



29 September 2010

General Carter F. Ham, USA, CRWG Co-Chair  
Major General Greg Biscone, USAF, CRWG Chief of Staff  
Jeh Johnson, General Counsel, Department of Defense, CRWG Co-Chair  
Pentagon, Room 2B546A  
Washington, DC 20330-1670

Dear General Ham, General Biscone, and Mr. Johnson:

Thank you for your service on the Consolidated Review Working Group. We deeply appreciate the time that the CRWG committed to meeting with the Alliance Defense Fund, the Center for Military Readiness, and several of our colleagues on 16 September 2010.

ADF is a national legal alliance that defends religious freedom, the natural family, and the right to life through both litigation and training legal professionals in a proper understanding of constitutional rights.

We are well-qualified to evaluate the impact on religious freedom if the military officially normalizes homosexual and bisexual behavior. Our 26 in-house litigators and almost 1900 volunteer attorneys have long defended the natural family and marriage between one man and one woman against legal attacks by homosexual advocacy groups such as the ACLU, Lambda Legal, and the National Center for Lesbian Rights. The number of our legal matters in this area is well into the hundreds.

Accordingly, at our meeting I identified three problems posed by the proposed repeal of 10 U.S.C. § 654—commonly known as the Don't Ask, Don't Tell ("DADT") policy: (1) unavoidable conflict with the military chaplaincy; (2) inevitable conflict with the religious freedom of service members, and (3) an onslaught of demands for protecting "transgendered" persons and "gender identity" rights that will follow the normalization of homosexual behavior.

Today I supply the CRWG with documentation of those concerns and expand on my prior remarks.

**1. Conflict between the Chaplaincy and novel military sexual conduct policy.**

The United States' military chaplaincy was founded on 29 July 1775. Then, as now, it was charged with a critical mission. The U.S. Army Chaplain Corps puts it this way: Chaplains "[p]rovide religious support to America's Army across the full spectrum of operations[, a]ssist the Commander in ensuring the right of free exercise of religion[, and p]rovide spiritual, moral, and ethical leadership to The Army."<sup>1</sup> In the Army alone, that mission has been carried out by some 25,000 chaplains serving about 25 million Soldiers and dependents.<sup>2</sup> The chaplaincy of each of the armed services has a similar duty and may lay claim to similar performance.

Broadly, chaplains serve two roles: a pastoral role where the chaplain serves members of his own faith as a spiritual leader (such as a priest, pastor, imam, or rabbi), and a support role where the chaplain's expertise in comforting, counseling, and teaching bolsters the emotional and spiritual reserves of all service members, regardless of their faith. Thus, chaplains must teach moral and ethical values as well as care for spiritual needs.

Historically, the values taught by chaplains—like honor, duty, self-sacrifice, courage, sexual fidelity, and complete commitment to goals and truths that are bigger than any one person—directly supported those of the military. Perhaps the only recent example of tension between the combat arms and the chaplaincy was during the later phases of the Vietnam War, when a few chaplains aligned with pacifistic teachings were perhaps overly enthusiastic in facilitating the discharge of conscientious objectors.

But a far more serious conflict will arise if homosexual behavior is officially normalized by the military: *For the first time in American history, the military's moral policies on sexual conduct would directly conflict with the official doctrines, moral teaching, and ethical standards of every major faith group in the chaplaincy—Christian, Jewish, and Islamic.*

That statement is grounded in the assessment of 66 experienced military chaplains who collectively served our country for almost 1,700 years. Their brief biographies are a terse litany of service, sacrifice, honor, and integrity that commands respect for their views. What they have to say must be heard by the CRWG, and their letter (Exhibit A, attached) plainly lays out the looming conflict.

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<sup>1</sup> The Army Chaplaincy Strategic Plan, 2009-2014, p.1

<sup>2</sup> *Id.*, inside cover.

