer Center, and like-minded groups.<sup>91</sup> A closer look at materials produced by the activist groups usually reveals questionable methodology and unsupported conclusions.

#### d. *Surveys and Polls*

In January 2007, retired Army Gen. John M. Shalikashvili, Chairman of the Joint Chiefs of Staff from 1993 to 1997, became a "celebrity endorser" for the gays-in-the-military cause by writing an op-ed for publication in *The New York Times*, a newspaper that has been in the forefront of efforts to repeal the 1993 homosexual conduct law.<sup>92</sup> The General's article drew attention to a December 2006 poll of 545 service members conducted by Zogby International, indicating that seventy-three percent of the respondents said they were "comfortable interacting with gay people."<sup>93</sup>

The only surprising thing about this innocuous question was that the favorable percentage was not closer to one hundred percent. The Zogby poll asked another, more important question that was not even mentioned in the news release announcing the poll's results: "Do you agree or disagree with allowing gays and lesbians to serve openly in the military?" On that question, twenty-six percent of those surveyed "Agreed," but thirty-seven percent "Disagreed." The Zogby poll also found that thirty-two percent of respondents were "Neutral" and only five percent were "Not sure."<sup>94</sup>

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88. See *Gay Riders to Challenge "Don't Ask, Don't Tell" at West Point*, ASSOCIATED PRESS, Apr. 26, 2006; Kristen Wyatt, *Protesters Object to Naval Academy Policy on Gays*, ASSOCIATED PRESS, Oct. 21, 2005.

89. Center for the Study of Sexual Minorities in the Military, *West Pointer Wins First-Ever Military Award for Challenging Gay Ban* (Aug. 9, 2006), [http://www.gaymilitary.ucsb.edu/PressCenter/press\\_rel\\_2006\\_0808.htm](http://www.gaymilitary.ucsb.edu/PressCenter/press_rel_2006_0808.htm); *Thesis Challenges Gay Policy*, ASSOCIATED PRESS, Aug. 9, 2006; Roger Brigham, *West Point Grad Takes Aim at DADT*, BAY AREA REPORTER (S.F.) (online ed.), Aug. 24, 2006, <http://ebar.com/news/article.php?sec=news&article=1108>. The Center for Military Readiness raised questions about the suitability of this award. Then-Cadet Raggio had every right to express his opinions, but the paper was thinly sourced and did not even cite or accurately describe the text of the 1993 law. See CMR Issues Analysis (Oct. 2006), available at <http://cmrlink.org/cmrnotes/analysisraggiothesis.pdf>.

90. See Gretchen Parker, *Gay Academy Alums to Apply Again for Official Recognition*, ASSOCIATED PRESS, Nov. 12, 2004; Molly Knight, *OK For Gay Group Sought: Naval Academy Alumni Resume Efforts for Chapter*, BALTIMORE SUN, Nov. 12, 2004, at 1B; Jamie Stiehm, *Gay Academy Alumni Seek Anti-Bias Policy: Graduate Association Board Insists No Such Action Is Needed*, BALTIMORE SUN, Nov. 29, 2005, at 5B; see also Gretchen Parker, *Naval Alumni Association Rejects Gay Group*, ASSOCIATED PRESS, Dec. 2, 2004. Recognition was not granted because affiliate groups are organized geographically, not by affiliations of gender, race, service community, or other factors. An affiliated chapter for alumni who live in recreational vehicles is the exception that proves the rule.

91. See *infra* notes 112-114 and accompanying text.

92. John M. Shalikashvili, Op-Ed, *Second Thoughts on Gays in the Military*, N.Y. TIMES, Jan. 2, 2007, at 17.

93. ZOGBY INTERNATIONAL, OPINIONS OF MILITARY PERSONNEL ON GAYS IN THE MILITARY, DEC. 2006, SUBMITTED TO AARON BELKIN, DIRECTOR, MICHAEL D. PALM CENTER [hereinafter ZOGBY POLL], available at <http://www.zogby.com/news/ReadNews.dbm?ID=1222>.

94. See *id.* at 14-15. Responses to this question revealed additional findings that received little notice:

Within military subgroups, the highest agreement rates [supporting gays in the military] were found among Veterans (thirty-five percent) and those having served less than four years (thirty-seven percent). The lowest acceptance rates were among Active Duty Personnel (twenty-three percent), officers (twenty-three percent), those serving between ten and fourteen years (twenty-two percent) and those serving more than twenty (nineteen percent). Active Duty Personnel were also among those with the highest disapproval rates (thirty-nine percent), as were those serving between fifteen and nineteen years (forty percent), those serving more than twenty (forty-nine percent), and officers (forty-seven percent).

If this poll were considered representative of military personnel, the twenty-six percent of respondents who wanted the law repealed could not compete with the combined sixty-nine percent of people who were opposed to or neutral on repeal. This minority opinion was hardly a mandate for radical change.

Polling organizations recognize that respondents who believe a policy is already in place are more likely to favor that policy, while those who know otherwise are less likely.<sup>95</sup> Incorrect assertions that “homosexuals can serve in the military provided that they do not say they are gay” are probably skewing polls of civilians, who mistakenly believe that homosexuals are already eligible to serve, due to the “Don’t Ask, Don’t Tell” policy.

People in the military, however, are more likely to understand what the law is.<sup>96</sup> In the most recent poll announced by the *Military Times* newspapers, in response to the question “Do you think openly homosexual people should be allowed to serve in the military?” thirty percent answered “Yes,” but fifty-nine percent answered “No,” and ten percent answered “No Opinion.”<sup>97</sup> The same percentage—fifty-nine percent in opposition—was reported by the *Military Times* survey in the previous year.<sup>98</sup>

A closer look at the Zogby poll reveals more interesting details that should have been recognized by news media people reporting on it.<sup>99</sup> First, the Zogby poll news release clearly states that it was designed in conjunction with Aaron Belkin, Director of the Michael D. Palm Center, formerly the Center for Sexual Minorities in the Military.<sup>100</sup> This is an activist group promoting homosexuals in the military.<sup>101</sup> Second, the poll claims to be of 545 people “who have served in Iraq and Afghanistan (or in combat support roles directly supporting those operations), from a purchased list of U.S. Military Personnel.”<sup>102</sup> However, the U.S. military does not sell or provide access to personnel lists. Due to security rules that were tightened in the aftermath of 9/11, personal details and even general information about the location of individual personnel is highly restricted.<sup>103</sup> Third, the apparent absence of random access undermines the credibility of the poll, which inflates the claim that, “The panel used for this survey is composed of over 1 million members and correlates closely with the U.S. population on all key profiles.”<sup>104</sup> Fourth, activists frequently claim that the greater comfort of younger people

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*Id.* at 6 (alteration added).

95. PRESIDENTIAL COMMISSION REPORT, *supra* note **Error! Bookmark not defined.**, at C-135 (Commissioner Generated Finding 14) (citing ROPER ORGANIZATION, INC., ATTITUDES REGARDING THE ASSIGNMENT OF WOMEN IN THE ARMED FORCES: THE PUBLIC PERSPECTIVE (Sept. 1992)).

