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# Beyond the Soldier: The Hidden Costs of "Don't Ask, Don't Tell"

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# BEYOND THE SOLDIER: THE HIDDEN COSTS OF “DON’T ASK, DON’T TELL”

JOHN EVERIDGE BARRETT

## I. INTRODUCTION

Before there was a United States of America, there was an American military. During the Revolution, when the nation had yet to win its independence, General George Washington and his Continental Army were, for all intents and purposes, the nation. The issue of homosexuals serving in the American military goes back at least that far; and even then, the military did not know quite what to do with the gay Soldiers serving in its ranks. For example, General Frederick von Steuben, a French officer who had come to America to train its young Army, was openly gay.<sup>1</sup> In spite of this he commanded a division at Valley Forge, served as the first Inspector General of the Army, and wrote the first drill and ceremony manual for the Army.<sup>2</sup> He is remembered in history as a hero of the Revolutionary War and is still invoked by the modern United States military.<sup>3</sup>

But the American military has always been of two minds when it comes to the idea of homosexuals serving within its ranks. At the same time and in the same army that Gen. von Steuben was charged with molding into a competent fighting force, Lieutenant Gotthold Frederick Enslin was discharged for engaging in same-sex sexual relations.<sup>4</sup> Despite the lack of any codified ban on either gays serving or engaging in such same-sex conduct such discharge ““with Abhorrence and Detestation of such Infamous Crimes””<sup>5</sup>

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<sup>1</sup> RANDY SHILTS, CONDUCT UNBECOMING: GAYS & LESBIANS IN THE US MILITARY 10 (1993).

<sup>2</sup> *Id.*

<sup>3</sup> NATHANIEL FRANK, UNFRIENDLY FIRE: HOW THE GAY BAN UNDERMINES THE MILITARY AND WEAKENS AMERICA 2 (2009).

<sup>4</sup> SHILTS, *supra* note 1, at 11.

<sup>5</sup> *Id.*

should come as no surprise to anyone familiar with the history behind and enforcement of the United States military's modern policy on gay and lesbian service members, "Don't Ask, Don't Tell."

As a political compromise born out of an effort at reform that was opposed by supporters of more traditional ideas<sup>6</sup>, the statute was a success (it ensured, as such compromises often do, that neither side got what it really wanted), at least in the short term. However, despite its deceptively simple name, "Don't Ask, Don't Tell" has become a complicated issue for the gay and lesbian community, its political allies (and enemies), the military itself, and the nation as a whole. This paper is the attempt by one veteran (Captain, Ordnance Corps, U.S. Army, 2003-2008, Operations Iraqi Freedom I and V) to examine the impact of "Don't Ask, Don't Tell" in the seventeen years since its inception. This paper will not focus on the impact of the policy on gay and lesbian service members as individuals; this most personal and tragic aspect of the policy has been examined from many perspectives, and those looking for such an analysis will find an especially well-reasoned and poignant article by Daniel Ryan Koslosky entitled *Sexual Identity as Personhood: Towards an Expressive Liberty in the Military Context* extremely helpful.<sup>7</sup>

Instead, this paper will focus on several of the less-examined (but just as important) areas impacted by the policy. Part II provides a brief background of the policy. Part III examines the substance of the policy, looking at not only the terms of the policy but also how it is actually applied in the military. Part IV examines arguments in

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<sup>6</sup> Sharon E. Debbage Alexander, *A Ban by Any Other Name: Ten Years of "Don't Ask, Don't Tell"*, 21 Hofstra Lab. & Emp. L.J. 403, 408 (2004).

<sup>7</sup> Daniel Ryan Koslosky, *Sexual Identity as Personhood: Towards an Expressive Liberty in the Military Context*, 84 N. Dak. L. Rev. 175 (2008).

support of the policy. Part V examines the policy's impact on different-sex families in the military, and goes beyond discussions of monetary compensation to those less-tangible, but equally (if not more) important communal and social benefits. Part VI examines the impact of the policy on the military itself, including the most important (and possibly only) justification: that allowing gay and lesbian service members to serve openly will negatively impact morale, good order and discipline, and unit cohesion to the extent that it affects the military's ability to complete its mission. Part VII examines the impact that the policy has had on the nation as a whole. Finally, Part VIII considers how the military and the nation should move forward, especially in light of the administration's renewed support for ending the policy and allowing gays and lesbians to serve openly.

## II. BACKGROUND OF THE POLICY

Throughout most of American history there was no ban on homosexuals serving in the military. The first criminalization of sodomy under military law did not occur until the passage of the Articles of War of 1916.<sup>8</sup> This regulation only criminalized conduct, however; the first administrative prohibition on gays and lesbians serving in the military did not appear until World War II.<sup>9</sup> From then until 1993 homosexuality itself provided sufficient cause for discharge from the service.

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<sup>8</sup> David F. Burrelli, *An Overview of the Debate on Homosexuals in the U.S. Military*, in GAYS AND LESBIANS IN THE MILITARY 17, 17 (Wilbur J. Scott & Sandra Carson Stanley eds., 1994).

<sup>9</sup> ALLEN BERUBE, *COMING OUT UNDER FIRE: THE HISTORY OF GAY MEN AND WOMEN IN WORLD WAR TWO* 9-21 (1990).

During the 1992 presidential campaign, candidate Bill Clinton made ending the ban on gays and lesbians serving in the military a part of his platform.<sup>10</sup> After his inauguration, President Clinton immediately ordered the Secretary of Defense to design an executive order ending the ban on gays and lesbians.<sup>11</sup> Despite the administration's pledge to end the ban, and perhaps as a result of the public opposition to that position expressed by the Joint Chiefs of Staff, the resulting order represented a compromise, where gays and lesbians could serve in the military, but homosexual conduct would still be grounds for discharge.<sup>12</sup> Simultaneously, Congress was considering two separate bills in response to the President's pledge.<sup>13</sup> The bill that was eventually enacted into law embodied the compromise of the executive order, and became the law popularly known as "Don't Ask, Don't Tell."<sup>14</sup> Contrary to the spirit of compromise intended by the President, the new law "turned out to be a ban on gays in the military disguised as a liberalization of the government's stance on gays in the military."<sup>15</sup>

### III. SUBSTANCE OF THE POLICY

Ten U.S.C. § 654, "Policy Concerning Homosexuality in the Armed Forces," provides that a service member will be separated from the military if one or more of the following findings is made: the service member has engaged in, attempted to engage in, or solicited another to engage in homosexual acts;<sup>16</sup> the service member has stated he or

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<sup>10</sup> Jerry Roberts, *Clinton Attacks Bush on Family Health Issues: Democrat Calls Perot 'Wrong' on Gays*, S. F. CHRON., May 30, 1992, at A1.

<sup>11</sup> JANET HALLEY, DON'T: A READER'S GUIDE TO THE MILITARY'S ANTI-GAY POLICY 21 (1999).

<sup>12</sup> Assessment of the Plan to Lift the Ban on Homosexuals in the Military: Hearings Before the Military Forces and Personnel Subcommittee of the Committee on Armed Services, 103d Cong. 9-11 (1993).

<sup>13</sup> HALLEY, *supra* note 11, at 22.

<sup>14</sup> 10 U.S.C. § 654 (2000).

<sup>15</sup> Alexander, *supra* note 6, at 410.

