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How to End "Don't Ask, Don't Tell"

A Roadmap of Political, Legal, Regulatory, and Organizational Steps to Equal Treatment

MAY 2009

by Aaron Belkin, Nathaniel Frank, Gregory M. Herek,
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Table of Contents

Executive Summary

President Barack Obama has stated his intention to end the Pentagon policy known as "don't ask, don't tell," and allow gay men and lesbians to serve openly in the military. The federal statute governing this policy, Section 571 of the FY1994 National Defense Authorization Act, codified at 10 U.S.C. § 654, is titled "Policy Concerning Homosexuality in the Armed Forces" and has come to be known as "don't ask, don't tell."

While strong majorities of the public, and growing numbers within the military, support such a change, some political leaders and military members have expressed anxiety about what impact it will have on the armed forces. Scholarly evidence shows that lifting the ban on service by openly gay personnel is unlikely to impair military effectiveness or to harm recruiting, retention or unit cohesion. Yet questions remain as to how best to execute and manage the transition from exclusion to inclusion of openly gay personnel in a way that takes into consideration the concerns and sensitivities of the military community. In this report, we address political, legal, regulatory, and organizational steps that will ensure that the implementation process goes smoothly. We begin by suggesting six key points that should be kept in mind as policymakers consider the change.

1) The executive branch has the authority to suspend homosexual conduct discharges without legislative action.

The process of lifting the ban on service by openly gay personnel is both political and military in nature. While research shows that the planned policy change does not pose an unmanageable risk to the military, how the transition is executed politically can affect how smoothly the change is implemented. The President has the authority to issue an executive order halting the operation of "don't ask, don't tell." Under 10 U.S.C. § 12305 ("Authority of the President to Suspend Certain Laws Relating to Promotion, Retirement, and Separation"), Congress grants the President authority to suspend the separation of military members during any period of national emergency in which members of a reserve component are serving involuntarily on active duty. We believe that issuing such an order would be beneficial to military readiness, as it would minimize the chances of replaying a debate that is already largely settled but could still inflame the passions of some in the military. Once gay people are officially serving openly in the military, it will become clear to those with concerns about the policy change that service by openly gay personnel does not compromise unit cohesion, recruiting, retention or morale. This in turn will make it easier to secure the passage of the Military Readiness Enhancement Act (MREA) in Congress, which would repeal "don't ask, don't tell." While it would be optimal to see lawmakers embrace repeal by passing MREA, it may not be politically feasible to do so, despite overwhelming public support and Democratic control of Congress. Conservative Democrats in Congress may oppose MREA, and the White House may not wish to expend the political capital necessary to overcome their resistance. The executive option may end up costing the President less in political capital

than the effort needed to push repeal through Congress. And it could help avoid the emergence of split military leadership which could make the transition bumpier than it has to be.

2) Legislative action is still required to permanently remove "don't ask, don't tell."

Since MREA was first introduced in 2005, it has remained a stand-alone, unicameral bill. Passage of the bill would be the best way to permanently eliminate "don't ask, don't tell" for the following reasons: First, since the current policy is based on a statute passed by Congress, its permanent elimination will require legislative or judicial action. Second, the legislation as currently written would establish a uniform code of conduct across the military for all service members, gay and straight, without regard to sexual orientation. Evidence from foreign militaries indicates that this is one of the most important steps for the successful transition to a policy of inclusion. Finally, articulating the new policy in a federal statute will give the policy the imprimatur of broad public support and will create a clear set of standards and policies for service members and commanding officers. As stated in #1, above, pushing MREA through Congress may best be done after an executive order first halts discharges for homosexual conduct.

3) The President should not ask military leaders if they support lifting the ban.

The President has stated he wants to consult with the military leadership about lifting the ban on service by openly gay personnel. It is crucial that such consultation not take the form of yielding authority on this issue to the Defense Department, which could create a damaging wedge between the President and the military. A catch-22 is now paralyzing action on ending homosexual conduct discharges. Many members of Congress are fearful that supporting repeal could cost them political support, despite polls showing majority support for service by openly gay personnel even in conservative populations. Because of that fear, some lawmakers seek to shift responsibility for repeal to the Pentagon. But senior insiders in the Pentagon are unwilling to tackle "don't ask, don't tell" because they view the issue as a "hot potato" or "career killer" so they seek to shift responsibility back to Congress. A similar scenario is threatening to play out between the White House and the Pentagon, in which the current administration, despite having promised it will end the ban, wants the impetus for change to appear to come from the Pentagon, whose top leaders have indicated no such will for change. In other countries, militaries have acted to end discrimination only when so ordered, as was the case in the U.S. with respect to racial integration in the military. It is likely that reform in this case will happen only through action by civilian leadership. Since President Obama already has said that he plans to lift the ban, he will gain nothing from throwing this particular decision up to debate.

Already, interest groups have begun organizing to defeat the President's plan to lift the ban. Over 1,000 retired admirals and generals have signed a document opposing repeal, at the behest of a conservative group that is lobbying to retain the ban. While the document is not based on any research or new information, efforts such as this one will make the President's job more difficult, and provide evidence for why decisive action is

needed on this issue.

In 1993, members of President Clinton's transition team consulted extensively with all levels of the U.S. military, ranging from the Joint Chiefs of Staff to enlisted personnel. Despite these efforts, the Chiefs claimed that they had not been sufficiently consulted. This precedent suggests that, whether the Obama administration consults with the military or not, Pentagon leaders may feel or say they were inadequately consulted. Thus, despite the President's pledge to take military perspectives into account on this issue, he should realize that what the military needs most in this case is leadership. Any consultation with uniformed leaders should take the form of a clear mandate to give the President input about how, not whether, to make this transition.

