

**STATEMENT OF ELAINE DONNELLY  
PRESIDENT, CENTER FOR MILITARY READINESS**

**HOUSE ARMED SERVICES COMMITTEE  
SUBCOMMITTEE ON PERSONNEL**

**In Support of Section 654, Title 10, the 1993 Law Stating that  
Homosexuals are not Eligible to Serve in the Military**

**Rayburn House Office Building, Washington D.C.  
July 23, 2008**

Thank you for the opportunity to testify before this committee today on an issue that is important to the strength, readiness, and culture of our military. The Center for Military Readiness (CMR) is an independent 501(c)(3) public policy organization that specializes in military/social issues. I founded CMR in 1993, and we are supported by civilians, retired and active duty military people in all 50 states and all branches of the armed forces. CMR is not affiliated with or funded by the Department of Defense.

In 1993 President Bill Clinton attempted to lift the ban on homosexuals in the military. It was one of the most contentious efforts of his administration, sparking months of intense debate. Following twelve legislative hearings and field trips, Congress passed a law codifying and confirming the pre-Clinton policy. That statute, technically named [Section 654, Title 10, P.L. 103-160](#),<sup>1</sup> is frequently mislabeled “Don’t Ask, Don’t Tell.” A more accurate name would have been the [“Military Personnel Eligibility Act of 1993.”](#)<sup>2</sup> The statute, which has been upheld by the courts as constitutional several times, clearly states that homosexuals are not eligible for military service.

In 1993 members of Congress gave serious consideration to a proposal known as “Don’t Ask, Don’t Tell,” which was announced by President Clinton on July 19, 1993. The concept suggested that homosexuals could serve in the military as long as they didn’t *say* they were homosexual. Congress wisely rejected the convoluted “Don’t Ask, Don’t Tell” concept and did not write it into law. Members recognized an inherent inconsistency that would render that policy unworkable and indefensible in court: If homosexuality is not a disqualifying characteristic, how can the armed forces justify dismissal of a person who merely reveals the presence of such a characteristic? Instead of approving such a convoluted and legally-questionable concept, Congress chose to codify Defense Department regulations that were in place long before Bill Clinton took office.<sup>3</sup>

The resulting law, identified as Section 654, Title 10, continued the long-standing Defense Department policy stating that homosexuals are ineligible for military service. Following extensive debate in both Houses, the legislation passed with overwhelming, veto-proof bipartisan majority votes.<sup>4</sup> In writing this law, members wisely chose statutory language

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<sup>1</sup> See National Defense Authorization Act for Fiscal Year 1994, Pub. L. No 103-160, § 571, 107 Stat. 1547, 1670 (1993) (codified at 10 U.S.C. § 654 (2000)) (reprinted in Appendix). The 1993 law codified long-standing Defense Department regulations regarding homosexual conduct, which were based on the principle that homosexuality is incompatible with military service. See Elaine Donnelly, *Duke University Journal of Gender Law & Policy*, “Constructing the Co-Ed Military,” May 2007, hereinafter cited as “*Duke Law Journal*,” pp. 908-910. Excerpts of the peer-reviewed 137-page article, and copy of the statute, are appended to this statement. The *Duke Law Journal* article is available in full at <http://www.law.duke.edu/shell/cite.pl?14+Duke+J.+Gender+L.+&+Pol%27y+8151>,

<sup>2</sup> Legislative history clearly shows that members of Congress did not intend to accommodate professed homosexuals in the military. See House Report, reprinted in the Appendix. Also see *Duke Law Journal* article, pp. 905-908, and the July 2007 CMR articles, “Give the Law a Name,” available on the website, [www.cmrlink.org](http://www.cmrlink.org), at <http://cmrlink.org/printfriendly.asp?docID=300>.

<sup>3</sup> See *Duke Law Journal*, pp. 904-907.

<sup>4</sup> On Sept. 9, 1993, the Senate approved language in the FY 1994 Defense Authorization bill that codified the homosexual ban, using language almost identical to that in the Defense Department directive that had been in place since 1981. An amendment offered by Sen. Barbara Boxer (D-Cal.), which would have allowed the president to decide policy regarding gays in the military, was defeated on Sept. 9, 1993, on a bipartisan 63-33 vote. On Sept.

almost identical to the 1981 Defense Department Directives regarding homosexual conduct, stating that “homosexuality is incompatible with military service.” Those regulations had already been challenged and upheld as constitutional by the federal courts.<sup>5</sup>

The 1993 statute was designed to encourage good order and discipline, not the dishonesty inherent in “Don’t Ask, Don’t Tell.” Congress rejected that concept, and chose instead to codify unambiguous findings and statements that were understandable, enforceable, consistent with the unique requirements of the military, and devoid of the First Amendment conundrums that were obvious in President Clinton’s July 19 proposal.<sup>6</sup>

A thorough search of media reports at the time, however, reveals that there were few news stories reporting passage of the law. Those that did appear in print failed to report its language and meaning with accuracy.<sup>7</sup> Those reports and convoluted Defense Department statements since then have confused the issue by erroneously suggesting that Congress voted for Bill Clinton’s flawed proposal, known by the catch-phrase “Don’t Ask, Don’t Tell.”<sup>8</sup>

Describing the law as a “compromise” and referring to it as “Don’t Ask, Don’t Tell” gave political cover to President Clinton, who had promised to lift the ban shortly after his election in 1992. In fact, due to overwhelming public opposition, President Clinton failed to deliver on his promise. The only “compromise” involved allowed the Clinton administration to continue its

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28, the House rejected a similar amendment, sponsored by Rep. Martin Meehan (D-MA) and Rep. Patricia Schroeder (D-CO), which would have stricken the Senate-approved language and expressed the sense that the issue should be decided by the President and his advisors. The Meehan/Schroeder amendment was defeated on a bipartisan roll-call vote, 264 to 169.

<sup>5</sup> See P. L. No. 103-160, § 571(d), 107 Stat. at 1673, reprinted in Appendix A, and the analysis of legislative history published by the Duke University *Journal of Gender Law & Policy*, pp. 903-910. Also see University of Missouri-Kansas City Law Review article by William A. Woodruff, “Homosexuality and Military Service,” 64 UMKC L. Rev. 121, 123-24 (Fall 1995). Prior to retiring from active duty in the Judge Advocate General’s Corps, Professor Woodruff served as Chief of the Litigation Division in the Office of the Judge Advocate General, where he was responsible for defending the Army’s interests in civil litigation, including litigation challenges to the homosexual exclusion policy.

<sup>6</sup> Among other things, the law states that “military life is fundamentally different from civilian life,” and standards of conduct apply “whether the member is on base or off base, and whether the member is on duty or off duty.” It further notes that members of the armed forces must “involuntarily...accept living conditions and working conditions that are...characterized by forced intimacy with little or no privacy.” Therefore, “The prohibition against homosexual conduct is a long-standing element of military law that continues to be necessary in the unique conditions of military service.” These findings and statements are very different from the language proposed by Bill Clinton on July 19, 1993, which Congress did not write into law: “Sexual orientation is considered a personal and private matter, and homosexual orientation is not a bar to service entry or continued service unless manifested by homosexual conduct.” See Duke *Law Journal*, pp. 908-911.

<sup>7</sup> See July 2007 CMR article, “[Why the Law Did Not Get a Name of Its Own.](http://cmrlink.org/HMilitary.asp?docID=299),” available at <http://cmrlink.org/HMilitary.asp?docID=299>

<sup>8</sup> Statutory language mandated briefings and educational materials to clarify the meaning and intent of the law, but the Department of Defense has failed to comply with this provision. Official spokesmen continue to mention the 1993 law in suggesting, erroneously, that homosexuals are eligible for military service if they do not *say* they are homosexual. See Pub. L. No. 103-160, § 571(d), 107 Stat. at 1673, reprinted in Appendix A.

“interim policy” of not asking “the question” regarding homosexuality that used to appear on routine induction forms.<sup>9</sup>

This politically expedient concession on a matter of process was ill-advised, but it did not nullify the language of the law. The Secretary of Defense is authorized to restore “the question” about homosexuality at any time, without additional legislation.

It is significant to note that the vague phrase “sexual orientation,” stated twice in Bill Clinton’s original “Don’t Ask, Don’t Tell” proposal, was not incorporated anywhere in the law that Congress actually passed. Members of Congress recognized that the phrase would be difficult to define or enforce. Instead, the law is firmly based on conduct, evidenced by actions or statements. Absent unusual circumstances, a person who says that he is homosexual is presumed to engage in the conduct that defines what homosexuality is.

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

“Although some would assert that section 654 of Title 10, US Code . . . embodied the compromise now referred to as “Don’t Ask, Don’t Tell,” there is no evidence to suggest that the Congress believed the new law to be anything other than a continuation of a firm prohibition against military service for homosexuals that had been the historical policy.

“The law, as well as accompanying legislative findings and explanatory report language, makes absolutely clear that known homosexuals, identified based on acts or self admission, must be separated from the military. After extensive testimony and debate, the Congress made a calculated judgment to confirm the continued bar to the service of homosexuals in the military. The case supporting the Congressional position is well documented and compelling. . . .

“Those that claim that the Don’t Ask, Don’t Tell policy has failed simply do not understand the underlying law. The prospect of a homosexual openly serving in the military was never contemplated by the Congress and any policy that suggests that the military should be receptive to the service of homosexuals is in direct violation of the law.”<sup>10</sup>

The difference between what should have been named the “Military Personnel Eligibility Act” and the Clinton enforcement policy explains why factions on both sides of the issue are critical of “Don’t Ask, Don’t Tell.” Even though Congress rejected, with good reason, the “Don’t Ask, Don’t Tell” concept in 1993, the Clinton Administration imposed it on the military anyway in the

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<sup>9</sup> *Duke Law Journal*, pp. 900-908.

<sup>10</sup> [Memorandum for Members of the Republican Conference](#) from Rep. Steve Buyer, Chairman of the House Armed Services Subcommittee on Personnel, “Policy Regarding the Present Ban on Homosexuals in the Military,” Dec. 16, 1999.

form of enforcement regulations that were announced in December 1993. Those expendable regulations, unfortunately, remain in effect today.<sup>11</sup>

In 1996 the U.S. Court of Appeals for the Fourth Circuit said in a ruling upholding the constitutionality of the law that the Clinton Administration's enforcement policies ("Don't Ask, Don't Tell") were not consistent with the statute that Congress actually passed; i.e., Section 654, Title 10.<sup>12</sup> The Clinton Administration disregarded the Court, and perpetuated deliberate confusion by retaining its inconsistent "Don't Ask, Don't Tell" policy in Defense Department enforcement regulations.

It is not difficult to recognize just how inefficient and contrary to sound policy the "Don't Ask" concept is. In the civilian world, it would be tantamount to a state law forbidding bartenders to check ID before serving younger customers who may not be of legal age. Such a law would force the proprietor of a bar to *assume the risk* that if an under-age customer drives and hurts someone on the way home, the proprietor of the bar will be held liable. That risk is reduced by the posting and enforcement of signs stating "We Check ID."<sup>13</sup>

In the same way, it makes no sense for the Department of Defense to forbid routine questions on induction forms that help to determine eligibility for military service. Such a policy ("Don't Ask, Don't Tell") forces the armed forces to *assume the risk* that persons who engage in homosexual conduct will be inducted or retained in the military.