<sup>16</sup> 10 U.S.C. § 654 (b) (2000).

she is a homosexual or bisexual;<sup>17</sup> the service member has married or attempted to marry a person of the same sex.<sup>18</sup> Under the statute, a service member who has made a statement that he or she is gay, lesbian, or bisexual can be retained if the service member can show he or she has no propensity to engage in same-sex acts.<sup>19</sup>

The Department of Defense (DOD) developed the “Don’t Ask, Don’t Tell” policy to comply with the requirements of the statute enacted by Congress.<sup>20</sup> This policy features four major components: “Don’t Ask,” “Don’t Tell,” “Don’t Pursue,” and “Don’t Harass.”<sup>21</sup> “Don’t Ask” prohibits commanders or investigating officers from asking service members about their sexual orientation.<sup>22</sup> On its face, this component allows gay and lesbian service members to serve in the military without the fear of being forced into making self-incriminating statements that can lead to their discharge. In fact, while free from official interrogation into their sexual orientation, gay and lesbian service members often find themselves in a difficult position when asked personal questions by their fellow service members. Such questions, even when asked innocently, can force service members to choose between lying to their comrades or making potentially damaging statements that, while not necessarily sufficient to warrant a discharge, can often lead to an official investigation.<sup>23</sup>

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<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> 10 U.S.C. § 654 (b) (1) (E) (2000).

<sup>20</sup> The following relevant Department of Defense Instructions are cited in this paper: DoDI 1332.14, *Enlisted Administrative Separations*, (2008); DoDI 1304.26, *Qualification Standards for Enlistment, Appointment, and Induction*, (2007); DoDI 1314.2, *Defense Enrollment Eligibility Reporting System (DEERS) Procedures*, (1999); DoDI 1342.19, *Family Care Plans*, (1992); and DoDI 1000.13, *Identification (ID) Cards for Members of the Uniformed Services, Their Dependents and Other Eligible Individuals*, (1997).

<sup>21</sup> Alexander, *supra* note 6, at 409.

<sup>22</sup> Department of Defense Instruction 1332.14, 17, at 39, E5.3.c (2008).

<sup>23</sup> *Id.* at E5.2.d.2.

The Policy's "Don't Tell" component puts gay and lesbian service members on notice that disclosing their sexual orientation will provide grounds for discharge.<sup>24</sup> Such disclosure can take the form of "homosexual acts, a statement...that demonstrates a propensity to engage in homosexual acts, or a homosexual marriage or attempted marriage."<sup>25</sup> There are some exceptions to this, such as security clearance interviews (statements of sexual orientation not a basis for discharge) and privileged statements in the context of the attorney-client relationship.<sup>26</sup> However, the majority of statements, even those made to health care providers and chaplains, can be used in a discharge.<sup>27</sup>

The policy's "Don't Pursue" component defines "when it is appropriate to conduct an investigation and what the scope of a legitimate investigation may include."<sup>28</sup> DOD guidelines state that a legitimate investigation may only be initiated and conducted by a service member's commanding officer, and only when the commander has credible information that there is a basis for discharge.<sup>29</sup> According to the DOD, credible information does not exist when accusations are based on opinion, rumor, or associational activity (such as reading gay literature, going to a gay bar, or associating with gays or lesbians).<sup>30</sup> Rather, credible information can only be based on first-hand knowledge of the prohibited conduct.<sup>31</sup> While "Don't Pursue" is designed to protect service members from unjustified investigations, commonly known as "witch hunts," the complex system of directives and instructions created to express this component makes it difficult for

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<sup>24</sup> *Id.* at 38 E5.2.b.2.

<sup>25</sup> DoDI 1332.14, *supra* note 22, at 38 E5.2.b.

<sup>26</sup> Servicemembers Legal Defense Network, *Survival Guide: A Comprehensive Guide to "Don't Ask, Don't Tell, Don't Pursue, Don't Harass" and Related Military Policies* 48 (2007) available at <http://www.sldn.org/pages/survival-guide> (last visited Apr. 11, 2010).

<sup>27</sup> Alexander, *supra* note 6, at 414.

<sup>28</sup> *Id.*

<sup>29</sup> DoDI 1332.14, *supra* note 22, at 38 E5.2.a.

<sup>30</sup> *Id.* at 39 E5.2.c.

<sup>31</sup> *Id.* E5.2.d.

installation Judge Advocate General (JAG) officers to understand and apply “Don’t Pursue,” and renders it nearly incomprehensible to commanding officers.<sup>32</sup>

While serving as a company commander on two different Army installations<sup>33</sup> I experienced the confusion surrounding “Don’t Pursue” firsthand. Upon taking command at both installations, I contacted the JAG officer assigned to assist commanders in my battalion. In each location I received different guidance across the board: what constituted credible information, what an investigation could cover, even what role JAG would play in any investigation (little to none). Additionally, at neither post was there a coherent policy (that I was made aware of) at the division level, or even at the brigade level; discretion to create a policy was left to battalion commanders. Of the two battalion commanders I answered to while in command, one had no concrete policy: his only guidance was that the “Don’t Ask, Don’t Tell” policy would be enforced, but that company commanders were free to use their own discretion. The effect of this was that the policy was not enforced in the battalion while I was there.

My second battalion commander made his policy much more clear: while not going so far as to speak negatively of “Don’t Ask, Don’t Tell” he made sure his company commanders knew there was no room for discrimination of any kind in his battalion, and that while company commanders had the authority to open and pursue an investigation, he believed such investigations placed a greater strain on unit morale than the gay or lesbian service members they were designed to remove. Accordingly, he required any commander opening such an investigation to provide him a Memorandum For Record explaining, with specificity, what harm the allegedly homosexual Soldier was causing to

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<sup>32</sup> Alexander, *supra* note 6, at 416.

<sup>33</sup> B Company, 127<sup>th</sup> Aviation Support Battalion, 1<sup>st</sup> Armored Div., Fliegerhorst Kaserne, Germany; Headquarters and Support Company, 601<sup>st</sup> Aviation Support Battalion, 1<sup>st</sup> Infantry Div., Ft. Riley, KS.

the unit, and why an investigation leading to discharge was the only available course of action (though not required by the Policy, such a requirement is within the discretionary authority of a battalion commander). As with my first battalion commander (but for very different reasons) the result was that the policy was not enforced. Conversely, I was aware that other battalions on both posts had very different policies, and that openly gay and lesbian Soldiers were not welcome in those units. Thus, at both the JAG and command levels, I experienced no unifying guidance on how to approach, never mind enforce, the “Don’t Ask, Don’t Tell” policy. This lack of clear guidance alone was enough to make me, and my fellow company commanders, disinterested in enforcing the policy; we had to choose our battles, and we decided our energies and authority was better directed elsewhere.

The final component, “Don’t Harass,” was designed to protect service members from harassment based on their sexual orientation; it also instructed commanders not to investigate service members who had complained of anti-gay harassment.<sup>34</sup> The Department of Defense also adopted its Anti-Harassment Action Plan, designed to increase training on and awareness of anti-harassment directives aimed at protecting homosexuals.<sup>35</sup> Unfortunately, in my experience and the experience of my Reserve Officer Training Corps (ROTC) and Officer Basic Course (OBC) classmates, this Plan was not widely disseminated to the lower levels of the Army’s leadership structure. As a Platoon Leader and later Company Commander, I attended many mandatory training sessions with my Soldiers in both Germany and Ft. Riley that covered everything from drunk driving to sexual harassment; in none of those training sessions was the “Don’t

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<sup>34</sup> Alexander, *supra* note 6, at 416.

<sup>35</sup> *Id.*

Ask, Don't Tell" policy ever discussed, beyond general briefings on tolerance. There was never mention of an Anti-Harassment Action Plan (which I had never heard of until I began research for this paper). While other posts or services may have seen broader dissemination of the Plan, it is clear that implementation of anti-harassment directives designed to protect gay and lesbian service members has been sporadic at best, and virtually non-existent at worst.

#### IV. IN DEFENSE OF THE POLICY

For many people the story of "Don't Ask, Don't Tell" epitomizes the political process: an attempt to use the Federal government as an engine to drive positive social change (or, on the other side, to try to fix something that wasn't broken) that ended up as a political compromise that satisfied no one. However, democratic government necessitates compromise, and there are several arguments positing that "Don't Ask, Don't Tell" strikes a necessary balance while, at least on its face, acting as a step in the right direction.