4) The President should therefore take into consideration the following with regard to consulting the military:

A. The President may be accused of not consulting with the Pentagon regardless of what steps he takes to reach out to the military;
B. If he does consult, he may be told that most service members do not want the ban to be lifted, thus constricting his options when he decides to move forward with repeal;
C. Significant support for repeal exists within the military, but there is enormous institutional pressure to avoid expressing that support, which hence does not get registered in consultation;
D. A significant cadre of military leadership, although unwilling to acknowledge so in public, want lawmakers to mandate reform so as to give them cover;
E. While many people in the military oppose policy change, the percentage that feels *strongly* that gay men and lesbians should not be allowed to serve openly is quite small, and research shows that there is a difference between what troops say they want in a poll and how they actually behave when taking orders;
F. Even among opponents of repeal, most military members understand its inevitability;
G. Extensive consultation of the armed forces could distract them from their efforts to secure our nation's security and expose them to the risk of being exploited by those who oppose change for moral or cultural reasons.

5) Studying the issue further would cause waste, delay and a possible backlash.

Recent proposals to study *whether* to repeal the law are unwarranted. A significant body of scholarly research, which we summarize in section two of this report, already shows clearly that the ban is unnecessary, that it harms the military, and that repeal would improve the military. Even the question of how to repeal the law is not something that requires study. Research summarized in this report already explains how to implement change. And while some have suggested that the President could request a study on how, rather than whether, to end the ban, this was precisely what President Clinton ordered in

1993 with both the Rand Study and the Military Working Group. Opening up these questions to study will allow time for mobilization of emotional constituencies who are more focused on a narrow moral agenda than on military readiness, as was the case in 1993.

6) Equal standards and leadership support are critical to a successful policy change.

Any legal or regulatory change should heed the two most important lessons from foreign militaries that have transitioned to open service. First, the military must adopt a single code of conduct for all service members, gay and straight, without regard to sexual orientation. Second, military leaders must signal clearly that they expect all members of the armed forces to adhere to the new policy, regardless of their personal beliefs.

Expected Impact of Service by Openly Gay Personnel

At July 23, 2008 Congressional hearings about the "don't ask, don't tell" law, former Representative Nancy Boyda (D-KS) expressed frustration at the lack of evidence concerning the impact of service by openly gay personnel on the military. Referring to the testimony of service members and experts during the hearing, she said, "It's been people's stories, their feelings, opinions, and while it's been interesting, I'd like to see a little bit more... hard data."

There has never been a policy change that involved certain knowledge about outcomes, as the future is never perfectly predictable. That said, the data that former Congresswoman Boyda requested already exist. Evidence shows consistently that after gay men and lesbians are allowed to serve openly in the armed forces, military readiness will not be compromised. The data have been produced by a wide range of scholars at the Army Research Institute, the RAND Corporation, the Defense Personnel Security Research Center, and a large number of universities. No reputable or peer-reviewed study has ever shown that allowing service by openly gay personnel will compromise military effectiveness.

Three types of evidence can be used to assess the nature and likelihood of any impact to the military following the decision to allow service by openly gay personnel, and all three types of evidence suggest there will be no negative impact on the military. Those three areas of evidence are:

- Data about what happens in the U.S. military when gay men and lesbians serve openly, i.e. notwithstanding the strictures of the current policy.
- Data from analogous institutions, including but not limited to foreign militaries, that allow gay men and lesbians to serve openly.
- Data about the unit cohesion rationale: the argument that unit cohesion will suffer if gay men and lesbians serve openly.

Data about what happens in the U.S. military when gay men and lesbians serve openly: The U.S. military functionally suspended the gay ban during the first Gulf War by halting the gay discharge process. There have been no indications of any detriment to unit cohesion or readiness during that war. In fact, the cohesion and readiness of the troops during the first Gulf War have been widely praised. Researchers have followed units in which American troops worked with and even took orders from openly gay foreigners in integrated multinational units under the auspices of NATO, the United Nations, and other multinational organizations. They found no negative impact to cohesion and readiness. More recently, a survey was administered to 545 service members who fought in Afghanistan and Iraq. Respondents were asked about the presence of openly gay members of their units, and about their units' cohesion and readiness. A majority of respondents said they knew of, or suspected, gays in their units. Statistical analysis of results found that there was no relationship between the presence of openly gay troops and the cohesion or readiness of the unit.

Data from analogous institutions that allow gay men and lesbians to serve openly:
Twenty-four foreign militaries allow gay men and lesbians to serve openly. None has reported any detriment to cohesion, readiness, recruiting, morale, retention or any other measure of effectiveness or quality. Studies conducted by the militaries in Canada and Britain as well as scholarly studies published in peer-reviewed journals have confirmed the same finding: decisions to allow service by openly gay personnel had no negative impact on cohesion, readiness, recruiting, morale, retention or any other measure of effectiveness or quality in foreign armed forces. In the more than three decades since an overseas force first allowed gay men and lesbians to serve openly, no study has ever documented any detriment to cohesion, readiness, recruiting, morale, retention or any other measure of effectiveness or quality. No American police or fire department that allows gay men and lesbians to serve openly has reported any detriment to cohesion, readiness, recruiting, morale, retention or any other measure of effectiveness, and scholarly research has confirmed the lack of any decline. No federal agency that allows gay men and lesbians to serve openly such as the C.I.A., F.B.I., or Secret Service has reported any detriment to cohesion, readiness, recruiting, morale, retention or any other measure of effectiveness or quality.

Data about the impact of service by openly gay personnel on unit cohesion:
The "unit cohesion rationale" is the claim that heterosexuals will not form bonds of trust with gay people, and that if gay men and lesbians are allowed to serve openly, units will fail to develop a sufficient degree of cohesion; as a result, military effectiveness will suffer. Empirical data, however, show this assertion is not grounded in fact. A recent survey of 545 service members who served in Afghanistan and Iraq found that 72% reported that they are comfortable working with gay men and lesbians. Of the 20% who said they are uncomfortable, only 5% are "very uncomfortable," while 15% are "somewhat" uncomfortable. Senior members of the armed forces, both active duty and former, have concluded that no evidence has ever linked service by openly gay personnel to any impairment of military effectiveness. For example, Colonel Tom Kolditz, Chairman of the Department of Behavioral Sciences and Leadership at the U.S. Military Academy at West Point, and one of the Army's top experts on leadership and cohesion, told a 2008 study commission of retired flag and general officers that he is unaware of any evidence suggesting that heterosexuals cannot form bonds of trust with gays, lesbians and bisexuals.