We keep hearing about personnel losses that have occurred since 1994 when military personnel announce that they are homosexual, and are honorably discharged. In comparison to discharges for other reasons, such as pregnancy or violations of weight standards, these numbers are relatively small.<sup>14</sup> They could be reduced to near-zero if the Defense Department stopped issuing misleading information about the eligibility of homosexuals to serve in uniform. The routine inquiry about homosexuality can and should be reinstated now; no additional legislation is required.

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<sup>11</sup> The DoD News Release announcing regulations to enforce Section 654, Title 10, referred to the "Don't Ask, Don't Tell" policy announced by President Clinton on July 19, 1993. Few members of the media noticed (or chose to write about) the glaring discrepancy, which has been the source of confusion and controversy ever since. *See* DoD Release No. 605-93, Dec. 22, 1993.

<sup>12</sup> In a 9-4 decision that denied the appeal of Navy Lt. Paul G. Thomasson, a professed homosexual who wanted to stay in the Navy, U.S. Circuit Judge Michael Luttig wrote about the exclusion law: "Like the pre-1993 [policy] it codifies, [the statute] unambiguously prohibits all known homosexuals from serving in the military . . ." Judge Luttig added that the Clinton Administration "fully understands" that the law and DoD enforcement regulations are inconsistent and has engaged in "repeated mischaracterization of the statute itself . . ." This ruling should have prompted the Defense Department to drop the problematic "Don't Ask, Don't Tell" policy/regulations, but the Clinton administration failed to strengthen enforcement of Section 654, Title 10, by dropping the administrative policy known as "Don't Ask, Don't Tell."

<sup>13</sup> Commander Wayne L. Johnson, JAGC Navy (Ret.), stated this analogy in a communication with CMR.

<sup>14</sup> See Duke Law Journal, pp. 919-923, and graph prepared and prepared by the Center for Military Readiness, posted here: <http://cmrlink.org/CMRNotes/HomosexualDischarges100107.pdf>

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

Fifteen years after passage of the law, we are hearing about problems that members of Congress predicted when they voted to reject “Don’t Ask, Don’t Tell.” Contradictions between policy and law are the main cause of emotional problems the committee likely will hear about today. Most of these problems could have been avoided if the law had been properly enforced. The answer is not to repeal the 1993 law, but to improve understanding of what the statute actually says, and why.

For years, less than credible “studies,” which are based on questionable methodology and unsupported theories, have been released by activist sources trying to create an illusion of momentum for their cause. I have analyzed most of these polemics, which cannot withstand close scrutiny, in my comprehensive article for the Duke University *Journal of Gender Law and Policy*, excerpts of which are attached to this statement.

My primary purpose in the limited time available today is to focus attention on some of the consequences that would result from repeal of this law, Section 654, Title 10. In this statement and supporting documents I am submitting for the record, I would like to address these issues in detail.

## **1. Repeal of the Law and Forced Cohabitation**

If Congress repeals the 1993 statute stating that homosexuals are not eligible to serve in uniform, and the military is ordered to accommodate professed (not discreet) homosexuals, the culture of the military will be radically changed. Recruiters will be directed to accept and even seek out professed homosexuals for induction in all branches of the military, including direct ground combat communities. This means that heterosexuals—the majority of men and women who volunteer to serve—will be required to live in forced cohabitation with professed (not discreet) homosexuals, on all military bases and ships at sea, on a 24/7 basis. Such a policy would impose new, unneeded burdens of sexual tension on men and women serving in high-pressure working conditions, far from home, that are unlike any occupation in the civilian world.

The real-world issue here is not superficial. Nor is it a Hollywood fantasy portrayed for laughs in a television sitcom. We are talking about human sexuality and the normal, human desire for personal privacy and modesty in sexual matters. Repealing the 1993 law would be tantamount to forcing female soldiers to cohabit with men in intimate quarters, on all military bases and ships at sea, on a 24/7 basis. Stated in gender-neutral terms, forced cohabitation in military conditions that offer little or no privacy would force *persons* to live with *persons* who might be sexually attracted to them.

Inappropriate passive/aggressive actions common in the homosexual community, short of physical touching and assault, will be permitted in all military communities, to include Army

and Marine infantry battalions, Special Operations Forces. Navy SEALs, and cramped submarines that patrol the seas for months at a time.

The ensuing sexual tension will hurt discipline and morale, but commanders will not have the power to improve the situation. Individuals whose beliefs and feelings about sexuality are violated by the new policy will have no recourse. The only option will be to avoid or leave the service. Forced cohabitation with homosexuals in the military, 24/7, would be unfair, demoralizing, and harmful to the culture of the volunteer force, on which our national security depends.

We keep hearing that in the brave new “Will & Grace” world, none of this matters. And yet, it was only a year ago when the nation reacted with universal disapproval of Sen. Larry Craig (R-ID) and 39 others who were arrested for inappropriate behavior in a public but transient place at the Minneapolis airport over a period of three months.<sup>15</sup>

Columnist Michael Medved drew a valid comparison in an insightful article titled “Larry Craig and ‘Don’t Tap, Don’t Tell.’” Medved asked a fair question: If preventing public sex in airport men’s rooms is important enough to justify the deployment of undercover cops, isn’t it similarly important to deter the sexualization of private facilities in the military?<sup>16</sup>

Contrary to the misleading name assigned to legislation proposed to repeal Section 654, Title 10, personnel policies that cause turbulence and division in military units, instead of uniting them, would detract from readiness, not “enhance” it.<sup>17</sup>

## **2. Implications of the “Civil Rights” Argument**

Activists who demand repeal of the 1993 law invoke the honored standard of “civil rights.”<sup>18</sup> Their cause, however, bears little resemblance to our military’s proud history of

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<sup>15</sup> Duff Wilson, the *New York Times*, “Sting Charges Against Craig Harsher Than Some,” Sept. 10, 2007. A defense lawyer for another man accused of disorderly conduct in the Minneapolis Airport restroom stated the behavior attributed to his client, which was short of actually having sex in the bathroom, should not be considered a crime. This is the type of mindset that would excuse similar passive/aggressive behavior in the military.

<sup>16</sup> [Townhall.com, Sept. 5, 2007](#), reprinted in Appendix. Medved noted that the same principle would invite men and women to occupy the private areas of the opposite sex, and that advocates rely on “rules that would, theoretically, prevent gay men from hassling other men in the head would prevent hetero men from harassing women (or vice versa)...“but that wouldn’t make [them] any more welcome in a female facility.” Commenting on the “national shudder of discomfort and queasiness” that ensued when Sen. Craig was arrested in 2007, Medved added, “We have a common and compelling interest in keeping such places free of erotic tension and that’s why we dispatch police officers to patrol public rest stations—even though they are hardly needed to prevent outright assaults. And if regular users of airport or public park facilities have a right to escape suggestive glances or inviting gestures...how much more so do young recruits (many of them 18 or 19 years old) have the same right to avoid similar attentions (or even suspicions) from their fellow soldiers in the intimate quarters necessitated by military service?”

<sup>17</sup> Military Readiness Enhancement Act of 2007, sponsored by Rep. Ellen Tauscher. (D-CA). The legislation as drafted purports to eliminate discrimination on the basis of “sexual orientation,” an indefinable phrase that refers to “heterosexuality, homosexuality, or bisexuality, whether the orientation is real or perceived, and includes statements and consensual sexual conduct manifesting heterosexuality, homosexuality, or bisexuality.” The phrase “real or perceived,” opens the door to transgenderism and other exotic forms of sexual expression. See footnote 38 below, regarding advocacy of transgenderism in the British military.

racial integration.<sup>19</sup> If this is deemed a civil rights issue, the argument should be taken to its logical conclusion. If the military is ordered to accommodate homosexuals, it will follow the civil rights model in counter-productive attempts to make the new paradigm “work.”

The principle of “zero tolerance” in matters of civil rights is well established. The military does not do things half-way. Nor does it tolerate members who do not support civil rights and equal opportunity in the military.

This means that any military man or woman who expresses concerns about professed homosexuals in the military, for any reason, will be assumed “intolerant,” and suspected of harassment, homophobia, “bullying,” bigotry, or worse. Since our military does not tolerate sexual harassment or bigotry, disciplinary penalties and career-ending denials of promotions would be the logical consequence of treating homosexuals in the military as a “civil rights” issue.<sup>20</sup>

This mandate would be particularly divisive among men and women whose religious convictions are thrown into direct conflict with official military policy. As a result, thousands of valuable troops could feel compelled to avoid or leave military service.

In the most recent “study” released by the Palm Center, formerly named the Center for the Study of Sexual Minorities in the Military (CSSMM), a panel of four retired military officers showed little concern about this problem. In “Finding Five” of the document, the panel conceded that an estimated 4,000 military personnel would be lost to the service if the law were repealed. They also claimed, with no credible support, that the loss would be “a wash in terms of recruiting and retention” because 4,000 gays and lesbians would enlist to take their places.

The report based its estimates of potential personnel losses on responses to a survey question in a Zogby Poll, which the Palm Center commissioned and paid for in late 2006. Upon

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<sup>18</sup> In a statement before a Senate Committee hearing on this issue on April 29, 1993, Lt. Gen. Calvin A. H. Waller, a highly-respected African-American military leader, was asked by Sen. Sam Nunn (D-GA) whether he agreed with the racial analogy, equating homosexual rights and civil rights for racial minorities. Waller replied, “We are talking about the lifestyle or the sexuality of a person who wants to be open with their sexuality or with their lifestyle into a force or into the Armed Forces where I think that is detrimental to readiness and to good law and order and discipline.” Waller further commented that he strongly disagreed with the racial analogy. “I am opposed to that. I do not like that analogy. I do not think it is the same in any respect.” Respected sociologist Charles Moskos, testifying on the same day, added “I think the black/white analogy vis-à-vis gays/straights which General Waller has tossed out a couple of times really is the misleading one. It really is the male/female analogy.” See Senate Hearing 103-845, pp. 399-404 and 424.

<sup>19</sup> President Harry Truman’s Executive Order to end racial discrimination in 1948 advanced civil rights, but its primary purpose was to serve the needs of the military. Title VII of the Civil Rights Act of 1964 does not apply to uniformed military personnel because its provisions might detract from the needs of the military, which is charged to confront enemies that are not subject to similar rules. See Report of the Presidential Commission on the Assignment of Women in the Armed Forces, Nov. 30, 1992, Findings 1.32, 1.33, and 1.33A, p. C-40.

<sup>20</sup> The British military provided an example of how the “civil rights” principle and “zero tolerance” enforcement can be taken to intolerant extremes. In 1999 the European Court of Human Rights ordered the United Kingdom to accommodate homosexuals in their armed forces. According to the London *Telegraph*, a former Army major recently was suspended for allegedly telling a lesbian soldier that lesbians and gays should not be serving in the Army. Stephen Adams, *Telegraph*.co.uk, [“Army Anti-Sex Harassment Head Suspended for Alleged Harassment.”](#) Jun. 18, 2008.

closer analysis, the estimate of potential losses would be more than five times *greater* than 4,000.<sup>21</sup> The prospect of losing thousands of personnel apparently did not disturb the panel members, however, because the military would become more “diverse” as a result. This statement discredits the perception that the campaign to repeal the 1993 law is motivated by a concern for recruiting, retention, or any other factor associated with military necessity.

### **3. Affirmative Action and Retroactive Consequences of a “Civil Rights” Standard**

If the civil rights model is followed in all matters involving homosexuals, it is likely that a wide array of disruptive policies will be implemented by bureaucrats or judges taking the principle to its logical conclusion. That could mean recruiting quotas for gay personnel, the offer of enlistment to those previously denied, retroactive promotions, and financial settlements for persons claiming past discrimination.

