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## Homosexuals and the U.S. Military: Current Issues

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## Homosexuals and the U.S. Military: Current Issues

### Abstract

[Excerpt] In 1993, new laws and regulations pertaining to homosexuals and U.S. military service came into effect reflecting a compromise in policy. This compromise, colloquially referred to as "don't ask, don't tell," holds that the presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion which are the essence of military capability. Service members are not to be asked about nor allowed to discuss their homosexuality. This compromise notwithstanding, the issue has remained politically contentious.

Prior to the 1993 compromise, the number of individuals discharged for homosexuality was generally declining. Since that time, the number of discharges for homosexual conduct has generally increased until recently.

Constitutional challenges to the former and current military policies regarding homosexuals followed in the wake of the new 1993 laws and regulations. Based on the U.S. Supreme Court ruling in *Bowers v. Hardwick* that there is no fundamental right to engage in consensual homosexual sodomy, the courts have uniformly held that the military may discharge a service member for overt homosexual conduct. However, the legal picture was complicated by the Court's 2003 decision in *Lawrence v. Texas* which overruled *Bowers* by declaring unconstitutional a Texas law that prohibited sexual acts between same sex couples. In addition, unsettled legal questions remain as to whether a discharge based solely on a statement that a service member is homosexual transgresses constitutional limits. Meanwhile, efforts to allow individuals of the same sex to marry legally appear unlikely to affect the DOD policy in the near term, since such individuals are barred from serving in the military, although court challenges are possible.

In recent years, many academic institutions have enacted rules that protect homosexuals from discrimination on campus. As a result, colleges, universities, and even high schools have sought to bar military recruiters from their campuses and/or to eliminate Reserve Officer Training Corps (ROTC) programs on campus because of the DOD policy on homosexuals in the military. At the same time, legislation has been enacted that bars giving federal funds to campuses that block access for military recruiters. On March 6, 2006, the Supreme Court reversed a federal appeals court ruling in *Rumsfeld v. Forum for Academic and Institutional Rights (FAIR)*, and upheld the constitutionality of the Solomon Amendment, which prohibits certain federal funding to higher educational institutions that deny access by military recruiters to their students equal to that provided to other employers. On November 14, 2006, the San Francisco school board voted 4-2 to phase out Junior ROTC over two years. That phase-out was later delayed by an additional year.

This report will be updated as events warrant.

### Keywords

United States, military, homosexuality, "don't ask, don't tell", public policy, Department of Defense, discrimination

### Comments

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# CRS Report for Congress

## Homosexuals and the U.S. Military: Current Issues

Updated July 18, 2008

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Prepared for Members and  
Committees of Congress

# Homosexuals and the U.S. Military: Current Issues

## Summary

In 1993, new laws and regulations pertaining to homosexuals and U.S. military service came into effect reflecting a compromise in policy. This compromise, colloquially referred to as “don’t ask, don’t tell,” holds that the presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion which are the essence of military capability. Service members are not to be asked about nor allowed to discuss their homosexuality. This compromise notwithstanding, the issue has remained politically contentious.

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Constitutional challenges to the former and current military policies regarding homosexuals followed in the wake of the new 1993 laws and regulations. Based on the U.S. Supreme Court ruling in *Bowers v. Hardwick* that there is no fundamental right to engage in consensual homosexual sodomy, the courts have uniformly held that the military may discharge a service member for overt homosexual conduct. However, the legal picture was complicated by the Court’s 2003 decision in *Lawrence v. Texas* which overruled *Bowers* by declaring unconstitutional a Texas law that prohibited sexual acts between same sex couples. In addition, unsettled legal questions remain as to whether a discharge based solely on a statement that a service member is homosexual transgresses constitutional limits. Meanwhile, efforts to allow individuals of the same sex to marry legally appear unlikely to affect the DOD policy in the near term, since such individuals are barred from serving in the military, although court challenges are possible.

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# Homosexuals and the U.S. Military: Current Issues

## Background and Analysis<sup>1</sup>

Early in the 1992 presidential campaign, then-candidate Bill Clinton commented that, if elected, he would “lift the ban” on homosexuals serving in the military.<sup>2</sup> Existing policies had been in place since the Carter Administration and, historically speaking, homosexuality had not been tolerated in the military services. The issue drew heated debate among policymakers and the public at large. In response to congressional concerns, President Clinton put into place in early 1993, an interim compromise that allowed the Department of Defense an opportunity to study the issue and develop a “draft executive order” that would end discrimination on the basis of “sexual orientation.” This interim compromise (announced on January 29, 1993) also provided Congress additional time to more fully exercise its constitutional authority under Article I, Section 8, clause 14, “To make rules for the Government and Regulation of the land and naval Forces,” including the consideration of legislation and the holding of hearings on the issue. In announcing the interim agreement, the President noted that the Joint Chiefs of Staff agreed to remove questions regarding sexual orientation from the enlistment application.<sup>3</sup> One of the elements of the compromise was an agreement within the Congress not to immediately enact legislation that would have maintained the prior policy (of barring homosexuals from service and continuing to ask recruits questions concerning their sexuality) until after the completion of a congressional review.<sup>4</sup>