The alarm sounded by these retired chaplains is urgent and immediate. Several of the signatories are very recently retired, some after completing tours in Afghanistan or Iraq, and were pleased that they were free to speak on behalf of those who are now on active duty. Moreover, their concerns are strongly reinforced by statements ADF has obtained from active duty personnel, who must remain anonymous for fear of retaliation.<sup>3</sup>

Bluntly, the potential conflict with the religious liberty of chaplains has a very high potential to seriously undercut the ability of chaplains to preserve and protect the morale and spiritual welfare of all service members.

## **2. Conflict between individual service members' religious freedom and novel military sexual conduct policy.**

Just as a military commander accepts the duties of command, so a Christian accepts the duties of faith. Speaking briefly and broadly, Christian duties include the obligation to seek objective truth; an obligation to share that truth; and an obligation to defend the truth. While the Christian knows that these duties should be discharged as inoffensively as possible, he also knows that at bottom, the transcendent truths of the Gospel will offend some others. Importantly, the Christian can no more deny his Godly duties than can a commander deny his military duties, for the consequence in both cases is that one ceases to be who he or she is.

Obviously, Christian chaplains must go in harm's way due to their combined military and religious duties, as we were again reminded of by the loss of U. S. Army Chaplain Captain Dale Goetz in Afghanistan on 30 August 2010. But a Christian's duty *as a Christian* is so strong that he may willingly choose death rather than support policies that violate his conscientious obligations of faith. As Dutch priest Titus Brandsma aptly said before he was executed for opposing Nazi social policies, "[t]hose who want to win the world for Christ must have the courage to come into conflict with it."<sup>4</sup>

While Christians may be relied upon to be circumspect and reasoned, they may also be relied upon to express truth. However much the military insists its members must accommodate and affirm homosexual and bisexual behavior, Christian service members will respectfully but steadfastly point out that such is sin,<sup>5</sup> policy or not.

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<sup>3</sup> See "A Senior Chaplain Weighs In," attached as Exhibit B, and footnote 10, below.

<sup>4</sup> Matthew Bunson, Margaret Bunson, Stephen Bunson, *John Paul II's Book of Saints*, (Huntington, IN: Our Sunday Visitor Publishing, 1999), p. 353.

<sup>5</sup> See, e.g., Genesis 19, Leviticus 20:13, Romans 1:24-27, 1 Corinthians 6:9; see also The Southern Baptist Convention: "Homosexuality is not a valid alternative lifestyle. The Bible condemns it as sin." SBC.net, Position Statement on Sexuality, available at <http://www.sbc.net/aboutus/pssexuality.asp>; see also *Catechism of the Catholic Church* § 2357:

Herein is the root of conflict. In civilian life, the exercise of Christian faith is profoundly protected by the religion clauses of the federal First Amendment, and it is fairly rare for the practicing Christian to have his faith directly compromised by government regulation. But in military life, those rights are necessarily less broad, and balanced against the demands of military discipline.<sup>6</sup>

If homosexual behavior is officially protected by the military, the military will be torn between simultaneously endorsing sexual behavior that the Bible condemns and trying to protect the right of Christians to express what their faith teaches.

Often, large organizations can avoid a problem by tactfully overlooking most minor conflicts. But recall that the phrase “zero tolerance” was repeatedly voiced at the 16 September meeting: advocates of homosexual behavior will brook no opposition to their behavior or their views. However much some commanders may want to avoid the issue, the homosexual activists will be in court forcing the point. *The likely impact of “zero tolerance” will be a powerful constraint on the ability of military commanders to govern their troops.*

There is sound evidence that “zero tolerance” rides hard on the heels of normalizing homosexual behavior. Consider this statement from Equal Employment Opportunity Commission Commissioner Chai Feldblum<sup>7</sup>—one of the highest federal officials enforcing nondiscrimination laws—about subordinating religious beliefs to the demands of homosexual advocates:

I find it difficult to envision any circumstance in which a court could legitimately conclude that a legislature that has passed a LGBT equality law, with no exceptions for individual religious people based on belief liberty, has acted arbitrarily or pointlessly. If the “justifying principle” of the legislation is to protect the liberty of LGBT people to live freely and safely in all parts of society, it is perfectly reasonable for a legislature not to

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“Basing itself on Sacred Scripture, which presents homosexual acts as acts of grave depravity, tradition has always declared that ‘homosexual acts are intrinsically disordered.’” Whatever view one takes of religious doctrine, it is evident that there is little room for an orthodox Christian to affirm homosexual behavior. Indeed, the author resigned his position with the U.S. Forest Service rather than comply with a directive instructing fire crew bosses to “value the sexual orientation of their firefighters.”