The first argument in defense of the policy is that it has made it possible for gays and lesbians to legally serve in the armed forces, and has actually improved the condition of their service in several ways. Most obviously is "the elimination of any questions related to the sexual orientation of those applying for or entering the armed forces."<sup>36</sup> The elimination of this preliminary bar to military service is, on its face, a victory for gays and lesbians: serving in the military (and thereby defending the nation) is an important civic responsibility, one not all citizens are fit for. Ending the categorical

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<sup>36</sup> Chad C. Carter, CPT, USAF & Antony Barone Kolenc, MAJ, USAF, *Don't Ask, Don't Tell: Has the Policy Met Its Goals?*, 31 Dayton L. Rev. 1, 8 (2005).

prohibition on such service by homosexuals sends the message that gays and lesbians, in general, are no less able to bear that responsibility than the members of any other particular group currently permitted to do so. While the policy is not what President Clinton promised, and by its very nature does not permit gays and lesbians to serve openly, it is nevertheless a step in the right direction, in that it is a first step towards the end of the Federal government's implicit (and in this case, explicit) marginalization of gays and lesbians.

Another argument in favor of "Don't Ask, Don't Tell" is that it has protected gay and lesbian service members while they served. The policy's "Don't Pursue" component was designed to end the harassment of and witch hunts for homosexuals in the military.<sup>37</sup> The Department of Defense's Instruction on investigations into homosexual conduct is intended to provide a framework for commanders that allow them to enforce the policy while simultaneously restricting them with certain guidelines, such as the requirement of credible information, and what may and may not qualify as such.<sup>38</sup> Such restrictions are designed to eliminate efforts to expose a service member's alleged homosexual orientation, and then find actionable homosexual conduct in the wake of that revelation.<sup>39</sup> In this regard the policy has largely been successful, as witch hunts have decreased (but not disappeared) throughout the services.<sup>40</sup>

Again, while "Don't Pursue" is not an ideal solution it has, as with the "Don't Ask" component, provided gay and lesbian service members a benefit they did not possess before. Before the policy was implemented, homosexual service members were

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<sup>37</sup> *Id.* at 15.

<sup>38</sup> DoDI 1332.14, *supra* note 22, at 38 E5.1.a.

<sup>39</sup> Carter, *supra* note 36, at 18.

<sup>40</sup> SLDN at 19.

completely at the mercy of their individual commanders: while many served with distinction and even served openly, they did so only with at least tacit permission from their commanders.<sup>41</sup> Even this was a risk: a change of command could bring a new person unwilling to tolerate homosexuals in his or her unit, and then a service member's open homosexuality would suddenly become grounds for discharge. Under "Don't Ask, Don't Tell" gay and lesbian service members are protected from such arbitrary enforcement: they no longer need fear that a change of command or reassignment to another unit will result in an investigation that will lead to discharge.

Of course, this is because under the policy, gay and lesbian service members may not serve openly; if they are in compliance with "Don't Tell," the service members ostensibly need not fear such change because neither a new commander nor a new unit will know they are homosexual. While it is true that the policy protects gay and lesbian service members from arbitrary enforcement, it also denies the possibility of those service members from serving openly, as some did before the ban.<sup>42</sup> Additionally, I have personally served in units where gay and lesbian Soldiers served with varying degrees of openness, from just out of the closet to having their partner listed on the unit's informal contact roster. Thus, the reality of life in the services (or at least in the Army) for gay and lesbian service members seems to have come full circle, with their ability to serve openly to any degree dependant on their individual commanders' tolerance for homosexuals.

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<sup>41</sup> Alexander, *supra* note 6, at 404.

<sup>42</sup> *Id.*

## V. IMPACT ON THE FAMILY

As a young lieutenant leading a platoon of Soldiers in a foreign country, I quickly learned that in addition to taking care of my Soldiers, one of my most important duties would be to take care of their families as well. Today's military puts a premium on not only its service members, but also on their spouses, children and other family members, collectively referred to in the military as dependants.<sup>43</sup> Unfortunately, the military's support of families is not universal: "Don't Ask, Don't Tell" severely affects the families of gay and lesbian service members by making any attempt to have a family life similar to their heterosexual comrades difficult to impossible.

The families of gay and lesbian service members, like those of straight service members, can take many shapes. They can be single parent homes, or they can live with a partner. They can have children, whether biologically from previous marriages, or through adoption; or they can be childless. Whatever their composition, they all have one thing in common with different-sex families: all dependants are enrolled in the Defense Enrollment Eligibility Reporting System (DEERS).<sup>44</sup> DEERS is used by the Department of Defense to ensure that family members receive the benefits they are entitled to; the nature of DEERS's centralized, service-wide database becomes especially important during a deployment, when a service member will not be available to confirm that family members are in fact dependants, and therefore eligible for benefits. The nature of the problem facing same-sex families is immediately evident: while a heterosexual service

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<sup>43</sup> Dependants are defined as spouses, unmarried children under 21, and parents or children residing with the service member who receive over fifty percent of their support from the service member. Department of Defense Instruction 1000.13, 34 (1997).

<sup>44</sup> DEERS is an "automated information system designed to provide timely and accurate information on those eligible for these benefits and entitlements and to prevent and detect fraud and abuse in the distribution of these benefits and entitlements." Department of Defense Instruction 1341.2, 2 (1999).

member will not think twice before enrolling his wife upon joining (or getting married)<sup>45</sup>, a gay or lesbian service member enrolling his or her same-sex partner in DEERS runs the risk that such action will be questioned, investigated, and considered a “statement... that demonstrates a propensity to engage in homosexual acts” in violation of the policy.<sup>46</sup> This quandary becomes even more unfortunate when the full spectrum of benefits available to military families is considered.

All service members and their dependants are entitled to full medical care, including general health, dental, optical and chiropractic, through the military’s health care program.<sup>47</sup> Most of this care, especially for service members serving outside the continental United States (i.e. Germany, Italy, Japan, South Korea, etc.), is directly provided by the military at military medical facilities.<sup>48</sup> To receive these medical benefits (and any medical care outside the United States) dependants must be enrolled in DEERS.<sup>49</sup> For this reason the partners of many gay and lesbian service members have no access to the medical care that their different-sex counterparts enjoy.

Service members who are married or have children (or are of a sufficiently senior rank) may generally choose to either live on post while receiving an allowance for dependants, or to live off post and receive a housing allowance to cover some of their costs (along with the dependant allowance).<sup>50</sup> Especially for junior enlisted service members, the additional allowances can account for a large percentage of their monthly

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<sup>45</sup> Heterosexual service members cohabitating with a partner may not enroll their partner in DEERS; enrollment (and the formal benefits it confers) is limited to dependants connected to the service member by marriage (spouses) or blood relation (children). DoDI 1000.13, *supra* note 43, at 34.

<sup>46</sup> DoDI 1332.14, *supra* note 22, at 18 E3.8.a.2.b.

<sup>47</sup> Kathi Westcott & Rebecca Sawyer, *Silent Sacrifices: The Impact of “Don’t Ask, Don’t Tell” on Lesbian and Gay Military Families*, 14 *Duke J. Gender L. & Pol’y* 1121, 1125 (2007).

<sup>48</sup> *Id.*

<sup>49</sup> DoDI 1341.2, *supra* note 44, at 2.

<sup>50</sup> Westcott & Sawyer, *supra* note 47, at 1126.

take-home pay, and help defray the costs of supporting children and a dependant partner.<sup>51</sup> Again, to be eligible for these additional payments, service members must enroll their dependants in DEERS. This prevents many gay and lesbian service members from applying for and receiving the same compensation as their heterosexual comrades, and creates a burden that falls heaviest on those least able to bear it.

