

**“DON’T ASK, DON’T TELL:” LAW OR DOD POLICY?
DECIPHERING THE DIFFERENCES**

A thesis presented to the Faculty of the U.S. Army
Command and General Staff College in partial
fulfillment of the requirements for the
degree

**MASTER OF MILITARY ART AND SCIENCE
General Studies**

by

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Fort Leavenworth, Kansas
2009-02

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REPORT DOCUMENTATION PAGE			<i>Form Approved</i> <i>OMB No. 0704-0188</i>		
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1. REPORT DATE (DD-MM-YYYY) 11-12-2009		2. REPORT TYPE Master's Thesis		3. DATES COVERED (From - To) FEB 2009 – DEC 2009	
4. TITLE AND SUBTITLE “Don’t Ask, Don’t Tell:” Law or DoD Policy? Deciphering the Differences			5a. CONTRACT NUMBER		
			5b. GRANT NUMBER		
			5c. PROGRAM ELEMENT NUMBER		
6. AUTHOR(S) Luiken, Trisha A.D., Major, U.S. Air Force			5d. PROJECT NUMBER		
			5e. TASK NUMBER		
			5f. WORK UNIT NUMBER		
7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES) U.S. Army Command and General Staff College ATTN: ATZL-SWD-GD Fort Leavenworth, KS 66027-2301			8. PERFORMING ORG REPORT NUMBER		
9. SPONSORING / MONITORING AGENCY NAME(S) AND ADDRESS(ES)			10. SPONSOR/MONITOR'S ACRONYM(S)		
			11. SPONSOR/MONITOR'S REPORT NUMBER(S)		
12. DISTRIBUTION / AVAILABILITY STATEMENT Approved for Public Release; Distribution is Unlimited					
13. SUPPLEMENTARY NOTES					
14. ABSTRACT Congress governs the United States Armed Forces by writing laws for the Department of Defense (DoD) to implement. In 1993, Congress passed a federal law banning homosexuality in the armed forces. The DoD created a policy to implement the law, but the language of this policy allows homosexuality in the armed forces provided it be kept silent and a person does not act out on his/her homosexual preferences. For the past sixteen years, some aspects of the law and the DoD policy have been in conflict; yet many persons inside and outside the military do not realize this. The term “Don’t ask, don’t tell” emerged during the development of the DoD policy designed to implement the federal statute. Many persons mistakenly combine both the law and DoD policy under this header. The two documents are similar in some respects, but quite different in others. The law does not restrict a person from being questioned about his/her homosexuality; therefore, it does not actually have a “don’t ask” portion. The law, like the DoD policy, does have a “don’t tell” portion; but only the DoD policy contains a “don’t ask” portion. Since it appears likely that the Obama Administration will face the contentious issue of homosexuality and the military, it behooves all who have an interest in the debate to realize the differences in the language and the policies in order to speak intelligently about the issues and propose solutions that are logical and in consonance with their true beliefs and opinions on this very contentious issue.					
15. SUBJECT TERMS DADT, “Don’t ask, don’t tell,” homosexuality and the armed forces, homosexuals in the military, federal law banning homosexuality in the military					
16. SECURITY CLASSIFICATION OF:			17. LIMITATION OF ABSTRACT	18. NUMBER OF PAGES	19a. NAME OF RESPONSIBLE PERSON
a. REPORT	b. ABSTRACT	c. THIS PAGE			19b. PHONE NUMBER (include area code)
(U)	(U)	(U)	(U)	87	

Standard Form 298 (Rev. 8-98)
Prescribed by ANSI Std. Z39.18

MASTER OF MILITARY ART AND SCIENCE

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The opinions and conclusions expressed herein are those of the student author and do not necessarily represent the views of the U.S. Army Command and General Staff College or any other governmental agency. (References to this study should include the foregoing statement.)

ABSTRACT

“DON’T ASK, DON’T TELL:” LAW OR DOD POLICY, DECIPHERING THE DIFFERENCES, by Trisha Alisa Dawn Luiken, 87 pages.

Congress governs the United States Armed Forces by writing laws for the Department of Defense (DoD) to implement. In 1993, Congress passed a federal law banning homosexuality in the armed forces. The DoD created a policy to implement the law, but the language of this policy allows homosexuality in the armed forces provided it be kept silent and a person does not act out on his/her homosexual preferences.

For the past sixteen years, some aspects of the law and the DoD policy have been in conflict; yet many persons inside and outside the military do not realize this. The term “Don’t ask, don’t tell” emerged during the development of the DoD policy designed to implement the federal statute. Many persons mistakenly combine both the law and DoD policy under this header. The two documents are similar in some respects, but quite different in others. The law does not restrict a person from being questioned about his/her homosexuality; therefore, it does not actually have a “don’t ask” portion. The law, like the DoD policy, does have a “don’t tell” portion; but only the DoD policy contains a “don’t ask” portion.

Since it appears likely that the Obama Administration will face the contentious issue of homosexuality and the military, it behooves all who have an interest in the debate to realize the differences in the language and the policies in order to speak intelligently about the issues and propose solutions that are logical and in consonance with their true beliefs and opinions on this very contentious issue.

ACKNOWLEDGMENTS

The accomplishment of writing this Master of Military Art and Science (MMAS) thesis was possible only through the support of my family; I could not have succeeded without their belief in my work.

My thesis committee Chairman, Lieutenant Colonel Prisco Hernández, Ph.D. was instrumental in guiding me through this endeavor and I am grateful for his unwavering support and encouragement. I am thankful he agreed to embark on this journey with me. I would also like to thank the other members of my committee, Colonel Gary Bowman and Colonel Cynthia Rapp. The insight they provided regarding the U.S. and Military legal systems helped me to think and look more critically at the information I encountered.

I would also like to express my appreciation to Dr. Robert Baumann and Dr. Constance Lowe of the Army Command and General Staff College Directorate of Graduate Degree Programs for their honesty and initial guidance through the early stages of the course. Dr. Baumann was correct; if you do not “love” your topic, do not pursue it, because it will get difficult to stay focused when everyone else is out enjoying the summer weather.

Colonel William Raymond’s MMAS seminar group was a blessing. His leadership style set the tone for what lay ahead and kept the seminar group focused on achieving our goal.

Finally, I wish to thank Major Andre Matthews, my MMAS seminar group partner, for his encouraging words and enthusiastic support.

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ACRONYMS

CJCS	Chairman of the Joint Chiefs of Staff
DADT	“Don’t Ask, Don’t Tell”
DoD	Department of Defense
DODD	Department of Defense Directive
DODI	Department of Defense Instruction
H.R.	House of Representatives
P. Law	Public Law
SecDef	Secretary of Defense
UCMJ	Uniform Code of Military Justice

CHAPTER 1

INTRODUCTION

When we assumed the Soldier [Airman, Marine, Sailor], we did not lay aside the Citizen.

— General George Washington, FM 6-22, *Army Leadership*

Background

The United States Armed Forces are the best in the world. Countries around the globe look to the United States for support, guidance, and assistance in every aspect of government, to include military standards and policies. It takes a special type of person to serve one's country and be willing to make the ultimate sacrifice for its citizen's values and beliefs. With this in mind it appears logical to ask the questions: Does a person's sexual orientation define whether he or she is fit to serve the nation? Are heterosexuals more patriotic than homosexuals? Are heterosexuals more effective in military service than homosexuals? Upon reflection, it appears that what is recognized and honored by society is Military members' accomplishments and dedication to duty, not their sexual orientation.

The issue of sexual orientation, specifically homosexuality, is again confronting the military, mainly in the discussion on whether or not persons who define themselves openly as homosexuals should be allowed in the armed forces. Under the current Department of Defense (DoD) policy, also known as, "Don't ask, don't tell" (DADT), the assumption is that homosexuals can and are currently serving in the military. However, the federal law, from which the DoD policy is derived, excludes homosexuals from the military. Activist groups for and against the DADT policy are beginning to raise their

voices. On the surface, this controversy appears to be a purely military issue. However, the issue of homosexuality is extremely controversial on various grounds and subject to political polarization. Does either side know what it is really asking for? Many believe that repealing DADT will allow homosexuals to serve openly in the armed forces. Careful analysis shows that this would not be the case. Since DADT is a DoD policy designed to implement a specific congressional law, repealing it would take away the current “silent authorization” homosexuals have to serve in the military. Understanding and addressing the federal law regarding homosexuality in the armed forces should be the first step in any process that intends to allow homosexuals to serve openly in the military.

Both the law and the DoD policy designed to implement it distinguish two issues pertaining to homosexuals and military service: (1) legal homosexual service, and (2) open homosexual service. In order to effectively challenge the status quo, activist groups on both sides must ensure they are addressing the correct issue using the proper terminology. Even a cursory overview of the highly politicized discussion surrounding these topics shows that precision is difficult to find. Nonetheless, words do have meaning; especially the words used in legal documents. Politics and the U.S. legal system are based on phraseology, advocates for various positions fight with words. This thesis seeks to clarify the difference between the 1993 Public Law 103-160, Section 571, codified in Title 10, Section 645 of the United States Code, and DoD regulations and policies created to implement the law. These policies pertain to accessions, separations, and the conduct of military members with regards to sexual orientation--specifically, homosexuality.

The Development of DoD Policy Regarding Service by Homosexuals

Traditionally, a military member who acknowledged him or herself as a homosexual, verbally or by exhibiting a propensity for homosexual tendencies, has constituted grounds for dismissal from the service. The official language from DoD Directive 1332.14 (*Enlisted Administrative Separations*),¹ January 1982 reads:

- a. Homosexuality is incompatible with military service. The presence in the military environment of persons who engage in homosexual conduct or who, by their statements demonstrate a propensity to engage in homosexual conduct seriously impairs the accomplishment of the military mission. The presence of such members adversely affects the ability of the Military Services to maintain discipline, good order, and morale; to foster mutual trust and confidence among service members; to ensure the integrity of the system of rank and command; to facilitate assignment and worldwide deployment of service members who frequently must live and work under close conditions affording minimal privacy; to recruit and retain members of the Military Services; to maintain public acceptability of military service; and to prevent breaches of security.
- b. As used in this directive:
 - (1) Homosexual means a person, regardless of sex, who engages in, desires to engage in, or intends to engage in homosexual acts.
 - (2) Bisexual means a person who engages in, desires to engage in, or intends to engage in homosexual and heterosexual acts; and
 - (3) A homosexual act means bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires.
- c. The basis for separation may include preservice, prior service, or current service conduct or statements. A member shall be separated under this section if one or more of the following approved findings is made:
 - (1) The member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts unless there are approved further findings that:

¹Officer separations were listed under a different DoD Directive, 1332.30, *Separation of Regular Commissioned Officers for Cause* (Washington, DC: Government Printing Office, 1986).

- (a) Such conduct is a departure from the member's usual and customary behavior;
 - (b) Such acts under all circumstances are unlikely to recur;
 - (c) Such conduct was not accomplished by use of force, coercion, or intimidation by the member during a period of military service;
 - (d) Under the particular circumstances of the case, the member's continued presence in the Service is consistent with the interest of the Service in proper discipline, good order, and morale, and
 - (e) The member does not desire to engage in or intends to engage in homosexual acts.
- (2) The member has stated that he or she is a homosexual or bisexual unless there is a further finding that the member is not a homosexual or bisexual.
- (3) The member has married or attempted to marry a person known to be of the same biological sex (as evidenced by the external anatomy of the persons involved) unless there are further findings that the member is not a homosexual or bisexual and that the purpose of the marriage or attempt was the avoidance or termination of military service.²

The DoD directive was not a federal law, but a DoD policy enforced by the military. The accepted paradigm changed when the president wanted to ease discrimination on sexual orientation in the military.

The Compromise

During the 1992 presidential campaign, presidential candidate, then-Governor of Arkansas, Bill Clinton vowed that if elected he would “eliminate discrimination based on sexual orientation in the U.S. military.”³ This constituted a true statement at the time

²U.S. Department of Defense, Office of the Secretary of Defense, Department of Defense (DoD) Directive 1332.14, *Enlisted Administrative Separations, Homosexuality, Part 1, Section H* (Washington, DC: Government Printing Office, 1982).