<sup>6</sup> *Parker v. Levy*, 417 U.S. 733, 759 (1974) (“Speech that is protected in the civil population may nonetheless undermine the effectiveness of response to [military] command. If it does, it is constitutionally unprotected.”)

<sup>7</sup> See <http://www.eeoc.gov/eeoc/feldblum.cfm> (brief biography).



provide any exemption that will cordon off a significant segment of society from the anti-discrimination prohibition.<sup>[8]</sup>

Simply put, if Congress imposes a sexual orientation “equality” law upon the military, then the leading advocates of homosexual behavior will insist that it is unreasonable for the military to “cordon off” religious service members in any way that inhibits full support for the new official policies.

That is scarcely a new point of view among the advocates of homosexual behavior. Some twenty years before Ms. Feldblum was appointed to the EEOC, activists Marshall Kirk and Hunter Madsen spoke about those who believed in “orthodox religion” and bluntly proclaimed: “Our primary objective regarding diehard homohaters of this sort is to cow and *silence* them.”<sup>9</sup>

The threat is clearly understood by the rank-and-file military. As one active duty USAF Captain recently said, “if the ban on homosexual conduct is dropped, there will inevitably be a push to give homosexuals special protected treatment through military-wide ‘diversity’ and ‘sensitivity’ training that promotes acceptance of homosexual behavior, and to punish chaplains, counselors, and others who state what their religion teaches about homosexuality.”<sup>10</sup>

The Captain’s fear is legitimate, given that one of the largest homosexual advocacy groups demanded that “Congress should treat religiously held beliefs that being gay is sinful just as it treated religiously held beliefs that women are unequal and that segregation was God’s law. It should uphold a person’s right to believe it, but keep it out of the workplace.”<sup>11</sup> This is the standard that you should anticipate the activists will demand of the military.

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<sup>8</sup> Chai Feldblum, *Moral Conflict and Liberty: Gay Rights and Religion*, 72 Brook. L. Rev. 61, 115 (2006).

<sup>9</sup> Marshal Kirk and Hunter Madsen, *After the Ball: How America will conquer its fear & hatred of gays in the 90s* (New York, NY: Plume/Doubleday 1990) (emphasis in original), p. 176.

<sup>10</sup> Letter, USAF Captain at pp. 4-5 (attached as Exhibit C). Note also that the Captain’s letter confirms the concerns voiced in the 16 September meeting as to the inherent flaws in the CRWG survey methodology.

<sup>11</sup> *Lambda Legal: Weakened ENDA Means Less Protection for Everyone* (available at <http://www.lambdalegal.org/news/pr/weakened-enda-means-less-protections.html>). Of course, Lambda’s attempt to tar Christians with the broad brush of bigotry arrogantly dishonors the generations of Christians who *led* the efforts to abolish slavery worldwide; dishonors other Christians who marched with the Reverend Martin Luther King to silence the evil echoes of slavery, and dishonors still more Christians who saw women’s suffrage as grounded in Scriptural mandates.

Courts have proven all-too-willing a forum for activists to disregard First Amendment rights in favor of judge-made “privacy rights.” And even a strong statutory religious liberty exemption<sup>12</sup> could be undermined by principles embedded in two recent (albeit wayward) lower federal court decisions.

First, a court could make a “factual” finding that “[r]eligious beliefs that gay and lesbian relationships are sinful or inferior to heterosexual relationships harm gays and lesbians.”<sup>13</sup> Second, the court could say that the right asserted by homosexual activists to “certain intimate conduct” merits a heightened degree of scrutiny from the courts—thus shifting the burden of proof from the plaintiffs to the government, and disregarding the deference normally given to the military for personnel management.<sup>14</sup> If a court then joins these two principles while considering an exemption for religious beliefs that disapprove of homosexual behavior, there is little hope that the exemption would survive. For the service member who simply asks for his religious freedom to be protected, the military’s answer would have to be, “Sorry, you have no rights.”