96. See Robert Hodierne, *We Asked What You Think. You Told Us*, NAVY TIMES, Jan. 3, 2005, at 14–15 (citing the section on Race, Gender, Gay, Question 6), available at [http://www.militarycity.com/polls/2004\\_chart3.php](http://www.militarycity.com/polls/2004_chart3.php). Annual *Military Times* surveys are done by mailing questionnaires randomly to subscribers to the affiliated newspapers *Air Force Times*, *Army Times*, *Navy Times*, and *Marine Corps Times*. The polls tabulate only responses from active-duty personnel. Results are published in all four affiliated newspapers.

97. See Robert Hodierne, *Down on the War*, ARMY TIMES, Dec. 29, 2006, at 12–14. The *Military Times* survey was done by mailing questionnaires randomly to subscribers of affiliated newspapers, but the poll only tabulated responses (954) from active-duty personnel. Results were published in all four affiliated newspapers.

98. See *id.* (presenting bar graphs of polling results).

99. See ZOGBY POLL, *supra* note 93.

100. See *id.* The cover page and news release were titled “Zogby Poll: ‘Don’t Ask, Don’t Tell’ Not Working.”

101. See The Michael D. Palm Center, About Us, <http://www.palmcenter.org/about> (last visited May 10, 2007).

102. See ZOGBY POLL, *supra* note 93, at 2.

103. Memorandum from Deputy Secretary of Defense Paul Wolfowitz to Secretaries of the Military Departments et al. (Oct. 18, 2001) (addressing “Operations Security Throughout the Department of Defense”) (on file with author); Memorandum from Office of the Secretary of Defense, Administration and Management Director D.O. Cooke to DoD FOIA Offices (Nov. 9, 2001) (addressing “Withholding of Personally Identifying Information Under the Freedom of Information Act (FOIA)”) (on file with author). Zogby International did not respond to a telephone request from this author for more information on its selection of survey participants.

104. See ZOGBY POLL, *supra* note 93, at 2. Zogby’s polling sample is somewhat questionable, but “internal” data in the poll reveals interesting insights on the question of whether opinions among younger people might make it more acceptable to accommodate gays in the military. The Zogby poll seems to indicate that opinions on this issue have more to

with homosexuals is evidence enough to justify changing the law; however, if that were the case, all referenda banning same-sex marriage would have been soundly defeated. On the contrary, the voters of several states have approved twenty-six of twenty-seven such referenda, often with comfortable majorities.<sup>105</sup>

e. *The National Security Argument: Too Many Discharges of Homosexuals*

Supporters of legislation to repeal the 1993 homosexual conduct law have tried to reframe their argument in terms of military necessity, rather than equal opportunity. The “national security” argument for gays in the military usually centers on the number of discharges of homosexual servicemen and women that have occurred and suggests that recruiting problems and shortages could be solved if only the military were open to professed homosexuals.<sup>106</sup>

A report done by the Government Accountability Office (GAO) early in 2005 provided statistical data on the number of “unprogrammed separations.”<sup>107</sup> The GAO report essentially estimated the “replacement costs” of discharging and replacing homosexual service members from FY 1994 through FY 2003 to be approximately \$190.5 million.<sup>108</sup>

Dr. David Chu, Under Secretary of Defense for Personnel and Readiness, responded to the GAO report with a two-page memorandum.<sup>109</sup> Figures cited by Dr. Chu indicated that discharges due to the homosexual exclusion policy between 1994 and 2003 amounted to only 0.37% of discharges for all reasons (about five percent of unplanned separations) during that period.<sup>110</sup> There were, for example, 26,446 discharges for pregnancy; 36,513 for violations of weight standards; 38,178 for “serious offenses;” 20,527 for parenthood, 59,098 for “drug offenses/use”; and 9501 for homosexuality.<sup>111</sup>

The Berkeley based Center for the Study of Sexual Minorities in the Military (CSSMM) was not satisfied with the \$190 million dollar estimate. CSSMM Executive Director Aaron Belkin organized a “Blue Ribbon Commission,” which he chairs.<sup>112</sup> This

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do with military occupation than they do with age. Active duty people in the younger and older ranks are more favorable to the idea, but the ones in the middle age and experience group, who are more likely to be involved in close combat situations, are more strongly opposed. It is possible that an objective poll of identified military personnel—similar to the official survey done by the Roper Organization for the 1992 Presidential Commission on the Assignment of Women in the Armed Forces—would show similar results. See ZOGBY POLL, *supra* note 93, at 14–15; see also *supra* note 94.

105. See Human Rights Campaign, *State Prohibitions on Marriage for Same Sex Couples 1* (Nov. 2006), <http://www.hrc.org/TemplateRedirect.cfm?Template=/ContentManagement/ContentDisplay.cfm&ContentID=28225> (listing twenty-six states that have a voter-approved constitutional amendment prohibiting same-sex marriage and nineteen states that have a law prohibiting same-sex marriage). To date, Arizona is the only state in which voters have repudiated an attempt to amend a state constitution to ban same-sex civil marriage. See CNN.com, *America Votes 2006, Key Ballot Measures*, <http://www.cnn.com/ELECTION/2006/pages/results/ballot.measures/> (reporting on the failure of Arizona Proposition 107 on November 7, 2006).

106. John Henren, *Ban on Gays in Military Assailed*, L.A. TIMES, Feb. 25, 2005, at A24; Josh White, *“Don’t Ask” Costs More Than Expected*, WASH. POST, Feb. 14, 2006, at A04; John Files, *Military’s Discharges for Being Gay Rose in ‘05*, N.Y. TIMES, Aug. 15, 2006, at A17.

107. See generally GOV’T ACCOUNTABILITY OFFICE, *MILITARY PERSONNEL: FINANCIAL COSTS AND LOSS OF CRITICAL SKILLS DUE TO DOD’S HOMOSEXUAL CONDUCT POLICY CANNOT BE COMPLETELY ESTIMATED* (Feb. 2005) [hereinafter GAO, *FINANCIAL COSTS CANNOT BE ESTIMATED*], available at <http://www.gao.gov/new.items/d05299.pdf>.

108. *Id.* at 3.

109. Memorandum from Dr. David Chu, Under Secretary of Defense for Personnel & Readiness, to Derek Stewart, Director of Defense Capabilities and Management at the GAO (Feb. 7, 2005), reprinted in GAO, *FINANCIAL COSTS CANNOT BE ESTIMATED*, *supra* note 107, at 42–43.