Three additional observations deserve mention. First, while many service members indicate on surveys that they oppose lifting the ban, the relevant data point is not whether troops wish to serve with openly gay peers, but whether service by openly gay personnel will undermine military effectiveness. On one recent, non-randomized survey, between 10 and 24% of service members indicated that they would leave or might leave the military if gay men and lesbians were allowed to serve openly. Social science research, however, shows that opinion polls do not predict the troops' behavior, and that there is a

significant gap between what is expressed in military surveys and the actual impact of policy change on behavior. In both Canada and Britain, two-thirds of male troops said that they would not work with gay men if gay bans were lifted in those countries. After the lifting of the bans, fewer than a half dozen people resigned in each case.

Second, while any policy change can generate certain disruptions, the very few "horror stories" that are sometimes used to oppose reform must not be confused with relevant empirical evidence. The question is not whether "bad apples" or isolated incidents cause problems in some units, but whether service by openly gay personnel presents problems that are any different or less surmountable than service by open heterosexuals. Conduct that is deemed inappropriate is deemed so regardless of the sexual orientation or gender of those involved. The military already has appropriate conduct laws and regulations which are neutral with respect to sexual orientation and gender to handle disruptions.

Finally, while the data show that allowing service by openly gay personnel will not undermine the military, research suggests that a number of positive benefits will accrue. Repeal of the law will: (1) make it easier for gay troops to do their jobs; (2) save hundreds of millions of dollars currently spent on training replacement troops; (3) prevent the loss of talented service members; (4) eliminate a source of negative media publicity for the military; and (5) promote unit cohesion both by minimizing unnecessary personnel loss and by enhancing a climate of honesty, respect, and obedience to a uniform code of conduct for all service members.

Scholarly research on military readiness and service of openly gay personnel:
Taken together, the evidence on the ability of countries to lift their gay bans without problems is overwhelming. Descriptions of relevant research are provided below, and full citations are included at the end of this report.

1. The U.S. Navy's Crittenden Report from 1957 which found that gay troops did not present a security risk.

2. The Defense Department's PERSEREC study from 1988 which found the same thing as the Crittenden report, and also concluded that the rationale for the ban was unfounded and not based on evidence.

3. A 1992 draft report by the GAO suggesting that the military "reconsider the basis" of the gay exclusion rule.

4. A 1993 GAO study of four foreign militaries which found that "the presence of homosexuals in the military is not an issue and has not created problems in the functioning of military units."

5. A 1993 RAND study prepared by over 70 social scientists based on evidence from six countries and data analyses from hundreds of studies of cohesion that concluded that sexuality was "not germane" to military service, and recommended lifting the ban.

6. A 1994 assessment of the Canadian Forces by the U.S. Army Research Institute for the Behavioral and Social Sciences finding that predicted negative consequences of ending gay exclusion did not materialize following the lifting of the ban.

7. The assessments of the British Ministry of Defence in 2000 calling its new policy of equal treatment "a solid achievement" with "no discernible impact" on recruiting and no larger problems resulting from reform; and a 1995 assessment by a Canadian military office finding that there was no effect on readiness when the ban was lifted, despite enormous resistance and anxiety preceding the change.

8. Four independent academic studies conducted by the Palm Center at the University of California finding that lifting bans in Britain, Israel, Canada and Australia had "no impact" on military readiness and that negative attitudes almost never translated into service member departures, recruiting problems or other disruptions.

9. A 2008 report by a commission of retired general and flag officers who concluded that "allowing gays and lesbians to serve openly would pose no risk to morale, good order, discipline, or cohesion."

10. A 2009 statistical analysis by a RAND scholar and a University of Florida professor which shows that there is no correlation between whether or not a unit includes openly gay service members and the readiness or cohesion of the unit.

Presidential Authority to Suspend Discharges for Homosexual Conduct

10 U.S.C. § 654 ("Policy Concerning Homosexuality in the Armed Forces") states that a "member of the armed forces shall be separated from the armed forces under regulations prescribed by the Secretary of Defense if one or more of the following findings is made and approved in accordance with procedures set forth in such regulations": (1) "the member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts"; (2) "the member has stated that he or she is a homosexual or bisexual, or words to that effect"; or (3) "the member has married or attempted to marry a person known to be of the same biological sex."

The President of the United States has authority under the laws of the United States and the Constitution to suspend all investigations, separation proceedings, or other personnel actions conducted under the authority of 10 U.S.C. § 654 or its implementing regulations. Below we explain the basis of such authority.

I. The Laws of the United States.

Federal law recognizes that the President and Congress share authority to govern the military. In fact, by law currently in effect, Congress has already granted the President authority with respect to military promotions, retirements, and separations in a time of national emergency. This authority includes the power to suspend laws such as 10 U.S.C. § 654. Under 10 U.S.C. § 12305 ("Authority of the President to Suspend Certain Laws Relating to Promotion, Retirement, and Separation"), Congress grants the President authority to suspend any provision of law relating to the separation of any member of the armed forces who the President determines is essential to the national security of the United States, during any period of national emergency in which members of a reserve component are serving involuntarily on active duty. The statute states:

> Notwithstanding any other provision of law, during any period members of a reserve component are serving on active duty pursuant to an order to active duty under authority of section 12301, 12302, or 12304 of this title, the President may suspend any provision of law relating to promotion, retirement, or separation applicable to any member of the armed forces who the President determines is essential to the national security of the United States.

This law is colloquially referred to as "stop-loss" authority, and it has been used to suspend the voluntary separation of members of the military who have reached the end of their enlistment obligation or have qualified for retirement. The law, however, gives the President authority to suspend "*any* provision of law" relating to separation of members of the armed forces, including involuntary separations under 10 U.S.C. § 654. The Army has announced it will phase out the "stop-loss" program, which forcibly retains soldiers who wish to leave after their tours. It is important to point out that this use of stop-loss

has been particularly unpopular because it forces ongoing service by those who wish to leave the military, whereas the use of stop-loss to suspend homosexual conduct discharges would, by contrast, allow ongoing service by those who generally wish to remain in uniform.