³Curtis Wilke, “Harvard Tosses Warm-up Questions to Clinton on Eve of N.H.

because existing DoD regulations excluded homosexuals from serving in the military. Therefore, candidate Clinton's promise was to allow homosexuals to serve constituted a desire to effect a significant change to the accepted paradigm. However, he made no mention of open service, although the inference was that homosexuals would be allowed to serve openly in the military. In 1993, within the first few weeks of taking the oath of office, President Clinton proposed issuing an executive order to override DoD regulations that banned the service of homosexuals in the Armed Forces--thereby allowing homosexuals to serve legally and openly.

The Clinton Administration met severe backlash and opposition from constituents in the military, Congress, and the public at large regarding this particular campaign promise. In January 1993, after the initial turmoil caused when the president requested an executive order, the president and Congress reached an interim agreement that would allow a six-month research period. During this interim period, at the request of President Clinton, recruits into the military would not be asked about sexual orientation upon entrance--hence the term "don't ask."

After months of deliberation during the period set for further study which included, congressional hearings, especially commissioned research studies, and public debate in formal and informal forums presidential advisors recommended that the president propose a compromise solution. In reality, the political process itself led to an uneasy solution. When conservatives in Congress turned the then-DoD policy excluding homosexuals in the military into a public law; the executive branch responded by

Debate," *Boston Globe*, 31 October 1991, 22, <http://www.boston.com/tools/archives> (accessed 15 November 2009).

establishing the DoD policy colloquially known as “Don’t ask, don’t tell.” This was touted as a means to implement the law; but it created the possibility for homosexuals to serve--as long as they did not reveal their sexual orientation. Interestingly, the older 1982 DoD policy excluding homosexuals from military service (mentioned in the above discussion) was the basis for the federal law enacted in November 1993. Another by-product of Congress’ adoption of the 1982 DoD policy as federal law made it more permanent because it could no longer be changed solely by the Secretary of Defense.⁴

With the passage of the new law, the interim agreement to cease “asking” upon accession was honored with a caveat; Congress gave the Secretary of Defense (SecDef) the authority to ask questions on sexual orientation if the SecDef deemed it necessary to carry out the policy, albeit affording the member a warning.⁵ Therefore, the law does not have a strictly “don’t ask” clause. The spirit of the DoD policy, is that homosexuals may enter and remain in the military as long as they are silent about their sexual orientation. In addition, military members are not routinely authorized to ask others members about their sexual orientation. This rule also applies to commanders.

⁴DoD Directive 1332.14, 21 December 1993 has been replaced with DoD Instruction 1332.14, 28 August 2008. In addition, a separate DoD Instruction, 1332.30, 11 December 2008, provides guidance for officer separations (see Appendix C and D).

⁵Uniform Code of Military Justice, §831, Article 31 Compulsory self-incrimination prohibited, (b) No person subject to this chapter may interrogate or request any statement from an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.

The Statute

As shown above, the compromise solution arrived at between the Clinton Administration and Congress has two components--a statute which prohibits service by homosexuals and a DoD policy that allows homosexuals to serve as long as they are silent about their sexual orientation. In addition, the provision not to “ask,” although not strictly part of the policy, is generally honored.

The Public Law 103-160, §571, codified by United States Code, Title 10, §654, entitled “Policy Concerning Homosexuality in the Armed Forces” prohibits homosexual conduct by members of the military service. The statute states the grounds on which an individual may be separated from the military services based on homosexual conduct (see Appendix A):

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.⁶

Congress made clear that it intended to prohibit military service by homosexuals. The statute includes findings that lay the foundation for the law. Several of the findings are factual and derive from the Constitution, regarding the establishment, support, and governing of the armed forces by Congress. However, two of the 15 statute findings reference homosexuality directly and are based on traditional values--which are ultimately religious in origin. Kermit Hall, editor-in-chief of *The Oxford Companion to American Law* states: "American law has emerged as a form of civic religion, a set of values, ideals, and processes to which the American people have been as committed as they have been to any spiritual code."⁷ Statute findings 13 and 15 attest to this moral code:

(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. . . .

(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.⁸

Statute findings 13 and 15 are accepted traditional values, they are not factually based. Finding 14 states: "The armed forces must maintain personnel policies that exclude persons whose presence in the armed forces would create an unacceptable risk to

⁶10 U.S.C. §654 (1993).

⁷Kermit L. Hall, ed., *The Oxford Companion to American Law* (New York: Oxford University Press, 2003), vii.

⁸10 U.S.C. §654 (1993).

the armed forces' high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.⁹ In order to maintain readiness, it is accepted that the armed forces is an organization that must discriminate against certain types of personnel. A law exists against homosexual conduct and it directs military policy. By this federal legislation, Congress has determined what appropriate *sexual behavior* in the military is.

The Don't Ask, Don't Tell Policy

Several Department of Defense Directives or Instructions address the subject of homosexuality in military service. For example, the military homosexuality policy is mentioned in directives and instructions pertaining to qualification standards for accessions and officer and enlisted separations. Therefore, although numbered differently, the language in DoD Directives and Instructions is similar. The following is an excerpt from the current DoD Instruction number 1304.26, *Qualification Standards for Enlistment, Appointment, and Induction, Change 1*, 11 July 2007 (see Appendix B).

E2.2.8. Provision Related to Homosexual Conduct.

E2.2.8.1 A person's sexual orientation is considered a personal and private matter, and not a bar to service entry or continued service unless manifested by homosexual conduct in the manner described in §654 of [Title 10, United States Code]. Applicants for enlistment, appointment, or induction *shall not be asked or required to reveal their sexual orientation nor shall they be asked to reveal whether they have engaged in homosexual conduct*, unless independent evidence is received indicating an applicant engaged in such conduct or the applicant volunteers a statement that he or she is a homosexual or bisexual, or words to that effect [emphasis added].¹⁰

⁹10 U.S.C. §654 (1993).

¹⁰U.S. Department of Defense, Office of the Secretary of Defense, DoD Instruction Number 1304.26, *Qualification Standards for Enlistment, Appointment, and Induction, Change 1* (Washington, DC: Government Printing Office, 2007).

The wording of the Instruction explains why the DoD policy is termed “Don’t ask, don’t tell;” unlike the law, which has no such clarity. Another DoD instruction includes language which directs the separation of individuals who engage in homosexual acts, DoD Instruction 1332.14, *Enlisted Administrative Separations*, 28 August 2008, Enclosure 3, paragraph 8 (see Appendix C):

HOMOSEXUAL CONDUCT

a. Basis

(1) Homosexual conduct is grounds for separation from the Military Services under the terms set forth in subparagraph 8.a.(2) of this enclosure. Homosexual conduct includes homosexual acts, a statement by a Service member that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage. A statement by a Service member that demonstrates a propensity or intent to engage in homosexual acts is grounds for separation not because it reflects the Service member’s sexual orientation, but because the statement indicates a likelihood that the Service member engages in or will engage in homosexual acts. A Service member’s sexual orientation is considered a personal and private matter, and is not a bar to continued service under this paragraph unless manifested by homosexual conduct in the manner described in subparagraph 8.a.(2) of this enclosure.

(2) A Service member shall be separated under this paragraph if one or more of the following approved findings is made:

- (a) The Service member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts, unless there are approved further findings that:
1. Such acts are a departure from the Service member’s usual and customary behavior;
 2. Such acts under all the circumstances are unlikely to recur;
 3. Such acts were not accomplished by use of force, coercion, or intimidation;
 4. Under the particular circumstances of the case, the Service member’s continued presence in the Armed Forces is consistent with the interest of the Armed Forces in proper discipline, good order, and moral; and
 5. The Service member does not have a propensity or intent to engage

in homosexual acts.

(b) The Service member has made a statement that he or she is a homosexual or bisexual, or words to that effect, unless there is a further approved finding that the Service member 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. A statement by a Service member that he or she is a homosexual or bisexual, or words to that effect, create a rebuttable presumption that the Service member engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts. The Service member shall be advised of this presumption and given the opportunity to rebut the presumption by presenting evidence demonstrating that he or she does not engage in, attempt to engage in, have a propensity to engage in, or intend to engage in homosexual acts. Propensity to engage in homosexual acts means more than an abstract preference or desire to engage in homosexual acts; it indicates a likelihood that a person engages in or will engage in homosexual acts. In determining whether a Service member has successfully rebutted the presumption that he or she engages in, attempts to engage in, or has a propensity or intent to engage in homosexual acts, some or all of the following may be considered:

1. Whether the Service member has engaged in homosexual acts;
2. The Service member's credibility;
3. Testimony from others about the Service member's past conduct, character, and credibility;
4. The nature and circumstances of the Service member's statement;
5. Any other evidence relevant to whether the Service member is likely to engage in homosexual acts. (This list is not exhaustive; any other relevant evidence may also be considered.)

(c) The Service member has married or attempted to marry a person known to be of the same biological sex (as evidenced by the external anatomy of the persons involved).¹¹

However, the policy prohibits any effort to find facts that could form the basis of such separation proceedings unless the Service member's commander first receives "credible evidence" that a Service member has committed the prohibited homosexual

¹¹U.S. Department of Defense, Office of the Secretary of Defense, DoD Instruction 1332.14, *Enlisted Administrative Separations* (Washington, DC: Government Printing Office, 2008), Encl 3, para 8.

conduct. DoD Instruction 1332.14, *Enlisted Administrative Separations*, 28 August 2008, Enclosure 5, paragraph 1:

GUIDELINES FOR FACT-FINDING INQUIRIES INTO HOMOSEXUAL
CONDUCT

1. RESPONSIBILITY

- a. Only a Service member's commander is authorized to initiate fact-finding inquiries involving homosexual conduct. A commander may initiate a fact-finding inquiry only when he or she has received credible information that there is basis for discharge. Commanders are responsible for ensuring that inquiries are conducted properly and that no abuse of authority occurs.
- b. A fact-finding inquiry may be conducted by the commander personally or by a person he or she appoints. It may consist of an examination of the information reported or a more extensive investigation, as necessary.
- c. The inquiry should gather all credible information that directly relates to the grounds for possible separation. Inquiries shall be limited to the factual circumstances directly relevant to the specific allegations.
- d. If a commander has credible evidence of possible criminal conduct, he or she shall follow the procedures outlined in Reference (o) [Manual for Courts-Martial, United States] and implementing regulations issued by the Secretaries of the Military Departments concerned.
- e. The guidelines in this enclosure do not apply to activities referenced in DoDI 5505.8 (Reference (t)) [Defense Criminal Investigative Organizations and Other DoD Law Enforcement Organizations Investigations of Sexual Misconduct, 24 January 2005].¹²

Thus, even though the policy prohibits homosexual conduct, the policy provides procedural protections that prevent the separation of service members from whom "credible evidence" of their homosexuality cannot be obtained and provided to their commanders.

¹²Ibid., Encl 5, para 1.

Dividing Lines

If the DoD DADT policy is overturned it would not change the law, it would remove the tacit permission homosexuals currently have to serve (provided they do not disclose their homosexuality). Overturning DADT would not affect the law--which does not allow homosexuals to serve in the military. The law is what is preventing homosexuals from serving in the military, not the DADT policy.

Proponents of the ban wanted to prevent homosexuals from serving in the military and the law outlines strict rules; however, the DoD policy allows homosexuals to serve and to remain serving as long as they are silent about their sexual orientation. Although silence allows homosexuals to serve, it does authorize them to serve. In a sense, the DoD policy *does* acknowledge the existence of homosexuals in the military; although it does so tacitly and even this is subject to interpretation.