110. Chu, *supra* note 109.

111. GAO, *FINANCIAL COSTS CANNOT BE ESTIMATED*, *supra* note 107, at 42.

112. FRANK J. BARRETT ET AL., *THE PALM CENTER, FINANCIAL ANALYSIS OF “DON’T ASK, DON’T TELL”: HOW MUCH DOES THE GAY BAN COST?*, at 1, 3 (Feb. 2006), available at <http://www.palmcenter.org/files/active/0/2006-FebBlueRibbonFinalRpt.pdf>. In addition to Prof. Belkin, this non-governmentally authorized, private group includes Lawrence Korb, Adm. John D. Hutson, USN (Ret.), and other activists supporting repeal of the law regarding homosexual

non-governmental “Blue Ribbon Commission” claimed in a February 2006 report that the GAO estimate of “replacement costs” was too low.<sup>113</sup> The CSSMM argued that a more accurate estimate of the costs of discharges for homosexuality would be \$363 million—approximately \$173.3 million, or ninety-one percent higher, than the GAO estimate.<sup>114</sup>

The Comptroller General responded by addressing a letter to Sen. Edward Kennedy (D-Mass.) on July 13, 2006, which “stood by” the original GAO estimate.<sup>115</sup> The entire debate about numbers generated publicity, but it missed the point. The cost of personnel losses related to the homosexual conduct law, whatever it is, could be reduced to near-zero if all potential recruits were fully and accurately notified that the 1993 law means that homosexuals are not eligible to serve. It is bad policy to enforce a regulatory policy such as “Don’t Ask, Don’t Tell,” which misinforms potential recruits about the conditions of eligibility and encourages people to be less than honest about their homosexuality—only to be subject to discharge later.

The GAO document provided useful information, but you do not get the right answers if you do not ask the right questions. The issue is not “replacement cost.” It is the cost of recruiting and training individuals who are not eligible to serve in the military because they are homosexual.

f. *Contradiction: Too Few Discharges Due to the War*

Many of the same people who claim that the military is losing too many homosexual personnel simultaneously make a contradictory claim: Dismissals have declined because gays are needed to fight in the war.<sup>116</sup> A Congressional Research Service Report to Congress discussed this argument:

Some have claimed that discharges decline during time of war, suggesting that the military ignores homosexuality when soldiers are most needed, only to “kick them out” once the crisis has passed. It is notable that during wartime, the military services can, and have, instituted actions “to suspend certain laws relating to . . . separation” that can limit administrative discharges. These actions, know [sic] as “stop-loss,” allow the services to minimize the disruptive effects of personnel turnover during a crisis. However, administrative discharges for homosexual conduct are *not* affected by stop-loss. It can be speculated that a claim of homosexuality during a crisis may be viewed skeptically and under the policy would require an investigation. . . . [but if] such a claim were found to be in violation of the law on homosexual conduct, the services could not use “stop-loss” to delay an administrative discharge.<sup>117</sup>

Two news releases from the Center for the Study of Sexual Minorities in the Military in September 2005 claimed to have evidence that homosexual service members were being retained to serve the needs of war, despite the homosexual conduct law.<sup>118</sup> But a

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conduct in the military. The report also acknowledges receiving help from the offices of Rep. Marty Meehan (D-Mass.) and Sen. Frank Lautenberg (D-N.J.), sponsors of legislation to repeal the 1993 law.

113. *Id.* at 2.

114. *Id.* at 3.

115. Letter from David M. Walker, Comptroller General of the United States, to Sen. Edward Kennedy (July 13, 2006), available at <http://www.gao.gov/htext/d06909r.html>.

116. Associated Press, “Don’t Ask” Dismissals Drop in Wartime, WASH. POST, Mar. 24, 2004, at A22; Evelyn Nieves & Ann Scott Tyson, *Fewer Gays Being Discharged Since 9/11*, WASH. POST, Feb. 12, 2005, at A01.

117. CONGRESSIONAL RESEARCH SERVICE, *HOMOSEXUALS AND U.S. MILITARY POLICY: CURRENT ISSUES 9–10* (May 27, 2005) (citations omitted; alteration added), available at <http://www.fas.org/sgp/crs/natsec/RL30113.pdf>.

118. The Michael D. Palm Center, *Researchers Locate Army Document Ordering Commanders Not to Fire Gays* (Sept. 13, 2005), available at [http://www.palmcenter.org/press/dadt/releases/researchers\\_locate\\_army\\_document\\_ordering\\_commanders\\_not\\_to\\_fire\\_gays](http://www.palmcenter.org/press/dadt/releases/researchers_locate_army_document_ordering_commanders_not_to_fire_gays); The Michael D. Palm Center, *Pentagon Acknowledges Sending Openly Gay Service Members to War* (Sept. 23, 2005), available at

spokesman at the Forces Command Army base at Fort McPherson, Georgia, where this evidence allegedly was found, has countered that argument with a clarification. According to the spokesman, if a soldier declares himself to be homosexual just prior to a deployment, an investigation ensues, lasting eight to ten weeks, which may not be completed prior to deployment. If the investigation does find that a person is homosexual and therefore not eligible to serve, an honorable discharge is ordered, even if the person is deployed.<sup>119</sup>

Anecdotes about homosexuals being allowed to remain in the military demonstrate the need for accurate information on what the “Military Personnel Eligibility Act” actually says. Commanders who do not understand or enforce the law should be given accurate information and support when taking steps to comply with it. Officials who choose to disregard this law should be held accountable in the same way that they would be for other failures to comply with duly enacted law.

g. *Linguists and the Defense Language Institute*

The “Don’t Ask, Don’t Tell” policy/regulations have caused widespread confusion and costly errors, such as the admittance of twelve homosexual language trainees to the Army’s Defense Language Institute (DLI) in Monterey, California. Two of the students were found in bed together, and the others voluntarily admitted their homosexuality.<sup>120</sup>

All were honorably discharged.<sup>121</sup> Gay activist groups decried the dismissals as a loss for national security. The true loss occurred, however, when twelve students who were not eligible to serve occupied the spaces of other language trainees who could be participating in the current war. This wasted time and money was a direct result of President Clinton’s calculated action to accommodate homosexuals in the military, despite prohibitions in the law.

Military specialty schools such as the DLI should not be misusing scarce resources to train linguists who are not eligible to serve in the military. The problem here is not the 1993 homosexual conduct law, but “Don’t Ask, Don’t Tell,” a set of inconsistent enforcement regulations that ought to be administratively eliminated.<sup>122</sup>

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[http://www.palmcenter.org/press/dadt/releases/pentagon\\_acknowledges\\_sending\\_openly\\_gay\\_service\\_members\\_to\\_war\\_acknowledgement\\_follows\\_discovery\\_of\\_regulat](http://www.palmcenter.org/press/dadt/releases/pentagon_acknowledges_sending_openly_gay_service_members_to_war_acknowledgement_follows_discovery_of_regulat)

119. E-mail correspondence from Major Nate Flegler, Chief, Media Division, FORSCOM Public Affairs, to author (Nov. 15, 2005) (on file with author).