In a recent communication with the Center for Military Readiness, Campbell University Law Professor William Woodruff, an expert on the issue of homosexuals in the military, expressed concern that the full impact of applying the “civil rights” standard to homosexuals in the military could be imposed by the federal courts, based on legal and administrative precedents:

“We all know that the military has used various "affirmative action" measures to promote women and minorities. Every selection board instruction by the secretary of the service tells the promotion board to look specifically at minorities and women and make sure they are given fair consideration for promotion because they may not have had the best assignments or gotten the best OERs—evaluations that need to be considered in that context. This is a generalization, but some language in some promotion board instructions has actually been interpreted as an expectation of recruiting quotas.

“Several successful court cases have resulted in back pay for officers non-selected for promotion or who have been forced into selective early retirement because women and minorities were given special consideration in the board's instructions. Should secretarial guidance to selection boards include similar language with regard to homosexuals? Clearly, they have been subject to past "discrimination." Should "affirmative action" be required to remedy those past "injustices?" If so, what should the board's guidance be?

“This opens a can of worms that most folks won't want to deal with. But, in affirmative-action-land a history of institutional discrimination is one of the factors that courts look to in determining whether quotas or other preferential policies are warranted. I suggest that in context, homosexuals will have a stronger argument for affirmative action recruiting than

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<sup>21</sup> Palm Center Report Finding #5, p. 9: “In the worst case scenario, if it turns out to be true that the numbers cancel out and 4,000 heterosexuals refrain from enlisting, while 4,000 gays, lesbians, and bisexuals do enlist, the group nevertheless points to the many official pronouncements about the importance of building and maintaining a diverse force to represent the values of a free, pluralist democracy. Building and maintaining a diverse force is a central component to winning the war on terror because the diversity of the armed forces can serve as a living example to peoples living under authoritarian rule, and demonstrate that pluralism and tolerance offer a better way of life.” See Elaine Donnelly, [Human Events](#) Online, “PM Polemic for Gays in the Military,” July 15, 2008.

women and minorities. Will application of the affirmative action efforts require the service to "ask" about sexual orientation? How else can you identify the people entitled to special consideration?"<sup>22</sup>

Before voting to repeal the 1993 law for "civil rights" reasons, members of Congress need to give serious thought to the cost of all potential consequences — legal, cultural, financial, and operational. The next step is to answer an obvious question: How will all of these costs benefit discipline, morale, and readiness in the volunteer force? None of these consequences would burden the military if Congress remembers that the institution exists to defend the country; it is not just another equal opportunity employer.

#### **4. Enforcement of Laws and Regulations Re Sexual Misconduct**

Activists demanding repeal of the law dismiss concerns about sexual misconduct by claiming that existing regulations against heterosexual misconduct can and should be equally applied to misconduct involving professed homosexuals. This is an unrealistic argument, which betrays an elitist attitude and false assumptions about military culture and law.

It is theoretically possible that incidents of sexual assault by homosexuals in our military would be punished in an even-handed way, but in actual practice this would be small comfort to persons experiencing forced cohabitation with others whose inappropriate behavior causes sexual tension and division in groups that need to be cohesive in order to be effective. (The previous sentence applies to forced cohabitation involving both homosexuals and heterosexuals)<sup>23</sup>

When a female soldier reports an incident of sexual harassment or abuse, she enjoys the presumption of truthfulness. But under the new civil rights standard, if a male soldier reports an incident of homosexual harassment or abuse, he will face the suspicion, if not the presumption, of unacceptable attitudes toward fellow soldiers who are gay.

Since charges of harassment will be met with counter charges of "bigotry" or "homophobic bullying," heterosexuals whose values are violated will hesitate to file complaints, lest they be suspected and probably accused of attitudes that violate the new "zero tolerance" policy, favoring homosexuals in the military.

In messy, emotionally-charged disputes such as this, commanders themselves will be accused of homophobic attitudes if they take the side of the heterosexual person over the homosexual one. Who is bullying whom? In close quarters it wouldn't matter—the effect on unit cohesion would be the same.

In recent months the Center for Military Readiness has received several messages from active duty and retired military person with personal knowledge of disruptive behavior, harassment, and assault by male and female homosexuals. One of the most graphic messages came from Cynthia Yost, a former Army a medical corpsman (91B). In the mid-1970s, she

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<sup>22</sup> According to a report in the London TimesOnline, in 2007 the British Ministry of Defence issued an open apology last year to all servicemen and servicewomen who were not admitted to or retained in the military before the ban on homosexuality was lifted (by order of the European Court of Human Rights) eight years ago. *See* Damian Barr and Lucy Bannerman, "[Soldiers Can Wear Their Uniforms with Pride at Gay Parade, says MoD.](#)" June 14, 2008.

<sup>23</sup> See [House Report 103-200](#), 103<sup>rd</sup> Congress, 1<sup>st</sup> Session, National Defense Authorization Act for F.Y. 1994, Report of the Committee on Armed Services, House of Representatives, on H.R. 2401, July 30, 1993.

wrote, there was a heightened sensitivity to inappropriate attitudes regarding race. A group of lesbian women separated themselves from everyone else, and training classes tended to elevate tensions, rather than alleviate them. On one occasion, wrote Yost,

“Some of them were ethnic minorities, and it was a group of black lesbians who decided to gang-assault me. I don't know what else you would call it. This incident happened in the spring of 1974, at Fort Jackson, South Carolina. We were riding crowded together in a "cattle truck", and suddenly they all began groping my crotch and breasts through my fatigues, talking suggestively, rubbing my thighs, hugging me tightly around the waist and shoulders, and giggling.

“This was in 1974, when the military brass lived in terror of accusations of racist attitudes among military personnel. It was assumed that any white person hitting or attacking a black one for any reason, even in self-defense, was, ipso facto, a racist. Such an incident, reported, meant a letter of reprimand in one's permanent record, and many tedious hours of "race relations" classes.

“...I didn't report the assault because I wanted to keep my record clean, and I didn't defend myself from their physical assault for the same reason. I didn't want a permanent label of "racist" to derail my military career. So, I restrained my nausea and outrage, and just kept pushing their hands and arms off me and telling them to please stop. They finally did, when they were tired of it.

“The way these women behaved in the company, and the assault, soured me on the idea that homosexuals had any "right" to be in the military. If they are allowed in openly, we'd be on a steep slippery slope, indeed. I'd bet that within five years an assault like the one I endured would be "de-criminalized," on the grounds that the victim is a “homophobe” if they won't just "relax and enjoy" being sexually assaulted.”<sup>24</sup>

In a subsequent message to CMR, Ms. Yost made an additional point that is as contemporary as the latest iPhone. Shortly after the assault that she suffered, one of the lesbians began surreptitiously taking pictures of Yost and other female soldiers while they were showering, running off and laughing when they turned to look. Wrote Yost, “Such behavior then was bad enough. But in these days of digital cameras and camera phones with Internet access, such photos could be sent anywhere and everywhere in the world in seconds, along with the victim's name and location.” Her warning should not be disregarded.

In Britain, which homosexual activists point to as an example to be followed by the American military, the gay activist group Stonewall praised the Ministry of Defence (MoD) for working with the group on “homophobic bullying.”<sup>25</sup> This is an interesting comment since activists claim that the British experience has been completely positive.

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<sup>24</sup> [Letter from Cynthia Yost](#) to House Armed Services Committee Chairman and Ranking Member, July 18, 2008.

<sup>25</sup> Chris Gourley, [London TimesOnline](#), “Armed Forces March United for Gay Rights at Pride London,” July 5, 2008.

The London *Telegraph* also reported in the past month that a former Army major who now heads an Equal Opportunities Inquiry Team (EOIT) in the British military was suspended for allegedly abusing a lesbian sergeant verbally. John Wooldridge, 51, who reportedly had been previously involved in “several” inquiries into homosexual behavior among military personnel before 2000, was disciplined for saying on more than one occasion that “lesbians and gays should not be serving in the Army.”<sup>26</sup> Accusations such as this could become common in the American military if the 1993 law is repealed.

In some cases, a person accused of homosexual conduct tries to escape punishment by claiming that the act was consensual. Air Force Capt. Devery L. Taylor, for example, who was convicted and sentenced to 50 years in prison for raping four men and attempting to rape two others, claimed that he was the victim of consensual partners who lied to protect their military careers.<sup>27</sup>

The question must be asked, how would all this turmoil improve readiness, morale, and discipline? The only beneficiaries, it seems, would be lawyers needed to defend military personnel accused of “bad attitudes,” and professional diversity trainers paid to conduct “diversity” and “sensitivity training” that is supposed to change personal feelings about sexuality.

## **5. Inadequate Reports and Risks of Physical Abuse**

If the 1993 law is repealed, it is highly unlikely that evidence of problems will be reported for objective evaluation by Congress or the general public. In Britain, held out as a model for the United States on social change, the Ministry of Defence barred interviews with military personnel by the *New York Times*, on or off the record, on the subject of gays in the military. The resulting article nevertheless was headlined as if the British experience is an unqualified success.<sup>28</sup>

A *Navy Times* editorial commenting on the disturbing case of Navy Lt. Cmdr. John Thomas Lee, described below, noted that unlike the civilian judicial system, military courts do not offer a publicly accessible docket of pending court martial cases. As a result, “military commanders release that information at will, giving them unmatched control over information that should be out in the open.”<sup>29</sup>

The *Navy Times* further reported that incidents of male sexual assault often are underreported and may be more prevalent in the military than in other parts of society. Studies

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<sup>26</sup> Stephen Adams, *Telegraph.co.uk*, “Army Anti-Sex Harassment Head Suspended for Alleged Harassment,” June 18, 2008.

<sup>27</sup> Eglin AFB, *Air Force Times*, “Officer Accused of Rape Says He Rejected Alleged Victim,” Mar. 5, 2007. See also *Duke Law Journal*, p. 926. See more about the Devery Taylor case elsewhere in this testimony.

<sup>28</sup> Sarah Lyall, the [New York Times](#), “Gay Britons Serve in Military With Little Fuss, as Predicted Discord Does Not Occur,” May 21, 2007, p. 8.

<sup>29</sup> Editorial, *Navy Times*, “Corps Puts Spin Control Ahead of Victims’ Health,” Dec. 17, 2007, p. 44.

suggest that sexual assault among military men is most prevalent among junior enlisted ranks.<sup>30</sup> Authorizing policies that would increase the number of sexual harassment cases among men would achieve a type of “equality,” but this is not the kind of equality that we need in the volunteer force.

We also know that current discharges of persons who engage in homosexual conduct frequently are not reported as such. If an offender is court-martialed and punished for a more serious offense involving same-sex assault, or for disobedience of orders forbidding sexual activity for HIV-positive individuals, discharge records are more likely to show the more serious offense, but not homosexual conduct. Two cases summarized below demonstrate the high risk of sexual abuse that could occur with little or no public notice if the 1993 law is repealed:

- ***Navy Lt. Commander John Thomas Lee***

The court martial of Navy Lt. Commander John Thomas Lee is a recent case of egregious sexual abuse resulting from the “Don’t Ask, Don’t Tell” policy. Lt. Cmdr. Lee, a 42 year-old Catholic priest, is a Navy chaplain who tested positive for HIV in 2005. Between 2003 and 2007, Chaplain Lee, who was assigned to counsel midshipmen at the U.S. Naval Academy and Marines at Quantico, VA, engaged in gross misconduct that Navy officials should have punished severely.