The United States public law created in 1993 prohibits homosexual act(s), statement(s), and marriage in the armed forces. Per direction of Congress, the Secretary of Defense (SecDef) prescribed that a DoD Directive (policy) be written to implement the law. The DoD policy comprises “four essential elements”¹³ that the Commander-in-Chief

¹³William J. Clinton, “Remarks Announcing the New Policy on Gays and Lesbians in the Military.” National Defense University, Fort McNair, 19 July 1993, 1369. President Bill Clinton outlined four essential elements to be drafted into the new DoD Directive: “One, service men and women will be judged based on their conduct, not their sexual orientation. Two, therefore the practice, now 6 months old, of not asking about sexual orientation in the enlistment procedure will continue. Three, an open statement by a service member that he or she is a homosexual will create a rebuttable presumption that he or she intends to engage in prohibited conduct, but the service member will be given the opportunity to refute that presumption; in other words, to demonstrate that he or she intends to live by the rules of conduct that apply in the military service. And four, all provisions of the Uniform Code of Military Justice will be enforced in an even-handed manner as regards both heterosexuals and homosexuals.”

at the time, President Bill Clinton, wanted to address regarding the issue of homosexuals serving in the military. This is the part of the DoD policy that has become commonly referred to as “Don’t ask, don’t tell.” Again, this language is written in the DoD policy not the law as many seem to believe. It was the intent of then-President Bill Clinton that the DoD policy be written to minimize discrimination against homosexuals in the military. Bear in mind that the law *prohibits* homosexuality in the military. The DoD policy was issued one month after the law was signed; its language effectively interpreted the application of the law created a compromise to the provisions of the law.¹⁴

Contradictions

The contradiction between the statute (law) and the “Don’t ask, don’t tell” policy is clear. The statute requires that a service member be removed from the armed forces for conducting homosexual acts, making homosexual statements, or entering or attempting to enter into a homosexual marriage, while the DoD policy allow homosexuals to serve as long as they do not identify themselves as homosexuals. However, the five exception clauses in the statute create potential exceptions to this apparent contradiction. Even if a service member is accused of being a homosexual, he or she may continue to serve if they can prove their behavior conforms to all five exceptions. In addition, if a person makes a statement about sexual orientation, yet can prove that he/she has not engaged in homosexual acts or that he/she will not attempt to, has a propensity for, or intends to engage in homosexual acts, then their statement of status is permitted. Thus, the statute does not prohibit service by an individual who has the status of homosexuality; it

¹⁴David F. Burrelli, “*Don’t Ask, Don’t Tell: The Law and Military Policy on Same-Sex Behavior* (Washington, DC: Congressional Research Service, 2009), 1-4.

prohibits service by persons who commit homosexual acts. In this sense, the law and the policy do not contradict each other. Take note, the statute makes no reference to sexual orientation unlike the DoD policy. As stated in DoD policy, “Sexual orientation is considered a personal and private matter, and is not a bar to service,”¹⁵ the statute does not explicitly make this statement.

The discussion above regarding the law seems a little confusing; however, there are additional caveats. To ensure members do not attempt to terminate a military service commitment early, the law is written so as not to separate individuals if it has been proved they have conducted homosexual acts or declared their homosexuality for the purpose of getting out of a military obligation prematurely. Another stipulation states that the DoD may retain members who are known homosexuals if “separation of the member would not be in the best interest of the armed forces.”¹⁶ Based on this premise, the services retain the right to keep known homosexuals in the military based on a judgment of military necessity or benefit to the services.

It is clear that both the statute and the DADT policy prohibit service by individuals who engage in homosexual acts, self-identify as homosexuals, and who enter into a same-gender marriage. In this sense, they appear to be on equal footing; however, because of additional language in the DADT policy, it creates the compromise with advocates of those who believe that homosexuals should be allowed to serve in the

¹⁵U.S. Department of Defense, Office of the Secretary of Defense, DoD Directive, Number 1304.26, *Qualification Standards for Enlistment, Appointment, and Induction* (Washington, DC; Government Printing Office, 1994).

¹⁶*FY 1994 National Defense Authorization Act*, Public Law 103-106, §571, codified at *U.S. Code* 10 (1993), §654.

military by creating the rule that prohibits military officials from inquiring about a service member's sexual orientation.

Judicial Involvement

Following President Bill Clinton's precedent, President Barack Obama has promised to end discrimination against homosexuals serving openly in the military. Prior to his inauguration, President Obama's Press Secretary Robert Gibbs stated, "President-elect Barack Obama will allow gays to serve openly in the military by overturning the controversial 'Don't ask, don't tell' policy that marred President Clinton's first days in office."¹⁷ Although many activist groups have criticized the slow, methodical pace at which the process is happening; it is happening. In June 2009, a separate branch of the federal government independent of the executive branch, refused to intervene in a challenge to the federal law. A former Army Captain, James Pietrangelo, discharged under the law, brought the case before the Supreme Court. Despite the president's avowed preference to allow homosexuals to openly serve in the military, his administration even weighed-in on this case recommending that the Supreme Court not address the case,¹⁸ possibly reasoning that, since homosexuals are not a recognized minority group, they do not rate equal protection under the law. Since the judicial branch denied review of the case and are not required to state reasons for denial, change on this issue remains, for the moment, subject to initiatives from the legislative arm of

¹⁷Carl Cameron, "Obama to End Military's 'Don't Ask, Don't Tell' Policy," *Fox News*, <http://www.foxnews.com/story/0,2933,479952,00.html> (accessed 14 January 2009).

¹⁸*Pietrangelo vs. Gates*, cert. denied, 556 U.S.____ (2009).

government. Some opponents of the ban view the ruling as a setback in getting the law changed; however, it is just the opposite. It puts the onus on the executive and legislative branches of government, which is where the controversy began over a decade ago.

Primary Research Question

The purpose of this thesis is to analyze and clarify the provisions of the congressional law and the DoD policy governing homosexuality and the possibility of service in the armed forces. It will do this by asking: What is the difference between the law excluding homosexuals from serving in the armed forces and the DoD policy designed to implement the law? The current DoD policy assumes homosexuals are serving in the military, and many interpret the policy as tacit permission to serve, provided one's sexual orientation identity is not revealed; yet the law clearly prohibits practicing homosexuals from serving in the military, thus denying them the same opportunities heterosexuals are afforded to serve the nation. Clarifying the difference between the law banning practicing homosexuals from serving in the military and the DoD policy generally known as "Don't ask, don't tell," which has been the cause of much controversy and misunderstanding by many both inside and outside the military, is the object of this thesis.

Significance

During his 2008 presidential campaign, Presidential candidate Barack Obama promised to reassess the DADT policy, with the intent of changing it to allow homosexuals to serve openly in the military. However, ensuring proper understanding of the DoD DADT policy and the federal law is crucial for the understanding and evaluation

of any proposed change. Many observers combine the two policies under the same header, “Don’t ask, don’t tell,” which in this author’s opinion is not correct. The law was created over fifteen years ago and many of those who developed the policy are no longer in Congress or in the DoD. The law does not restrict a person from asking military members about homosexuality nor does it address the terminology of sexual orientation, or the self-identification of individuals as homosexuals or bisexuals. The DoD policy addresses these topics. A side-by-side comparison of the law and the DoD policy will serve as the methodological framework for of this thesis. The importance of explaining the differences between the law and the DoD policy will bring to light the fact that it will take more than a Secretary of Defense’s pen stroke to effect change favorable to the interests of homosexuals. Such a change would require Congress to review the current law and abrogate it or substitute it for another one allowing homosexuals to serve openly in the military. This action would then drive a change in current DoD policy.

Assumptions

This thesis assumes that homosexuals are currently serving in the armed forces. It also assumes that many, both inside and outside the military, do not know and understand the differences between the law and the DoD policy. It is this author’s belief that many DoD members, including many officers, do not know the difference between the law and the DoD policy. In making this assumption, it is also believed that the vast majority of the American public does not realize the distinction. If the American public indirectly makes the laws of the nation through their congresspersons, they should be informed of what they are asking them to do. The voice of the American people has proven time and again

that they can effect change. However, in order to effect change, educating those who have the power to make change is essential.

Definitions and Terms

The following definitions and terms are extracted from Title 10 United States Code, Chapter 37, Subtitle A, Part II, §654.

Bisexual: a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual and heterosexual acts.

Homosexual: 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.”

Homosexual act: (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).

The following definition and term extracted from Department of Defense Instruction number 1332.14, Enlisted Administrative Separations, 2008 and number 1332.30, Separation of Regular and Reserve Commissioned Officers, 2008.

Propensity to engage in acts: more than an abstract preference or desire to engage in homosexual acts; it indicates a likelihood that a person engages in or will engage in homosexual acts.

The following definition and term extracted from Randall L. Sell, Archives of Sexual Behavior, New York: December 1997. Vol. 26, Iss. 6; pg. 643.

Sexual orientation: today's preferred terms and the term "sexual orientation" itself have a wide variety of definitions in the literature but these generally comprise one or both of two components: a "psychological" component and a "behavioral" component. Not all definitions include both these components, but definitions that include both components use either the conjunction "and" or "or" to join them.

Don't ask, don't tell: a common reference to the Department of Defense policy relating to the implementation of Public Law 103-160 concerning homosexual conduct in the military.

Limitations

Many studies and research projects regarding homosexuals in the military have been conducted through the years. In general, this research concludes that homosexuality is not conducive to military service.¹⁹ Discussion regarding these topics will be limited because they are not relevant to the topic addressed in this work--distinguishing between the difference between the current federal the law governing service by homosexuals in the military and the DoD policy designed to implement the law.

There is also confusion about the definition of "sexual orientation" as used in the DoD policy. Does sexual orientation identify a status or does it signify a specific

¹⁹Ronald D. Ray, *Military Necessity & Homosexuality* (Louisville: First Principles, 1993); Center for Military Readiness, "False 'National Security' Argument for Gays in the Military," <http://www.cmrlink.org> (accessed 18 November 2009).

behavior? The author will define the term as it is used in today's colloquial language and analyze the subtleties of the word. However, time constraints prohibited extensive research and discussion. Nonetheless, every effort to ensure the validity and legitimacy of data will be made.

Delimitations

The scope of this investigation focuses strictly on clarifying the differences between the federal law in question and the DoD policy. Due to the contentious subject matter, this study seeks to present the facts regarding the issue, homosexuality and the military. Discussion will be limited to analysis of the law and the DoD implementation policy, in order to explain the present de facto compromise and any inherent contradictions it may possess.

This study also examines several points of view on the current law and policy. The intent is to collect facts, gather pertinent information, and provide a clear distinction between the provisions of federal law and DoD policy.

CHAPTER 2

LITERATURE REVIEW

All truths are easy to understand once they are discovered; the point is to discover them.
—Galileo Galilei

Overview

Chapter Two is a review of the literature used to support this study. Historical documents, recent works, opinion/editorials, and research studies were used to determine the subtle differences between the federal law and the DoD policy. Many of the studies were completed prior to the passing of the law; they were used to serve as a foundation for the law. However, a preponderance of the literature focuses on the effects homosexuality in the armed forces has had on mission effectiveness and unit cohesion, very few point out the differences in the two policies and the conflicting nature in which they are written. This validates the need to fill a gap in the literature--which is the purpose of this thesis.

Following the approval of the law, excluding homosexuals from the military, and the DoD's policy in 1993 and 1994, respectively, a flurry of documentation emerged on the topic of homosexuality and the military. Most of the discussion circled around a term coined by Charles Moskos,¹ "Don't ask, don't tell." Although the law and the DoD policy are two different documents, many mistakenly lump them under same rubric and use the phrase to categorize anything relating to homosexuality and the military. The

¹Nathaniel Frank, *Unfriendly Fire: How the Gay Ban Undermines the Military and Weakens America* (New York: St. Martin's Press, 2009), xv. Charles Moskos, Northwestern University professor, and in the fall of 1992 considered the most influential military sociologist in the United States.

distinction between the two is critical because it is what defines the existing de facto compromise; a law that is in essence, violated by the implementing policy. Some authors also believe the “policy was perhaps the greatest blunder of the Clinton administration.”² This is because despite President Clinton’s campaign promise of ending the military’s ban on homosexuals the result is an unsatisfactory compromise in the eyes of both homosexual advocates and traditionalists.

As discussed in chapter one, much of the research conducted was prior to passage of the law because of the interim agreement between President Clinton and Congress in January 1993. There is very little “gray” between the two side’s opinions and beliefs. In 1982, the DoD implemented directive 1332.14 (Enlisted Administrative Separations) and stated, “homosexuality is incompatible with military service.” Prior to the 1982 directive, military members investigated for homosexuality and prepared for discharge were able to find loopholes in the policy and make a case for retention.³ The 1982 directive changed the wording and intent for discharging members thus nullifying existing ambiguities. The current law is only slightly different from the 1982 policy and the same arguments of incompatibility surface today for keeping homosexuals from serving in the military.