If these lower court decisions stand (both are still subject to appeal) and DADT is repealed, then the military will have to enforce the first federal law imposing such broad affirmation of homosexual behavior, even as the issue remains in fierce turmoil in the rest of American society. The military should be the last place—not the first—that Congress engages in radical social engineering.<sup>15</sup>

Most importantly, statements like Commissioner Feldblum’s and Lambda Legal’s highlight one fact: the homosexual agenda will have zero tolerance for orthodox Christianity. Advocates of homosexual behavior will demand that Christianity be suppressed, and commanders will be constrained by policy to comply.

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<sup>12</sup> See, e.g., letter of 14 May 2010 from ADF to Thomas D. Miller, transmitting proposed text for a Religious Liberty Exemption, attached as Exhibit D.

<sup>13</sup> Such a factual finding was made in *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 985 (N.D. Cal. 2010).

<sup>14</sup> Such a legal principle was applied in *Log Cabin Republicans v. U.S.*, 2010 WL 3526272 at \*22 (C.D. Cal. Sept. 9, 2010).

<sup>15</sup> Someone will no doubt analogize endorsing homosexual acts to integrating the races. But skin color is value-neutral, while sexual conduct is value-laden. Pragmatically, military integration came only after there was strong national unity about integration, which developed over a century that encompassed the abolition movement, the Civil War, the Thirteenth and Fourteenth Amendments to the U.S. Constitution, and World Wars I and II. Even then, stresses persisted for many years, as evidenced by racial violence aboard the aircraft carriers U.S.S. Kittyhawk and U.S.S. Constellation off of Vietnam in 1972. In contrast, America is certainly *not* unified in support of normalizing homosexual behavior with 45 of 50 states enacting laws that prohibit same-sex “marriage.” See DOMA Watch <http://www.domawatch.org/stateissues/index.html>.

### **3. Follow on demands—transgender and gender identity “rights.”**

The CRWG cannot safely assume that the military may normalize homosexual/bisexual behavior, proclaim “mission accomplished” in the culture wars, and proceed unmolested by further demands from the radical advocates of novel sexual liberties.

First, normalizing homosexual behavior will bring with it the battle over “transgender rights” because (per the legal director for the National Center for Lesbian Rights) “a sizable percentage of transgender people also identify as lesbian, gay, or bisexual.”<sup>16</sup> “Transgender,” in turn, covers a vast array of behaviors, including “transsexuals, transvestites, cross-dressers, drag queens and drag kings, butch and femme lesbians, feminine gay men, intersexed people, bigendered people, and others who . . . ‘challenge the boundaries of sex and gender.’”<sup>17</sup> In short, once the military disconnects sex from the historic moral bounds of Western civilization, there is no principled basis to say “homosexual behavior is officially endorsed but transsexual behaviors are not.”

This linkage was evident when activist groups raked Congress over the coals after it deleted protection for transgendered persons from the proposed Employment Nondiscrimination Act (ENDA).<sup>18</sup> Even more recently, activists are arguing that the state must accommodate “transgendered persons” in “gender-free” university housing—housing that is similar in many ways to the military’s barracks and berthing spaces.<sup>19</sup>

Nor should the military assume that clearly defining which homosexual/bisexual behaviors are endorsed<sup>20</sup> will forestall demands for “transgender rights.” Consider Title

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<sup>16</sup> Shannon Minter, *Do Transsexuals Dream of Gay Rights? Getting Real About Transgender Inclusion in the Gay Rights Movement*, 17 N.Y.L. Sch. J. Hum. Rts. 589, 591 (2000).

<sup>17</sup> *Id.* at 621 n.4 (quoting Leslie Feinberg, *Transgender Warriors: Making History from Joan of Arc to RuPaul*, at x (1996)).