The Senate and House Armed Services Committees (SASC and HASC) held extensive hearings on the issue in 1993. By May 1993, a congressional consensus appeared to emerge over what then-SASC chairman Sam Nunn described as a “don’t ask, don’t tell” approach. Under this approach, the Department of Defense would not ask questions concerning the sexual orientation of prospective members of the military, and individuals would be required to either keep their homosexual

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<sup>1</sup> The legal portions of this report were originally prepared by Charles V. Dale, Legislative Attorney.

<sup>2</sup> “[H]e elicited approving whoops when he said he would sign an executive order to eliminate discrimination based on sexual orientation in the US military.” Wilkie, Curtis, Harvard tosses warmup queries to Clinton on eve of N.H. debate, *Boston Globe*, October 31, 1991: 22.

<sup>3</sup> President’s News Conference, in *Public Papers of the Presidents of the United States, William J. Clinton, 1993, Book 1*, January 29, 1993: published 1994: 20.

<sup>4</sup> See *Congressional Record*, February 4, 1993, S2163-S2245.

orientation to themselves, or, if they did not, they would be discharged if already in the service or denied enlistment/appointment if seeking to join the service.

On July 19, 1993, President Clinton announced his new policy on homosexuals in the military. According to the President, the policy was to be made up of these essential elements:

One, service men and women will be judged based on their conduct, not their sexual orientation. Two, therefore the practice ..., of not asking about sexual orientation in the enlistment procedure will continue. Three, an open statement by a service member that he or she is a homosexual will create a rebuttable presumption that he or she intends to engage in prohibited conduct, but the service member will be given an opportunity to refute that presumption; .... And four, all provisions of the Uniform Code of Military Justice will be enforced in an even-handed manner as regards both heterosexuals and homosexuals. And thanks to the policy provisions agreed to by the Joint Chiefs, there will be a decent regard to the legitimate privacy and associational rights of all service members.<sup>5</sup>

The Administration dubbed this policy, “don’t ask, don’t tell, don’t pursue.” It is noteworthy that the President did not mention “don’t pursue” in the announcement of the policy on July 19, 1993. The inclusion of “don’t pursue” (akin to a “don’t investigate” stance advocated by homosexual rights groups) seemingly created a contradiction in the President’s policy.<sup>6</sup> On the one hand, it maintained the notion of military necessity and privacy as found in the congressional compromise of “don’t ask, don’t tell,” and then appeared to prevent efforts to enforce the regulations and laws which implement the broad policy by limiting the military’s role via “don’t pursue.” This problem was discussed at hearings with then-Secretary of Defense Les Aspin. Secretary Aspin indicated that individuals could acknowledge their homosexuality without risking an investigation or discharge;<sup>7</sup> later he said that

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<sup>5</sup> President’s News Conference, in *Public Papers of the Presidents of the United States, William J. Clinton, 1993, Book 1*, July 19, 1993: published 1994: 1111.

<sup>6</sup> According to a Senior Administration official, ...[W]e think that probably the most significant advance is heightened — no witch hunts, no pursuit policy. So I think it’s fair to call this policy ‘don’t ask, don’t tell, don’t pursue.’” White House Briefing, Federal News Service, July 16, 1993.

<sup>7</sup> “The previous policy was, ask, do not tell, investigate. The [proposed] policy is, do not ask, do not tell, do not investigate.” Secretary of Defense, Les Aspin, U.S. Congress. Senate. Committee on Armed Services, Hearings, Policy Concerning Homosexuality in the Armed Forces, Senate Hearings 103-845, 103rd Cong., 2nd Sess., 1994: 746. “And even Secretary of Defense Les Aspin seemed a bit confused about the Clinton administration’s new policy allowing homosexuals in the military, expressing doubt as to whether a single acknowledgment of homosexuality by a service member would constitute grounds for discharge... But grasping [the policy’s] details could prove difficult, as Aspin himself demonstrated yesterday in response to a question from Sen. Jeff Bingaman (D-N.M.). The senator asked Aspin what would happen in the case of a homosexual soldier who reveals his sexual orientation to another soldier, who then reports the conversation to a commander. At first, Aspin said flatly that such a disclosure would not be grounds for dismissal... But that brought a puzzled response from [committee chairman, Sen.] Nunn, who quoted Aspin (continued...)

individual statements might not be credible grounds for investigating if the commander so decided, but, if investigated, such statements could be credible grounds for a discharge proceeding. Ultimately, the Secretary agreed that statements are grounds for investigations and possible discharge.