When a Guard or Reserve unit is mobilized to active duty, Forces Command Regulation 500-3-3 . . . identifies 35 different criteria that may prevent a Soldier from deploying with his or her unit. Examples include being overweight, facing criminal prosecution, or medical problems. . . . Should a Soldier declare him or herself homosexual, a process defined not by FORMDEPS but by other regulations is begun to determine the veracity of the assertion and whether the assertion constitutes grounds to discharge the Soldier from military service. This process can last eight to ten weeks. . . . While our spokesman may have been accurately quoted as saying, “they still have to go to war and the homosexual issue is postponed until they return to the U.S. and the unit is demobilized,” we wish to clarify that the Soldier’s case is not postponed until the unit returns. The review process continues while the unit is deployed and there is no delay in resolving the matter or discharging the Soldier if that is the resolution.

*Id.*

120. See Nathaniel Frank, “Don’t Ask, Don’t Tell” v. the War on Terrorism, *NEW REPUBLIC*, Nov. 18, 2002, at 18; Op-Ed, Alistair Gamble, *A Military at War Needs Its Gay Soldiers*, *N.Y. TIMES*, Nov. 29, 2002.

121. See Frank, *supra* note 120.

122. On December 11, 2002, the Center for Military Readiness filed a formal Request for Assistance with the Army Inspector General, asking for an investigation of this waste of educational resources by authorities at DLI. No response was received. A subsequent Freedom of Information (FOIA) request, which did not ask for individual information, was addressed in a letter to the DoD Inspector General on November 17, 2003. The FOIA request was initially denied and later “answered” with largely blank pages marked with FOIA exemption code “(b)(7)(c).” That code is used when government officials refuse to confirm or deny that disciplinary proceedings have taken place.

#### h. *Alleged Shortages in Critical Specialties*

In July 1994, the Center for the Study of Sexual Minorities in the Military (CSSMM) claimed the military was discharging valuable personnel in important military specialties. These included, for example, “49 nuclear, biological, and chemical warfare specialists; 212 medical-care workers; 90 nuclear power engineers; 52 missile guidance and control operators; 10 rocket, missile and other artillery specialists; 340 infantrymen; 88 linguists; and 163 law-enforcement specialists.”<sup>123</sup> The story was based on data that the CSSMM obtained from the Defense Manpower Data Center (DMDC) by means of a Freedom of Information Request.<sup>124</sup>

A closer look at the same data, obtained from the DMDC, reveals several disparities with those quoted in the “study” released by the CSSMM. For example, according to the official who provided the same DMDC data to this author, the category of persons in the “nuclear power” field does not necessarily mean that all the people in question were “nuclear power engineers.”<sup>125</sup> As for the eighty-eight discharged linguists, the list of “Primary DoD Occupation Code” titles includes, at number 241, “Language interrogation,” an occupation from which a total of fifteen persons were separated due to homosexuality. But that is seventy-three persons short of the number of discharged “linguists” cited. How to account for the discrepancy? A Duty Base Facility Identifier Table, also provided by the DMDC, indicates that a total of seventy-three persons were separated from the Presidio of Monterey, where the Defense Language Institute is located.<sup>126</sup> It is not clear how the CSSMM came up with the the claim that “eighty-eight linguists” were discharged due to the “Don’t Ask, Don’t Tell” policy. Fifteen plus seventy-three, coincidentally, equals eighty-eight. There is no “linguist” category listed among the DMDC categories of occupations.<sup>127</sup>

Another round of news reports and hand-wringing commentaries centered on the loss of “fifty-four Arabic linguists” trained for military service.<sup>128</sup> This number is in a column of personnel losses noted by the General Accountability Office (GAO) in 2005.<sup>129</sup> The referenced number is broken down, however, by type and level of proficiency of the language trainees, which varied considerably. Again, the number of language trainees lost after any time in training could be reduced to near zero if the “Military Personnel Eligibility Act” were accurately explained and enforced by the Department of Defense.

#### i. *The Urban Institute*

In September 2004, the Urban Institute, a nonpartisan social policy and research organization, issued a report estimating that approximately 65,000 gay personnel are now serving in the U.S. military, and another one million gays and lesbians are veterans.<sup>130</sup>

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123. Vince Crawley, *Hundreds of Discharged Gays Served in Critical Specialties*, AIR FORCE TIMES, June 12, 2004, available at [http://docs.newsbank.com/openurl?ctx\\_ver=z39.88-2004&rft\\_id=info:sid/iw.newsbank.com:AFNB:AFTB&rft\\_val\\_format=info:ofi/fmt:kev:mtx:ctx&rft\\_dat=103F530765572C3E&svc\\_dat=InfoWeb:aggregated4&req\\_dat=0F56A02D68496F45](http://docs.newsbank.com/openurl?ctx_ver=z39.88-2004&rft_id=info:sid/iw.newsbank.com:AFNB:AFTB&rft_val_format=info:ofi/fmt:kev:mtx:ctx&rft_dat=103F530765572C3E&svc_dat=InfoWeb:aggregated4&req_dat=0F56A02D68496F45) See also Kim Curtis, *Report: Number of Gay Linguists Discharged Higher than Thought*, ASSOCIATED PRESS, Jan. 13, 2005.

124. Defense Manpower Data Center, tables titled “Separations Due to Homosexual Conduct, FY 1998–2003,” and “Duty Base Facility Identifier, (FY 1998–2003)” (on file with author).

125. See *id.*

126. See *id.*

127. *Id.*

128. See, e.g., Mackubin Thomas Owens, *Ask, Tell, Whatever?: Gays-in-the-Military Comes Up Again*, NAT’L REV., Apr. 16, 2007; Debra Saunders, *Don’t Ask, Don’t Tell for the Devout*, WASH. TIMES, Mar. 17, 2007, at A13.

129. GAO, FINANCIAL COSTS CANNOT BE ESTIMATED, *supra* note 107, at 21.

130. GARY J. GATES, THE URBAN INSTITUTE, GAY MEN AND LESBIANS IN THE U.S. MILITARY: ESTIMATES FROM CENSUS 2000, at iii (2004), available at [http://www.urban.org/UploadedPDF/411069\\_GayLesbianMilitary.pdf](http://www.urban.org/UploadedPDF/411069_GayLesbianMilitary.pdf).

Activists frequently cite this report when advocating repeal of the 1993 homosexual conduct law<sup>131</sup>—sometimes touting the data as if it is brand new and “solid.”<sup>132</sup>

The document, however, reveals questionable methodology, based on presumptions about the percentage of homosexuals in the general population and about the sexuality of persons interviewed by the census.<sup>133</sup> The speculative claim that three percent of women and four percent of men are homosexual was applied to 2000 census data on the number of persons of the same sex living in the same household—one of whom is a “veteran.”<sup>134</sup> Citing mathematical computations, the study speculated that household-mates of the same sex are homosexual.<sup>135</sup> Next came the leaping conclusion that sixty-five thousand gay men and lesbians are serving or used to be in the military. This number is frequently trumpeted by gay activists and like-minded journalists, who overlook or fail to mention the fact that the census does not ask questions about sexual orientation or behavior. All estimates are based on sheer speculation, dressed up with a public relations spin.