The [Washington Post](#) reported on December 7, 2007, that Lt. Cmdr. Lee pleaded guilty to several serious charges: consensual and forcible sodomy with several men, including a Naval Academy midshipman, an Air Force lieutenant colonel, and a Marine corporal. Lee’s misconduct involved indecent acts, aggravated assault for not informing at least one victim of his contagious HIV status, and conduct unbecoming an officer that was all the more reprehensible because of the betrayal of trust associated with Lee’s status as a priest and chaplain.<sup>31</sup>

According to court testimony and factual stipulations signed by Lee and Navy prosecutors, Lee plied the male midshipman with dinner and drinks, followed by gay sex acts and unwanted touching. Lee also misused government computers to solicit sex partners, saving and sending more than 375 pornographic images of himself and other men. Some of the photos were taken by Lee’s victims, in his office or other locations. For all of these offenses, worsened by the element of violated trust, Lt. Cmdr. Lee got off with a twelve-year prison sentence reduced to two, with only 18 months to be served. The plea bargain, currently under appellate

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<sup>30</sup> Andrew Tilghman, *Navy Times*, “Military Among Settings in Which Assault ‘Most Likely,’” Dec. 17, 2007, p. 9. This article quotes Mic Hunter, a psychologist and author of *Honor Betrayed: Sexual Abuse in America’s Military*, “The military, boarding schools, sports teams and prison – these are the settings where a male is most likely to be assaulted.” An estimated 3% of junior enlisted men reported incidents of sexual coercion during a 12-month period, and about 2% reported sexual assaults during the previous year, according to the Armed Forces 2002 Sexual Harassment Survey conducted by the Defense Department.

<sup>31</sup> Ernesto Londono, the [Washington Post](#), “Navy Chaplain Pleads Guilty: HIV-Positive Priest is Sentenced in Sex Case,” Dec. 7, 2007, B-1. In one of the pornographic photos obtained by the *Post*, Lt. Cmdr. Lee is sitting nude on a sofa in his office flanked by an image of the Virgin Mary and a framed photo of Marine Gen. Peter Pace, former Chairman of the Joint Chiefs of Staff. Also see

review, effectively swept the case under the rug with little public awareness that the scandal even happened.

The abuses of a Navy chaplain priest who was engaged in homosexual conduct of the most dangerous kind, exposing his victims to HIV infection should give rise to questions about why Lt. Cmdr. Lee was in the Navy at all. Had the 1993 law been properly enforced, these abuses would not have occurred.

An alarming article in *Newsweek* stated that according to a recent report, up to 60 military chaplains have been convicted or at least are strongly suspected of committing sexual abuse over the past four decades, sometimes against the children of military personnel. In many cases, the priests were involved in abusing children, but their churches did not bring the charges to the military's attention.<sup>32</sup>

The experience of the Roman Catholic Church is a cautionary tale. For many years, the church did not ask questions about homosexuality among seminarians and priests. With few exceptions, lay people did not suspect that anything was amiss when they entrusted their young sons to the care of these priests. A huge and costly nationwide scandal developed over time, doing enormous damage to the church as an institution. Scandals comparable to this could undermine public support for the volunteer force at a time when that support is needed most.

- ***Pfc. Johnny Lamar Dalton***

In another disturbing case reported last year in the *Raleigh News & Observer*, Pfc. Johnny Lamar Dalton, 25, was charged with assault with a deadly weapon — the HIV virus, an indicator of AIDS.<sup>33</sup> Pfc. Dalton reportedly had unprotected sex while HIV-positive. The civilian mother of an 18 year-old reported that her son appeared to become ill shortly after his encounter with Dalton. The soldier reportedly failed to tell the teenager about his HIV-positive status before they had unprotected, consensual sex. The unnamed young man previously had been HIV-negative.

In addition to misdemeanor charges for assault with the deadly weapon of HIV, Dalton was charged with “a crime against nature” — illegal under the Uniform Code of Military Justice and a felony in North Carolina. Following a 5-month investigation, Dalton was sent to the county jail in lieu of \$50,000 bail. The AP later reported that Dalton pleaded guilty to assault for unprotected sex, and he was sentenced to 40 months in prison, reduction in rank, and a dishonorable discharge.<sup>34</sup> In answer to an inquiry from CMR, an Army spokesman confirmed that Dalton's records will only show his criminal violations, not the lesser offense of homosexual

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<sup>32</sup> Dan Ephron, *Newsweek*, [“Questionable Conduct.”](#) Dec. 15, 2007.

<sup>33</sup> Michael Moore, *Raleigh News & Observer*, [“Soldier at Bragg Charged with HIV Assault.”](#) July 18, 2007.

<sup>34</sup> AP, the *Washington Post*, [“US: HIV-Positive Paratrooper Pleads Guilty to Assault for Unprotected Sex.”](#) Nov. 1, 2007.

conduct.<sup>35</sup> This case demonstrates why figures on discharges that involve homosexual conduct may not be reported accurately.

In the same way, when a servicemember reveals that he is homosexual just prior to the end of his tour of duty, discharge papers may not show homosexuality as the reason for separation. A case in point was that of former Navy Petty Officer Jason D. Knight, who revealed that he was homosexual just before the end of his term of enlistment. His discharge forms were not properly coded to indicate that he was a homosexual. Due to the bureaucratic error, Knight later received a computer-generated inquiry, along with many others, asking if he would consider volunteering for re-mobilization in the war.

Knight could have been honest with Navy officials who re-enlisted him, but by his own admission, reported by *Stars & Stripes*, he said nothing.<sup>36</sup> Instead of making the case for repeal of the law, the story of Jason Knight demonstrates that accurate information about homosexual conduct in the military can be misleading or incomplete. If the 1993 law is repealed, members of Congress and the general public should not expect to get complete and candid information on the incidence, age and gender breakdown, and nature of homosexual conduct in the military.

## **6. Risks of HIV-Positive Non-Deployable Personnel**

During the 1993 debate that culminated in the law banning homosexuals from the military, Congress recognized that all soldiers serving in a combat environment are potential blood donors for each other. As stated in the 1993 law, the armed forces cannot afford the elevated risk of disruptive homosexual conduct in the ranks. That risk is even more dangerous when HIV infection enters the picture.

Any behavior or propensity to behave in a manner that raises risks to survival for any servicemember should be eliminated to the greatest extent possible. Persons found to be HIV-positive are not eligible for induction, but once they are in uniform they must be retained for as long as they are physically able, with access to appropriate medical care. These personnel, however, are not deployable.<sup>37</sup>

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<sup>35</sup> E-mail communication from Maj. Thomas Earnhardt, MIL USA FORSCOM to Elaine Donnelly, Jan. 28, 2008. Maj. Earnhardt wrote that Pfc. Dalton was not charged with homosexual conduct because “[I]t’s not in the Army’s interest to pursue an additional charge that imposes no criminal penalty. Our goal was to punish Dalton for his blatant disregard for orders and public safety. As far as the criminality of his case was concerned, Dalton was guilty of serious crimes above and beyond engaging in homosexual activity. Those crimes carry penalties far greater than simple discharge.”

<sup>36</sup> Chris Amos, *Navy Times*, “Coming Out, Then Coming Back?” July 2, 2007, p. 12; *Stars & Stripes*, “Navy Disputes Gay Sailor’s Claim of Discharge, Recall”, May 12, 2007. Knight was reported to be a spokesman for the Servicemembers Legal Defense Network’s campaign to repeal the 1993 law.

<sup>37</sup> [Department of Defense Instruction No. 6485.01, Oct. 17, 2006.](#)

An examination of military HIV non-deployability cases shows that since the passage of Section 654, Title 10, the incidence of HIV service-wide has trended downward.<sup>38</sup> Reasons for the trend are not clear, but it is reasonable to expect that if the law is repealed and great numbers of men having sex with men (MSM) are inducted into the military,<sup>39</sup> the line indicating non-deployable personnel who are HIV-positive probably would trend upward.

Given the officially-recognized correlation between homosexual conduct and HIV infection, it is reasonable to expect that repeal of the law could increase the number of troops who require medical benefits for many years but cannot be deployed. At a time when multiple deployments are putting great stress on the volunteer force, Congress should not make a major change in policy that could increase the number of non-deployable personnel.

## **7. Social Issues and Training to Enforce Acceptance of Homosexuality**

Since our military has a tradition of leading the way in matters of social change, the armed forces will be pressured to follow the example of Britain in creating some sort of legal/social status for same-sex couples, and providing quarters for same-sex couples in family housing. In a short amount of time civilian institutions, such as marriage bureaus, schools, and possibly churches will be pressured to follow the military's lead. If the Marine Corps recognize same-sex couples, why should the schools and churches not do the same?

Activists who demand repeal of the law regarding homosexual in the military often claim that if the military's civil rights tradition is followed, programs of "sensitivity training" would be sufficient to resolve any problems. They also expect "Diversity Day" events and other occasions to celebrate homosexual servicemembers, in the same way that other minority groups and women are recognized by the military.

The Department of Defense demonstrated how this would be done early in the Clinton Administration, when it sponsored a day-long "Diversity Day Training Event" in Arlington, Virginia's Crystal City area near the Pentagon. The program, co-sponsored with 18 other government agencies, featured lectures, panel discussions, exhibits, workshops, and video presentations, including a video titled "On Being Gay."<sup>40</sup>

Our civilian and military cultures are very different from cultural practices in Britain, but our military is being pressured to follow the example of the United Kingdom, which capitulated to a European Court ordering inclusion of homosexuals in the military. If the United States

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<sup>38</sup> See analysis and graph prepared and posted by the Center for Military Readiness at [http://cmrlink.org/cmrrnotes/HIV\\_Statistics100107.pdf](http://cmrlink.org/cmrrnotes/HIV_Statistics100107.pdf)

<sup>39</sup> Sarah Kershaw, the *New York Times*, "[New H.I.V. Cases Drop but Rise in Young Gay Men](#)", Jan. 2, 2008. This is the demographic group that the Center for Disease Control has repeatedly identified as being at highest risk of HIV infection.

<sup>40</sup> Rowan Scarborough, the *Washington Times*, "Navy Officers Balk at Pro-Gay Seminar, Sep. 8, 1994, A-1, and [Department of the Navy, Memorandum for All Hands from Cmdr. G.R. Stermer, Naval Sea Systems, Subject: Diversity Day 1993 Event](#), Aug. 26, 1994, on file with the author. Some participants in the program reported anti-Christian hostility similar to that leveled last year against the former Chairman of the Joint Chiefs of Staff, Marine General Peter Pace.

follows the British example, it is likely that official advisory committees will be invited to work with Pentagon officials to advance a comprehensive agenda, including acceptance of transgenderism.<sup>41</sup> The implications of similar policies in the American military are disturbing, but members of Congress must contemplate them seriously before the law is repealed, not afterwards.

British military personnel have been permitted to march in Gay Pride parades, and same-sex couples are permitted to live in family housing. Despite these “outreach” efforts, which surely contribute to the advertised level of satisfaction among homosexuals who serve, an April 2007 report of the British Parliament indicated that the armed forces remain short of servicemen and women.<sup>42</sup>

The only people likely to benefit from pursuit of such programs would be professional “diversity trainers” and outside activists who would be invited to participate. Even if professional trainers could succeed in that goal, this is not a suitable mission for the armed forces of the United States.