Laws Versus Regulations

Research for this study regarding the Public Law 103-160, codified in Title 10, Chapter 37, Section 654, “Policy concerning homosexuality in the armed forces” and the

²Aaron Belkin and Geoffrey Bateman, *Don’t Ask, Don’t Tell: Debating the Gay Ban in the Military* (Boulder, CO: Lynne Rienner Publishers, Inc., 2003), 5.

³Melissa Sheridan Embser-Herbert, *The U.S. Military’s “Don’t Ask, Don’t Tell” Policy* (Westport, CT: Praeger Security International, 2007), 7.

DoD policy also known as, “Don’t Ask, Don’t Tell,” began with reading and understanding what the policy actually says. It continued with researching and distinguishing between federal laws, memorandums, proclamations, Department of Defense directives, instructions, and regulations. The Constitution puts the responsibility for governing the armed forces on Congress through Article I, Section 8, clause 14, “To make rules for the Government and Regulation of the land and naval Forces.”⁴ This statute is the foundation of civilian control over the armed forces. It is the military’s responsibility to implement and comply with the laws set by Congress.

Identifying differences in federal law and DoD level jurisdiction is important to understanding current military and public issues regarding homosexuality. Understanding how federal law and DoD policies are set and implemented is fundamental to understanding the difference between the law and the DoD policy. If the law regarding homosexuality in the military were repealed, many unintended second and third order effects would become apparent which could surprise many of those engaged in the debate. If a congressional law mandates implementation by the DoD, the Secretary of Defense gives guidance to each military branch for drafting regulations that comply with it. Due to their unique differences, military branches draft regulations to cover the specific circumstances of their own service. Each DoD military service develops its own language to meet the intent of the federal government’s direction and guidance. Regulations are not laws, but prescriptive instructions developed by the service chiefs. Regulations are flexible and evolve as changes occur in each military branch. Unlike federal laws, the service chiefs can amend a regulation. Identifying these differences

⁴U.S. Constitution art. 1, sec. 8, cl. 14.

between laws and regulations and how they affect the military services is essential to thinking intelligently about the consequences of changing any of these documents.

Government Research Literature

The subject of homosexuality and the military is highlighted in several government research products to include; Congressional Research Service (CRS) reports, (the most current is that of August 2009), the United States General Accounting Office (GAO) report, June 1992, and the DoD Military Working Group report completed in July 1993.⁵ As official government products, the reports strive to present fair and objective views on the subject of homosexuality and the military.

The CRS products provide factual background information and significant events that have occurred pertaining to the subject. The CRS products clearly mention that there are two separate documents, a law and a DoD regulation. It is also mentioned that the compromise between the two is referred to as “Don’t ask, don’t tell.” Most of the document discusses pertinent information regarding homosexuality and the military and its observed or potential effect on unit cohesion and military effectiveness.

Some examples of the type of information pertaining to homosexuality and military service included in CRS report information are: legal challenges presented, recruiting policies, Reserve Officer Training Corps (ROTC), Junior ROTC (JROTC), and

⁵Frank C. Conahan, U.S. General Accounting Office, *GAO Report on Gays in the Military* (Washington, DC: Government Printing Office, 1992). http://www.fordham.edu/halsall/pwh/gao_report.html (accessed 11 March 2009); U.S. Department of Defense, Office of the Secretary of Defense, *Summary Report of the Military Working Group: Recommended DoD Homosexual Policy*, by MG John Otten, MG William Davitte, RAdm James Loy, RAdm John Redd, and BG Gerald Miller (Washington, DC: Government Printing Office, 1993); David F Burrelli and Jody Feder, *Homosexuals and the U.S. Military* (Washington, DC: Congressional Research Service, 2008).

university campus policies as they relate to the military and its position on homosexuality, homosexuals and marriage, and foreign military experiences.

The *Military Working Group* charged by DoD to study homosexuality and the military comprised of a general or flag officer from each service and a support staff of approximately fifty officers, enlisted and civilian employees, issued a DoD summary report on the *Recommended DoD Homosexual Policy*. Their conclusion was similar to the language found in the 1982 DoD regulation, however adding, “Since it is impossible to determine an individual’s sexual orientation unless he or she reveals it, sexual orientation alone is a personal and private matter.”⁶

Literature

Dr. Nathaniel Frank, a research fellow at the Palm Institute in Santa Barbara, California examines the 1993 law banning homosexual service in the military and the DoD policy, “Don’t Ask, Don’t Tell,” and provides compelling evidence as to why the law should be repealed. He researched hundreds of governmental documents; congressional hearing reports, military service policies, and debates and discussions leading up to the law signed 30 November 1993. He personally interviewed several senior government officials and military leaders--some currently serving on active duty and some retired. Dr. Frank visited several military bases and interviewed former and present military members on their opinions about military service by homosexuals.

Proponents of the ban believe that homosexuality in the military would destroy the crux of what is necessary to military effectiveness--unit cohesion. Indeed, unit

⁶U.S. Department of Defense, *Summary Report of the Military Working Group: Recommended DoD Homosexual Policy*.

cohesion is a critical component to a unit's ability to accomplish its mission and mutual trust among all unit members is a key element in the achievement of unit cohesion. Frank provides numerous examples of how the policy damages the foundation of our nation's armed forces by creating distrust. Dr Frank concludes that the policy was poorly designed and implemented. He goes on to state that "'Don't ask don't tell,' has bred massive confusion about how service members--gay and straight alike--are expected to behave, what their rights and constraints are and what are military commanders allowed and expected to do to enforce the rules--which include both the federal law and the policy."⁷ Since neither the law nor the policy have changed, the confusion still exists today.

Legal Literature

Proponents of the military homosexual exclusion policy have an ally in the legal community because of "a lengthy tradition of 'special deference' to the elective political branches have led most federal district and appeals courts to affirm the 'considered professional judgment' of military leaders to discipline or discharge a service member for homosexual conduct of speech."⁸ Proponents of the ban are typically conservative in nature, a philosophical bent that is attracted to military service in greater numbers than society in general. The courts have deferred to this judgment, grounding their reasoning in the belief that the military is a unique culture different from the civilian citizenry and that military members should be allowed to enforce their own regulations. In 1986, a

⁷Frank, *Unfriendly Fire*, 168.

⁸Burrelli and Feder.

Supreme Court case *Bowers v. Hardwick*,⁹ it was ruled there is no fundamental right to engage in consensual homosexual sodomy, thereby ruling in favor of the military's constitutional right to discharge a service member for overt homosexual behavior. However, in the 2003 *Lawrence v. Texas* case,¹⁰ all changed, complicating matters. The Supreme Court ruled a Texas law that prohibited sexual acts between same sex couples unconstitutional.¹¹ The 2003 ruling also invalidated sodomy laws throughout the country, the only exception being the U.S. Armed Forces; which retain the authority to uphold their law as stated in the Uniform Code of Military Justice (UCMJ).¹²

In 1993, President Clinton directed then Secretary of Defense (SecDef), Les Aspin, to collect information and analyze data that supported "ending discrimination on the basis of sexual orientation in the Armed Forces."¹³ The SecDef called upon the RAND Corporation's National Defense Research Institute. RAND was "instructed to study *how* to implement an order ending discrimination against homosexuals, not *whether* a policy of admitting open homosexuals into the military was prudent."¹⁴ The study generated a lengthy report consisting of over 500 pages. The executive summary of this

⁹*Bowers v. Hardwick*, 478 U.S. 186 (1986).

¹⁰*Lawrence v. Texas*, 539 U.S. 558 (2003).

¹¹Burrelli and Feder.

¹²United States Code, Title 10, Subtitle A, Part II, Chapter 47, Uniformed Code of Military Justice (UCMJ), Section 923, Article 125, http://www.loc.gov/rr/frd/Military_Law /UCMJ_LHP.html.

¹³National Defense Research Institute, *Sexual Orientation and U.S. Military Personnel Policy: Options and Assessment* (Santa Monica: RAND, 1993), iii.

¹⁴David F. Burrelli, *Homosexuals and U.S. Military Policy: Current Issues* (Washington, DC: Congressional Research Service, 1996).

report presented the salient results and provided a policy option that appeared consistent with the direction of the presidential memorandum. The study determined, “sexual orientation, by itself, as not germane to determining who may serve in the military.”¹⁵ Based on the option presented, RAND recommended the policy should contain clear standards of conduct that would be equally enforced and would entail minimal changes to current military administrative documentation. The report emphasized the importance of effective leadership for the successful implementation of a new policy should the federal law be repealed. The RAND report was not considered in developing neither the federal law nor the policy. “A Pentagon official explained, the RAND study provided a ‘methodological approach,’ while the military offered an ‘independent judgment.’”¹⁶ At the time, it was obvious what study would prove most noteworthy.

Retired Military Members

Former military members, including those who have retired or those separated by the enforcement of the policy, have contributed their opinions to the debate. Now, sixteen years after the implementation of the law and the policy, several senior military officers and government officials who served during the firestorm of creating and implementing the policy have retired and are speaking out--some in support, others against the ban. Just

¹⁵National Defense Research Institute, xviii.

¹⁶Eric Schmitt, “Pentagon Speeds Plan to Lift Gay Ban,” *New York Times*, 16 April 1993, <http://www.nytimes.com/ref/membercenter/nytarchive.html> (accessed 15 November 2009). The “methodological approach” referred to the RAND study who assigned historians, economists, sociologists, psychologists, anthropologists, doctors, and lawyers to the study. The military “independent judgment” referred to the Military Working Group assigned by Secretary of Defense comprised of DoD active duty members and civilian employees.

as the military reviews lessons learned following an operation, the sage council offered by retired officers could provide an additional perspective to the current DoD leadership. Former Chairman of the Joint Chiefs of Staff (CJCS) John Shalikashvili, General, U.S. Army (Retired), along with over one-hundred retired senior military and government officials have voiced opinions in favor of a policy change. In addition, former Secretary of State and CJCS Colin Powell, General, U.S. Army (Retired) a who had been a staunch supporter of barring homosexuals from serving openly in the military recently commented: “The policy and the law that came about in 1993 I think was correct for the time...a lot has changed with respect to attitudes within our country. And therefore, I think this is a policy and a law that should be reviewed.”¹⁷ Advocating to keep the ban in place more than one-thousand retired military officers, to include former Marine Corps Commandant Carl Mundy, Jr., General U.S. Marine Corps (Retired), Commander Air Forces during the Gulf War, Charles Horner, General, U.S. Air Force, (Retired) and former Commander, U.S. Naval Forces Europe, Leighton Smith, Admiral, U.S. Navy (Retired), continue to support the principle of “incompatibility” and believe that allowing homosexuals to serve openly in the military could jeopardize morale and “unit cohesion.”¹⁸ These opinions from senior military officers who have commanded thousands are certainly worthy of careful consideration.

¹⁷Early bird website, “State of Union,” *CNN*, <http://ebird.osd.mil/ebfiles/e20090706688059.html> (accessed 7 July 2009).

¹⁸David Crary, “Retired Military Officers: Keep Ban on Gays,” *Washington Post*, 31 March 2009, <http://ebird.osd.mil/ebfiles/e20090401667191.html> (accessed 1 April 2009).

Congress

Documentation in congressional hearings is emotionally charged and one can definitely “hear” what side certain congresspersons are on when they comment on the subject. As is well known, our government’s legislative body is intended to be a representation of the people. Elected officials campaign on the values and beliefs of their constituents and are expected to maintain those biases once in office. Therefore, to achieve re-election, congresspersons are not likely to change their stance on hot-button issues, especially one like homosexuality and the military.

CHAPTER 3

RESEARCH METHODOLOGY

A good plan violently executed *now* [emphasis added] is better than a perfect plan next week.

— General George S. Patton Jr.
FM 5-0, *Army Planning and Orders Production*

Methodology

The methodology used in this study begins with a historical review of the issue of homosexuality in the military service. It continues with a comparative analysis of the federal law governing service by homosexuals in the military and the DoD directives designed to implement this law. This comparative analysis will serve as a foundation for an assessment of the current status quo and the considerations that advocates either for the banning homosexuals from military service or for allowing open service by homosexuals in the military must consider as they make their arguments.