The Urban Institute report, which was prepared in consultation with the activist Center for the Study of Sexual Minorities in the Military and the Servicemembers Legal Defense Network, is more like an urban legend than a serious piece of scholarship.

j. *Harassment of Homosexuals*

Contrary to exaggerated claims by activist groups, more than eighty percent of homosexual service members 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 DoD Task Force report, there were only four cases of anti-homosexual harassment reported since 1994.<sup>136</sup> Two of those cases involved anonymous letters that could not be traced.<sup>137</sup>

In 1999, homosexual activists crafted a polemic campaign that focused on the brutal murder of Army Pfc. Barry Winchell, an alleged homosexual, at Fort Campbell, Kentucky, in July of that year.<sup>138</sup> The savage killing of Pfc. Barry Winchell has been cited as evidence that more must be done to end “hate crimes” and harassment of homosexuals.<sup>139</sup>

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131. See Joanne Kimberlin, *Study Finds 65,000 Gay Men, Women in the Military*, VIRGINIAN-PILOT, Oct. 21, 2004, at A10; Denise M. Bonilla, *Don't Ask, Don't Tell: A Policy Under Fire*, NEWSDAY, Aug. 6, 2006, at G05.

132. See Deb Price, *UCLA Researcher Mines Data to Make Gays Visible*, DETROIT NEWS, Apr. 2, 2007, at 13A. In this article, self-identified gay columnist Deb Price praises Gary J. Gates, now affiliated with the progressive Williams Institute at the University of California at Los Angeles, for producing “solid numbers” that will help persuade Congress to lift the ban on homosexuals in the military. The public relations strategy at work here may be a reflection of what is known about surveys of public opinion. People are more likely to favor a policy if they think it is already in place. See *supra* note 95.

133. GAO, FINANCIAL COSTS CANNOT BE ESTIMATED, *supra* note 107, at 1–4. The report, which includes many caveats, concedes that “the census does not ask any questions about sexual orientation, sexual behavior, or sexual attraction (three common ways used to identify gay men and lesbians in surveys).” *Id.* at 1.

134. *Id.* at 3.

135. *Id.* at 1–4.

136. OFFICE OF THE UNDER SECRETARY OF DEFENSE FOR PERSONNEL AND READINESS, REPORT TO THE SECRETARY OF DEFENSE, REVIEW OF THE EFFECTIVENESS OF THE APPLICATION AND ENFORCEMENT OF THE DEPARTMENT'S POLICY ON HOMOSEXUAL CONDUCT IN THE MILITARY 6 (Apr. 1998) [hereinafter DO D TASK FORCE REPORT 1998, available at [http://dont.stanford.edu/casestudy/appendixG\\_short.pdf](http://dont.stanford.edu/casestudy/appendixG_short.pdf); Dep't of Defense News Release, No. 158-98 (Apr. 7, 1998).

137. DO D TASK FORCE REPORT 1998, *supra* note 136.

138. Jane McHugh, *Murder in the Barracks*, ARMY TIMES, Aug. 23, 1999, at 12; Jane McHugh, *Second Soldier Implicated in Possible Hate Crime*, ARMY TIMES, Aug. 2, 1999, at 8.

139. See Dep't of Defense News Release No. 432-00, Department of Defense Issues Anti-Harassment Guidelines (July 21, 2000); Tom Ricks, *Pentagon Vows to Enforce "Don't Ask, Don't Tell,"* WASH. POST, July 22, 2000, at 1A (quoting Carol Battiste, head of a Pentagon panel set up to review the seven year-old “Don't Ask, Don't Tell” policy in 2000). Battiste said that military leaders face a “dilemma” when they try to counter discrimination against homosexuals, who cannot identify themselves. *Id.* Ricks added, “One reason the military establishment continues to be uncomfortable with ‘Don't Ask, Don't Tell’ is that it is a policy that is purposely ambiguous, while military culture tends to value clarity.” *Id.* Actually, a policy that encourages deception is not workable in any institution. This is one of the reasons why members of Congress did not vote for the proposal known as “Don't Ask, Don't Tell.” Instead of wringing their hands about “ambiguity” and

The confessed killer, Pvt. Calvin Glover, assaulted Winchell in the barracks with a baseball bat on July 4, 1999, several hours after Winchell had beaten him in a drunken brawl.<sup>140</sup> Evidence of Glover's hostile attitude toward Winchell, who was involved with a transgender male nightclub entertainer who appeared to be a woman, was a factor in his trial and sentencing to life in prison.<sup>141</sup> An Army Inspector General investigation cleared Fort Campbell commanders, but noted poor morale and a tolerance of underage drinking and anti-gay language by the senior sergeant in the battalion. The report also noted the reluctance of battalion commanders to ask questions about matters involving alleged homosexuality.<sup>142</sup> Military discipline requires constant awareness of what is happening in military units, throughout the chain of command. A policy such as "Don't Ask, Don't Tell" that discourages the asking of legitimate questions interferes with sound leadership. In this tragic case, a failure to ask questions apparently was a factor in the creation of a volatile situation that exploded with violence. Perpetrators of this crime have been rightly punished, but there is no need for additional legislation to stop harassment or murderous assaults—of anyone—in the barracks.

Some recent cases of harassment involving persons of the same sex deserve closer scrutiny and objective analysis of whether the "Don't Ask, Don't Tell" policy created conditions conducive to abuse. For example, the Associated Press reported that a drill sergeant at Fort Eustis, Virginia, faced molestation charges for forcing a trainee to dress as Superman and submit to sexual acts. A Fort Eustis spokeswoman, Karla Gonzalez, confirmed that Army Staff Sgt. Edmundo F. Estrada, thirty-five-years-old, was accused of indecent assault, having an inappropriate relationship with a trainee, and cruelty and maltreatment of subordinates.<sup>143</sup>

Air Force Captain Devery L. Taylor was convicted and sentenced to twenty-eight to fifty years in prison for raping four men, allegedly with date-rape drugs. According to a report in *Air Force Times*, an investigator interrogating Taylor, now a convicted serial rapist, said that he would not ask any questions about the man's sexual practices because such questions are not allowed. This statement demonstrated how misunderstandings about the 1993 homosexual conduct law help to create volatile conditions that undermine good order and discipline.<sup>144</sup> Sexual assault of any kind is wrong and especially

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"dilemmas," Pentagon officials should scrap the "Don't Ask, Don't Tell" regulations and issue informational materials that reflect the clarity of the law.

140. *Id.*

141. See David France, *An Inconvenient Woman*, N.Y. TIMES MAG., May 28, 2000, available at <http://www1.nytimes.com/library/magazine/home/index.html>; Brian Dunn, *Private Confessed to "Gay Bash" Slaying, Inmate Says*, ARMY TIMES, Sept. 13, 1999, at 16.

142. Jane McHugh, *1st Sgt. Faulted in report on Gay Beating Death*, ARMY TIMES, July 31, 2000, at 8. This article reported on the Army Inspector General's Investigation of the July 1999 beating death of Army Pfc. Barry Winchell. The report found that the command environment at Fort Campbell, Kentucky, was generally positive, but the unit in which the killing occurred suffered from poor morale and a tolerance for underage drinking—a major factor in the case. According to *The Army Times*, the report also found that commanders were frustrated and confused by the "Don't Ask, Don't Tell" policy. *Id.*

[Some were] afraid to violate military law by retaining soldiers who admit homosexuality. But they are also afraid that some of these soldiers might be saying they are gay just to get out of the Army. Either way, commanders are reluctant to investigate. They fear that looking into the matter would only hurt unit and soldier morale.