Related to this problem is the more fundamental dilemma of children themselves: namely, how to actually have children in a same-sex family in the military. Gay and lesbian parents of children who are living with a partner while serving face many obstacles; all children (whether biological or adopted) must be enrolled in DEERS, and the failure to do so may be punished under the Uniform Code of Military Justice (UCMJ).<sup>52</sup> If the parent's partner is not enrolled as the child's other parent, the partner will have no authority over or interests in the child within the realm of the military's jurisdiction. If the child is adopted by the partner, official adoption papers could be considered a statement under "Don't Ask, Don't Tell."<sup>53</sup>

A similar problem emerges when a service member is deployed to a combat zone. Service members with minor children must, without exception, develop and present a family care plan to their commanding officer.<sup>54</sup> This plan must detail who will care for the child(ren) while the service member is deployed, how the service member will finance the care, how logistical support will be provided and where the child(ren) will

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<sup>51</sup> Defense Finance and Accounting Service, Military Pay: 2009 Military Pay Charts, available at <http://www.dfas.mil/militarypay/militarypaytables/2009MilitaryPayTables.doc> (last viewed Apr. 11, 2010).

<sup>52</sup> 10 U.S.C. § 892 (1) (2000).

<sup>53</sup> Westcott & Sawyer, *supra* note 43, at 1124.

<sup>54</sup> A family care plan is an agreement between the service member and his or her commanding officer explaining how dependants will be cared for when the parent is deployed. Department of Defense Instruction 1342.19, 2 (1992).

live, and include detailed information on the care provider.<sup>55</sup> Failure to provide such a plan can be punishable by administrative action or, if the deficiency is not corrected, involuntary separation from the service.<sup>56</sup> A gay or lesbian parent with children who wanted their partner to be the caregiver for their children while they were deployed is thus faced with the same dilemma: list their partner as the primary care provider and risk having their mandatory family care plan be used as a statement within the meaning of “Don’t Ask, Don’t Tell,” or choose to list someone else as the primary care provider for their children. For those same-sex families without extended family to help them this dilemma can prove especially cruel, forcing some gay and lesbian service members to choose between their families and their careers in a way straight service members never have to.

The burden on same-sex families runs deeper than lacking the financial benefits provided by the military to its families. Families are the backbone of the armed forces: they provide service members the emotional and psychological support they need to survive long deployments in today’s non-linear warzones. The military, in turn, has developed many programs and institutions to provide support to the families left behind when service members go to war.

Nowhere is the military’s support of families more apparent and necessary than for service members in overseas duty stations. My first posting was to a unit near Frankfurt, Germany. When I arrived, my unit was already deployed to Iraq, and I spent several months with the Rear Detachment before joining them downrange. At the same time I was becoming familiar with the services the military provides for its overseas

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<sup>55</sup> *Id.* at 13.

<sup>56</sup> *Id.* at 5.

personnel, I was learning how important those services were to the families of deployed Soldiers. In Germany, only single officers lived off-post; all other personnel lived on small bases scattered around the country. These bases provided almost everything an American could want: supermarkets that sold American food; a Post Exchange that sold American clothes, electronics, appliances and media; laundry and dry cleaning services; movie theaters; post offices; travel agencies; recreational spots for bowling and roller skating; American fast food restaurants; car dealerships selling Ford and Chevrolet; American barber shops and hair salons; even service stations selling gas at American prices. The largest posts were like small cities, with their own malls, food courts, hospitals, emergency services and neighborhoods. Even the smallest communities had schools, parks, community centers and clubs. For American service members and their families, these communities were slices of home, transported to a foreign country. For the younger Soldiers and their spouses, often just out of high school, they were an antidote to homesickness: a place where everyone spoke English, and they could belong.

Families stationed overseas often take such services and opportunities for granted; for same-sex families however, such necessities are difficult, if not impossible, to enjoy. Access to U.S. military installations is restricted to ID card holders; once inside some activities, such as shopping at the supermarket or Post Exchange, require an ID card. For dependants to receive ID cards they must be enrolled in DEERS; this puts same-sex families in the same quandary examined above. In order to benefit from the same privileges different-sex families enjoy, they must risk taking action that could be construed as a statement under “Don’t Ask, Don’t Tell.”<sup>57</sup>

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<sup>57</sup> DoDI 1332.14, *supra* note 22, at 38 E5.8.a.2.b.

Not all the assistance provided to families is so tangible. Family Readiness Groups (FRGs) are gatherings where all the family members in a company are invited to come and share food, ideas, and tips and to receive news from a central point. They voice their concerns and complaints to the spouse of a senior officer, usually the commander's wife or husband. The spouse then relays those concerns and messages to the commander, ensuring senior officers are kept aware of the conditions of the families back home. Often the groups provide an outlet for frustrated spouses to blow off steam and an opportunity for older spouses to watch for warning signs, such as a young spouse with a young child who is having trouble. These groups are an invaluable resource for families, binding them together and to the unit during the most difficult times. Their function is especially important overseas, where FRGs often take the place of extended families that would otherwise provide emotional and moral support.

For same-sex families who have come together while the service member is stationed in the United States, the burden is heaviest when the service member is transferred to an overseas duty station. In the States same-sex families can work around many of the difficulties: they can live off post, have off-post access to virtually all services the military provides overseas, and often have extended family able to help them. When this same-sex family moves overseas, all these advantages disappear: the family is almost totally reliant on the military and the institutions and support programs it provides. For this reason, and because military communities are almost always smaller and more closely knit overseas, same-sex families are particularly vulnerable to an overseas tour. Partners cannot participate in the formal moving process, because the necessary procedures to get them classified as dependants can be used as statements

against the service member.<sup>58</sup> While nothing prevents them from buying a plane ticket to their service member's destination, partners who make the trip are faced with living by themselves in a foreign country (unless their service member is permitted to live off post), unable to freely enjoy that slice of home that other military families have come to depend on. Though they may gain access to the physical facilities through their partner, they cannot participate in the community itself: the family activities, the formal events, the unit parties, and everything else that draws the Soldiers and families of a unit together without risking discovery and the investigation that may follow. Perhaps most important, they may be unwilling or unable to join their unit's Family Readiness Group; without the support of the group, they will be alone when their partner deploys. Military life is stressful enough on families, especially during deployments. Take away the programs and institutions designed to relieve that stress, and add the active exclusion of (and implicit moral judgment against) same-sex partners and the military becomes a very difficult place for same-sex families to exist.

## VI. IMPACT ON THE MILITARY

Strongly connected to the negative impact the policy has on individual service members and their families is an effect that has become clearer over the past few years: the negative impact "Don't Ask, Don't Tell" has on the military itself. Publicized by high profile stories in newspapers across the country and increasingly referred to by high-ranking military officers themselves, it is likely this factor more than any single other that has led to the current drive to repeal the policy.

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<sup>58</sup> *Id.*

The statute on which “Don’t Ask, Don’t Tell” is based was the result of Congressional policymaking designed to head off a possible executive order lifting the ban on homosexuals serving in the military.<sup>59</sup> Congress received support from the Joint Chiefs of Staff, whose uncharacteristically public opposition to repeal stemmed at least in part from the traditional doctrine that gays and lesbians in the military would undermine morale and unit cohesion.<sup>60</sup> Perhaps predictably, Congress made several findings that it codified in the resulting statute, including “[t]he presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.”<sup>61</sup> From the beginning then, the rationale for “Don’t Ask, Don’t Tell” has been the perceived need to keep openly gay and lesbian service members out of the military or risk the erosion of the qualities which comprise the military’s fighting capability.

Seventeen years later, there is evidence that not only does such a need not exist but that the opposite may be true: discharging otherwise qualified service members because they are openly gay or lesbian, and the resulting atmosphere created within the military, may actually harm morale, good order and discipline, and unit cohesion.<sup>62</sup> One source for this new perspective is the Federal government itself. The Department of Defense’s Office of the Inspector General (IG) commissioned a report to examine the extent to which anti-homosexual remarks and harassment was prevalent and tolerated

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<sup>59</sup> Eugene R. Milhizer, *Don’t Ask, Don’t Tell: A Qualified Defense*, 21 Hofstra Lab. & Emp. L.J. 349, 355 (2004).

<sup>60</sup> Alexander, *supra* note 6, at 408.

<sup>61</sup> 10 U.S.C. § 654 (a) (15) (2000).