In addition to the analysis and comparison of the federal law and DoD policy, an opinion survey was conducted to gain insight into the thoughts of serving mid-grade officers on the question of open service by homosexuals in the military. Opinions were gathered from a cross-section of military mid-level officers attending U.S. Army Command and General Staff College (CGSC) in Fort Leavenworth, Kansas.¹ Students attending CGSC class 09-02 voluntarily participated in the survey-questionnaire. Survey data analysis is based on non-random and non-probability sampling. Due to the sampling method, statistical analysis was not appropriate.

¹Military mid-level officers are referred to as Field Grade Officers (FGOs) and are either the rank of Major or Lieutenant Colonel (the grade of O-4 or O-5, respectively).

Survey Questionnaire

The survey questionnaire solicited the opinions of mid-level military officers attending Intermediate Level Education at CGSC in Fort Leavenworth, Kansas about homosexuality in the military. The survey's intent was to identify the overall acceptance of homosexuality by this important population and determine whether to recommend repeal of the law. Development of the survey began in March 2009. The proposed survey questions were submitted to CGSC Directorate of Graduate Degree Programs for committee review. Following changes recommended by the committee, the request for survey approval was sent to the CGSC Institutional Review Board (IRB). Approval was granted in July 2009. The CGSC Quality Assurance Office (QAO) distributed and collated the survey via electronic means (e-mail). The timeframe allotted for sampling was one week. On two occasions, three days apart, the survey was distributed. The second offering was a reminder e-mail that is standard practice for CGSC QAO research team.

The sample population solicited was CGSC 09-02 (winter class 2009). The total U.S. student population was 327 mid-level military officers (Majors/O-4 from U.S. Army, U.S. Air Force., U.S. Navy, U.S. Marine Corps, National Guard and Reservists). The respondent population was 83.

The initial survey distribution did not properly identify the subject or intent of the survey in the e-mail subject line. The first distribution e-mail subject line only listed DADT. Many respondents commented later that they did not know what the acronym DADT was so they deleted the e-mail even before opening the survey. In addition, many of the recipients of the e-mail survey did not recognize the sender's name and suspected

an e-mail scam thereby deleting the survey immediately. The follow-up e-mail distribution clearly identified the survey as a CGSC Master of Military Art and Science candidate's research and spelled out the acronym DADT--"Don't Ask, Don't Tell," in the subject line. Prior to the second distribution, the initial respondent population was approximately 15 percent. A 15 percent response rate is considered normal according to the CGSC QAO.

Combining responses to both distributions yields an overall rate of response of 25 percent. CGSC QAO commented that this was a tremendous response. Possible reasons for higher return could be the sensitivity of the topic in today's military.

Survey Analysis

An analysis of the findings of a survey performed at the U.S. Army Command and General Staff College (CGSC) also appears in this chapter. The survey shows a general perception among the surveyed population that current policies allow homosexuals to serve in the military and further demonstrates that military members believe that they serve with homosexuals, even though homosexuals are not allowed to self-identify as such and remain in the military.

Three hypotheses regarding mid-level officers' attitudes and opinions about homosexuals serving in the military and homosexuals serving openly were tested by the survey (see Appendix E and F). The responses positively supported each hypothesis. The first hypothesis tested was that military members perceive they have served in the military with homosexuals. The survey supported the hypothesis with a 98.80 percent positive return. The purpose of this question was to identify to what extent military members perceive the presence of homosexuals. The data implies military members may

be willingly violating a federal law (homosexual exclusion policy), yet because of the DoD policy compromise, “don’t ask,” the obligation to report a violation of cause is negated.

The second hypothesis tested by the survey was that the presence of perceived homosexuals does not negatively affect the efficiency of mission accomplishment. The survey data supported this claim with a 72.29 percent positive return. The purpose of this question was to provide data disproving the argument that the participation of homosexuals in the military negatively affects mission accomplishment. Response validity is suspect because the question does not account for the previous duty assignment the respondent held prior to attending CGSC. It is just as reasonable to suppose the respondent was in a position to accurately assess overall mission accomplishment of the unit as it is to suppose they were not in a position to make an assessment. Data was not collected to determine degree of unit authority or responsibility respondents had to base the information on, which correlates to the credibility in respondent ability to assess the unit’s effectiveness.

The third hypothesis tested by the survey was that a military members’ service would not be negatively affected in the presence of homosexuals serving openly in the military. The data supports this claim, although not as convincing as other returns; a 57.83 percent positive response was calculated. The intent of this survey question was to assess the likelihood of military members’ willingness to serve with homosexuals if the law authorized open homosexuality in the military. Validity of response is unjustified because it is predicting something that has not yet happened. The survey did not inquire

about respondents' past experiences with open homosexuality, therefore providing no basis to measure likelihood of future service.

CHAPTER 4

ANALYSIS

Although our intellect always longs for clarity and certainty, our nature often finds uncertainty fascinating. Unconfined by narrow necessity, it can revel in the wealth of possibilities; which inspire courage to take wing and dive into the element of daring and danger like a fearless swimmer into the current.

— Carl von Clausewitz, *On War*

Overview

This chapter consists of a side-by-side comparison between the federal law governing homosexuality in military service and the DoD policy designed to implement it. The discussion will identify the subtle differences between the law and the DoD policy. An explanation of the differences between law and policy and of the importance of educating not only DoD personnel, but American citizens in general because of their indirect role in making laws for the nation and the armed forces follows.

The DoD recognizes homosexuals have served and will continue to serve in the armed forces, as evidenced in the language of the DADT policy. Empirical evidence supports this claim. If the DoD would not actually *know* that homosexuals have served and are potentially serving in the military the DoD would not have to discharge its members or design policies to deal with serving homosexuals among the ranks. In 1991, then-Secretary of Defense (SecDef) Dick Cheney “admitted that gays do serve in the military,”¹ something the DoD had not stated until then. So what would change if homosexuals serve openly in the military, given that everyone already knows they are already serving? This chapter seeks an answer to this question.

¹Nathaniel Frank, *Unfriendly Fire: How the Gay Ban Undermines the Military and Weakens America* (New York: St. Martin’s Press), 13.

Both the DoD policy in question and its prevailing colloquial interpretation as “DADT” are vague, and to some degree contradictory. Perhaps this is intentional. Perhaps this is so in order to deliberately create a vague area that is at least partially satisfactory to both advocates and opponents of the ban. If politics may be defined as the art of compromise--especially in a democracy--this idea is not necessarily farfetched, cynical or the sign of a larger conspiracy theory. As written, it appears that the DoD policy tolerates and even encourages violation of the federal law. The law states that homosexual acts are grounds for separation, yet the DoD policy alludes to the fact that homosexual acts are happening--that is why you are directed to “don’t ask.” On the other hand, service members are directed to “don’t tell.” This could be interpreted by many observers as a provision that allows homosexuals to serve provided that their sexual orientation remains secret and that they do not act out on this orientation. Further, they may choose to act on their sexual inclinations; but, as long as this remains a secret, they may continue to serve. Thus, the DADT policy says the DoD will not ask about homosexual conduct or sexual orientation and also that military members face possible discharge if they offer information regarding a homosexual orientation.

Current Administration

Although it has not yet merited outright attention, the topic of homosexuality and the Armed Forces is beginning to gather steam on both sides of the debate. Currently, a bill introduced in the House of Representatives is gaining momentum to “repeal the law and replace it with a policy of nondiscrimination on the basis of sexual orientation.”² It is

²David F. Burrelli, “*Don’t Ask, Don’t Tell: The Law and Military Policy on Same-sex Behavior*” (Washington, DC: Congressional Research Service, 2009), summary.

important to note that if the intent is to allow homosexuals to serve openly in the military, the emphasis should be on repealing the law and not the DoD policy, also known as DADT. There is a difference between “service” and “open service” and many do not properly make the distinction.

The Obama administration and the DoD are being confronted with a challenge. The discussion on homosexuals serving openly in the military is beginning to come to the surface of a political debate. This author believes that the debate includes two separate but related issues: (1) authorizing homosexuals to serve in the military, and (2) allowing homosexuals in the military to be open about their sexual orientation. There lies the problem; many think the subject is solely about open service, in this author’s considered interpretation it is also about permitting homosexual conduct without reprisal.

Under current law, if one conducts homosexual acts while serving in the military, one is violating the law. If persons committing these acts are discovered they face possible separation under the law and the UCMJ. In addition, there is a potential for blackmail or extortion by others who have obtained knowledge of these forbidden acts. If credible evidence is produced for use against a military member who committed a homosexual act, this information could be used to coerce the member at fault, exploiting the fear that the evidence collected about them could be handed over to military authorities and that they would be penalized or discharged.

Terminology

As in any specialized profession, a precise definition and understanding of terminology is critical in order to understand the issues. Politics and the law are no exception. The military also has its own set of terms and conditions that most service

members understand. To tackle the issue of homosexuality in the armed forces one must understand the context and terminology being used. The “Don’t ask, don’t tell” policy is a DoD policy. Unfortunately, some have lumped the congressional law into the DoD policy term. The “Don’t ask, don’t tell” phrase was coined while conducting research during the six-month interim agreement between President Clinton and Congress on the issue of homosexuality and the military. Following the six-month period, Congress passed a law banning homosexual conduct in the military. In response, and following the president’s wishes, The SecDef created policy that “incorporated both the restrictions in the law and the President’s desire to open military service ‘to those who have a homosexual orientation.’”³ As was addressed in Chapter One, the law reinstated the option for the SecDef to “ask” if deemed necessary. Therefore, the “don’t ask” clause is not applicable to the federal law; it is only in the DoD policy.⁴

The Current Law and DoD Policy

In chapter 1, it was mentioned that there are fifteen findings that precede the actual statute policy. As mentioned, these findings set the intellectual foundations for the law and show the basis for its derivation. Although the findings are incorporated into the statute, they are not the policy. The findings are the first difference noticed between the two documents; the law and the DoD policy. The Public Law 103-160, §571, codified by United States Code, Title 10, §654, “Policy concerning homosexuality in the armed forces,” it outlines reasons for separation of an individual from the military for various

³Burrelli, “*Don’t Ask, Don’t Tell*,” 4.

⁴*FY 1994 National Defense Authorization Act*, Public Law 103-106, §571, codified at *U.S. Code* 10 (1993), §654.

actions associated with homosexuality (see Appendix A). To summarize, one may be separated from the armed forces for conducting homosexual acts, making a statement of homosexuality, or marrying or attempting to marry someone of the same sex.

As previously mentioned, DoD policy regarding a particular subject may be cross-referenced and may exist in many different regulations. For instance, Department of Defense Instruction (DODI) for *Qualification Standards for Enlistment, Appointment, and Induction*, addresses homosexual conduct in relation to the possibility of joining the military. The instruction explicitly says, “Applicants . . . shall not be asked or required to reveal their sexual orientation nor shall they be asked to reveal whether they have engaged in homosexual conduct.”⁵ It is obvious that this instruction is the reason the DoD policy was termed, “Don’t ask, don’t tell.” Other DoD instructions address homosexual conduct with regards to investigations and separations. These instructions are the DoD’s interpretation and implementation of the federal law. This too is another example of the difference between the law and the DoD policy. The law does not restrict asking individuals about homosexuality; therefore it does not contain a “don’t ask” segment. It does discuss “don’t tell” and this section is similar to the DoD policy. Thus, the rules governing the making of a statement on one’s homosexuality, are found in the second finding of the law and in the DoD policy.

⁵U.S. Department of Defense, Office of the Secretary of Defense, DOD Instruction 1304.26, *Qualification Standards for Enlistment, Appointment, and Induction, Change 1*, (Washington, DC: Government Printing Office 2007), 9.

Conduct Versus Status

Explaining and clarifying the DoD DADT policy and distinguishing between the policy and the law is critical. Lawmakers, senior military officials, and the public do not seem to understand the actual law, although they may intentionally be using its ambiguity for political purposes. What does the law say? What does the law restrict or allow? The law is divided into three findings that mandate separation. However to complicate matters, there are several caveats. The law prohibits military members from: (1) conducting homosexual acts, (2) self-identifying as homosexual, or (3) marrying or attempting to marry someone of the same sex.

Although at present the debate is relatively dormant, the subject has always been present in military circles. The ban against open homosexuality in military service is addressed in DoD policy. The regulation was drafted by then-Secretary of Defense Les Aspin, with the concurrence of the service chiefs. President Bill Clinton desired to minimize discrimination against homosexuals serving in the military. As has been shown, DoD regulations are created to implement federal laws, yet what was created interpreted the law in such a way as to create a number of ambiguities and contradictions.