10 U.S.C. § 12305 gives the President authority to suspend laws relating to separation of members of the military if two requirements are met. First, the suspension must occur during a period of national emergency in which members of the military reserve are involuntarily called to active duty under sections 12301 (reserve components generally), 12302 (ready reserve), and 12304 (selected reserve and certain individual ready reserve members). As of April 7, 2009, there were 93,993 members of reserve components or retired members serving on active duty after involuntary activation. Second, the President must make a determination that retention of members of the military—and suspension of any law requiring their separation—is essential to the national security of the United States. The conditions of 10 U.S.C. § 12305 are sensible because they give the President authority to suspend laws relating to separation when a national emergency has strained personnel requirements to the point that members of the reserve forces have been involuntarily called to active duty. The constitutionality of 10 U.S.C. § 12305 was upheld in *Santiago v. Rumsfeld*, 425 F.3d 549 (9th Cir. 2005).

Under 10 U.S.C. § 123 ("Authority to Suspend Officer Personnel Laws During War or National Emergency"), Congress grants the President similar authority to suspend laws relating to the separation of officer personnel.

The "don't ask, don't tell" policy itself, as codified by Congress, also grants authority to the Department of Defense to determine the procedures under which investigations, separation proceedings, and other personnel actions under the authority of 10 U.S.C. § 654 will be carried out. Section 654(b) states: "A member of the armed forces shall be separated from the armed forces under regulations prescribed by the Secretary of Defense if one or more of the following findings is made and approved in accordance with procedures set forth in such regulation." Under this section, the Secretary of Defense has discretion to determine the specific manner in which "don't ask, don't tell" will be implemented. Furthermore, the statute does not direct the military to make any particular findings of prohibited conduct or statements; it only states that members shall be separated under regulations prescribed by the Secretary *if* such findings are made. The Secretary has broad authority to devise and implement the procedures under which those findings may be made.

A recent decision of the Ninth Circuit Court of Appeals, *Witt v. Department of the Air Force*, 527 F.3d 806 (9th Cir. 2008), calls into question whether "don't ask, don't tell," as implemented by regulations prescribed by the Secretary of Defense, violates the due process rights of service members under the Fifth Amendment of the U.S. Constitution. The court remanded the case for further findings on whether the separation of this specific service member would significantly further an interest in military effectiveness, and whether less intrusive means would be unlikely to further the same interest. The Secretary has authority under 10 U.S.C. § 654 to determine whether regulations

implementing the statute are consistent with the ruling in *Witt*, whether the regulations should be revised and, if necessary, whether amendments to the statute should be recommended for further consideration by Congress.

II. The Constitution of the United States.

Federal law reflects that the President, the Congress, and the federal courts share constitutional power and responsibility for governance of the armed forces of the United States.

1. Under Article I, Section 8, Clauses 12-14, Congress has the power to raise and support armies, to provide and maintain a Navy, and to make rules for the government and regulation of the land and naval forces. Congress legislated under this authority in enacting 10 U.S.C. § 654.

2. Under Article II, Section 2, Clause 1, the President has the power to act as Commander-in-Chief of the armed forces of the United States.

3. Under Article III, federal courts have the power to decide all cases arising under the Constitution and the laws of the United States. Federal courts have the power to interpret law and ensure that the other branches of government act in accordance with the Constitution.

Although Congress has power to make rules to govern the military, it shares that power with the President, who, as Commander-in-Chief, has power to direct the operation of military forces. If Congress were understood to have sole power to remove members of the military from the chain of command operating under the direction of the President, particularly in a time of national emergency, the President's ability to carry out his constitutional obligations would be impaired. Therefore, the constitutional authority of the Commander-in-Chief includes at least shared authority to ensure that members of the military essential to national security are not removed from duty.

III. The Regulations of the Department of Defense.

10 U.S.C. § 654 directs that the "don't ask, don't tell" policy be implemented under regulations prescribed by the Secretary of Defense. There are three principal Department of Defense implementing regulations in force: Department of Defense Instruction 1304.26, "Qualification Standards for Enlistment, Appointment, and Induction" (July 11, 2007); Department of Defense Instruction 1332.14, "Enlisted Administrative Separations" (August 28, 2008); and Department of Defense Instruction 1332.30, "Separation of Regular and Reserve Commissioned Officers" (December 11, 2008). Each of the military services has in turn issued regulations to implement Department of Defense guidance.

Department of Defense regulations governing the separation of members under 10 U.S.C. § 654 preserve discretion within the military chain of command to retain members under

certain circumstances. “Enlisted Administrative Separations,” for example, states at Enclosure 3, paragraph 8.d (7)(c), page 21: “Nothing in these procedures . . . precludes retention of a Service member for a limited period of time in the interests of national security as authorized by the Secretary concerned.” Military commanders have significant discretion to decide whether they should initiate investigations or separation proceedings, or whether no action should be taken at all: “They shall examine the information and decide whether an inquiry is warranted or whether no action should be taken” (“Enlisted Administrative Separations,” Enclosure 5, paragraph 3.b, p. 39; “Separation of Regular and Reserve Commissioned Officers,” Enclosure 8, paragraph 3.b, p. 23).

Regulatory Revisions that Should Accompany Policy Change

Service by openly gay personnel will require changes in administrative procedures that can be handled through the military's usual processes of revising, reissuing, and cancelling publications. The enforcement and administration of the homosexual conduct policy has spawned many rules and regulations, most of which can be changed easily to comply with an Executive Order suspending the policy. Below, we describe and propose revisions to the publications that currently enforce and administer the homosexual conduct policy—and control its collateral consequences—in the Defense Department, its components, the Department of Homeland Security, and the U.S. Coast Guard. The process of publication review that is already in place can be used to make necessary changes. Pending a full review, interim guidance can be issued to suspend discharges, and other adverse personnel actions, under the policy.