<sup>62</sup> Tobias Barrington Wolff, *Political Representation and Accountability Under Don’t Ask, Don’t Tell*, 89 Iowa L. Rev. 1633, 1681 (2004).

within the armed forces.<sup>63</sup> The inquiry was prompted by concerns of the Secretary of Defense that “disparaging speech or expression with respect to sexual orientation ... can undermine good order and discipline.”<sup>64</sup> The IG surveyed multiple installations from all the services and discovered that “offensive comments about homosexuals were commonplace and a majority believed they were tolerated to some extent.”<sup>65</sup> In addition, seventy-three percent of respondents who stated that a senior person witnessed the harassment reported that the senior person did nothing to stop the harassment.<sup>66</sup> Of respondents who described witnessing a specific instance of harassment, sixty-one percent stated the incident occurred on a military installation or ship, and just under fifty percent that the harassment occurred while on duty.<sup>67</sup>

Though the IG drew no substantive conclusions from the data gathered, for such harassment to occur while on duty and in the presence of seniors and go uncorrected speaks volumes about how far the climate in such units has deteriorated. No unit can experience the harassment of one group of people that is effectively sanctioned by leadership and not be affected in some way; any such unit where homosexual service members are harassed so openly will suffer morale and discipline problems, as leadership’s failure to address the harassment emboldens those responsible. If such harassment continues or even escalates, any sense of esprit de corps will be lost, resulting in impaired capability to complete the mission.

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<sup>63</sup> Office of the Inspector General of the Department of Defense, Evaluation Report on the Military Environment With Respect to the Homosexual Conduct Policy 1, 1 (2000).

<sup>64</sup> *Id.* at 7.

<sup>65</sup> *Id.* at 24.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

The military's long-held position that gays and lesbians serving openly would undermine morale and unit cohesion is undercut by its own practices. If the military's contention were true, it should be possible to see an increase in the number of discharges of homosexual service members during times of war: to retain such 'disruptive' personnel when units were going into combat would be logically inconsistent with the universally acknowledged need to deploy units at peak military fitness.

In fact, for all the inconsistencies of enforcement of the ban on homosexuals (whether pre- or post-"Don't Ask, Don't Tell") there is one unifying factor: a decrease in the discharging of gay and lesbian service members during wartime.<sup>68</sup> During every conflict from World War II on, the military has consistently relaxed its enforcement of (the contemporary incarnation of) the ban on gays and lesbians.<sup>69</sup> Since the opening of the Global War On Terrorism after September 11, 2001, homosexual discharges have decreased every year.<sup>70</sup> This trend reached its peak in 2009, when such discharges were roughly one-quarter of their number in 2001, the last year the United States was not at war.<sup>71</sup> To loosen the restrictions on a group of people who are supposedly a disruption to their unit just when unit cohesion matters most is a clear logical inconsistency: either unit cohesion does not really matter (it does), or homosexuals are not the disruptive influence the military claims. Such practice at the very least "calls into question the rationales asserted for banning lesbian, gay, bisexual and transgender persons from the military."<sup>72</sup>

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<sup>68</sup> Alexander, *supra* note 6, at 407.

<sup>69</sup> R.L. Evans, *U.S. Military Policies Concerning Homosexuals: Development, Implementation, and Outcomes*, 11 Law & Sex. 113, 134 (2002).

<sup>70</sup> Servicemembers Legal Defense Network, *Total "Don't Ask, Don't Tell Discharges 1994-2006*, available at <http://www.sldn.org/page/-/Website/Fact%20Sheets/DADT%20Fact%20Sheets/Fact%20Sheet%20-%20Discharges%201994-1996.pdf>, (last visited April 25, 2010).

<sup>71</sup> Servicemembers United, *Final Discharge Numbers Released for FY2009*, available at <http://servicemembersunited.org/?p=2419> (last visited on April 25, 2010).

<sup>72</sup> Alexander, *supra* note 6, at 408.

The policy has also hurt the military in very specific ways. In 2002 and 2003, with the United States preparing for the invasion of Iraq, thirty-seven linguists were discharged from the Defense Language Institute under “Don’t Ask, Don’t Tell.”<sup>73</sup> Many of these linguists were trained in Arabic, and would have likely played critical roles in the invasion and subsequent counter-insurgency.<sup>74</sup> The story was circulated in the national media, resulting in widespread outrage from people and politicians (on both sides of the isle) that renewed debate on the ban.<sup>75</sup> The military looked foolish and decreased its readiness at the same time, while enforcing a policy that would see its enforcement decrease as the decade (and two wars) wore on.<sup>76</sup> But these counter-productive discharges have not been limited to translators: nearly 800 service members with critical skills have been dismissed under the policy.<sup>77</sup> The drain of such critical personnel can only have negative consequences for the readiness of the military.

There is evidence that gays and lesbians can serve openly in a modern army without negatively impacting readiness and unit cohesion. Twenty-four nations now permit gays and lesbians to serve openly.<sup>78</sup> The case of the United Kingdom is especially enlightening. In several different cases, members and former members of the British military sued the British government, claiming the military’s investigations into their private lives, pursuant to its ban on homosexuals, violated their rights as outlined in the

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<sup>73</sup> *Id.* at 432.

<sup>74</sup> FRANK, *supra* note 3, at 218.

<sup>75</sup> *Id.*

<sup>76</sup> SLDN, *supra* note 70.

<sup>77</sup> Palm Center, *Report of the General/Flag Officers Study Group 9*, (2008).

<sup>78</sup> AARON BELKIN, DON’T ASK, DON’T TELL: IS THE GAY BAN BASED ON MILITARY NECESSITY? 109 (2003).

European Convention on Human Rights.<sup>79</sup> The case came before the European Court on Human Rights,<sup>80</sup> where the United Kingdom claimed its policy was necessary because the presence of homosexuals had a “substantial, negative impact on morale, fighting power, and operational effectiveness.”<sup>81</sup> The Court found this argument rested “solely upon the negative attitudes of heterosexual personnel towards those of homosexual orientation.”<sup>82</sup> The Court also noted that the work performance of the service members was never the subject of doubt within the Ministry of Defense.<sup>83</sup>

In addition to the United Kingdom, the examples of Canada, Australia, and Israel are informative. Like the United Kingdom and the United States, they are representative democracies that had previously banned gays and lesbians from serving in their militaries.<sup>84</sup> Like the United Kingdom, all three countries reversed their bans.<sup>85</sup> In all four countries there were numerous studies conducted that attempted to discern any decrease in readiness, morale or unit cohesion after the ban on homosexuals was lifted.<sup>86</sup> All the studies agreed that there was no reduction in readiness, and that repealing the ban did not adversely affect morale or unit cohesion.<sup>87</sup> In fact, they found the opposite: repealing the ban resulted in a reduction of harassment, decreased anxiety about gays and lesbians in the ranks, and greater openness between gay and lesbian and

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<sup>79</sup> Scott Morris, *Europe Enters a New Millennium With Gays in the Military While the United States Drowns in Don't Ask, Don't Tell: Twin Decisions by the European Court of Human Rights*, 9 Am. U.J. Gender Soc. Pol'y & L. 423, 438 (2001).

<sup>80</sup> *Lustig-Prean and Beckett v. The United Kingdom*, 29 EHRR 548 (Eur. Ct. Human Rights, 1999).

<sup>81</sup> Morris, *supra* note 79, at 439.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 440.

<sup>84</sup> BELKIN, *supra* note 78, at 110.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 114.