The law expressly prohibits homosexual conduct while serving in the armed forces. The DoD policy states a person's sexual orientation is a personal and private matter, and is not a bar to service "... unless manifested in homosexual conduct."⁶ The law and policy are designed to prohibit and reprimand conduct not status. Therefore one's sexual orientation or status is not banned, but specific conduct, homosexual acts are banned. It stands to reason that one who typically conducts homosexual acts most likely

⁶Ibid.

has a homosexual orientation; therefore it is reasonable to assume that sexual orientation of homosexuals is also being prohibited. In essence the law and policy ban homosexuals, punishing their conduct and status, even though the DoD policy states that sexual orientation (status) is not a bar to service. However, if an individual has an orientation of homosexuality, yet does not act on that orientation he/she is not in violation of the law. The law defines the terms homosexual and homosexual acts, however it also allows a person who may have a homosexual orientation to remain in the military if this orientation does not result in homosexual conduct.

Contradictions

In November 1993, the 103rd Congress passed the FY1994 National Defense Authorization Act and President Clinton (Public Law 103-160) signed it into law. In section 571 of the law, codified in United States Code, Title 10, Section 654, is the “Policy concerning homosexuality in the armed forces.”⁷ This statute was a result of several months of congressional hearings and research projects. The hearings were held in the House and Senate Armed Service Committees and included the DoD leadership, CJCS, service chiefs, and advocate groups for and against open homosexual military service. The hearings and research addressed the relevancy of sexual orientation to military service. The statute begins with findings made by Congress; the findings serve as a preamble to the policy and set the stage for what is in the policy. See Appendix A for Public Law 103-160 as codified in 10 USC §654.

⁷Burrelli, “*Don’t Ask, Don’t Tell*,” 3.

The law is comprised of three findings, (1) homosexual acts, (2) statements of homosexuality, and (3) marriage or attempting marriage to someone of the same sex. Any of these constitute grounds for separation from the armed forces. However, there are five exclusion clauses to the first finding of the law--homosexual acts. These clauses name specific circumstances that may be used to retain--at least temporarily--a service member, who would otherwise be deemed a candidate for separation under the public law in question.

The second finding of the law prohibits members from stating they are homosexual or bisexual or words to that effect or they face potential dismissal. Is making a statement making an announcement of one's sexual orientation or status or does it mean more than that? According to the law, military members under investigation for breaching the second finding, making a statement of homosexuality, are given the opportunity to demonstrate they do not engage, attempt to engage, have a propensity to engage, or intend to engage in homosexuals acts. If able to do so, they are released of allegations. As discussed previously, it is unclear what is reprimanded, is it merely sexual orientation or does this have to be confirmed by acting on this orientation? The DoD policy does not make the subject simpler, as it too contradicts the law as will be seen.

Compromise

The 1993 federal law excludes personnel who conduct homosexual acts from serving altogether. However, the DoD implementation policy allows members with a homosexual orientation to serve as long as they do not disclose any information about it. The law prohibits homosexuality, yet the DoD policy assumes homosexuals are serving, but will not discover this through questions and does not want to have acknowledgment

from members. How can this be possible? Is there a contradiction between the law by the implementing policy?

The DoD policy does contradict the law. It was the intent of President Clinton, to minimize discrimination against homosexuals in the military; remember, the law bans persons who conduct homosexual acts, i.e. homosexuals. To do this the SecDef's policy directed that military members could not be asked about their sexual orientation or whether they had engaged in homosexual conduct; nor are they required to reveal their sexual orientation or if they had engaged in homosexual conduct.⁸ The term "sexual orientation" was introduced in the DoD policy and is not mentioned in the law. The term seems to be poorly cast because of its confusing connotation. However, the possibility exists that it was intentional to create ambiguity and achieve a compromise. If one makes a statement of homosexuality, "a statement demonstrates the propensity or intent to engage in homosexual acts, not because it reflects a service member's sexual orientation."⁹ So an individual is restricted from not only making a statement of homosexuality, but a person who considers his/her sexual orientation as homosexual, should not announce this orientation because it would most likely be equivalent to a statement of homosexuality. The DoD policy also spells out what is meant by propensity: "Propensity to engage in homosexual acts means more than an abstract preference or desire to engage in homosexual acts."¹⁰ The use of the word "abstract" leaves many ways

⁸U.S. Department of Defense, DOD Instruction 1304.26, enclosure 2, 9.

⁹U.S. Department of Defense, Office of the Secretary of Defense, DOD Instruction 1332.14, *Enlisted Administrative Separations* (Washington, DC: Government Printing Office, 2008), 18.

¹⁰*Ibid.*

to interpret this portion of the policy. Again, the language is ambiguous, but perhaps intentional; because of the word choice, it provides avenues for the potential for future argument and litigation.

The DoD policy's second finding--making a statement of homosexuality--places the burden on the defendant to prove innocence; contrary to what the U.S. legal system espouses. If service members make such a statement, they have the right to defend their intent not to act on their sexual preferences;¹¹ however, very few cases have been won proving an individual's intentions not to act on his/her homosexual preferences.

Navy Lieutenant Commander, Maria Zoe Dunning, was the first to be tried under the rules of the new DoD policy. Early in 1993, after President Clinton continued to stand by his promise of lifting the ban, Lt. Cmdr. Dunning announced she was a lesbian. The Navy began discharge proceedings and was directed by the President to use the rules of the new policy--not pre-1993 policy. The policy allows the defendant to rebut the presumption of the statement and provide evidence, which Dunning did. She argued her comments were a declaration of her orientation and did not reveal a propensity to engage in homosexual conduct. The review board granted her retention. The military was not pleased with the outcome. The general counsel of the DoD issued a memorandum directing officials never again to accept as a defense against a discharge a simple

¹¹Rebuttable presumption--under "Don't ask, don't tell," the accused has the right to counter, or rebut, a presumption of homosexuality; unlike non-military law where proving guilt typically lies with the accusing party; the rebuttable presumption puts the burden of proving innocence on the defendant; further complicating matters is the need to prove the future negative--that is, prove that you will not do something in the future. Melissa Sheridan Embser-Herbert, *The U.S. Military's "Don't Ask, Don't Tell Policy: A Reference Handbook* (Westport, CT: Praeger Security International, 2007), 156.

statement from an avowed homosexual denying he or she was likely to engage in homosexual acts.¹²

Following the decision and her return to work, she said her colleagues treated her like a “nuclear bomb.”¹³ For a while; they were unsure how to react. If they were happy for her they feared being accused of association; however, if they disapproved, they feared discrimination allegations. Commander Dunning retired from the Navy in 2007, after serving openly for thirteen years.¹⁴

The law and the policy seek to pacify two sides of a very controversial issue, an obvious compromise. For proponents of the ban, the federal law reinforces disapproval of homosexuality by keeping homosexuals out of the military. For opponents of the ban, the DoD policy authorizes homosexuals to serve, albeit silently, therefore providing some legitimacy for the approval of homosexuality in the military service. The U.S. military is a well-respected community in American society and using it as a means to gain acceptance for either side, is a means to an end. A dichotomy is created because DoD policy should run analogous to federal legislation and implement the law. However it is not always so, the Court granted the military a measure of autonomy, “special deference,” to regulate itself due to the uniqueness of the military society.

¹²Frank, *Unfriendly Fire*, 175.

¹³Cmdr. Zoe Dunning comments at the “Freedom to Serve” forum at the Truman Presidential Library, Independence, Missouri, 27 July 2009, attended by the author.

¹⁴Frank, *Unfriendly Fire*, 175.

Judgment Call

In the book, *Exclusion: Homosexuals and the Right to Serve*, Melissa Wells-Petry states:

The Secretary of Defense has determined that homosexuality is incompatible with military service. This determination is not based on circumstances, conduct, or qualities of individual homosexuals. Rather, it is the result of applying common sense and experience to discernible characteristics of homosexuals in general and to their conduct and then making a *judgment call*. The use of “classwide presumptions” is recognized as both necessary and appropriate in policy-making. . . . Clearly the determination that homosexuality is incompatible with military service is not, strictly speaking, a determination of *fact*. Rather, it is an exercise of professional military judgment in making a broad policy *choice*.¹⁵

In debates about DADT, the “professional military judgment” has been accepted as fact and as precedent. As discussed in Chapter Two, special deference is given to the military services for enforcement of their own regulations. So a *judgment call* is made about homosexuals in general (society), using inflammatory statistics about medical histories and sexual partners, to determine homosexuals characteristic.¹⁶ Since the policy restricts knowing who in the U.S. military is homosexual, there is no way of getting an accurate account of what the “general” military homosexual population statistics were for that time. The military’s recognized prerogative to exercise a professional judgment call is used to maintain the ban against homosexuals. Could the reason why the DoD has disregarded the comparison with militaries around the world that have seamlessly integrated homosexual troops, be that such comparisons do not fit its *judgment call*? If so, it would be interesting to compare the difference in professional military judgment calls

¹⁵Melissa Wells-Petry, *Exclusion: Homosexuals and the Right to Serve* (Washington, DC: Regnery Gateway, 1993), 89.

¹⁶*Ibid.*, 93.

regarding the issue of homosexuals in military service and empirical evidence on the results of these different calls as experienced in various military establishments around the world.

Power Play

The U.S. Government is divided into three branches: executive, legislative, and judicial. As was the intent of the nation's founders, the Constitution mandates that each branch play a significant role regarding the military, thus providing checks and balances to each other's powers. The leader of the executive branch, the president, is the Commander in Chief of the military. However, the legislative branch, the Congress, is given the power to raise and govern the armed forces. The Congress is responsible for making policy for the military to implement. As we know, Congress represents the people; what Congress says should be a reflection of society, therefore society sets policy for the military.

U.S. identity is embodied in U.S. society. The United States is possibly the most progressive society in the world. Many societies around the world observe what the United States is doing and use this as a model. This includes a balanced governmental system and its military establishment. The purpose of the military's is to fight and win the nation's wars abroad. The military's implementation of government policy benefits American society. Many of the freedoms and choices Americans enjoy are because of the military's precise implementation and enforcement of the nation's foreign policy. The military is a part of society. Military service members are also citizens and enjoy many of the same rights and freedoms as non-military members with some exceptions due to their

special status. It is feasible that, as society changes its views on homosexuality, the military will eventually also change.

If society indirectly sets policy for the armed forces, opinion polls have recently shown American views regarding homosexuals serving in the military have shifted. In 1993, 44 percent of Americans favored gays serving openly in the military, compared to 75 percent in 2008.¹⁷ The polls do not give the demographics for the sample. However, as most know, the two coasts of the U.S. are typically more liberal than the heartland and the south; therefore, if polled on the two coasts it is possible the numbers would reflect this higher percentage in favor of homosexuals serving openly in the military.

The military is a unique organization, “fundamentally different from civilian life,” capable of withstanding conditions and rules typically not considered acceptable by the general public.¹⁸ Prior to desegregation, the Army consistently stood by its policy of keeping African-Americans out of key positions, fearful that racial integration would cause the Army’s demise. “Insistence on the need for segregation in the name of military efficiency was also useful in rationalizing the prejudice and thoughtless adherence to traditional practice which obviously played a part in the Army’s tenacious defense of its policy.”¹⁹

¹⁷Servicemembers Legal Defense Network, “Polling Data,” Servicemembers Legal Defense Network, <http://www.sldn.org/pages/polling-data> (accessed 17 July 2009).

¹⁸United States Code, Title 10 – Armed Forces, Subtitle A – General Military Law, Part II – Personnel, Chapter 37 – General Service Requirements, Section 654, “*Policy concerning homosexuality in the armed forces,*” Statute (a) Findings. (8), 30 November, 1993.

¹⁹Morris J. MacGregor, Jr., *Integration of the Armed Forces 1940-1965* (Washington, DC: U.S. Government Printing Office, 1981), 428.