## C. Unconvincing Arguments for Repeal

### 1. Surveys & Polls

In January 2007, retired Army Gen. John M. Shalikashvili, Chairman of the Joint Chiefs of Staff from 1993 to 1997, became a “celebrity endorser” for the gays-in-the-military cause by writing an op-ed for publication in the *New York Times*, a newspaper that has been in the forefront of efforts to repeal the 1993 homosexual conduct law.<sup>43</sup> The General’s article drew attention to a December 2006 poll of 545 service members conducted by Zogby International, indicating that 73% of the respondents said they were “comfortable interacting with gay people.”<sup>44</sup>

The only surprising thing about this innocuous question was that the favorable percentage was not closer to 100%. The Zogby poll asked another, more important question that was not even mentioned in the news release announcing the poll’s results: “*Do you agree or disagree with allowing gays and lesbians to serve openly in the military?*” On that question, 26% of those

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<sup>41</sup> In the British military, inclusion of persons having a transgendered “orientation” is prominently discussed and displayed on the website of the [Ministry of Defense LGBT Forum](http://www.mod.uk/NR/rdonlyres/370C9F8D-4728-4805-BE98-27A0207C2271/0/LGBTNewsletterMay08.pdf). The website displays a multi-colored “rainbow” version of the MoD’s official seal. See LGBT Newsletter and other documents on the Ministry of Defense website: <http://www.mod.uk/NR/rdonlyres/370C9F8D-4728-4805-BE98-27A0207C2271/0/LGBTNewsletterMay08.pdf>

<sup>42</sup> Chris Gourley, *TimesOnline*, “[Armed Forces March United for Gay Rights at Pride London](#),” Jul. 5, 2008. Also see the United Kingdom Parliament, [Public Accounts – Thirty-Fourth Report](#), Summary, Jul. 3, 2007. Concerns about the current war are a contributing factor, but the inclusion of homosexuals has not proved to be the solution to the British military’s recruitment and retention problems.

<sup>43</sup> John M. Shalikashvili, Op-Ed, the *New York Times*, “Second Thoughts on Gays in the Military,” Jan. 2, 2007, p. 17.

<sup>44</sup> Zogby International, Opinions of Military Personnel on Gays in the Military, Dec. 2006, Submitted to Aaron Belkin, Director, Michael D. Palm Center [hereinafter Zogby Poll], available at <http://www.zogby.com/news/ReadNews.dbm?ID=1222>.

surveyed “Agreed,” but 37% “Disagreed.” The Zogby poll also found that 32% of respondents were “Neutral” and only 5% were “Not sure.”<sup>45</sup>

If this poll were considered representative of military personnel, the 26% of respondents who wanted the law repealed were far fewer than the combined 69% of people who were opposed to or neutral on repeal. This minority opinion was hardly a mandate for radical change. The poll was nevertheless trumpeted as if it were.

Polling organizations recognize that respondents who believe a policy is already in place are more likely to favor that policy, while those who know otherwise are less likely.<sup>46</sup> For this reason, widely-believed but inaccurate claims, such as the idea that homosexuals can serve in the military as long as they do not *say* they are gay, probably are skewing polls of civilians on this question.

People in the military, however, are more likely to understand what the law is.<sup>47</sup> In the 2006 poll announced by the *Military Times* newspapers, in response to the question “*Do you think openly homosexual people should be allowed to serve in the military?*” 30% answered “Yes,” but 59% answered “No,” and 10% answered “No Opinion.”<sup>48</sup> The same percentage—59% in opposition—was reported by the *Military Times* survey in the previous year, and the figure for [2007](#) was 57.4%.

A closer look at the Zogby poll reveals more interesting details that should have been recognized by news media people reporting on it:

- a. The Zogby news release announcing results clearly stated that the survey was designed in conjunction with Aaron Belkin, Director of the Michael D. Palm Center, formerly the Center for Sexual Minorities in the Military. This is an activist group promoting homosexuals in the military.

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<sup>45</sup> See Zogby Poll, pp. 14–15. Responses to this question revealed additional findings that received little notice: “Within military subgroups, the highest agreement rates [supporting gays in the military] were found among Veterans (35%) and those having served less than four years (37%). The lowest acceptance rates were among Active Duty Personnel (23%), officers (23%), those serving between 10 and 14 years (22%) and those serving more than 20 (19%). Active Duty Personnel were also among those with the highest disapproval rates (39%), as were those serving between 15 and 19 years (40%), those serving more than 20 (49%), and officers (47%).”

<sup>46</sup> Presidential Commission Report, Nov. 15 1992, p. C-135 (Commissioner Generated Finding 14) (citing Roper Organization, Inc., “Attitudes Regarding the Assignment of Women in the Armed Forces: The Public Perspective” (Sept. 1992).

<sup>47</sup> Robert Hodiern, *Navy Times*, “We Asked What You Think. You Told Us,” Jan. 3, 2005, at 14–15 (citing the section on Race, Gender, Gay, Question 6), available at [http://www.militarycity.com/polls/2004\\_chart3.php](http://www.militarycity.com/polls/2004_chart3.php). Annual *Military Times* surveys are done by mailing questionnaires randomly to subscribers to the affiliated newspapers *Air Force Times*, *Army Times*, *Navy Times*, and *Marine Corps Times*. The polls tabulate only responses from active-duty personnel. Results are published in all four affiliated newspapers.

<sup>48</sup> Robert Hodiern, *Army Times*, “Down on the War,” Dec. 29, 2006, pp. 12–14. The *Military Times* survey was done by mailing questionnaires randomly to subscribers of affiliated newspapers, but the poll only tabulated responses (954) from active-duty personnel. Results were published in all four affiliated newspapers.

- b. The poll claimed to be of 545 people “*who have served in Iraq and Afghanistan (or in combat support roles directly supporting those operations), from a purchased list of U.S. Military Personnel.*” However, the U.S. military does not sell or provide access to personnel lists. Due to security rules that were tightened in the aftermath of 9/11, personal details and even general information about the location of individual personnel is highly restricted.<sup>49</sup>
- c. The apparent absence of random access undermined the credibility of the poll, which inflated the claim that, “*The panel used for this survey is composed of over 1 million members and correlates closely with the U.S. population on all key profiles.*”<sup>50</sup>
- d. Activists frequently claim that the greater comfort of younger people with homosexuals is evidence enough to justify changing the law. However, if that were the case, all referenda banning same-sex marriage would have been soundly defeated. On the contrary, the voters of several states have approved 26 of 27 such referenda, often with comfortable majorities.<sup>51</sup>

A recent *Washington Post*/ABC News poll, released on July 19, 2008, was typical of several polls of civilians on this issue. Surveys such as this both reflect and help to shape public opinion as part of a relentless public relations (PR) perception management (PM) campaign that has been going on for years.

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<sup>49</sup> Memorandum from Deputy Secretary of Defense Paul Wolfowitz to Secretaries of the Military Departments et al., Oct. 18, 2001, addressing “Operations Security Throughout the Department of Defense” (on file with author). Zogby International did not respond to a telephone request from this author for more information on its selection of survey participants.

<sup>50</sup> Zogby Poll, p. 2. Zogby’s polling sample is somewhat questionable, but “internal” data in the poll reveals interesting insights on the question of whether opinions among younger people might make it more acceptable to accommodate gays in the military. The Zogby poll seems to indicate that opinions on this issue have more to do with military occupation than they do with age. Active duty people in the younger and older ranks are more favorable to the idea, but the ones in the middle age and experience group, who are more likely to be involved in close combat situations, are more strongly opposed. (See footnote #45) It is possible that an objective poll of identified military personnel—similar to the official survey done by the Roper Organization for the 1992 Presidential Commission on the Assignment of Women in the Armed Forces—would show similar results.

<sup>51</sup> See Human Rights Campaign, State Prohibitions on Marriage for Same Sex Couples 1 (Nov. 2006), <http://www.hrc.org/TemplateRedirect.cfm?Template=/ContentManagement/ContentDisplay.cfm&ContentID=28225> (listing twenty-six states that have a voter-approved constitutional amendment prohibiting same-sex marriage and nineteen states that have a law prohibiting same-sex marriage). To date, Arizona is the only state in which voters have repudiated an attempt to amend a state constitution to ban same-sex civil marriage. See CNN.com, America Votes 2006, Key Ballot Measures, <http://www.cnn.com/ELECTION/2006/pages/results/ballot.measures/> (reporting on the failure of Arizona Proposition 107 on November 7, 2006).

The *Washington Post*/ABC News poll was less than persuasive because it included two questions that demonstrate how misinformation and diversionary questions can affect the results of polls:<sup>52</sup>

- The two questions on the subject of homosexuals in the military did not frame the real issue: *Should the military require, as a matter of policy, forced cohabitation between heterosexuals and homosexuals in all military units, including the infantry, Special Operations Forces, and submarines?*
- Instead, the questions used confusing double negatives, which end with the phrase, “*or not?*” It is difficult to find a clear statement in the poll on which to state an opinion.<sup>53</sup>
- The questions suggested that the main issue was being “undisclosed” or “disclosed” as a homosexual in the military. The true key issue was eligibility to serve, not disclosure of homosexuality.
- The survey questions also used the permissive word “*allowed,*” not the more accurate term, “*required,*” as in “*should members of the military be required...?*” Instead, the poll focused only on the desires of homosexuals who want to serve in the military. The issues of military discipline, morale, and readiness were not mentioned at all.
- Survey respondents in this poll were civilians who know little about the military and its culture, including the essential need for discipline and morale. This is tantamount to asking Americans what they think about issues currently being debated by the Canadian Parliament.<sup>54</sup>

The *Washington Post*-ABC News poll and others like it are not an accurate reflection of what Americans think. It was another example of perception management techniques made easier by “Don’t Ask, Don’t Tell.”

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

Supporters of legislation to repeal the 1993 homosexual conduct law have tried to reframe their argument in terms of military necessity, rather than equal opportunity. The “national security” argument for gays in the military usually centers on the number of discharges

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<sup>52</sup> Kyle Dropp and Jon Cohen, the [Washington Post](#), “Acceptance of Gay People in Military Grows Dramatically,” July 19, 2003, p. A03.

<sup>53</sup> [Washington Post-ABC News Poll](#) Question #33: “[D]o you think homosexuals who do NOT publicly disclose their sexual orientation should be allowed to serve in the military or not?” (Responses: Yes, 78%, No, 18% No Opinion, 5%) Question #34: “[D]o you think homosexuals who DO publicly disclose their sexual orientation should be allowed to serve in the military or not?” (Responses: Yes, 75%, No, 22%, No Opinion 3%)

<sup>54</sup> While 71% of self-identified veterans in the poll said gay people who do not declare themselves as such should be allowed to serve, that number dropped sharply, to 50%, for those who are open about their sexuality.

of homosexual servicemen and women that have occurred and suggests that recruiting problems and shortages could be solved if only the military were open to professed homosexuals.<sup>55</sup>

A report done by the Government Accountability Office (GAO) early in 2005 provided statistical data on the number of “unprogrammed separations.”<sup>56</sup> The GAO report essentially estimated the “replacement costs” of discharging and replacing homosexual service members from FY 1994 through FY 2003 to be approximately \$190.5 million.

Dr. David Chu, Under Secretary of Defense for Personnel and Readiness, responded to the GAO report with a two-page memorandum.<sup>57</sup> Figures cited by Dr. Chu indicated that discharges due to the homosexual exclusion policy between 1994 and 2003 amounted to only 0.37% of discharges for all reasons (about 5% of unplanned separations) during that period. There were, for example, 26,446 discharges for pregnancy; 36,513 for violations of weight standards; 38,178 for “serious offenses;” 20,527 for parenthood, 59,098 for “drug offenses/use;” and 9501 for homosexuality.