<sup>87</sup> *Id.*

heterosexual service members.<sup>88</sup> In addition, since The Netherlands first lifted its ban on gays and lesbians serving in 1974, no study of any of the twenty-three nations to follow suit has shown a decrease in performance attributed to lifting the ban.<sup>89</sup>

The evidence from these militaries is both powerful and relevant. Most of these countries are allies of the United States, and have deployed troops to Afghanistan or Iraq in support of U.S. operations. Their post-ban militaries have been tested by conflicts around the world, with no evidence of any decrease in performance.<sup>90</sup> It is clear that the militaries of our allies have not suffered from allowing gays and lesbians to serve openly. Supporters of “Don’t Ask, Don’t Tell” in America often point out that as the world’s only superpower the United States must meet obligations and maintain capabilities that our allies need not. While this is undoubtedly true, “the question is not how similar our missions are to those of other nations but whether the United States is any less capable than other nations of integrating gays into its military.”<sup>91</sup> Having served in her armed forces and alongside the armed forces of our allies, and led her young men and women, I can answer that question with certainty: if it is true that an organization is only as good as its people, the United States military is capable of accomplishing any mission given it, including the integration of openly gay and lesbian service members into its ranks.

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<sup>88</sup> FRANK, *supra* note 3, at 145.

<sup>89</sup> BELKIN, *supra* note 78, at 117.

<sup>90</sup> Wolff, *supra* note 62, at 1700.

<sup>91</sup> BELKIN, *supra* note 78, at 118. (Quoting Nathaniel Frank, *Real Evidence on Gays in the Military*, WASH. POST, Nov. 20, 2002).

## VII. IMPACT ON THE NATION

There is a final aspect of “Don’t Ask, Don’t Tell” that must be mentioned: its negative impact on the nation. The histories of America and its military are inextricably intertwined: during the Revolution, George Washington had to forge an army before he could build a nation. When the nation was torn apart by the Civil War, it was the military and its commander-in-chief that held it together. Afterwards, the Army led the country’s expansion westward while the Navy gained it prestige and respect abroad. Today America’s military continues to represent a wide spectrum of America, accepting citizens (and non-citizens) of all backgrounds who want to serve the cause of freedom, with one glaring exception: gays and lesbians. In a past dominated by different attitudes and mores, this might not have mattered. Today, while the rest of the country is slowly shifting to a position of equality for gays and lesbians in many areas, the military is in danger of becoming culturally isolated from the nation it defends.

There are several ways in which “Don’t Ask, Don’t Tell” is negatively impacting the nation. The most immediate is the judicial branch’s policy of deference to the military.<sup>92</sup> On occasion, the Supreme Court has declined to find that the military violated portions of the Constitution in circumstances where, had the incident occurred within the context of a different government agency, the Court might otherwise find such a violation.<sup>93</sup> Such deference did not begin with the policy<sup>94</sup>: in *Parker v. Levy*, the Supreme Court stated that “military society has been a society apart from civilian

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<sup>92</sup> “When the Court is confronted with questions relating to military discipline and military operations, we properly defer to the judgment of those who must lead our Armed Forces in battle.” *N.D. v. United States*, 495 U.S. 423, 443 (1990).

<sup>93</sup> Diane H. Mazur, *A Blueprint for Law School Engagement with the Military*, 1 J. Nat'l Security L. & Pol'y 473, 493 (2005).

<sup>94</sup> See *Goldman v. Weinberger*, 475 U.S. 503 (1986); *Rostker v. Goldberg*, 453 U.S. 57 (1981); *Parker v. Levy*, 417 U.S. 733 (1974).

society.”<sup>95</sup> In that case, the Court used the separate military justice system “to endorse a view of the entire military as an institution apart from, and not a part of, the society it protects.”<sup>96</sup> In *Goldman v. Weinberger* the Court ultimately held, with respect to regulations relating to discipline, that the “desirability of [such] regulations in the military is decided by the appropriate military officials, and they are under no constitutional mandate to abandon their considered professional judgment.”<sup>97</sup> According to Justice Brennan in dissent, if the military is willing to assert that disciplinary needs require restriction of constitutional rights, “it seems the Court will accept that conclusion, no matter how absurd or unsupported it is.”<sup>98</sup>

Judicial deference has the potential to damage civilian-military relations by threatening civilian control of the military. For the civilian government to work properly, all three branches must fully perform their constitutional role. Through its deference, the judiciary has emphasized the importance of Congressional authority to regulate the military. Ironically, “Don’t Ask, Don’t Tell” provides a special challenge for legislators: the policy prevents those affected by it (gays and lesbian service members) from raising concerns about it or even identifying themselves to their elected representatives while they are still serving on active duty or in the Guard or Reserves. Politicians cannot properly monitor a government policy without information about the policy’s workability, effectiveness, costs and benefits.<sup>99</sup> Deprived of first-hand information of the effect of the policy on those it regulates, and without proper statistical data about the policy (impossible to get without “asking” and requiring service members to “tell”)

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<sup>95</sup> *Parker*, 417 U.S. at 744.

<sup>96</sup> *Mazur*, *supra* note 93, at 496.

<sup>97</sup> *Id.*

<sup>98</sup> *Goldman*, 475 U.S. at 516.

<sup>99</sup> *Wolff*, *supra* note 62, at 1679.

policy makers in the legislative branch cannot get an accurate picture of the reality of the policy's effect. If information is power, the enforced silence of "Don't Ask, Don't Tell" reduces the military's accountability to the legislature, thereby reducing civilian control of the military.

Finally, and perhaps of greatest concern, is the growing cultural disconnect between the military and the rest of the nation.<sup>100</sup> Throughout its history the United States military has been seen as an honorable profession for America's young people. Appointments to the nation's military academies were sought after by the best and brightest, and it was not unusual to for young men to join after graduating from an Ivy League university. Today, the picture is far different: the military's policy on homosexuals stands in stark contrast to the nation's universities, virtually all of which prohibit discrimination on the basis of sexual orientation.<sup>101</sup> In these universities, the nation's future leaders see gay and lesbian students open about who they are, and involved in all facets of college life; in the military, they see only people forced to hide who they are from the very institution they have volunteered to serve in. In defending and enforcing "Don't Ask, Don't Tell" the military has created the image of an institution that these young people cannot relate to: they find it "alien, unwelcoming, and, for many, morally wrong."<sup>102</sup> The result is that Ivy League universities now send less than one percent of their graduates to the military.<sup>103</sup>

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<sup>100</sup> Diane Mazur, *Why Progressives Lost the War When They Lost the Draft*, 32 Hofstra L. Rev. 553, 563 (2003).

<sup>101</sup> Casey Pitts, Comment, *To Young People, "Don't Ask, Don't Tell" Means "Don't Enlist"*, 116 Yale L.J. Pocket Part 254, 256 (2007).

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

While in the short term this deprives the military of skilled leaders, in the longer term the ramifications for civil society are much greater: the possibility that many of the nation's future leaders will not only have never served in defense of their country, but will have seen the conditions of such service as incompatible with their personal beliefs. Such a result could have disastrous consequences for the nation as a whole. While repealing "Don't Ask, Don't Tell" will not, of course, completely bridge the gap between military and civil society, a military that allows gays and lesbians to serve openly will more closely reflect both the nation's values of equality and liberty and the changing mores of a society that is, slowly but surely, accepting gays and lesbians as equal members.

#### VIII. MOVING FORWARD

For the first time in 2008, the Democratic National Party included a repeal of "Don't Ask, Don't Tell" on its platform.<sup>104</sup> President Obama, a supporter of repeal, reemphasized his desire to see the end of the policy during his 2010 State of the Union address.<sup>105</sup> This turnabout in the executive branch, when coupled with an increase in the already existing base of support in both houses of Congress and the reality of the manpower requirements of two wars (and, for the cynical reader, an upcoming midterm election), make it increasingly possible that 2010 will be the last year gay and lesbian

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<sup>104</sup> Jackie Gardina, *Let the Small Changes Begin: President Obama, Executive Power, and "Don't Ask, Don't Tell"*, 18 B.U. Pub. Int. L.J. 237, 244 (2009).

<sup>105</sup> President Barack Obama, *The 2010 State of the Union Address*, available at <http://www.whitehouse.gov/the-press-office/remarks-president-state-union-address> (last visited Apr. 11, 2010).

service members are discharged under the policy.<sup>106</sup> The question of how repeal will be accomplished is shifting from an academic exercise to something more immediate.