A. **Publications**.

Department of Defense and service publications referencing homosexual conduct include directives, instructions, manuals, secretarial memoranda, and local instructions. Most of these publications include incidental references to the homosexual conduct policy and therefore would require only minor revisions. Others are specific to the policy and could be withdrawn or canceled. A few publications, primarily those related to separation procedures, will eventually require more substantial changes to implement permanent service by openly gay personnel. It is important to note the difference between discharges for homosexual conduct and action taken as the result of criminal conduct. Separations under "don't ask, don't tell" are not criminal but administrative and result, in the vast majority of cases, in an "honorable" discharge.

The major categories of relevant publications include:

1. **Criminal statutes, criminal procedure, and disciplinary codes** as contained in the Uniform Code of Military Justice (UCMJ) and its implementing regulations. No changes are required here. Congress should, however, consider adopting the recommendations of the Joint Services Committee on Military Justice to replace the consensual sodomy ban contained in Article 125 of the UCMJ with a ban in the Manual for Courts-Martial on all sexual acts that are prejudicial to good order and discipline. This would emphasize that a single standard of conduct applies to all military personnel.

2. **Personnel management directives and manuals that govern the policy and procedures for separation of officers and enlisted members under the Homosexual Conduct policies** created by the Department of Defense, Army, Navy, Marine Corps, Air Force and Coast Guard.[1] The sections of these

[1] See, e.g., DoDI 1332.14, *Enlisted Administrative Separations,* 28 August 2008*;* AR 635-200, *Personnel Separations: Active Duty Enlisted Separations,* 6 June 2005; AFI 36-3208, *Administrative Separation of Airman,* 9 July 2004; MILPERSMAN 1910.148, CH-23, 16 June 2008, *Separation by Reason of*

publications that govern discharge under the homosexual conduct policy can be reissued if Congress makes a statutory change. If an Executive Order suspends implementation of the policy, those sections should be immediately suspended, subject to review for compliance with the Order.

3. **Publications that govern documentation and record-keeping requirements as well as the collateral consequences of separation for homosexual conduct**, including regulations regarding discharge documents, benefits, separation pay and similar information. These publications should be revised in the established process of administrative review pending permanent changes in the policy.

4. **Directives and orders that limit the use of information related to homosexual conduct** in non-discharge related areas such as law enforcement, security clearances and medical care.[2] These publications should be revised in the usual process of regularized review, pending permanent changes.

5. **Training materials and instructions intended to guide the implementation of the existing homosexual conduct policy**, such as lesson plans, recruiting materials, and legal instructions. These should be withdrawn and revised in accordance with new policy guidelines as those policies are articulated.

B. **Existing Review Mechanisms.**

The armed forces are well practiced in adapting regulations and other administrative guidance to changed circumstances. Department of Defense (DoD) and service department publications are subject to periodic review. Department of Defense Directives (DoDD) are reviewed prior to the 4-year anniversary of their initial publication or last coordinated review to ensure they are necessary, current, and consistent with DoD policy, existing law, and statutory authority. Upon review, the DoDD may be reissued, certified as current, or cancelled. All DoDD certified as current shall be revised and reissued or cancelled within 6 years of their initial publication or last coordinated revision. All Department of Defense Instructions (DoDI), Department of Defense Manuals (DoDM) and Administrative Instructions (AI) shall be reviewed every 5 years, and revised, reissued or cancelled (see *DoDI 5025.01 .4., October 28, 2007, Subject: DoD Directives Program*). The Manual for Courts-Martial is reviewed annually, and updated and re-issued as needed, by Executive Order. The Uniform Code of Military Justice is amended when necessary by Congress, most often in response to requests from the DoD but also as a result of external suggestions (as in the most recent major change to the Code, the

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Homosexual Conduct, Military Personnel Manual; MARCORSEPMAN (MCO P1900.16 E) § 6207, *Marine Corps Separation and Retirement Manual* , 6 June 2007; *Coast Guard Personnel Manual, CH 12.E, Homosexual Conduct, COMDTINST M1000.6A;* AR 600-20, Ch. 4-19; AR 635-200, Ch. 15. The other uniformed services, Uniformed Corps of the U.S. Public Health Service and the National Oceanographic and Aeronautic Administration do not currently have homosexual conduct policies based on 10 U.S.C. § 654 as the statute only applies to the "armed" forces. They may be subject to these policies when serving with the armed forces or in Naval or Coast Guard operations.

[2] *See, e.g., DoDI 5505.8, Subject: Defense Criminal Investigative Organizations and Other DoD Law Enforcement Organizations Investigations of Sexual Misconduct, 24 January 2005.*

adoption of a revised sexual assault code in the new Article 120). Issuances that levy requirements or restrictions on the public, federal or government employees outside the DoD, and/or Reserve Components, or that have public or political interest should be considered for publication in the *Federal Register*. Publications addressing homosexual conduct have public and political interest that may mandate publication in the *Federal Register* for public comment. In general, a standard notice-and-comment period should be observed in revising these publications.

C. **Recommendations.**

After the issuance of an Executive Order suspending all investigations, separations, and other personnel actions under 10 U.S.C. § 654 and its implementing regulations, the Secretary of Defense would issue appropriate guidance to implement the order. After that initial step, an orderly review of the relevant publications would ensue. No change is required to the military's criminal law or procedure, because no criminal statute or provision of the *Manual for Courts-Martial* (2008 ed.) makes specific references to homosexual conduct.[3] Publications that govern discharge under the homosexual conduct policy should be canceled or withdrawn.[4]

Publications related to the collateral consequences of the homosexual conduct policy should be reviewed to ensure compliance with a revised policy. The most extensive of those modifications will involve personnel/human resources management publications. Because of the hierarchy of tasking in the departments, however, most changes are generated as a matter of course once the initial guidance has been issued. The DA publications range from administrative to technical and equipment publications and miscellaneous publication of such historical documents. Some of these will be unaffected by the Executive Order, while others will require more extensive revision. Likewise, educational and training publications related to the homosexual conduct policy should be withdrawn and revised accordingly. There will be no need to train personnel on a policy that is no longer in effect.