*Id.* (alteration added).

143. *Fort Eustis Drill Sergeant Faces Charges of Molesting Trainees*, ASSOCIATED PRESS, Mar. 4, 2007. Sgt. Estrada pleaded guilty to the charges at his court-martial on April 23, 2007, to three counts of mistreating soldiers, as well as to violating regulations not to develop relationships with subordinates. Associated Press, *Sgt. Pleads Guilty to Sexually Harassing Trainees*, ARMY TIMES, May 7, 2007, at 45. He faces six months in prison, a bad-conduct discharge and reduction in rank. *Id.*

144. See *Captain Sentenced to 50 Years for Raping 4 Men*, AIR FORCE TIMES, Mar. 12, 2007, at 15; *Officer Accused of Rape Says He Rejected Alleged Victim*, AIR FORCE TIMES, Mar. 5, 2007, available at <http://buzztracker.org/2005/01/19/cache/441692.html>. The March 5 article, reported from Eglin Air Force Base, Florida, reported that in a video of an interview with Taylor, shown during his February 22 court-martial, an Air Force

demoralizing in a military setting, where people live in conditions of “forced intimacy” and are not free to change jobs if someone threatens them. Such misconduct should not be considered “off limits” to questioning just because it happens to occur between persons of the same sex.

k. *Foreign Militaries*

The Center for the Study of Sexual Minorities in the Military and other activist groups frequently point to the experiences of other countries, such as Great Britain, Canada, Australia, the Netherlands, and Israel, which have no restrictions on professed homosexuals in their militaries.<sup>145</sup>

The United Kingdom was ordered by the European Court of Human Rights to open its ranks to homosexuals in September 1999.<sup>146</sup> There was some controversy in the Parliament, but instead of appealing or challenging the ruling, ultimately the nation complied—something the United States would be unlikely to do. Contrary to the notion that all has gone well, European newspapers have reported recruiting and disciplinary problems in the British military.<sup>147</sup>

Canada, Australia, and the Netherlands have cultures quite different from the United States<sup>148</sup> and live under the protection of the American military. Prof. Charles Moskos has noted that nations without official restrictions on gays in the military are also very restrictive in actual practice. Germany, for example, dropped criminal sanctions against homosexual activities in 1969, but also imposed many restrictions on open homosexual behavior and imposed career penalties such as denial of promotions and access to classified information.<sup>149</sup> Israel’s situation differs from the United States because all able-bodied citizens, including women, are compelled to serve in the military. Israeli soldiers usually do not reveal their homosexuality and are barred from elite combat positions if they do.<sup>150</sup>

The CSSMM frequently claims that no problems have been experienced in all of the countries listed above and is critical of those who support the ban, demanding that opponents provide “empirical” evidence to support their case. The irony is that the CSSMM and other activist groups base most of their arguments on anecdotal information and opinion, largely gathered from like-minded sources.

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Office of Special Investigations investigator told Taylor, “[It] doesn’t concern me if it (the sexual encounter) was consensual . . . I’m not allowed to talk about your preferences. That has nothing to do with your military career as far as the people who do my job are concerned.” *Id.* (alteration added). This was an astonishing statement for the investigator to have made, particularly in view of Capt. Taylor’s convictions for raping four men.

145. See Aaron Belkin, *Don’t Ask, Don’t Tell: Is the Gay Ban Based on Military Necessity?*, PARAMETERS (U.S. Army War Coll. Q.), Summer 2003, at 108-19.

146. See Lustig-Prean and Beckett v. United Kingdom, 29 Euro. Ct. H.R. 548, 587 (1999); HUMAN RIGHTS WATCH: UNIFORM DISCRIMINATION, *supra* note 74, at 38; *Delight and Despair at Gay Ban Ruling*, BBC NEWS, Sept. 27, 1999, [http://news.bbc.co.uk/2/hi/uk\\_news/458842.stm](http://news.bbc.co.uk/2/hi/uk_news/458842.stm) (reporting that the ruling of the European Court of Human Rights was “not binding on the UK Government”).

147. See, e.g., BBC News, *Deepcut Army Sex Attacker Jailed*, Oct. 22, 2004, [http://news.bbc.co.uk/1/hi/england/southern\\_counties/3634474.stm](http://news.bbc.co.uk/1/hi/england/southern_counties/3634474.stm); Nicholas Hellen, *Navy Signals for Help to Recruit Gay Sailors*, TIMESONLINE (London), Feb. 20, 2005, <http://www.timesonline.co.uk/tol/news/uk/article516647.ece>; Tony Czuczka, Associated Press, *British Soldier Admits to Assault on Captive*, WASH. TIMES, Jan. 19, 2005, available at <http://www.buzztracker.org/2005/01/19/cache/441692.html>; Michael Evans, *War Blamed as 6,000 Quit Territorial Army*, TIMES (London), Oct. 30, 2005, at 2; Michael Evans, *Iraq Factor Takes Toll on the TA*, TIMES (London), Oct. 31, 2005, at 8. The reported abuse of male Iraqi soldiers with a forklift involved forced sexual acts, but details are not known because of court-ordered gag orders.

148. See, e.g., Kate Monaghan, *Dutch Political Party Wants to Normalize Pedophilia*, CNSNEWS.COM, July 26, 2006, <http://www.cnsnews.com/ViewSpecialReports.asp?Page=/SpecialReports/archive/200607/SPE20060726a.html>.

149. See, e.g., Otto Kreisher, *Few Armies Accept Homosexuals*, SACRAMENTO UNION, June 7, 1993, at A5.

150. See Tom Philpott, *In Israel: The Hard Reality—Gays Are Allowed to Serve in the Military but They Are Not Fully Accepted*, ARMY TIMES, Jan. 11, 1993, at 11; Tom Philpott, *Gay Israelis Avoid Ridicule, Get Ahead by Staying in Closet*, ARMY TIMES, Jan. 11, 1993, at 13; Charles Moskos, *Services Will Suffer If Used for Social Experiments*, RICHMOND-TIMES DISPATCH, Feb. 28, 1993, at F1.

In a letter to *Parameters* responding to a Summer 2003 article by Aaron Belkin, Maj. Joseph A. Craft, USMC, pointed out that the CSSMM Executive Director had based his case on interviews with only 104 “experts” in four countries—all of whom were advocates of gays in the military.<sup>151</sup> Wrote Craft,

One of Belkin’s key arguments is that Don’t Ask, Don’t Tell (DADT) is based on anecdotes and misleading surveys instead of quantitative evidence. . . . Yet Belkin’s article is entirely anecdotal. It is nothing more than selected quotes from supposed experts who claim that homosexual integration has had no impact on unit cohesion or military readiness. A quick review of the author’s endnotes, cross-checked with an internet search, reveals the questionable credentials and political leanings of most of these experts. At one point, Belkin refers to a 1995 Canadian government report, which supposedly indicates that lifting the ban on gays in the military had “no effect.” However, his endnote does not cite the report but a “personal communication with Karol Wenek.”<sup>152</sup>

The issue of homosexuals in the military is a major political question that has been dealt with through the political system, as established by the U.S. Constitution. Major decisions such as this should not be decided by international courts, federal courts in the United States, or by politicians who are misinformed about the nature of the 1993 law and the rationale behind it.