In the wake of *Lawrence v. Texas*,<sup>107</sup> several cases have raised the question of the continued constitutionality of the policy<sup>108</sup>. In *Cook v. Gates*<sup>109</sup> twelve service members separated under the policy challenged the constitutionality of 10 U.S.C. § 654. Despite believing that the *Lawrence* holding was based on “a standard of review that lies between strict scrutiny and rational basis”<sup>110</sup> the U.S. Court of Appeals for the First Circuit in *Cook* rejected the plaintiffs’ arguments of due process,<sup>111</sup> equal protection,<sup>112</sup> and freedom of speech.<sup>113</sup> In *Witt v. Department of the Air Force*<sup>114</sup> the U.S. Court of Appeals for the Ninth Circuit confronted a similar case, with somewhat different results. Though the Ninth Circuit rejected Major Witt’s equal protection argument,<sup>115</sup> the court applied a heightened scrutiny test<sup>116</sup> to her substantive due process claim and remanded to the district court to develop the record on that claim.<sup>117</sup> While it is unclear what the ultimate result of this case will be, or how far its holding will resonate (for example, the First Circuit in *Cook* declined to follow the Ninth Circuit’s heightened scrutiny test<sup>118</sup>), it

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<sup>106</sup> Thom Shanker, *A Military Downgrading of ‘Don’t Ask, Don’t Tell’*, N.Y. TIMES, March 25, 2010.

<sup>107</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>108</sup> For a complete analysis of this topic, see: Diane H. Mazur, *Is “Don’t Ask, Don’t Tell” Unconstitutional After Lawrence? What it Will Take to Overturn the Policy*, 15 U. Fla. J.L. & Pub. Pol’y 423 (2004).

<sup>109</sup> *Cook v. Gates*, 528 F.3d 42 (2008).

<sup>110</sup> *Id.* at 56.

<sup>111</sup> “[W]here Congress has articulated a substantial government interest for a law, and where the challenges in question implicate that interest, judicial intrusion is simply not warranted.” *Id.* at 60.

<sup>112</sup> “[H]omosexuals are not a suspect class and the legitimate interests Congress put forward are rationally served by the Act.” *Id.* at 62.

<sup>113</sup> “[T]he Act is justified on a content-neutral, nonspeech basis; specifically, maintaining the military’s effectiveness as a fighting force.” *Id.* at 64.

<sup>114</sup> An Air Force reservist with an otherwise outstanding military career was discharged after her relationship with a female civilian was discovered. *Witt v. Department of the Air Force*, 527 F.3d 806 (2008).

<sup>115</sup> The Ninth Circuit had previously held that the Policy did not violate equal protection. *Id.* at 821.

<sup>116</sup> *Id.* at 818.

<sup>117</sup> *Id.* at 821.

<sup>118</sup> *Cook*, 528 F.3d at 45.

seems clear that judicial deference to the military means that any action will likely come from either the executive or the legislative branches.

President Obama's campaign rhetoric and recent reaffirmation of his desire to repeal "Don't Ask, Don't Tell" would seem to indicate the executive branch will lead the way in any effort to end the policy. In fact, this may not happen as many advocates hope: given President Clinton's experience attempting to unilaterally end the ban on homosexuals, without the support of either the military or Congress, it is likely President Obama will first attempt to build a consensus within Congress.<sup>119</sup> As with his Afghanistan strategy, Obama will also probably ensure he has the support of the Joint Chiefs of Staff before actively backing any proposal.<sup>120</sup> However, this does not mean the President's only option is to wait for a bill from Congress.

As Commander-in-Chief of the armed forces, President Obama has the authority to order the Department of Defense to issue new guidelines on the enforcement of "Don't Ask, Don't Tell."<sup>121</sup> In addition, the statute gives the Secretary of Defense the authority to develop regulations necessary to implement the policy.<sup>122</sup> These sources of authority give the President the ability to change some of the conditions of how the policy is enforced. The executive's first step should be to prevent service members from being discharged based on statements made to doctors, psychologists, and chaplains.<sup>123</sup> The lack of confidentiality for gay and lesbian service members with these care providers can create a barrier for them to seek help out of fear that statements they have made during

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<sup>119</sup> Gardina, *supra* note 104, at 238.

<sup>120</sup> The Chairman of the Joint Chiefs, Adm. Mike Mullen, has openly supported the repeal of the Policy in his testimony to Congress. Elisabeth Bumiller, *Top Defense Officials Seek to End 'Don't Ask, Don't Tell'*, N. Y. TIMES, Feb. 2, 2010.

<sup>121</sup> Gardina, *supra* note 104, at 256.

<sup>122</sup> 10 U.S.C. § 654 (b), (e) (2000).

<sup>123</sup> Gardina, *supra* note 104, at 257.

treatment will be used against them during a discharge.<sup>124</sup> With many service members facing the stress of multiple combat deployments and stories of Post-Traumatic Stress Disorder filling the news, the military should be actively encouraging its returning service members to receive treatment, not maintaining barriers that keep some of them away.

The second step should be to clarify the DOD's current guidelines on what qualifies as "credible information" and a "reliable source." Such information should only be admissible in an investigation if it comes from another service member, not a civilian.<sup>125</sup> The policy's stated goal is to protect morale and unit cohesion; if a civilian with no connection to the unit acquires knowledge of a service member's violation(s) of the policy, such knowledge should be irrelevant to the course of an investigation, as it would have no bearing on morale and unit cohesion. The most recent example of this was Air Force Sergeant Jene Newsome, who was serving in South Dakota and had married her partner in Iowa. When civilian police went to her home to arrest her spouse, they found a copy of her marriage certificate and informed the military. Sgt. Newsome was discharged under the policy.<sup>126</sup> There was no evidence that either Sgt. Newsome's sexual orientation or her marriage to a woman was either known or had any negative affect on the morale or cohesion of her unit. Such a discharge of a service member otherwise performing her duties and having no negative impact on her unit only underscores the need for better guidance from the DOD.

In addition, the executive branch should take steps to ensure that such "credible information" is only presented by a "reliable source." To do this, the DOD should

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<sup>124</sup> *Id.* at 259.

<sup>125</sup> *Id.* at 260.

<sup>126</sup> Timberly Ross, *Lesbian Sgt. Discharged After Police Tell Military*, ASSOC. PRESS, March 13, 2010.

require that any service member making an allegation go on record by submitting a sworn statement that they witnessed the conduct or statement prohibited by the policy.<sup>127</sup> This requirement could be used to ensure that commanders pursuing an investigation actually have “credible information” before any discharge proceedings. It would also discourage those who would use the policy as a tool for personal reasons, such as personal animus.

There is a final alteration the DOD could make to its guidance on the policy. Earlier I described how my Battalion Commander required any Company Commander who was going to conduct an investigation into a violation of the policy to submit to him a Memorandum for Record detailing why such an investigation was necessary; specifically, how the allegedly homosexual Soldier was hurting morale or unit cohesion.<sup>128</sup> This requirement served to discourage any such investigations. However, it also left the door open to investigate any genuine impact on morale or unit cohesion created by a violation of “Don’t Ask, Don’t Tell.” Perhaps unsurprisingly, no such investigation occurred. However, the basic concept could be used by the military at large: commanders pursuing an investigation could be required to make a showing that the service member’s homosexual conduct “substantially interfered with unit cohesion.”<sup>129</sup>

A showing that the service member’s discharge is least disruptive way to solve the problem could also be required.<sup>130</sup> Such a change would have several benefits. It would allow commanders who feel obligated to pursue such an investigation but who are reluctant to discharge one of their own people to take lesser steps, such as dispensing

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<sup>127</sup> Gardina, *supra* note 104, at 261.

<sup>128</sup> See *supra* page 7.

<sup>129</sup> Gardina, *supra* note 104, at 267.