Some observers have suggested that a change in the policy will require extensive retraining in order to prevent or limit harassment or abuse of openly gay or lesbian

[3] Although UCMJ Articles 125 (sodomy), 133 ("conduct unbecoming an officer and a gentleman"), and 134 (the general article) have been used to punish homosexual conduct, current statutory language, judicial opinions, and executive guidance do not expressly target same-sex sexual misconduct as compared to opposite-sex sexual misconduct. Military courts are already in the process of both construing the new provisions of Article 120 (effective since Oct. 1, 2007), which transformed the UCMJ's rape statute into a series of specified sex crimes, and re-interpreting the prosecution of sodomy in light of the Supreme Court's decriminalization of civilian sodomy in Lawrence v. Texas, 539 U.S. 558 (2003), and the U.S. Court of Appeals for the Armed Forces post-*Lawrence* decision, United States v. Marcum, 60 M.J. 198 (C.A.A.F. 2004).

[4] Each of the services in the Department of Defense Direction has personnel management publications which include the homosexual conduct provisions that set the policy, how it is to be applied, and describe the procedures for separating enlisted members and officers. Similarly, the U.S. Coast Guard, which operates as a component of the Department of Homeland Security unless placed under the Department of Defense during time of conflict, enforces 10 U.S.C. §654 under its own regulations. For example, AR 600-200, Army Command Policy, lays out a detailed discussion of DADT.

service members. Yet training materials already in use include specific instruction prohibiting harassment on the basis of sexual orientation.[5] This existing training is carried out during recruit training and officer candidate training, at intervals during the course of an individual's service, upon reenlistment, and is incorporated into the common task and common skills programs of the services.[6] As a result, the regulations directly speaking to training and EO issues are already institutionalized in regulations and functions. This means the functional elements of the policy and the regulations that set them can be modified from currently existing publications and tasking. Selected authorities include:

- DoDI 1332.14, Enlisted Administrative Separations, 28 (August 2008)
- Air Force Instruction 36-3208: Administrative Separation of Airmen (9 July 2004)
- Army Regulation 635-200, Personnel Separations: Active Duty Enlisted Separations (6 June 2005)
- Naval Military Personnel Manual, Article 1920-040, Involuntary Separation Pay (Non-Disability) Eligibility Criteria and Restrictions, (22 November 2005)
- Naval Military Personnel Manual, Article 1910.148, Separation by Reason of Homosexual Conduct (16 June 2008)
- Marine Corps Order P1900.16E, Marine Corps Separation and Retirement Manual, para. 6207 (6 June 2007)
- Coast Guard Personnel Manual, Homosexual Conduct, COMDTINST M1000.6A (18 June 2007)
- DoDI 5505.8, Defense Criminal Investigative Organizations and Other DoD Law Enforcement Organizations Investigations of Sexual Misconduct (24 January 2005)
- Army Regulation 25-30, The Army Publishing Program (27 March 2006)
- Army Regulation 600-200, Army Command Policy (18 March 2008)
- Marine Corps Administrative Message, R 220745Z, 2 August, MARADMIN 451/02, Subject: Homosexual Conduct Policy Tasks and Responsibilities
- Chief of Naval Operations Instruction 5354.1F, Navy Equal Opportunity (25 July 2007)
- 42 U.S.C. § 217
- 33 U.S.C. § 3061

[5] These guidelines, for example, appear in materials used to train service members on the homosexual conduct policy itself. Furthermore, since 2000, in addition to the mandated training offered to service members from the point of enlistment and throughout their service, the services have prohibited the harassment of service members based on their sexual orientation or perceived sexual orientation, and tasked the Inspectors General with investigating harassment based on sexual orientation. See, for example, the U.S. Navy Inspector General web page addressing homosexual conduct issues including harassment, www.ig.navy.mil/complaints/Complaints(homosexuality).htm

[6] See, e.g., *MARADMIN 451/02*, setting out a detailed schedule for training.

Organizational Changes that Should Accompany Policy Change

Social science research has proved invaluable to the U.S. armed forces in confronting the challenges of racial and gender integration. The knowledge gained from these experiences, supplemented with insights from social science research that has focused specifically on sexual orientation and on the open service of gays and lesbians in militaries abroad, suggests a relatively small number of general guidelines for successfully implementing a new policy that permits openly lesbian, gay, and bisexual personnel to serve. These guidelines are listed below, with references to relevant bibliographic sources appended at the end of this report.

1. **The new policy should be stated in clear and simple terms that will be easily understood by all personnel.**

2. **The new policy should apply a single standard of conduct to all personnel, regardless of their sexual orientation.** The acceptability and appropriateness of specific conduct should be judged by a single standard, regardless of the sexual orientation or gender of the individual(s) involved. Implementing the policy will require that personnel receive guidance in setting such a standard, e.g., explaining that mere disclosure of information that potentially reveals one's sexual orientation (such as one's marital status, the gender of one's spouse or romantic partner, one's membership in a particular social or community group) does not constitute misconduct. In addition, regulations for implementing a new policy should emphasize that:
    1. each individual, regardless of sexual orientation, is to be judged on the basis of her or his performance relevant to military goals;
    2. all personnel must respect one another's privacy;
    3. interpersonal harassment—whether verbal, sexual, or physical—will not be tolerated, regardless of the gender or sexual orientation of the people involved;
    4. no service member will be permitted to engage in conduct that undermines military effectiveness.

3. **The benefits of the new policy for the armed forces and for individual personnel must be made clear.** Policies imposed from outside an organization can meet with resistance if they are perceived as incompatible with organizational culture. A new policy will work best if personnel are persuaded that it will not be harmful to the armed forces or to themselves, and may even result in gains. Toward this end, explanations of the new policy should be framed using themes reflecting military culture, such as the military's pride in professional conduct, its priority of mission over individual preferences, its culture of hierarchy and obedience, its norms of inclusion and equality, and its traditional "can do" attitude. In this regard, useful strategies can be drawn from past experiences with

racial integration. In a 1973 training manual, for example, the goals of racial integration were framed in terms of accomplishing the Army's mission:

> "Equal and just treatment of all personnel exerts direct and favorable influence on morale, discipline, and command authority. Since these key factors contribute to mission effectiveness, efforts to ensure equal treatment are directly related to the primary mission." (Department of the Army. (1973). *Improving race relations in the Army: Handbook for leaders*. Washington, DC (Pamphlet Number 600-16), page 2.