The Santa Barbara based Center for the Study of Sexual Minorities in the Military (CSSMM), now called the Michael D. Palm Center, was not satisfied with the \$190 million dollar estimate. CSSMM Executive Director Aaron Belkin organized a “Blue Ribbon Commission,” which he chairs.<sup>58</sup> This non-governmental “Blue Ribbon Commission” claimed in a February 2006 report that the GAO estimate of “replacement costs” was too low. The CSSMM argued that a more accurate estimate of the costs of discharges for homosexuality would be \$363 million—approximately \$173.3 million, or 91% higher, than the GAO estimate. The Comptroller General responded by addressing a letter to Sen. Edward Kennedy (D-Mass.) on July 13, 2006, which “stood by” the original GAO estimate.<sup>59</sup>

The entire debate about numbers generated publicity, but it missed the point. The cost of personnel losses related to the homosexual conduct law, whatever it is, could be reduced to near-zero if all potential recruits were fully and accurately notified that the 1993 law means that

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<sup>55</sup> John Henren, *Los Angeles Times*, “Ban on Gays in Military Assailed,” Feb. 25, 2005, p. A24; Josh White, the *Washington Post*, “Don’t Ask” Costs More Than Expected, “ Feb. 14, 2006, p. A04.

<sup>56</sup> Government Accountability Office, *Military Personnel: Financial Costs and Loss of Critical Skills Due to DOD’s Homosexual Conduct Policy Cannot Be Completely Estimated* (Feb. 2005) [hereinafter GAO, *Financial Costs Cannot Be Estimated*], available at <http://www.gao.gov/new.items/d05299.pdf>.

<sup>57</sup> Memorandum from Dr. David Chu, Under Secretary of Defense for Personnel & Readiness, to Derek Stewart, Director of Defense Capabilities and Management at the GAO (Feb. 7, 2005), reprinted in GAO, *Financial Costs Cannot Be Estimated*, pp. 42–43.

<sup>58</sup> Frank J. Barrett et al., *The Palm Center, Financial Analysis of “Don’t Ask, Don’t Tell”: How Much Does the Gay Ban Cost?*, at 1, 3 (Feb. 2006), available at <http://www.palmcenter.org/files/active/0/2006-FebBlueRibbonFinalRpt.pdf>. In addition to Prof. Belkin, this non-governmentally authorized, private group includes Lawrence Korb, Adm. John D. Hutson, USN (Ret.), and other activists supporting repeal of the law regarding homosexual conduct in the military. The report also acknowledges receiving help from the offices of Rep. Marty Meehan (D-Mass.) and Sen. Frank Lautenberg (D-N.J.), sponsors of legislation to repeal the 1993 law.

<sup>59</sup> Letter from David M. Walker, Comptroller General of the United States, to Sen. Edward Kennedy (July 13, 2006), available at <http://www.gao.gov/htext/d06909r.html>.

homosexuals are not eligible to serve. It is bad policy to enforce a regulatory policy such as “Don’t Ask, Don’t Tell,” which misinforms potential recruits about the conditions of eligibility and encourages people to be less than honest about their homosexuality—only to be subject to discharge later.

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

### **3. *Contradiction: Too Few Discharges Due to the War***

Many of the same people who claim that the military is losing too many homosexual personnel simultaneously make a contradictory claim: Dismissals have declined because gays are needed to fight in the war.<sup>60</sup> A Congressional Research Service Report to Congress discussed this argument:

Some have claimed that discharges decline during time of war, suggesting that the military ignores homosexuality when soldiers are most needed, only to “kick them out” once the crisis has passed. It is notable that during wartime, the military services can, and have, instituted actions “to suspend certain laws relating to . . . separation” that can limit administrative discharges. These actions, know [sic] as “stop-loss,” allow the services to minimize the disruptive effects of personnel turnover during a crisis. However, administrative discharges for homosexual conduct are not affected by stop-loss. It can be speculated that a claim of homosexuality during a crisis may be viewed skeptically and under the policy would require an investigation. . . . [but if] such a claim were found to be in violation of the law on homosexual conduct, the services could not use “stop-loss” to delay an administrative discharge.<sup>61</sup>

Two news releases from the Center for the Study of Sexual Minorities in the Military in September 2005 claimed to have evidence that homosexual service members were being retained to serve the needs of war, despite the homosexual conduct law.<sup>62</sup> But a spokesman at the Forces Command at Fort McPherson, Georgia, where this evidence allegedly was found, has countered that argument with a clarification. According to the spokesman, if a soldier declares himself to be homosexual just prior to a deployment, an investigation ensues, lasting eight to ten weeks,

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<sup>60</sup> Associated Press, the *Washington Post*, “Don’t Ask” Dismissals Drop in Wartime,” Mar. 24, 2004, at A22; Evelyn Nieves & Ann Scott Tyson, the *Washington Post*, “Fewer Gays Being Discharged Since 9/11,” Feb. 12, 2005, at A01.

<sup>61</sup> Congressional Research Service, *Homosexuals and U.S. Military Policy: Current Issues 9–10 May 27, 2005*, available at <http://www.fas.org/sgp/crs/natsec/RL30113.pdf>.

<sup>62</sup> The Michael D. Palm Center, *Researchers Locate Army Document Ordering Commanders Not to Fire Gays* (Sept. 13, 2005), available at [http://www.palmcenter.org/press/dadt/releases/researchers\\_locate\\_army\\_document\\_ordering\\_commanders\\_not\\_to\\_fire\\_gays](http://www.palmcenter.org/press/dadt/releases/researchers_locate_army_document_ordering_commanders_not_to_fire_gays); The Michael D. Palm Center, *Pentagon Acknowledges Sending Openly Gay Service Members to War* (Sept. 23, 2005), available at [http://www.palmcenter.org/press/dadt/releases/pentagon\\_acknowledges\\_sending\\_openly\\_gay\\_service\\_members\\_to\\_war\\_acknowledgement\\_follows\\_discovery\\_of\\_regulat](http://www.palmcenter.org/press/dadt/releases/pentagon_acknowledges_sending_openly_gay_service_members_to_war_acknowledgement_follows_discovery_of_regulat).

which may not be completed prior to deployment. If the investigation does find that a person is homosexual and therefore not eligible to serve, an honorable discharge is ordered, even if the person is deployed.<sup>63</sup>

Anecdotes about homosexuals being allowed to remain in the military demonstrate the need for accurate information on what the “Military Personnel Eligibility Act of 1993” actually says. Commanders who do not understand Section 654, Title 10, or enforce the law should be given accurate information and support when taking steps to comply with it. Officials who choose to disregard this law should be held accountable in the same way that they would be for other failures to comply with duly enacted law.

#### **4. *Linguists and the Defense Language Institute***

The “Don’t Ask, Don’t Tell” policy/regulations have caused widespread confusion and costly errors, such as the admittance of twelve homosexual language trainees to the Army’s Defense Language Institute (DLI) in Monterey, California. Two of the students were found in bed together, and the others voluntarily admitted their homosexuality.<sup>64</sup>

All were honorably discharged. Gay activist groups decried the dismissals as a loss for national security. The true loss occurred, however, when twelve students who were not eligible to serve occupied the spaces of other language trainees who could be participating in the current war. This wasted time and money was a direct result of President Clinton’s calculated action to accommodate homosexuals in the military, despite prohibitions in the law.<sup>65</sup>

Military specialty schools such as the DLI should not be misusing scarce resources to train linguists who are not eligible to serve in the military. Instead of perpetuating unwarranted stereotypes about the homosexuals being more suited for some occupations than others, the Department of Defense should encourage and pursue more constructive options to solve the problem.

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<sup>63</sup> E-mail correspondence from Major Nate Flegler, Chief, Media Division, FORSCOM Public Affairs, to author (Nov. 15, 2005) (on file with author).

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

<sup>64</sup> See Nathaniel Frank, *The New Republic*, “Don’t Ask, Don’t Tell” v. the War on Terrorism,” Nov. 18, 2002, at 18; Op-Ed, Alistair Gamble, *New York Times*, “A Military at War Needs Its Gay Soldiers,” Nov. 29, 2002.

<sup>65</sup> On December 11, 2002, the Center for Military Readiness filed a formal Request for Assistance with the Army Inspector General, asking for an investigation of this waste of educational resources by authorities at DLI. No response was received. A subsequent Freedom of Information (FOIA) request, which did not ask for individual information, was addressed in a letter to the DoD Inspector General on November 17, 2003. The FOIA request was initially denied and later “answered” with largely blank pages marked with FOIA exemption code “(b)(7)(c).” That code is used when government officials refuse to confirm or deny that disciplinary proceedings have taken place.

For example, Congress can work with the Department of State to expand the number of visas available for pro-American Iraqi and Afghan immigrants who are willing to serve as interpreters.<sup>66</sup> The Department of State also should lend support to refugees from Iraq whose lives are being threatened because they provided help to American troops.

According to a recent CBS News “60 Minutes” report, a young private citizen, Kirk Johnson, has been tirelessly working, almost single-handedly, to provide urgent assistance to Iraqis who worked with and for the Americans in many occupations, including as translators. Threatened by enemies as collaborators with the United States, many were subjected to torture, rape and death threats.<sup>67</sup> Efforts such as this deserve support for national security as well as humanitarian reasons.

On the day that Baghdad was liberated in 2003 thousands of patriotic Iraqi-Americans danced in the streets, waving American flags. Background checks and security clearances are important, but more could and should be done to expedite the process of recruiting qualified people to become translators for our military. There is no need to repeal the 1993 law regarding homosexuals in the military.

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

In July 1994, the Center for the Study of Sexual Minorities in the Military (CSSMM, as noted earlier, now known as The Michael D. Palm Center) claimed the military was discharging valuable personnel in important military specialties. These included, for example, “49 nuclear, biological, and chemical warfare specialists; 212 medical-care workers; 90 nuclear power engineers; 52 missile guidance and control operators; 10 rocket, missile and other artillery specialists; 340 infantrymen; 88 linguists; and 163 law-enforcement specialists.”<sup>68</sup> The story was based on data that the CSSMM obtained from the Defense Manpower Data Center (DMDC) by means of a Freedom of Information Request.<sup>69</sup>

A closer look at the same data, obtained from the DMDC, reveals several disparities with those quoted in the “study” released by the CSSMM. For example, according to the official who provided the same DMDC data to the Center for Military Readiness, the category of persons in the “nuclear power” field does not necessarily mean that all the people in question were “nuclear power engineers.”

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<sup>66</sup> Michelle Tan, *Army Times*, “[Legislation Would Expand Visas for Iraqi, Afghan Interpreters.](#)” Jun. 9, 2008, p. 12.

<sup>67</sup> CBS News, “[The List, A Mission to Save Iraqi Lives.](#)” May 18, 2008, available at <http://www.cbsnews.com/stories/2008/05/16/60minutes/printable4103104.shtml>.