#### 1. *Religious Bias*

Finally, advocates of gays in the military have attempted to fire up their cause by criticizing Marine Gen. Peter Pace, Chairman of the Joint Chiefs of Staff, who expressed his personal views regarding gays in the military and personal morality during an interview on March 11, 2007.<sup>153</sup> A wave of name calling and demands for an apology ensued, but Gen. Pace had no reason to apologize for a law duly enacted by Congress. The statute reflects the views of people who see the issue in moral terms, but it uses secular language emphasizing military discipline. Duly enacted laws—including prohibitions against lying, stealing, and murder—should not be repealed just because they coincide with religious principles and moral codes such as the Ten Commandments.

### IV. CONCLUSION

#### f. *Enforce the 1993 Homosexual Conduct Law*

Activists who want to repeal the law banning homosexuals from the military are determined to impose their agenda on the military. This would include the full range of benefits and “sensitivity training” programs designed to promote acceptance of the homosexual lifestyle and conduct.<sup>154</sup> For the sake of civilian institutions as well as the military, they should not be allowed to succeed.<sup>155</sup>

President George W. Bush is obligated by the U.S. Constitution to enforce all laws, but he is not required to retain administrative regulations written by his predecessor,

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151. Joseph A. Craft, Letter to the Editor, *Legitimate Debate or Gay Propaganda?*, *PARAMETERS* (U.S. Army War Coll. Q.), June 22, 2004, at 132.

152. *Id.*

153. See, e.g., Aamer Madhani, *Top General Calls Homosexuality “Immoral,”* CHI. TRIB., Mar. 12, 2007, at 1; *Group Wants Gen. Pace Apology for Calling Gays “Immoral,”* ASSOCIATED PRESS, Mar. 13, 2007; Editorial, *Old Prejudice Dishonors New Military Generation*, USA TODAY, Mar. 14, 2007, at 10A; Elaine Donnelly, *Gen. Pace vs. PC Police*, WASH. TIMES, Mar. 18, 2007, at B3.

154. See *supra* note 13.

155. Closing scenes in the 1947 film *Miracle on 34th Street* suggest a strategy for the movement to gain legitimacy. The classic Christmas film ends happily when a kindly gentleman named Kris Kringle is recognized as Santa Claus by the U.S. Postal Service, which forwards thousands of children’s letters to him. If another respected government agency, the U.S. military, bestows legitimacy on the campaign for homosexual rights, recognition would soon be extended to other federal, state, and local agencies, and even private institutions that receive public support.

including the policy known by the catch phrase “Don’t Ask, Don’t Tell.” Whether intended or not, inconsistencies between Clinton’s policy and the 1993 homosexual conduct law create an advantage for activists who want to repeal both.

In doing this, the Department of Defense should not apologize or be intimidated by civil rights analogies and pejorative accusations. Gen. Colin Powell, who was Chairman of the Joint Chief of Staff early in the Clinton Administration, wrote a classic letter addressing the subject to then-Rep. Patricia Schroeder (D-Colo.) in 1993. Dismissing Schroeder’s argument that his position reminded her of arguments used in the 1950s against desegregating the military, Gen. Powell replied:

I know you are a history major but I can assure you I need no reminders concerning the history of African-Americans in the defense of their nation and the tribulations they faced. I am part of that history. . . . 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.<sup>156</sup>

Columnist Charles Krauthammer agreed:

Powell’s case does not just rest on tradition or fear. It rests on the distinction between behavioral and non-behavioral characteristics. Skin color is a non-behavioral trait. Homosexuality, like gender, is not. Consider the behavioral implications of gender differences: Men and women are sexually attracted to each other and sexual attraction engenders feelings not just of desire but shame and a wish for privacy. . . .

That is why if a white person refuses association with blacks, the military tells him that the refusal is irrational and will not be respected. But the military does respect the difference between men and women. Because the cramped and intimate quarters of the military afford no privacy, the military sensibly and non-controversially does not force man and women to share barracks.<sup>157</sup>

In recent years, advocates of gays in the military have been promoting the idea that sexual modesty does not matter, since modern military facilities provide more privacy than older ones. Even if people are exposed to others in the field, they say, younger people are used to it, and this is not a big deal.<sup>158</sup> This is an elitist argument, which is contradicted in numerous ways that usually escape notice.

A midwestern family-oriented recreation center, for example, has separate locker rooms for men and women, next to the community pool. Inside the entrance of the women’s locker room is a sign clearly stating that boys of any age are not permitted. A similar sign, regarding girls, is posted in the men’s locker room. The signs are there not as an affront to young boys (or girls). They are there because the community respects the desire for sexual modesty in conditions of forced intimacy. This is the case even though people who use the recreation center do not live and sleep there for months at a time.

Servicemen and women in the military deserve the same consideration, and much more. As columnist Thomas Sowell wrote, “Military morale is an intangible, but it is one of those intangibles without which the tangibles do not work.”<sup>159</sup> Military people depend on policymakers to remember basic realities and to guard their best interests. Considerations such as this strengthen vertical cohesion—the indispensable bond of trust between military leaders and the troops they lead.

To ensure that the intent of Congress is carried out with regard to homosexuals in the military, the Secretary of Defense should:

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156. Elmo R. Zumwalt & J.G. Zumwalt, *Schroeder Ignores Wise Advice from Powell*, HUM. EVENTS, June 1, 1992.

157. Charles Krauthammer, Op-Ed, *Powell Needs No Lectures*, WASH. POST, Jan. 29, 1993, at A23.

158. Aaron Belkin & Melissa Sheridan Embser-Herbert, *A Modest Proposal*, 27 INT’L SEC. 178 (Fall 2002).

159. Thomas Sowell, *The Anointed and Those Who Aren’t*, WASH. TIMES, Feb. 8, 1993, at E3.

- Improve understanding and enforcement of the law by eliminating the Clinton Administration's enforcement regulations, known as "Don't Ask, Don't Tell," which are inconsistent with the 1993 law that Congress actually passed, and (better yet) restore "the question" about homosexuality that used to be on induction forms prior to January 1993.
- Oppose any legislative attempt to repeal the 1993 homosexual conduct law in Congress.
- Ensure that the 1993 statute is vigorously defended every time it is challenged in the federal courts.
- Prepare and distribute accurate instructional materials for potential recruits, recruiters, and all military personnel that include the text and legislative history of the 1993 law.
- Remind the media that everyone can serve their country in some way, but not everyone is eligible to be in the military.