4. **Implementation plans for the new policy should include both pressure for compliance and support for effective implementation.** Compliance with the new policy will be facilitated to the extent that personnel understand that enforcement will be strict and that noncompliance will carry high costs, and thus perceive that their own self-interest lies in supporting the new policy. Consequently, the implementation plan should include clear enforcement mechanisms and strong sanctions for noncompliance, as well as support for effective implementation in the form of adequate resources, allowances for input from unit leaders for improving the implementation process, and rewards for effective implementation. Toward this end, the Defense Department should work to identify the most potent "carrots" and "sticks" for implementing the new policy. These include:
    1. the specific sanctions and enforcement mechanisms that will most effectively promote adherence to the policy;
    2. supporting mechanisms and resources that will be needed to assist personnel with enacting change;
    3. the types of surveillance and monitoring of compliance with the new policy that will be most effective at different levels in the chain of command.

5. **Upper-level commanders must send strong, consistent signals of their support for the new policy and their commitment to ensuring compliance with it.** Commanders will play a critical role in supporting the junior ranking personnel who actually implement a policy, ensuring that the latter come to view it as consistent with their own self-interest and with their own self-image as members of a military culture. Thus, a new policy's effectiveness will depend on repeated strong statements of clear support from the highest levels of leadership.

6. **Junior ranking personnel must understand that their ongoing successful implementation of the policy will be noticed and rewarded, and that breaches of policy by their subordinates will be considered instances of leadership failure.** Here again, strategies can be adapted from the military's efforts at racial integration. For example, the same training manual cited above clearly linked leadership abilities with successful implementation of policies for racial equality. After asserting that effective implementation of racial equality policies was integral to the accomplishment of the Army's mission and maintenance of the

welfare of troops, the manual defined leadership success in terms of policy implementation:

> "To a large extent, your success as a leader in the Army is going to depend on your ability to take men from a great variety of racial and cultural backgrounds, with all their racial suspicions and hostilities, and create in them the unity of spirit and action necessary for an effective fighting force. If you fail in this one task, you will have failed in creating high morale, *esprit*, unit efficiency, as well as failing to generate respect for your leadership by your troops. Your job, then, requires that you learn how to carry out your responsibilities for implementing basic Army policy regarding equal opportunity and treatment. If you do not know how, then your job is to learn." Department of the Army. (1973). (*Improving race relations in the Army: Handbook for leaders*. Washington, DC: Author (Pamphlet Number 600-16). Page 2.)

7. **Unit leaders should receive adequate training so they can address and solve challenges related to implementation.** Such training should stress that successful implementation of the policy is expected while imparting the knowledge and skills necessary to anticipate and identify implementation problems, and to make adjustments that address implementation problems and improve the implementation process. Any discretion accorded to unit leaders in deciding how best to correct implementation problems must be bounded by behavioral monitoring and strict enforcement of a code of professional conduct.

8. **Unit leaders must be provided with clear procedures for reporting problems, and they must believe that their superiors value accurate information about implementation problems.** It should be made clear that merely experiencing initial difficulties in implementing the new policy does not indicate a failure of leadership, provided that these problems are reported and appropriate steps are taken to resolve them.

9. **Plans should be developed for effectively monitoring and evaluating the new policy once it has been implemented.** It will be important to identify the key variables to be tracked for policy evaluation so that baseline data can be collected before a new policy is enacted. Examples of possible variables for monitoring include: number of openly gay or lesbian personnel serving, measures of unit performance (monitored in a way that will permit comparisons between units that do and do not have openly gay personnel, and within-unit comparisons before and after having openly gay personnel), and incidents of anti-gay harassment and violence. In addition, conducting regular surveys of officers' and enlisted personnel's knowledge and understanding of the new policy, their attitudes toward it, and their experiences with it could be valuable for monitoring compliance, identifying problems, and formulating solutions.

Responses to 1993 Questions by Senator Sam Nunn

During a January 27, 1993 speech on the Senate floor, former Senator Sam Nunn posed a string of questions that he said would need to be answered before allowing military service by openly gay personnel. Some of his questions are answered elsewhere in this report, or have been overtaken by changes in American society and abroad. For example, Nunn asked, "What has been the experience of our NATO allies and other nations from around the world? Not just in terms of the letter of their laws and rules, but the actual practice in their military services on recruiting, retention, promotion, and leadership of military members?" Elsewhere in this report we explain that none of the twenty-four foreign militaries that allow service by openly gay personnel has reported any overall detriment to recruiting, retention, cohesion or any other aspect of readiness. A number of Nunn's "thorny questions," however, remain. We answer those questions here:

1) As society changes, should our military services reflect those changes in society? Even if civilians believe openly gay people should be allowed to serve, isn't that irrelevant? Military effectiveness will suffer if we make the military more like civilian society.
Our rules about military service have always reflected changes in society, and all of the national polls on the issue—more than a dozen—conducted over the past five years have shown that between 56 and 81% of the public favors allowing openly gay people to serve. Although that alone is an insufficient reason to change the law, military researchers have rightly worried about the widening of the "civil-military gap" and the impact of that gap on the mutual support of the civilian sector and the military. Furthermore, research shows that the current policy does not serve its intended purpose and creates burdens on individuals and the military. Changes in society merely punctuate the policy's ineffectiveness.

2) Should the military have a single code of conduct that applies to conduct between members of the same sex, as well as members of the opposite sex? Or, are we going to have two separate codes of conduct for each of those groups?
The military already has a single code of conduct, which, after "don't ask, don't tell" is eliminated, will apply to all troops, straight and gay. This is a sufficient code to govern the behavior of all military members when applied equitably.

3) What if a gay service member makes a romantic overture to a straight colleague? What if a gay service member openly dates someone of the same sex on-post or on-base?
Asking for a date or conducting a romantic relationship should be governed by the same regulations that regulate heterosexual conduct. Standards should be the same for all service members and should not make distinctions based on sexual orientation.