<sup>68</sup> Vince Crawley, *Air Force Times*, “Hundreds of Discharged Gays Served in Critical Specialties,” June 12, 2004, available at [http://docs.newsbank.com/openurl?ctx\\_ver=z39.88-2004&rft\\_id=info:sid/iw.newsbank.com:AFNB:AFTB&rft\\_val\\_format=info:ofi/fmt:kev:mtx:ctx&rft\\_dat=103F530765572C3E&svc\\_dat=InfoWeb:aggregated4&req\\_dat=0F56A02D68496F45](http://docs.newsbank.com/openurl?ctx_ver=z39.88-2004&rft_id=info:sid/iw.newsbank.com:AFNB:AFTB&rft_val_format=info:ofi/fmt:kev:mtx:ctx&rft_dat=103F530765572C3E&svc_dat=InfoWeb:aggregated4&req_dat=0F56A02D68496F45) See also Kim Curtis, *Associated Press*, “Report: Number of Gay Linguists Discharged Higher than Thought,” Jan. 13, 2005.

<sup>69</sup> Defense Manpower Data Center, tables titled “Separations Due to Homosexual Conduct, FY 1998–2003,” and “Duty Base Facility Identifier, (FY 1998–2003)” (on file with author).

As for the 88 discharged linguists, the list of “Primary DoD Occupation Code” titles includes, at number 241, “Language interrogation,” an occupation from which a total of 15 persons were separated due to homosexuality. But that is 73 persons short of the number of discharged “linguists” cited. How to account for the discrepancy? A Duty Base Facility Identifier Table, also provided by the DMDC, indicates that a total of 73 persons were separated from the Presidio of Monterey, where the Defense Language Institute is located. It is not clear how the CSSMM came up with the claim that “88 linguists” were discharged due to the “Don’t Ask, Don’t Tell” policy. Fifteen plus 73, coincidentally, equals 88. There is no “linguist” category listed among the DMDC categories of occupations.

Another round of news reports and hand-wringing commentaries centered on the loss of “54 Arabic linguists” trained for military service.<sup>70</sup> This number is in a column of personnel losses noted by the General Accountability Office (GAO) in 2005.<sup>71</sup> The referenced number is broken down, however, by type and level of proficiency of the language trainees, which varied considerably. Again, the number of language trainees lost after any time in training could be reduced to near zero if the law, which should have been called the “Military Personnel Eligibility Act of 1993,” were accurately explained and enforced by the Department of Defense.

## **6. *The Urban Institute – 65,000 Homosexuals in the Military?***

In September 2004, the Urban Institute, a nonpartisan social policy and research organization, issued a report estimating that approximately 65,000 gay personnel are now serving in the U.S. military, and another one million gays and lesbians are veterans.<sup>72</sup> Activists constantly cite this report when advocating repeal of the 1993 homosexual conduct law<sup>73</sup>—sometimes touting the data as if it is brand new and “solid.”<sup>74</sup>

The document, however, reveals questionable methodology, based on presumptions about the percentage of homosexuals in the general population and about the sexuality of persons

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<sup>70</sup> See, e.g., Mackubin Thomas Owens, *National Review*, “Ask, Tell, Whatever?: Gays-in-the-Military Comes Up Again,” Apr. 16, 2007; Debra Saunders, *Washington Times*, “Don’t Ask, Don’t Tell for the Devout,” Mar. 17, 2007, at A13.

<sup>71</sup> GAO, *Financial Costs Cannot be Completely Estimated*, (Feb. 2005), p. 21. *available at* <http://www.gao.gov/new.items/d05299.pdf>.

<sup>72</sup> Gary J. Gates, *The Urban Institute*, “*Gay Men and Lesbians in the U.S. Military: Estimates from Census 2000*,” at iii (2004), *available at* [http://www.urban.org/UploadedPDF/411069\\_GayLesbianMilitary.pdf](http://www.urban.org/UploadedPDF/411069_GayLesbianMilitary.pdf).

<sup>73</sup> See Joanne Kimberlin, *Virginian-Pilot*, “Study Finds 65,000 Gay Men, Women in the Military,” Oct. 21, 2004, at A10; Denise M. Bonilla, *Newsday*, “Don’t Ask, Don’t Tell: A Policy Under Fire,” Aug. 6, 2006, at G05.

<sup>74</sup> See Deb Price, *Detroit News*, “UCLA Researcher Mines Data to Make Gays Visible,” Apr. 2, 2007, at 13A. In this article, self-identified gay columnist Deb Price praises Gary J. Gates, now affiliated with the progressive Williams Institute at the University of California at Los Angeles, for producing “solid numbers” that will help persuade Congress to lift the ban on homosexuals in the military.

interviewed by the census.<sup>75</sup> The speculative claim that 3% of women and 4% of men are homosexual was applied to 2000 census data on the number of persons of the same sex living in the same household—one of whom is or has been involved with one more branches of the military. Citing mathematical computations and other reports, the study speculated that household-mates of the same sex are homosexual.

Adding different sets of speculative figures regarding different military communities; i.e., active duty, guard, and reserve, the document leaped to the conclusion that there are “2.8% or 65,000 gay or lesbian military personnel.” This number is frequently trumpeted by gay activists and like-minded journalists. One guess-timate on top of another, however, does not a “solid” fact make. The census does not ask questions about sexual orientation or behavior, and all estimates are based on sheer speculation, dressed up with a public relations spin.

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

## **7. Harassment of Homosexuals and Heterosexuals**

Contrary to exaggerated claims by activist groups, more than 80% of homosexual service members discharged since the law was enacted left the service not because of witch hunts rooting them out but because of voluntary statements admitting homosexuality. According to a 1998 DoD Task Force report, there were only four cases of anti-homosexual harassment reported since 1994. Two of those cases involved anonymous letters that could not be traced.<sup>76</sup>

In 1999, homosexual activists crafted a polemic campaign that focused on the brutal murder of Army Pfc. Barry Winchell, an alleged homosexual, at Fort Campbell, Kentucky, in July of that year.<sup>77</sup> The savage killing of Pfc. Barry Winchell has been cited as evidence that more must be done to end “hate crimes” and harassment of homosexuals.<sup>78</sup>

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<sup>75</sup> GAO, “Financial Costs Cannot be Completely Estimated,” (Feb. 2005), p. 4. *available at* <http://www.gao.gov/new.items/d05299.pdf>. The report, which includes many caveats, concedes that “the census does not ask any questions about sexual orientation, sexual behavior, or sexual attraction (three common ways used to identify gay men and lesbians in surveys).”

<sup>76</sup> Office of the Under Secretary of Defense for Personnel and Readiness, Report to the Secretary of Defense, Review of the Effectiveness of the Application and Enforcement of the Department’s Policy on Homosexual Conduct in the Military 6 (Apr. 1998) [hereinafter DOD TASK FORCE REPORT 1998, *available at* [http://dont.stanford.edu/casestudy/appendixG\\_short.pdf](http://dont.stanford.edu/casestudy/appendixG_short.pdf); Dep’t of Defense News Release, No. 158-98 (Apr. 7, 1998).

<sup>77</sup> Jane McHugh, *Army Times*, “Murder in the Barracks,” Aug. 23, 1999, at 12; Jane McHugh, *Army Times*, “Second Soldier Implicated in Possible Hate Crime,” Aug. 2, 1999, at 8.

<sup>78</sup> See News Release No. 432-00, “Department of Defense Issues Anti-Harassment Guidelines,” July 21, 2000, and Tom Ricks, the *Washington Post*, “Pentagon Vows to Enforce ‘Don’t Ask, Don’t Tell,’” July 22, 2000, p. 1A. This article quotes Carol Battiste, head of a Pentagon panel set up to review the seven year-old “Don’t Ask, Don’t Tell” policy in 2000. Battiste said that military leaders face a “dilemma” when they try to counter discrimination against homosexuals, who cannot identify themselves. Ricks added, “One reason the military establishment continues to be uncomfortable with ‘Don’t Ask, Don’t Tell’ is that it is a policy that is purposely ambiguous, while military culture tends to value clarity.” Actually, a policy that encourages deception is not workable in any institution. This is one of the reasons why members of Congress did not vote for the proposal known as “Don’t Ask, Don’t Tell.” Instead of wringing their hands about “ambiguity” and “dilemmas,” Pentagon officials should scrap the

The confessed killer, Pvt. Calvin Glover, assaulted Winchell in the barracks with a baseball bat on July 4, 1999, several hours after Winchell had beaten him in a drunken brawl.<sup>79</sup> Evidence of Glover's hostile attitude toward Winchell, who was involved with a transgender male nightclub entertainer who appeared to be a woman, was a factor in his trial and sentencing to life in prison.

An Army Inspector General investigation cleared Fort Campbell commanders, but noted poor morale and a tolerance of underage drinking and anti-gay language by the senior sergeant in the battalion. The report also noted the reluctance of battalion commanders to ask questions about matters involving alleged homosexuality.<sup>80</sup>

Military discipline requires constant awareness of what is happening in military units, throughout the chain of command. A policy such as "Don't Ask, Don't Tell" that discourages the asking of legitimate questions interferes with sound leadership. In this tragic case, a failure to ask questions apparently was a factor in the creation of a volatile situation that exploded with violence. Perpetrators of this crime have been rightly punished, but there is no need for additional legislation to stop harassment or murderous assaults—of anyone—in the barracks.

Some recent cases of harassment involving persons of the same sex deserve closer scrutiny and objective analysis of whether the "Don't Ask, Don't Tell" policy created conditions conducive to abuse. For example, the Associated Press reported that a drill sergeant at Fort Eustis, Virginia, faced molestation charges for forcing a trainee to dress as Superman and submit to sexual acts. A Fort Eustis spokeswoman, Karla Gonzalez, confirmed that Army Staff Sgt. Edmundo F. Estrada, 35 years-old, was accused of indecent assault, having an inappropriate relationship with a trainee, and cruelty and maltreatment of subordinates.<sup>81</sup>

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"Don't Ask, Don't Tell" regulations and issue informational materials that include the text and legislative history of the law, Section 654, Title 10.

<sup>79</sup> David France, *New York Times Magazine*, "An Inconvenient Woman," May 28, 2000, available at <http://www1.nytimes.com/library/magazine/home/index.html>; Brian Dunn, *Army Times*, "Private Confessed to 'Gay Bash' Slaying, Inmate Says," Sept. 13, 1999, p. 16.

<sup>80</sup> Jane McHugh, *Army Times*, "1st Sgt. Faulted in report on Gay Beating Death," July 31, 2000, p. 8. This article reported on the Army Inspector General's Investigation of the July 1999 beating death of Army Pfc. Barry Winchell. The report found that the command environment at Fort Campbell, Kentucky, was generally positive, but the unit in which the killing occurred suffered from poor morale and a tolerance for underage drinking—a major factor in the case. According to *The Army Times*, the report also found that commanders were frustrated and confused by the "Don't Ask, Don't Tell" policy.

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

<sup>81</sup> Associated Press, "Fort Eustis Drill Sergeant Faces Charges of Molesting Trainees," Mar. 4, 2007. Sgt. Estrada pleaded guilty to the charges at his court-martial on April 23, 2007, to three counts of mistreating soldiers, as well as to violating regulations not to develop relationships with subordinates. Associated Press, *Army Times*, "Sgt. Pleads Guilty to Sexually Harassing Trainees," May 7, 2007, p. 45. Estrada faced six months in prison, a bad-conduct discharge and reduction in rank.