## 2. *The Only Military We Have*

Many institutions in civilian life have been affected negatively by unsuccessful social experimentation. The baby boomer and "Gen-X" generations, for example, have been subjected to "look-say" reading, "new math," and "civics" courses that fail to teach students fundamentals about history and the U.S. Constitution. In matters of urban policy, whole cities have been threatened by unrestrained crime, ruinous taxes, and crumbling neighborhoods.

Parents who are dissatisfied with the public schools can choose private ones or teach their children at home. If residents do not like the way their city is being managed, they can run for local office or move to another city. Some states gain population while others lose. Consumers constantly choose favored products over less desirable ones. This is a free country, and limitless choices are always available.

When it comes to national defense, however, there are no options from which to choose. Today's volunteer force is the only military we have. All of our freedoms are guaranteed by a strong national defense, which cannot be taken for granted in a dangerous world.

Our national security depends on the men and women of the military. For our own sake as well as theirs, the co-ed military must be constructed on foundations that are sound. We have to get this right; it is the only military we have. Ours is the strongest military in the world, and we have an obligation to keep it that way.

## APPENDIX A

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 1994, PUB. L. NO. 103-160, § 571, 107 STAT. 1547, 1670 (1993) (CODIFIED AT 10 U.S.C. § 654 (2000))

(a) Codification.—(1) Chapter 37 of title 10, United States Code, is amended by adding at the end the following new section:

§ 654. Policy concerning homosexuality in the armed forces

(a) Findings.—Congress makes the following findings:

(1) Section 8 of article I of the Constitution of the United States commits exclusively to the Congress the powers to raise and support armies, provide and maintain a Navy, and make rules for the government and regulation of the land and naval forces.

(2) There is no constitutional right to serve in the armed forces.

(3) Pursuant to the powers conferred by section 8 of article I of the Constitution of the United States, it lies within the discretion of the Congress to establish qualifications for and conditions of service in the armed forces.

(4) The primary purpose of the armed forces is to prepare for and to prevail in combat should the need arise.

(5) The conduct of military operations requires members of the armed forces to make extraordinary sacrifices, including the ultimate sacrifice, in order to provide for the common defense.

(6) Success in combat requires military units that are characterized by high morale, good order and discipline, and unit cohesion.

(7) 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.

(8) Military life is fundamentally different from civilian life in that—

(A) the extraordinary responsibilities of the armed forces, the unique conditions of military service, and the critical role of unit cohesion, require that the military community, while subject to civilian control, exist as a specialized society; and

(B) the military society is characterized by its own laws, rules, customs, and traditions, including numerous restrictions on personal behavior, that would not be acceptable in civilian society.

(9) The standards of conduct for members of the armed forces regulate a member's life for 24 hours each day beginning at the moment the member enters military status and not ending until that person is discharged or otherwise separated from the armed forces.

(10) Those 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.

(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.

- (12) The worldwide deployment of United States military forces, the international responsibilities of the United States, and the potential for involvement of the armed forces in actual combat routinely make it necessary for members of the armed forces involuntarily to accept living conditions and working conditions that are often spartan, primitive, and characterized by forced intimacy with little or no privacy.
- (13) The prohibition against homosexual conduct is a longstanding element of military law that continues to be necessary in the unique circumstances of military service.
- (14) 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.
- (15) The presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.
- (b) Policy.—A member of the armed forces shall be separated from the armed forces under regulations prescribed by the Secretary of Defense if one or more of the following findings is made and approved in accordance with procedures set forth in such regulations:
- (1) That the member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts unless there are further findings, made and approved in accordance with procedures set forth in such regulations, that the member has demonstrated that—
- (A) such conduct is a departure from the member's usual and customary behavior;
  - (B) such conduct, under all the circumstances, is unlikely to recur;
  - (C) such conduct was not accomplished by use of force, coercion, or intimidation;
  - (D) under the particular circumstances of the case, the member's continued presence in the armed forces is consistent with the interests of the armed forces in proper discipline, good order, and morale; and
  - (E) the member does not have a propensity or intent to engage in homosexual acts.
- (2) That the member has stated that he or she is a homosexual or bisexual, or words to that effect, unless there is a further finding, made and approved in accordance with procedures set forth in the regulations, that the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.
- (3) That the member has married or attempted to marry a person known to be of the same biological sex.
- (c) Entry standards and documents.—
- (1) The Secretary of Defense shall ensure that the standards for enlistment and appointment of members of the armed forces reflect the policies set forth in subsection (b).

- (2) The documents used to effectuate the enlistment or appointment of a person as a member of the armed forces shall set forth the provisions of subsection (b).
- (d) Required briefings.—The briefings that members of the armed forces receive upon entry into the armed forces and periodically thereafter under section 937 of this title [10 U.S.C. § 937] (article 137 of the Uniform Code of Military Justice) shall include a detailed explanation of the applicable laws and regulations governing sexual conduct by members of the armed forces, including the policies prescribed under subsection (b).
- (e) Rule of construction.—Nothing in subsection (b) shall be construed to require that a member of the armed forces be processed for separation from the armed forces when a determination is made in accordance with regulations prescribed by the Secretary of Defense that—
- (1) the member engaged in conduct or made statements for the purpose of avoiding or terminating military service; and
  - (2) separation of the member would not be in the best interest of the armed forces.
- (f) Definitions.—In this section:
- (1) The term “homosexual” means a person, regardless of sex, who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts, and includes the terms “gay” and “lesbian”.
  - (2) The term “bisexual” means a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual and heterosexual acts.
  - (3) The term “homosexual act” means—
    - (A) any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires; and
    - (B) any bodily contact which a reasonable person would understand to demonstrate a propensity or intent to engage in an act described in subparagraph (A).
- (b) Regulations.—Not later than 90 days after the date of enactment of this Act [Nov. 30, 1993], the Secretary of Defense shall revise Department of Defense regulations, and issue such new regulations as may be necessary, to implement section 654 of title 10, United States Code, as added by subsection (a).
- (c) Savings Provision.—Nothing in this section or section 654 of title 10, United States Code, as added by subsection (a), may be construed to invalidate any inquiry, investigation, administrative action or proceeding, court-martial, or judicial proceeding conducted before the effective date of regulations issued by the Secretary of Defense to implement such section 654.
- (d) Sense of Congress.—It is the sense of Congress that—
- (1) the suspension of questioning concerning homosexuality as part of the processing of individuals for accession into the Armed Forces under the interim policy of January 29, 1993, should be continued, but the Secretary of Defense may reinstate that questioning with such questions or such revised questions as he considers appropriate if the Secretary determines that it is necessary to do so in order to effectuate the policy set forth in section 654 of title 10, United States Code, as added by subsection (a); and

(2) the Secretary of Defense should consider issuing guidance governing the circumstances under which members of the Armed Forces questioned about homosexuality for administrative purposes should be afforded warnings similar to the warnings under section 831(b) of title 10, United States Code (article 31(b) of the Uniform Code of Military Justice).