<sup>18</sup> *Lambda Legal: Weakened ENDA Means Less Protection for Everyone* (available at <http://www.lambdalegal.org/news/pr/weakened-enda-means-less-protections.html>).

<sup>19</sup> One recent example was at a public university, where a female student who identified as a male applied to live in the male dorms and claimed gender identity discrimination when she was refused. Lara E. Pomerantz, *Winning the Housing Lottery: Changing University Housing Policies for Transgender Students*, 12 U. Pa. J. Const. L. 1215, 1215 (2010) (internal footnotes omitted).

<sup>20</sup> The current proposal restricts official affirmation of sexual behavior to homosexual and bisexual acts. But even if the military can so limit “sexual orientation,” there will be thorny issues, such as whether the Manual for Court Martial Paragraph 62 (explaining the adultery prohibition under UCMJ Article 134) will need to be amended to protect a bisexual’s desired sexual relationships with both a man and a woman from a third sexual interloper, in the same way that a husband and wife are now protected from an adulterer.

VII of the 1964 Civil Rights Act, the preeminent federal employment nondiscrimination law. One thing Title VII forbade was sex discrimination, in terms so clear that a host of federal appellate courts rejected claims for discrimination based upon being “transgendered.” But despite numerous losses, those who demanded “transgender rights” kept suing until they found a court willing to buy their theory.<sup>21</sup>

And the theory is endlessly malleable. This is how one “transgender” plaintiff described his sexual identity: “Morales is a male-to-female transgender woman. Although Morales is biologically male, she identifies and presents herself as a heterosexual female who dates heterosexual men. She does not self-identify as a homosexual and does not see herself as a man.”<sup>22</sup>

Injecting such legal battles into the military would put commanders in an intractable position. For instance, the male NCO who fondly touches his female peers may be edging toward a classic male-on-female sex harassment charge—a situation which a commander currently ignores at his peril. But in the new gender-neutral military, the commander may become a defendant if he intercedes and the aggressor male claims “gender identity discrimination,” saying he believes himself to be female and is acting consistently with that gender. Yet the aggressive male is not quite home free, as the commander will be bound to further investigate to discern whether the offender’s gender identity is really a pretext for sexual aggression—perhaps because he is a male harassing a female, but also perhaps because the male believes himself to be a lesbian female.

In sum, if the evidence of hundreds of lawsuits and legislative efforts in the civilian realm are any predictor of what will happen in the military, then normalization of homosexual and bisexual behavior will swiftly lead to demands for normalizing transgendered roles and banning “gender identity” discrimination. To invite such conflict into the military would severely impact the military’s ability to function in its role of fighting the nation’s wars.

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<sup>21</sup> For example, see *Schwenk v. Hartford*, 204 F.3d 1187, 1201-1202 (9<sup>th</sup> Circuit 2000), reviewing a series of cases that moved Title VII from the classic sex discrimination statute Congress enacted to a judicially modified statute that conflates biological sex with perceived “gender” and insinuates “transgender” as a protected class under the law.

<sup>22</sup> *Morales v. ATP Health & Beauty Care, Inc.*, 2008 WL 3845294 at \*1 (D. Conn. Aug. 18, 2008).



## CONCLUSION

DOD General Counsel Jeh Johnson made one point at the 16 September 2010 meeting that could not be disputed by any attendee: the CRWG will be castigated for its survey results, no matter what it reports.

ADF believes that if the CRWG is to be scorned, let it be scorned for choosing hard truth over political convenience.

The truth is that what the advocates of homosexual behavior demand is not equality before the law, but a malleable legal regimen that gives them two special rights: the right to associate in the most intimate circumstances of military life with those to whom they are sexually attracted—a right *not* extended to heterosexual relationships; and a regulatory right to trump any moral dissent, however soundly grounded it may be in religious doctrine, philosophy, or constitutional law.

To reject this demand for special rights would no doubt provoke a firestorm from the left. But it is the right thing to do for the troops and for our nation. That is the course we urge.

Please let me know if I may be of further service to the CRWG.

With kind regards,



Gary S. McCaleb  
Senior Counsel