Air Force Captain Devery L. Taylor was convicted and sentenced to twenty-eight to fifty years in prison for raping four men, allegedly with date-rape drugs. According to a report in *Air Force Times*, an investigator interrogating Taylor, now a convicted serial rapist, said that he would not ask any questions about the man's sexual practices because such questions are not allowed. This statement demonstrated how misunderstandings about the 1993 homosexual conduct law help to create volatile conditions that undermine good order and discipline.<sup>82</sup>

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

## **8. Foreign Militaries**

The Palm Center and other activist groups frequently point to the experiences of other countries, such as Great Britain, Canada, Australia, the Netherlands, and Israel, which have no restrictions on professed homosexuals in their militaries.<sup>83</sup>

The United Kingdom was ordered by the European Court of Human Rights to open its ranks to homosexuals in September 1999.<sup>84</sup> There was some controversy in the Parliament, but instead of appealing or challenging the ruling, ultimately the nation complied—something the United States would be unlikely to do. Contrary to the notion that all has gone well, European newspapers have reported recruiting and disciplinary problems in the British military.<sup>85</sup>

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<sup>82</sup> *Air Force Times*, "Captain Sentenced to 50 Years for Raping 4 Men," Mar. 12, 2007, p. 15; *Air Force Times*, "Officer Accused of Rape Says He Rejected Alleged Victim," Mar. 5, 2007, available at <http://buzztracker.org/2005/01/19/cache/441692.html>. The March 5 article, reported from Eglin Air Force Base, Florida, reported that in a video of an interview with Taylor, shown during his February 22 court-martial, an Air Force Office of Special Investigations investigator told Taylor, "[It] doesn't concern me if it (the sexual encounter) was consensual . . . I'm not allowed to talk about your preferences. That has nothing to do with your military career as far as the people who do my job are concerned." (alteration added). This was an astonishing statement for the investigator to have made, particularly in view of Capt. Taylor's convictions for raping four men.

<sup>83</sup> Aaron Belkin, *Parameters*, "Don't Ask, Don't Tell: Is the Gay Ban Based on Military Necessity?," (U.S. Army War Coll. Q.), Summer 2003, at 108–19.

<sup>84</sup> *Lustig-Prean and Beckett v. United Kingdom*, 29 Euro. Ct. H.R. 548, 587 (1999); Human Rights Watch: Uniform Discrimination, at 38; *BBC News*, "Delight and Despair at Gay Ban Ruling," Sept. 27, 1999, [http://news.bbc.co.uk/2/hi/uk\\_news/458842.stm](http://news.bbc.co.uk/2/hi/uk_news/458842.stm) (reporting that the ruling of the European Court of Human Rights was "not binding on the UK Government").

<sup>85</sup> *BBC News*, "Deepcut Army Sex Attacker Jailed," Oct. 22, 2004, [http://news.bbc.co.uk/1/hi/england/southern\\_counties/3634474.stm](http://news.bbc.co.uk/1/hi/england/southern_counties/3634474.stm); Nicholas Hellen, *TimesOnline (London)*, "Navy Signals for Help to Recruit Gay Sailors," Feb. 20, 2005, <http://www.timesonline.co.uk/tol/news/uk/article516647.ece>; Tony Czuczka, Associated Press, *Washington Times*, "British Soldier Admits to Assault on Captive," Jan. 19, 2005, available at <http://www.buzztracker.org/2005/01/19/cache/441692.html>; Michael Evans, *Times (London)*, "War Blamed as 6,000 Quit Territorial Army," Oct. 30, 2005, at 2; Michael Evans, *Times (London)*, "Iraq Factor Takes Toll on the TA," Oct. 31, 2005, at 8. The reported abuse of male Iraqi soldiers with a forklift involved forced sexual acts, but details are not known because of court-ordered gag orders.

Canada, Australia, and the Netherlands have cultures quite different from the United States<sup>86</sup> and live under the protection of the American military. The late Prof. Charles Moskos has noted that nations without official restrictions on gays in the military are also very restrictive in actual practice. Germany, for example, dropped criminal sanctions against homosexual activities in 1969, but also imposed many restrictions on open homosexual behavior and imposed career penalties such as denial of promotions and access to classified information.<sup>87</sup>

Israel's situation differs from the United States because all able-bodied citizens, including women, are compelled to serve in the military. Israeli soldiers usually do not reveal their homosexuality and are barred from elite combat positions if they do.<sup>88</sup>

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

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

"One of Belkin's key arguments is that Don't Ask, Don't Tell (DADT) is based on anecdotes and misleading surveys instead of quantitative evidence. . . . Yet Belkin's article is entirely anecdotal. It is nothing more than selected quotes from supposed experts who claim that homosexual integration has had no impact on unit cohesion or military readiness. A quick review of the author's endnotes, cross-checked with an internet search, reveals the questionable credentials and political leanings of most of these experts. At one point, Belkin refers to a 1995 Canadian government report, which supposedly indicates that lifting the ban on gays in the military had "no effect." However, his endnote does not cite the report but a "personal communication with Karol Wenek."<sup>89</sup>

The issue of homosexuals in the military is a major political question that has been dealt with through the political system, as established by the U.S. Constitution. Major decisions such

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<sup>86</sup> Kate Monaghan, *CNSNews.com*, "Dutch Political Party Wants to Normalize Pedophilia," July 26, 2006, <http://www.cnsnews.com/ViewSpecialReports.asp?Page=/SpecialReports/archive/200607/SPE20060726a.html>.

<sup>87</sup> Otto Kreisher, *Sacramento Union*, "Few Armies Accept Homosexuals," June 7, 1993, at A5.

<sup>88</sup> Tom Philpott, *Army Times*, "In Israel: The Hard Reality—Gays Are Allowed to Serve in the Military but They Are Not Fully Accepted," Jan. 11, 1993, P. 11; Tom Philpott, *Army Times*, "Gay Israelis Avoid Ridicule, Get Ahead by Staying in Closet," Jan. 11, 1993, P. 13; Charles Moskos, *Richmond-Times Dispatch*, "Services Will Suffer If Used for Social Experiments," Feb. 28, 1993, P. F1.

<sup>89</sup> Joseph A. Craft, Letter to the Editor, *Parameters (U.S. Army War Coll. Q.)*, "Legitimate Debate or Gay Propaganda?," June 22, 2004, p. 132.

as this should not be decided by international courts, federal courts in the United States, or by politicians who are misinformed about the nature of the 1993 law and the rationale behind it.

## **9. *Religious Bias***

Finally, advocates of gays in the military have attempted to fire up their cause by criticizing Marine Gen. Peter Pace, former Chairman of the Joint Chiefs of Staff, who expressed his personal views regarding gays in the military and personal morality during an interview on March 11, 2007.<sup>90</sup> A wave of name-calling and demands for an apology ensued, but Gen. Pace had no reason to apologize for a law duly enacted by Congress.<sup>91</sup>

The 1993 statute reflects the views of people who see the issue in moral terms, but it uses secular language emphasizing military discipline. Duly enacted laws—including prohibitions against lying, stealing, and murder—should not be repealed just because they coincide with religious principles and moral codes such as the Ten Commandments.

## **D. Recommendations and Conclusion**

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

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

The President of the United States is obligated by the U.S. Constitution to enforce all laws, but he is not required to retain administrative regulations written or retained by predecessors, including the policy known by the catch phrase “Don’t Ask, Don’t Tell.” Whether intended or not, inconsistencies between Clinton’s policy and the 1993 homosexual conduct law create an advantage for activists who want to repeal both.

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

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<sup>90</sup> Aamer Madhani, *Chicago Tribune*, “Top General Calls Homosexuality ‘Immoral,’” Mar. 12, 2007, p. 1; Associated Press, “Group Wants Gen. Pace Apology for Calling Gays ‘Immoral,’” Mar. 13, 2007; Editorial, *USA Today*, “Old Prejudice Dishonors New Military Generation,” Mar. 14, 2007, p. 10A; Elaine Donnelly, *Washington Times*, “Gen. Pace vs. PC Police,” Mar. 18, 2007, at B3.

<sup>91</sup> On June 19, 2008, President George W. Bush awarded to Gen. Peter Pace the Presidential Medal of Freedom.

“I know you are a history major but I can assure you I need no reminders concerning the history of African-Americans in the defense of their nation and the tribulations they faced. I am part of that history. . . . Skin color is a benign, non-behavioral characteristic. Sexual orientation is perhaps the most profound of human behavioral characteristics. Comparison of the two is a convenient but invalid argument.”<sup>92</sup>

Columnist Charles Krauthammer agreed:

“Powell’s case does not just rest on tradition or fear. It rests on the distinction between behavioral and non-behavioral characteristics. Skin color is a non-behavioral trait. Homosexuality, like gender, is not. Consider the behavioral implications of gender differences: Men and women are sexually attracted to each other and sexual attraction engenders feelings not just of desire but shame and a wish for privacy. . . . That is why if a white person refuses association with blacks, the military tells him that the refusal is irrational and will not be respected. But the military does respect the difference between men and women. Because the cramped and intimate quarters of the military afford no privacy, the military sensibly and non-controversially does not force man and women to share barracks.”<sup>93</sup>

In recent years, advocates of gays in the military have been promoting the idea that sexual modesty does not matter, since modern military facilities provide more privacy than older ones. Even if people are exposed to others in the field, they say, younger people are used to it, and this is not a big deal.<sup>94</sup> This is an elitist argument, which is contradicted in numerous ways that usually escape notice.

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

Servicemen and women in the military deserve the same consideration, and much more. As columnist Thomas Sowell wrote, “Military morale is an intangible, but it is one of those

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<sup>92</sup> Karen DeYoung, *Soldier: The Life of Colin Powell*, Alfred A. Knopf, 2006, pp. 230-233. Colin Powell and other members of the Joint Chiefs of Staff, particularly Marine General Carl E. Mundy, Jr., resisted President Clinton’s move to lift the ban on gays in the military. Powell was frustrated that the issue was overtaking every other issue. “He had never been attacked by liberals before, particularly as a bigot; it bothered him far more than he had anticipated...” In the same way, Senator Sam Nunn (D-GA) was and is still being vilified for not embracing the full agenda for gays in the military. This intimidation factor should be considered when prominent people appear to demur when asked to comment on this issue.

<sup>93</sup> Charles Krauthammer, Op-Ed, *Washington Post*, “Powell Needs No Lectures,” Jan. 29, 1993, at A23.

<sup>94</sup> Aaron Belkin & Melissa Sheridan Embser-Herbert, *27 Int’l Sec.* “A Modest Proposal,” 178 (Fall 2002).

intangibles without which the tangibles do not work.”<sup>95</sup> Military people depend on policymakers to remember basic realities and to guard their best interests. Considerations such as this strengthen vertical cohesion—the indispensable bond of trust between military leaders and the troops they lead.

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

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

## **2. *The Only Military We Have***

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

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

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

In a communication with CMR, Professor of Law William A. Woodruff wrote, “The American military does not fight an armed enemy sworn to destroy our way of life by showing

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<sup>95</sup> Thomas Sowell, the *Washington Times*, “The Anointed and Those Who Aren’t,” Feb. 8, 1993, p. E3.

how enlightened and progressive our popular culture is. The armed forces exist to project combat power as an arm of foreign policy and to protect our vital national interests. Anything, whether it is height, weight, IQ, character, physical fitness, medical condition, or any other condition that detracts from unit cohesion and combat effectiveness disqualifies an otherwise patriotic American from serving in the military. The military is not popular culture. It is very different and must remain so to defend the freedoms that advance our popular culture.”

Woodruff added, “Those who favor personnel policies grounded in notions of fairness to the individual must be required to demonstrate beyond any doubt that military discipline, unit cohesion, and combat effectiveness will not be diminished one iota by adoption of their preferred policy. Otherwise, it elevates the individual over the mission and that is the antithesis of military service.”

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

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