Political Military Relationship

The political and military relationship is closely integrated. The legislative branch, Congress, creates policy and the military, part of the executive branch, implements policy. The two realms intertwine, as it is military officials who educate and advise the civilian policy makers on a multitude of military issues. Congress puts pen to paper to create the law or policy and the armed forces will implement, enforce, and abide by set policy. Military members are encumbered because they live by a double-edged sword. Service members were civilians, members of society, before they became servants to their nation. Therefore, as they advise civilian leaders, they may carry intrinsic societal biases. However, because of the faith and trust bestowed by the Commander-in-Chief (the President) to military officials, their focus is on a broader national view versus their own narrow societal perspective. The congressional policy makers represent society's perspective; more realistically, their constituents' and their own bias. Since federal law directs the implementation of the DADT policy, it will take an act of Congress to repeal or modify it in any way.

SecDef

Unintentional consequences have affected homosexual military members who have abided by the law and the policy, yet they have been required to provide a rebuttable presumption of their adherence to them. For instance, if a military member's homosexual orientation is discovered by other than self-identification or conduct, an investigation could begin. The current Secretary of Defense Robert Gates has commented that the DoD is seeking to find a "more humane way of applying the law until the law gets changed." Secretary Gates wants to know if the military is obligated to enforce the policy if a third

party, a jilted lover or a family member, provides information about a service members' sexual orientation. The SecDef is finding just how inflexibly the law is written.²⁰ For an investigation to begin, information must be from a credible source. The credibility of a given source is, once more, a matter of judgment.

The SecDef and CJCS are continually asked about the policy at every speaking engagement they attend. As mentioned earlier, Secretary Gates has commented about trying to find flexibility in the law until its actual repeal. The CJCS has a slight tone of tolerance in his speech also. The leniency in each of these senior military leaders language is 180 degrees from where it was sixteen years ago when the SecDef and CJCS were weighing in against the topic.

Intent Achieved?

The intent of the policy was to lessen discrimination against those who identified with a homosexual sexual orientation while serving in the military. Although a federal law was created to deny admittance and continued service of homosexuals in the military, a DoD policy was emplaced that tacitly recognizes that persons who identify themselves as homosexuals may be serving in the military, and which allows them to continue service under certain conditions which essentially require that they keep their sexual orientation secret. Since it is assumed that homosexuals are serving in the military, the intent of those who advocate that homosexuals should be allowed to serve in the military has been partially achieved. Although not clearly defined by President Clinton in 1993,

²⁰Barbara Staff, *Defense chief giving 'Don't ask, don't tell' a closer look*, CNN, July 2009, <http://www.cnn.com/2009/POLITICS/0701/gates.gays/index.html> (accessed 7/1/09).

the intent to allow homosexuals to serve without barriers or discrimination in the military failed to meet the intent. Proponents wanting military service by homosexuals were willing to settle for the authorization to serve in the military and do it quietly. However, as with many things, if given some leeway one typically wants more. Therefore, creating the authorization, even in such a tacit manner, for homosexual military service may be seen as the stepping-stone to allowing homosexuals to serve openly in the military.

Based on the survey taken at CGSC, mid-level officers acknowledge their belief that homosexuals are currently serving in the military. The officers also state that homosexuals have had a limited negative impact on mission accomplishment. Thus, the author posits that if homosexuals were authorized to serve openly their service would not be detrimental to mission accomplishment.

CHAPTER 5

CONCLUSIONS AND RECOMMENDATIONS

The only ones among you who will be really happy are those who will have sought and found how to serve.

— Albert Schweitzer

Overview

This chapter offers conclusions and recommendations derived from the preceding research and analysis.. These recommendations are based on the author’s professional evaluation of the problems posed by the contradictions inherent to the current federal law and DoD policy governing homosexuals and military service. These recommendations reflect the author’s judgment of the costs and perceived dangers to military effectiveness as well as the potential benefits of a change in policy as well as the author’s core personal beliefs. The arguments are intended to be clear, logical, and reflect a well-considered professional opinion that is consistent, although not necessarily, confirmed by the research on which this thesis is based.

New Legislation

The preceding chapter’s discussion highlighted differences in language between Public Law 103-160 and the DoD policy designed to implement the law. When values and beliefs are at center stage, emotions are bound to run high, and opinions and decisions are not necessarily based on empirical evidence and facts. In a time of word wars and semantic word games, it is imperative to use proper terminology. If not, it is possible that another, perhaps more confusing, compromise could emerge. Currently, the House of Representatives has introduced a bill, the Military Readiness Enhancement Act

of 2009, H.R. 1283, intended to “enhance the readiness of the Armed Forces by replacing the current policy concerning homosexuality in the Armed Forces . . . with a policy of nondiscrimination on the basis of sexual orientation.”¹

The language in the new bill, does not explicitly say that “open” homosexuality is authorized, but that discrimination on the basis of sexual orientation will not be tolerated. In the current DoD policy, “sexual orientation . . . is not a bar to service . . . unless manifested by homosexual conduct.”² In the interest of clarity and intellectual honesty, the author recommends that the precise intent behind any proposed legislation and policy should be made in plain language rather than relying on vague or ambiguous terminology. Only then can the virtues or defects of new proposals be honestly and clearly debated.

The development of the current DoD policy brought about the need to clearly define sexual orientation. This process required several iterations before reaching an official definition. The current policy defines sexual orientation as: “an abstract sexual preference for persons of a particular sex, as distinct from a propensity or intent to engage in sexual acts.”³ The proposed new policy defines sexual orientation as: “heterosexuality, homosexuality, or bisexuality, whether the orientation is real or perceived, and includes

¹House of Representatives, 111th Congress, 1st session, H.R. 1283: Military Readiness Enhancement Act of 2009, <http://www.govtrack.us/congress/bill.xpd?bill=1283> (accessed 16 November 2009).

²David F. Burrelli, *Don't Ask, Don't Tell: The Law and Military Policy on Same-Sex Behavior* (Washington, DC: Congressional Research Service, 2009).

³Ibid.

statements and consensual sexual conduct manifesting heterosexuality, homosexuality, or bisexuality.”⁴

Policy-makers are constitutionally responsible to the people. They create rules and laws intended to enhance the overall well-being of the nation. It is no wonder that the President and Congress are cautiously moving forward with the bill that is currently in the legislative system. They want to get it right, leaving no room for ambiguity and possible litigation. The bill’s premise is nondiscrimination on the basis of sexual orientation. Everyone has a sexual orientation; therefore if passed, all candidates meeting the established physical and intellectual requirements should be accepted in the Armed Forces without regards to their sexual orientation.

The proposed language in the new policy appears definitive, yet as in the past, words are powerful and contorting them in a fashion away from the original intent is possible. The people of this nation will help determine the success or failure of the bill through the influence they exert on their representatives in Congress as well as their direct and indirect contributions to the public debate conducted through the media and other forums.

Is the Debate a Play on Words?

Domestic policy is high on the minds of the current administration as demonstrated by the push for healthcare reform, and concerns about the nation’s financial stability and the job market. Addressing the issue of whether or not homosexuals should

⁴House of Representatives, 111th Congress, 1st session, H.R. 1283: Military Readiness Enhancement Act of 2009, <http://www.govtrack.us/congress/bill.xpd?bill=1283> (accessed 16 November 2009).

be able to openly serve in the military could prove to be a distracter from other, more pressing, policy issues. Those against homosexual service would like nothing better than to cause or aggravate such distractions. For proponents of the ban, it seems the intent is on making the cost of changing the policy higher than the benefit of a changed policy. If domestic issues fall off the radar all Americans suffer, so keeping domestic issues in front of the administration's agenda puts the homosexual exclusion policy on the back burner-- as it has been for almost a year.

Pro-ban supporters of banning homosexuals from military service could also put up the appearance of disagreeing to the repeal of DADT; but, if the language of the proposed change deals only with the repeal of DADT, they win. If the DoD policy, DADT, were repealed then a new policy would be crafted to implement the existing law which essentially bans homosexuals from serving in the military. Without the current DoD policy, the federal law would be the sole operating authority over the military; at least until a new DoD policy is established. This new policy could potentially use the law as a framework and the law excludes homosexuals from serving in the military. Remember, the "don't ask" clause is not in the law. Is it likely that the forthcoming debate over the repeal of DADT will be reduced to clever word play? Yes, it is likely-- especially giving the lack of understanding that exists even among high ranking members of the military, let alone the general American public with an interest, and potentially a stake, in the debate. Therefore, clearly outlining the differences between the current federal law and DoD policy is a necessary pre-requisite to intelligent debate and alleviates the potential for a misunderstanding of the intent as well as the words. Despite this truth, some parties may have a vested interest in preserving obscurity, for the

opportunities it offers them for political maneuver, demagoguery, and propaganda. Obscurity and ambiguity also offer some players in the debate to maintain an uneasy, but unresolved balance between an explosive and highly contentious issue. These parties would then seek to obscure the issue in order to serve any of the above purposes. This is indeed the present status quo.

Homosexuality in the Armed Services

The unspoken acceptance of homosexuality in the armed forces is real. Based on the survey conducted for this thesis and on many opinion polls in civil society, it is apparent those military members perceive or know they are serving with homosexuals. The civil society has steadily increased their acceptance and support for the desire of homosexuals to serve in the military and to do so openly. This appears to have created an unofficial climate favorable to a revision of both the federal law and the DoD policy in the direction of allowing homosexuals to serve openly in the military.

There are many who use the argument that posits that allowing homosexuals to serve openly in the military would have a negative impact on unit cohesion and good order and discipline. The author considers that this argument is no longer relevant to the debate, because homosexuals are currently serving, there is general agreement both inside and outside the military that they are serving, and there is no apparent detriment to unit cohesion nor has a cause and effect relationship been established through empirical studies.

Attempting to qualify what a person's sexual orientation is and what constitutes the qualification of sexual orientation delves into realms of theory and subjective evaluation of the concept of sexuality analysis. A person is whom he/she is and should be

authorized to serve. In addition, due to the complexities of human nature, trying to anticipate behavior by reviewing past behavior is good general practice when looking for behavioral indicators, but it cannot definitively predict the future.

Conclusion

The subtle differences found between Public Law 103-160, "Policy concerning homosexuality in the armed forces" and the Department of Defense implementation policy, commonly known as "Don't ask, don't tell" are important to understanding what these documents are mandating. If one does not appropriately distinguish between the two, the potential for misunderstanding is likely. Perhaps the most egregious example is that often those advocating that homosexuals be allowed to serve openly in the military are asking for the repeal of the policy informally known as "Don't ask, don't tell." Based on the strict letter of the law only and not on the intent of these advocates, if this were to happen, the DoD policy would go away and the only thing left is the actual law which bans homosexual acts, i.e. those who conduct homosexual acts, and/or persons identified as homosexuals. The DoD policy i.e. "Don't ask, don't tell" allows homosexuals to serve, albeit silently. Therefore, if one wants homosexuals to be able to serve openly, they need authorization to serve in the first place. The law is what needs repealing and changing, not the DoD policy. DoD policy is implementing policy--subordinated to and implementing whatever the law prescribes. Thus, what needs to be addressed in the law banning homosexual conduct in military service not the DoD policy.

In 1993, the waters were tested and the result was a hurricane-force objection to allowing homosexuals to serve openly in the military. After sixteen years of relatively calm seas, the time has come again to test these same waters. Has society's perception

that openly serving homosexuals would destroy unit cohesion changed? Several active-duty homosexual military members have spoken out in an attempt to debunk this commonly held belief basing on their personal experiences and observations. They have risked their military careers to do so and many have lost, because they violated the second finding of the federal law by self-identifying as homosexuals--which is also the "don't tell" provision of the DoD policy. By speaking out, these persons have raised public awareness of the compromise and contradictions inherent in the policy's implementation of the law. These persons and their supporters argue that a policy of meritocracy, not sexual behavior or orientation, should be at the deciding factor in any new legislation and policy. In a liberal democracy, proud of its long tradition of increased opportunities to previously marginalized groups who are willing to work and sacrifice for the common good, their argument is compelling: If an individual is willing and able to serve his or her country, he or she should be allowed and even encouraged to do so. The United States has the world's best military and by allowing all qualified individuals to serve, it can only get better.

GLOSSARY

Bisexual: a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual and heterosexual acts.

Don't ask, don't tell: a common reference to the Department of Defense policy relating to the implementation of Public Law 103-160 concerning homosexual conduct in the military. Many consider it to define both the law and the DoD policy.