In these same hearings, held from March 29, 1993 through July 22, 1993, Senators raised numerous questions as to what behavior, if any, would justify the commencement of an investigation, and what grounds would justify an administrative discharge.<sup>8</sup> Since commanders and noncommissioned officers are not usually lawyers, many critics argued that such rules created legal technicalities that would prove dysfunctional in a military setting, and/or lead to an expansion of unpredictable court remedies.<sup>9</sup> At the same time, some argued that this outcome would not have displeased the Administration, even if it was not the original intent. This thesis held that implementation of the compromise policy would have encouraged judicial intervention and, thereby, would have provided a means to seek a judicial resolution asserting that the compromise was unconstitutional. These critics hypothesized that the Clinton Administration may have been following a strategy of tacitly implementing a muddled regulation, awaiting a legal challenge, then poorly defending the policy — thereby encouraging judicial intervention in finding the policy unconstitutional.<sup>10</sup> Administration officials insisted that the President was merely trying to pursue a compromise that would take into account the concerns of

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<sup>7</sup> (...continued)

as saying in his opening remarks that homosexual ‘statements’ were a form of prohibited conduct.... At that point, Aspin seemed to shift position.” Lancaster, John, “Senators Find Clinton Policy on Gays in the Military Confusing,” *Washington Post*, July 21, 1993: A12.

<sup>8</sup> An administrative discharge is designated as ‘Honorable,’ ‘General,’ or ‘Other than Honorable,’ and is provided by an executive decision reflecting the nature of the service performed by the member. A ‘Bad Conduct’ or ‘Dishonorable’ discharge can only be awarded via a court-martial during sentencing. As discussed in the section entitled “Discharge Statistics,” the vast majority of homosexuals who are discharged receive administrative discharges and most of those are designated ‘Honorable.’

See the hearings with then-Secretary of Defense Aspin and others following release of the July 19, 1993 Memorandum, U.S. Congress. Senate. Committee on Armed Services, Hearings, Policy Concerning Homosexuality in the Armed Forces, Senate Hearings 103-845, 103rd Cong., 2nd Sess., 1994: 700 et seq.

<sup>9</sup> “...[T]he complex nature of the compromise was evident in the puzzlement of committee members who described [the policy] as confusing, contradictory and an invitation to endless litigation in the courts.” Lancaster, July 21, 1993. “Clinton interpreted this language at a news conference yesterday to mean that gay service personnel do ‘not necessarily’ have to remain in the closet. The senior Pentagon official acknowledged, however, that homosexuals probably will not be able to disclose their sexual orientation.”, Lancaster, John, “Policy Tosses Issue to Courts, Ambiguity Seen Leading to Protracted Litigation,” *Washington Post*, July 20, 1993: A1.

<sup>10</sup> “Clinton was also asked by a reporter whether he would direct his Justice Department, which had days before been in ... [court] arguing for the ban, not to appeal the anti-ban ruling, but he did not answer.... Today, the Clinton Department of Justice has not only appealed the anti-ban ruling but is arguing in court that the government can discriminate on the basis of sexual orientation.” Burr, Chandler, reprinted from *California Lawyer Magazine*, June, 1994.



the Congress and the military, but would also minimize discrimination against homosexuals.<sup>11</sup>

The policy announced by the Clinton Administration was based in large part, on sexual “orientation.”<sup>12</sup> This term has generated problems concerning its practical definition. Some view a sexual “orientation” as non-behavioral while others do not exclude behavioral manifestations when speaking of a sexual “orientation.” As will be discussed below, the Clinton Administration’s use of the term was subject to varying interpretations.

The ambiguities in the Administration’s interpretation of the policy, as well as conflicting legal rulings at the time, seemingly encouraged Congress to act. On November 30, 1993, the FY1994 National Defense Authorization Act was signed into law by President Clinton (P.L. 103-160). Section 571 of the law, codified at 10 United States Code 654, describes homosexuality in the ranks as an “unacceptable risk ... to morale, good order, and discipline.” The law codified the grounds for discharge as follows: (1) the member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts; (2) the member states that he or she is a homosexual or bisexual; or (3) the member has married or attempted to marry someone of the same sex. The law also stated that DOD would brief new entrants (accessions) and members about the law and policy on a regular basis. Finally, the law instructed that asking questions of new recruits concerning sexuality could be resumed — having been halted in January, 1993 — on a discretionary basis. As such, this law represented a discretionary don’t ask, definitely don’t tell policy. Notably, the law contains no mention of “orientation.” In many ways, this law contained a reiteration of the basic thrust of the pre-1993 policy (although it does not mention any restrictions regarding ‘asking’ about a person’s sexuality).