4) What about displays of affection that are otherwise permissible, while in uniform, such as dancing at a formal event?
In the British military, a service-wide code of conduct prohibits any behavior in the workplace that would compromise a unit's cohesion or readiness. Commanders are given

discretion to apply that code on a situation-by-situation basis. As for non-workplace social events, the British have found that leadership, a norm of discretion among both gay and heterosexual service members, and the wish of military members to conform to their surrounding culture have taken care of almost every conceivable problem. In the British case, both gay and straight service members generally understand which conduct is appropriate and, based on traditions of honor, discipline, exemplary conduct, respect, and judgment, know how to avoid conduct that could be prejudicial to good order and discipline, whether on duty or at social events. When they fail to exercise proper conduct, existing disciplinary codes against conduct that is prejudicial to good order and discipline are enforced against them. In the U.S., it is reasonable to expect that the military will face only minor adjustment problems that can be handled in the same way other personnel problems are handled.

5) What rules, if any, should be adopted to prohibit harassment on the basis of sexual orientation?
Standards governing sexual and other forms of harassment should be the same for all service members and should not mention sexual orientation. The military's equal opportunity system is capable of addressing this issue if given the appropriate authority to do so. The system does not involve lawsuits, and service members are barred from actions in tort incident to military service. Accordingly, the military equal opportunity system exists for remedies, not damages. Given, as well, that sexual harassment is sexual harassment regardless of the gender of the offending party, equal opportunity enforcement for gay and lesbian service members could easily be incorporated into extant equal opportunity systems and duties.

6) Should homosexual couples receive the same benefits as legally married couples? For example, non-military spouses now are entitled to housing, medical care, exchange and commissary privileges, and similar benefits. Military spouses also benefit from policies that accommodate marriages, such as joint assignment programs. If homosexual couples are given such benefits, will they also have to be granted to unmarried heterosexual couples?
Not under current U.S. law. The military, like all federal agencies, must comply with federal law with respect to marriage and partner benefits. The Defense Department currently relies on the Defense of Marriage Act as a controlling authority for its personnel decisions regarding civilian employees' same-sex partners. The same authority would govern decisions regarding service members' same-sex partners.

7) If discrimination is prohibited, will there be a related requirement for affirmative action recruiting, retention and promotion to compensate for past discrimination?
No. Policy should be directed toward the future effectiveness of the armed forces, not historical questions, and new provisions should in general apply prospectively. With regard to those who have been separated and whose discharge did not involve misconduct and who still meet military standards for enlistment, the new statute should include a provision to waive re-enlistment bars that exist in current law and permit correction of military service records if necessary.

Draft Executive Order Suspending Discharges for Homosexual Conduct

By the authority vested in me as President by the Constitution and the laws of the United States of America, in order to retain members of the armed forces essential to national security, I hereby order as follows:

Sec. 1. Definitions. As used in this order:

1. "Implementing regulations" means Department of Defense Instruction 1304.26, "Qualification Standards for Enlistment, Appointment, and Induction" (July 11, 2007); Department of Defense Instruction 1332.14, "Enlisted Administrative Separations" (August 28, 2008); Department of Defense Instruction 1332.30, "Separation of Regular and Reserve Commissioned Officers" (December 11, 2008); and all regulations of the armed forces issued under the authority of these Instructions.

2. "10 U.S.C. § 654 (Policy Concerning Homosexuality in the Armed Forces)" means the federal law commonly referred to as "don't ask, don't tell."

Sec. 2. Authority of the President. Under Article II, Section 2, Clause 1 of the Constitution of the United States, the President has authority as Commander-in-Chief to retain members of the armed forces serving under his command when essential to the national security of the United States. Under 10 U.S.C. § 123 ("Authority to Suspend Officer Personnel Laws During War or National Emergency") and § 12305 ("Authority of President to Suspend Certain Laws Relating to Promotion, Retirement, and Separation"), Congress also has given the President authority to suspend any provision of law relating to the separation of any member of the armed forces who the President determines is essential to the national security of the United States, during any period of national emergency in which members of a reserve component are serving involuntarily on active duty.

Sec. 3. Findings.

1. Prior Proclamations and Executive Orders. On September 14, 2001, the President issued Proclamation 7463 (Declaration of National Emergency by Reason of Certain Terrorist Attacks) and Executive Order 13223 (Ordering the Ready Reserve of the Armed Forces to Active Duty).

2. Members of Reserve Components Serving on Active Duty. As of April 7, 2009, there were 93,993 members of reserve components or retired members serving on active duty after involuntary activation.

3. Military Readiness and National Security. Retention of members of the armed forces who may be subject to separation under the authority of 10 U.S.C. § 654

(Policy Concerning Homosexuality in the Armed Forces) is essential to the national security of the United States.

Sec. 4. Suspension of 10 U.S.C. § 654. Effective immediately, all investigations, separation proceedings, or other personnel actions conducted under the authority of 10 U.S.C. § 654 or its implementing regulations shall be suspended. No adverse action shall be taken under the authority of 10 U.S.C. § 654 or its implementing regulations after this period of suspension has ended if the adverse action is based on conduct engaged in or statements made during this period of suspension. This provision does not bar investigations, personnel actions or disciplinary proceedings for misconduct.

Sec. 5. Review of Implementing Regulations. During this period of suspension, the Secretary of Defense shall review all implementing regulations prescribed under the authority of 10 U.S.C. § 654(b) in light of the Ninth Circuit Court of Appeals decision in *Witt v. Department of the Air Force*, 527 F.3d 806 (9th Cir. 2008). The Secretary of Defense shall determine whether the implementing regulations should be revised and, if necessary, whether amendments to 10 U.S.C. § 654 should be recommended for further consideration by Congress.

Sec. 6. Entry Standards. The Secretary of Defense shall ensure that the standards for enlistment and appointment of members of the armed forces reflect the policies set forth in this order.

Sec. 7. General Provisions. Nothing in this order shall prejudice the authority of the Secretary of Defense or military commanders to maintain good order and discipline as provided under other laws of the United States or other regulations of the armed services, provided such laws and regulations are enforced in a neutral manner, without regard to sexual orientation or the homosexual or heterosexual nature of conduct.

BARACK OBAMA

THE WHITE HOUSE,

[date]

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