Homosexual: 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."

Homosexual act: (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).

Propensity to engage in acts: more than an abstract preference or desire to engage in homosexual acts; it indicates a likelihood that a person engages in or will engage in homosexual acts.

Rebuttable presumption: under "Don't ask, don't tell," the accused has the right to counter, or rebut, a presumption of homosexuality; unlike non-military law where proving guilt typically lies with the accusing party; the rebuttable presumption puts the burden of proving innocence on the defendant; further complicating matters is the need to prove the future negative--that is, prove that you will not do something in the future.

Sexual orientation: today's preferred terms and the term "sexual orientation" itself have a wide variety of definitions in the literature but these generally comprise one or both of two components: a "psychological" component and a "behavioral" component. Not all definitions include both these components, but definitions that include both components use either the conjunction "and" or "or" to join them.

APPENDIX A

Public Law 103-160, Section 571, 30 November 1993, 107 Statute 1673, Title 10,
Subtitle A, Part Ii, Chapter 37, Section 654

STATUTE:

(a) 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 (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).

APPENDIX B

Extract From U.S. Department Of Defense, DOD Instruction 1304.26, *Qualification Standards For Enlistment, Appointment, And Induction, Change 1*, 11 July 2007

E2.2.8. Provision Related to Homosexual Conduct.

E2.2.8.1 A person's sexual orientation is considered a personal and private matter, and not a bar to service entry or continued service unless manifested by homosexual conduct in the manner described in §654 of [Title 10, United States Code]. Applicants for enlistment, appointment, or induction shall not be asked or required to reveal their sexual orientation nor shall they be asked to reveal whether they have engaged in homosexual conduct, unless independent evidence is received indicating an applicant engaged in such conduct or the applicant volunteers a statement that he or she is a homosexual or bisexual, or words to that effect.

E2.2.8.2. Applicants shall be informed of separation policy in accordance with section 654 of [Title 10, U.S.C.]. Failure to receive such information shall not constitute a defense in any administrative or disciplinary proceeding.

E2.2.8.3. Nothing in these procedures requires rejections for entry into the Armed Forces when the relevant Military Service Command authority determines:

E2.2.8.3.1. An applicant or inductee made a statement, engaged in acts, or married or attempted to marry a person of the same sex for the purpose of avoiding Military Service; and/or

E2.2.8.3.2 Rejection of the applicant or inductee may not be in the best interest of the Armed Forces.

APPENDIX C

Extract From U.S. Department Of Defense, DOD Directive 1332.14, *Enlisted Administrative Separations*, 28 August 2008.

8. HOMOSEXUAL CONDUCT

b. Basis

- (3) Homosexual conduct is grounds for separation from the Military Services under the terms set forth in subparagraph 8.a.(2) of this enclosure. Homosexual conduct includes homosexual acts, a statement by a Service member that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage. A statement by a Service member that demonstrates a propensity or intent to engage in homosexual acts is grounds for separation not because it reflects the Service member's sexual orientation, but because the statement indicates a likelihood that the Service member engages in or will engage in homosexual acts. A Service member's sexual orientation is considered a personal and private matter, and is not a bar to continued service under this paragraph unless manifested by homosexual conduct in the manner described in subparagraph 8.a.(2) of this enclosure.
- (4) A Service member shall be separated under this paragraph if one or more of the following approved findings is made:
- (d) The Service member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts, unless there are approved further findings that:
6. Such acts are a departure from the Service member's usual and customary behavior;
 7. Such acts under all the circumstances are unlikely to recur;
 8. Such acts were not accomplished by use of force, coercion, or intimidation;
 9. Under the particular circumstances of the case, the Service member's continued presence in the Armed Forces is consistent with the interest of the Armed Forces in proper discipline, good order, and moral; and
 10. The Service member does not have a propensity or intent to engage in homosexual acts.
- (e) The Service member has made a statement that he or she is a homosexual or bisexual, or words to that effect, unless there is a further approved finding that the Service member 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. A statement by a Service member that he or she is a homosexual or

bisexual, or words to that effect, create a rebuttable presumption that the Service member engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts. The Service member shall be advised of this presumption and given the opportunity to rebut the presumption by presenting evidence demonstrating that he or she does not engage in, attempt to engage in, have a propensity to engage in, or intend to engage in homosexual acts. Propensity to engage in homosexual acts means more than an abstract preference or desire to engage in homosexual acts; it indicates a likelihood that a person engages in or will engage in homosexual acts. In determining whether a Service member has successfully rebutted the presumption that he or she engages in, attempts to engage in, or has a propensity or intent to engage in homosexual acts, some or all of the following may be considered:

6. Whether the Service member has engaged in homosexual acts;
7. The Service member's credibility;
8. Testimony from others about the Service member's past conduct, character, and credibility;
9. The nature and circumstances of the Service member's statement;
10. Any other evidence relevant to whether the Service member is likely to engage in homosexual acts. (This list is not exhaustive; any other relevant evidence may also be considered.)

- (f) The Service member has married or attempted to marry a person known to be of the same biological sex (as evidenced by the external anatomy of the persons involved).

APPENDIX D

Extract From U.S. Department Of Defense, DOD Directive 1332.30, *Officer Administrative Separations*, 11 December 2008.

3. HOMOSEXUAL CONDUCT Homosexual conduct is grounds for separation from the Military Services under the terms set forth in paragraph 3.a.(2) of this enclosure. Homosexual conduct includes homosexual acts, a statement by a Service member that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage. A statement by a Service member that demonstrates a propensity or intent to engage in homosexual acts is grounds for separation not because it reflects the Service member's sexual orientation, but because the statement indicates a likelihood that the Service member engages in or will engage in homosexual acts. A Service member's sexual orientation is considered a personal and private matter, and is not a bar to continued service under this paragraph unless manifested by homosexual conduct in the manner described in subparagraph 3.a. of this enclosure.

a. A commissioned officer shall be separated under this paragraph if one or more of the following approved findings are made:

(1) The officer has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts, unless there are approved further findings that the officer has demonstrated:

- (a) Such acts are a departure from the officer's usual and customary behavior;
- (b) Such acts under all the circumstances are unlikely to recur;
- (c) Such acts were not accomplished by use of force, coercion, or intimidation;
- (d) Under the particular circumstances of the case, the officer's continued presence in the Armed Forces is consistent with the interest of the Armed Forces in proper discipline, good order, and moral; and
- (e) The officer does not have a propensity or intent to engage in homosexual acts.

(2) The officer has made a statement that he or she is a homosexual or bisexual, or words to that effect, unless there is a further approved finding that the officer 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. A statement by an officer that he or she is a homosexual or bisexual, or words to that effect, create a rebuttable presumption that the officer engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts. The officer shall be advised of this presumption and given the opportunity to rebut the presumption by presenting evidence demonstrating that he or she does not engage in, attempt to engage in,

have a propensity to engage in, or intend to engage in homosexual acts. "Propensity to engage in homosexual acts" means more than an abstract preference or desire to engage in homosexual acts; it indicates a likelihood that a person engages in or will engage in homosexual acts. In determining whether an officer has successfully rebutted the presumption that he or she engages in, attempts to engage in, or has a propensity or intent to engage in homosexual acts, some or all of the following may be considered:

- (a) Whether the officer has engaged in homosexual acts;
- (b) The officer's credibility;
- (c) Testimony from others about the officer's past conduct, character, and credibility;
- (d) The nature and circumstances of the officer's statement;
- (e) Any other evidence relevant to whether the officer is likely to engage in homosexual acts.

(3) The officer married or attempted to marry a person known to be of the same sex (as evidenced by the external anatomy of the persons involved).

(4) The list in paragraphs 3.a.(2)(a) through 3.a.(2)(e) of this enclosure is not exhaustive; any other relevant evidence may also be considered.

- b. The commissioned officer shall bear the burden of proving throughout the proceedings, by a preponderance of the evidence, that the retention is warranted under the limited circumstances described in paragraphs 3.a.(1) and 3.a.(2) of this enclosure.
- c. Nothing in this Instruction of the Service of implementing regulations requires that an officer be processed for separation when a determination is made as follows, in accordance with regulations prescribed by the Secretary of the Military Departments concerned, that:
 - (1) The officer engaged in acts, made statements, or married or attempted to marry a person known to be of the same biological sex for the purpose of avoiding military service, and
 - (2) Separation of the officer would not be in the best interest of the Armed Forces.

APPENDIX E

Army Command And General Staff College (CGSC) Masters of Military Arts and Science (MMAS) Don't Ask, Don't Tell (DADT) Questionnaire Survey

CONSENT STATEMENT:

The purpose of this survey is to gather opinions of military members from CGSC. Answering the survey is voluntary and confidential. The purpose of the survey is for research for an MMAS thesis and will not pose a risk to survey participants. The information collected is will be administered by an unbiased third-party, CGSC/Quality Assurance Officer (QAO). The survey will take approximately 15 minutes to complete. Thank you for participation in the survey questionnaire regarding the DADT policy.

Military : USA, USAF, USMC, USN

Branch/Functional Area/AFSC/MOS:

Gender: M/F

Age:

Years of military service:

Highest level of education completed:

1. Have you deployed in support of the Global War on Terrorism (GWOT)?
2. Do you believe homosexuals are currently serving in the military?
3. Do you believe you have served in the military with homosexuals?
4. What made you perceive that an individual might be homosexual? (choose all that apply)
 - a. Mannerisms
 - b. Speech
 - c. Self-identified
 - d. Pictures/literature
 - e. Other: _____
5. Did the presence of a presumed homosexual in your unit create problems? (choose all that apply)
 - a. Unit cohesion
 - b. Good order and discipline
 - c. Violence
 - d. Morale
 - e. Other: _____

6. Did the presumed homosexual in your unit negatively affect efficiency of mission accomplishment?
7. Do you believe homosexuals should be able to serve openly in the military?
8. If homosexuals were authorized to serve openly, would it negatively affect your personal military service?
9. How would it affect your personal military service?
10. If military members who self-identify themselves as homosexuals were allowed to serve in the military, how do you think it might affect your command?
11. Does the current DADT policy best serve the needs of the nation? Why?
12. Do you believe the current DADT policy should change? How?

Additional comments:

APPENDIX F

Results of Army Command and General Staff College (CGSC) Masters of Military Arts And Science (MMAS) Don't Ask, Don't Tell (DADT) Questionnaire Survey

Count and Percent DADT

	Count	Percent
1. Have you deployed in support of the Global War on Terrorism (GWOT)?		
(Not Answered)	1	1.20 %
Yes	80	96.39 %
No	2	2.41 %
Total Responses	83	100.00 %
2. Do you believe homosexuals are currently serving in the military?		
(Not Answered)	1	1.20 %
Yes	82	98.80 %
Total Responses	83	100.00 %
3. Do you believe you have served in the military with homosexuals?		
(Not Answered)	1	1.19 %
Yes	78	92.86 %
No	5	5.95 %
Total Responses	84	100.00 %
4. What made you perceive that an individual might be homosexual? (choose all that apply)		
(Not Answered)	4	2.76 %
Mannerisms	47	32.41 %
Speech	28	19.31 %
Self-identified	28	17.93 %
Pictures/literature	8	4.14 %
Other	34	23.45 %
Total Responses	145	100.00 %
5. Did the presence of a presumed homosexual in your unit create problems? (choose all that apply)		
(Not Answered)	28	22.61 %
Unit cohesion	24	20.87 %
Good order and discipline	25	21.74 %
Violence	6	5.22 %
Morale	11	9.57 %
Other	23	20.00 %
Total Responses	115	100.00 %

Count and Percent DADT

	Count	Percent
6. Did the presumed homosexual in your unit negatively affect efficiency of mission accomplishment?		
(Not Answered)	5	6.02 %
Yes	18	21.69 %
No	60	72.29 %
Total Responses	83	100.00 %
7. Do you believe homosexuals should be able to serve openly in the military?		
(Not Answered)	2	2.41 %
Yes	25	30.12 %
No	56	67.47 %
Total Responses	83	100.00 %
8. If homosexuals were authorized to serve openly, would it negatively affect your personal military service?		
(Not Answered)	1	1.20 %
Yes	34	40.96 %
No	48	57.83 %
Total Responses	83	100.00 %

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