<sup>130</sup> *Id.*

non-judicial punishment under Article 15 of the UCMJ.<sup>131</sup> It would discourage commanders from pursuing such an investigation for personal reasons by providing a burden of proof the commander would have to demonstrate to superior officers. Finally, such a change would leave open the possibility of discharge for any service member whose homosexual conduct could be shown to have actually adversely affected the morale or cohesion of his or her unit. Again, as this is the most proffered justification for the policy, it would be hard for supporters of the policy to object to any change that explicitly retained such a scenario.

These are changes that would be relatively easy for the executive branch to implement: the Department of Defense would have to issue a new Instruction updating its regulations on the policy, and would have to train commanders and JAG officers on the new regulations and their implementation. Nothing new for the rest of the force: everyone else would continue to play by the widely known (if not widely understood) existing rules of “Don’t Ask, Don’t Tell.” Now, as the Secretary of Defense has announced an easing of the policy,<sup>132</sup> Congress is stepping up consideration of its own options.

After years of vacillation on the subject, it now seems possible that Congress will reverse its own law of seventeen years and end “Don’t Ask, Don’t Tell.” In 2005 a bipartisan group of members of the House of Representatives introduced the Military

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<sup>131</sup> The military uses non-judicial punishment to correct minor disciplinary infractions; such punishments are not criminal in nature, but can consist of measures such as extra-duty, reduction in rank, loss of privileges, etc. Such punishment is ordered directly by the unit commander; typically once the punishment is served, the matter is considered closed, with no permanent repercussions. Uniform Code of Military Justice, Article 15, available at <http://www.ucmj.us/> (last visited on 25 April, 2010). Hypothetically, a gay or lesbian service member who makes a statement announcing their sexual orientation in violation of the policy could, under this scenario, be subject to a range of disciplinary actions covering everything from confinement to the post to loss of pay to working after hours, instead of being discharged.

<sup>132</sup> Shanker, *supra* note 106.

Readiness Enhancement Act.<sup>133</sup> The Act would repeal the current policy and replace it with a policy of non-discrimination with respect to sexual orientation in the armed forces.<sup>134</sup> The Act adds sexual orientation to the military's Equal Opportunity mandate and requires regulations on military personnel to be applied without regard to sexual orientation.<sup>135</sup> After years without similar legislation, the Senate now has its own version of the bill that would allow gays and lesbians to openly serve in the military.<sup>136</sup>

Of course, nothing is certain in Congressional politics; but the two pillars most often used by supporters to prop up the policy are both weakening. The first is the presumption that openly gay and lesbian service members will adversely affect unit cohesion and morale; this has been dealt with here, exposed as little more than personal opinion based ignorance and bias. The second and last bastion that supporters of the policy have clung to has been opposition within the military itself. It was the unexpected public opposition of the Joint Chiefs of Staff that helped derail President Clinton's attempt to lift the ban in 1993.<sup>137</sup> It was to preserve the military's ability to enjoy unfettered exercise of its professional judgment about its own policies that caused the judiciary, led by the Supreme Court, to give great deference to the military.<sup>138</sup>

However, even this last pillar of support for the policy may be cracking. Both the Secretary of Defense and the Chairman of the Joint Chiefs of Staff have called for a repeal of the law.<sup>139</sup> The DOD has begun a comprehensive review of the issue that

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<sup>133</sup> Sharon E. Debbage Alexander & Kathi S. Westcott, *Repeal of "Don't Ask, Don't Tell": A Smooth Transition*, 15 Wash. & Lee J. Civil Rts. & Soc. Just. 129, 132 (2008).

<sup>134</sup> *Id.* at 133.

<sup>135</sup> *Id.*

<sup>136</sup> Elisabeth Bumiller, *Repeal of 'Don't Ask, Don't Tell' Policy Filed in Senate*, N. Y. TIMES, March 3, 2010.

<sup>137</sup> Alexander, *supra* note 6, at 408.

<sup>138</sup> Mazur, *supra* note 93, at 496.

<sup>139</sup> Bumiller, *supra* note 120.

should be complete around 1 December 2010.<sup>140</sup> Indeed, the Chairman of the Joint Chiefs, Admiral Mike Mullen, stated he was “troubled by the fact that we have in place a policy which forces young men and women to lie about who they are in order to defend their fellow citizens.”<sup>141</sup> He added that it was his personal belief that “allowing gays and lesbians to serve openly would be the right thing to do.”<sup>142</sup> Much may depend on the results of the DOD’s in-house study of how to implement any change in the policy,<sup>143</sup> but if the military itself concludes that gays and lesbians can serve openly without hurting the mission, the fate of “Don’t Ask, Don’t Tell” may finally be sealed.

## IX. CONCLUSION

“Don’t Ask, Don’t Tell” was conceived as a political compromise and received by gays and lesbians as a victory that replaced a total ban with a policy that allowed them to serve in the military. As victories go, this must be one of the most pyrrhic in American history. For the right to serve their country without (nominally) fear of discharge because of their sexual orientation, gay and lesbian service members, their families, the military, and indeed, the entire nation have paid, and continue to pay, a heavy price.

And yet, despite the litany of harms “Don’t Ask, Don’t Tell” has wrought, as a Soldier and a veteran of two combat deployments, I might still support the policy if I believed there was any evidence for, or truth to, its ultimate justification: that allowing gays and lesbians to serve openly in the military would result in sufficient harm to

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<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> Secretary Gates also said the DOD would ask the RAND Corp. to update its 1993 study on the impact of allowing gays and lesbians to serve openly in the military to help the DOD determine how best to implement the repeal of the policy. CNN, “Gates Eases Ban on Gays in the Military,” available at <http://www.cnn.com/2010/POLITICS/03/25/military.gays/index.html?iref=allsearch>. (Last visited on April 25, 2010).

morale, good order and discipline, and unit cohesion to adversely impact the ability of the military to carry out its missions. There is no such evidence. The United States military is the greatest fighting force the world has ever seen; on the battlefield it has defeated some of the greatest enemies of freedom in history. Abroad, it has been the single greatest force behind the expansion of freedom and democracy since 1941. At home, it successfully integrated minorities into its ranks before those groups achieved similar equality in civil society. The belief that this same military would be derailed by allowing gays and lesbians to serve openly is no longer defensible; it is doubtful it ever was.

Indeed, such a belief is an insult to the brave men and women, past and present, of every background, who have defended their country and the cause of freedom. That belief, without evidence to support it, and now with ample evidence to refute it, is exposed for what it is: simple prejudice. Its premise is astonishing when finally laid bare: service members, the majority of whom are heterosexual, cannot or will not tolerate gays and lesbians serving openly alongside them. Good order and discipline will crumble, and morale and unit cohesion will collapse in a frenzy of anti-homosexual hatred, harassment and violence. To someone who has served in the military, it is almost incomprehensible that anyone could actually believe this. The truth is, despite a very mixed record with some genuinely ugly incidents, time and again service members have accepted and embraced both their closeted and openly gay and lesbian comrades-in-arms. In fact, from public schools to universities, from various blue-collar jobs to graduate school, the military has been the most diverse and accepting institution I have ever been a part of, with a breadth of diverse people, views and experiences that puts the highest ivory tower law school to shame.

“Don’t Ask, Don’t Tell” is one of the last policies of overt discrimination in the nation that defined freedom and equality for the modern world. Despite this discrimination, countless gay and lesbian Americans have risked humiliation and harassment to defend, and when necessary, to die for their country. We will likely never know their true number, where they served, or where they died. But we can honor all of them, known and unknown, by giving them something greater than any monument or memorial: we can honor their service by repealing “Don’t Ask, Don’ Tell” and replacing it with a policy that allows all qualified Americans to share in the responsibility of defending their country and the ideals on which it is built. Indeed, such an act would honor not just the many gay and lesbian service members who have sacrificed so much for America; it would honor all service members and veterans, living and dead. It would show us that, underneath the politics of fear and hatred, the America that we fought for, the land of “life, liberty and the pursuit of happiness,” is still alive and well.