On December 22, 1993, Secretary of Defense Aspin released new DOD regulations to implement the statute enacted the preceding month. Language in these regulations indicated that the Secretary was trying to incorporate both the restrictions in the law, and the President’s desire to open military service “to those who have a homosexual orientation.” The policy stated:

A Service member may also be separated if he or she states that he or she is a homosexual or bisexual, or words to that effect. Such a statement creates a rebuttable presumption that the member engages in homosexual acts or has a propensity or intent to do so. The Service member will have the opportunity to

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<sup>11</sup> Secretary of Defense, Les Aspin stated, “The Chiefs understood that the Commander-in-Chief wanted to change the existing policy to end discrimination based solely on status. The President understood that it was extremely important that any changes occur in a way that maintained the high level of morale and unit cohesion which is so important for military readiness and effectiveness.” Secretary of Defense, Les Aspin, (with DOD General Counsel, Jamie Gorelick), News Conference, Reuter Transcript Report, December 23, 1993: 1.

<sup>12</sup> U.S. Department of Defense, Secretary of Defense, *Memorandum for the Secretaries of the Army, Navy, Air Force, and Chairman of the Joint Chiefs of Staff*, July 19, 1993.

rebut that presumption, however, by demonstrating that he or she does not engage in homosexual acts and does not have a propensity or intent to do so.<sup>13</sup>

However, the policy — not the law it ostensibly implemented — stated that “sexual orientation is considered a personal and private matter, and homosexual orientation is not a bar to service entry or continued service unless manifested by homosexual conduct.” According to this statement of DOD regulations, “sexual orientation” was defined as “A sexual attraction to individuals of a particular sex.” Following Aspin’s resignation and the confirmation of William Perry as the new Secretary of Defense in February 1994, DOD reportedly accepted the recommendation of certain Senators to delete from DOD regulations the phrase, “homosexual orientation ... is not a bar to military service.”<sup>14</sup> In its place, DOD inserted the statement:

A person’s sexual orientation is considered a personal and private matter, and is not a bar to service or continued service unless manifested by homosexual conduct...<sup>15</sup>

In addition, the definition of “sexual orientation” was modified:

An abstract sexual preference for persons of a particular sex, as distinct from a propensity or intent to engage in sexual acts.<sup>16</sup>

The elusiveness of the definition of “orientation” is apparent. Under the Administration’s original definition, “orientation” is a sexual attraction. Under the revised definition, it is an abstract preference. Other sources define sexual “orientation” to include overt sexual behavior.<sup>17</sup>

Current regulations, therefore, are based on conduct, including verbal or written statements. Since sexual “orientation” is “personal and private,” DOD is not to ask

<sup>13</sup> Office of the Assistant Secretary of Defense, (Public Affairs), News Release, December 22, 1993.

<sup>14</sup> U.S. Department of Defense, Office of the Assistant Secretary of Defense (Public Affairs), News Release, No. 605-93, *Directives Implementing the New DOD Policy on Homosexual Conduct in the Armed Forces*, December 22, 1993.

<sup>15</sup> U.S. Department of Defense, Office of the Assistant Secretary of Defense (P&R), *Qualification Standards for Enlistment, Appointment and Induction*, Directive 1304.26, December 21, 1993, incorporating change 1, March 4, 1994: 9.

<sup>16</sup> U.S. Department of Defense, Assistant Secretary of Defense (P&R), Directive, *Enlisted Administrative Separations*, No. 1332.14, December 21, 1993, Incorporation Change March 4, 1994: 9. See Scarborough, Rowen, “White House cuts Phrase restricting gay discharges,” *Washington Times*, February 10, 1994: A1, and, “Defense Policy on Gays Takes Effect,” *Washington Post*, March 2, 1994.

<sup>17</sup> “Today’s preferred terms and the term ‘sexual orientation’ itself have a variety of definitions in the literature but these generally comprise one or both of two components: a ‘psychological’ component and a ‘behavioral’ component. Not all definitions include both components, ..., definitions that include both of these components use either the conjunction ‘and’ or ‘or’ to join them.” Sell, Randall L., “Defining and Measuring Sexual Orientation: A Review,” *Archives of Sexual Behavior*, Vol. 26, No. 6, 1997: 646.

and personnel are not to tell. Should an individual choose to make his or her homosexual “orientation” public — i.e., no longer private and personal, nor abstract — an investigation and discharge may well occur.

The ambiguous nature of the term “orientation” and its usage has not been without problems. In 1994, a Navy tribunal decided not to discharge Lt. Maria Zoe Dunning after she had made the statement “I am a lesbian” at a January 1993 rally. Her attorneys argued that she was not broadcasting her intentions to practice homosexuality but merely acknowledging her “sexual orientation.” In the view of the reviewing officers, she had successfully rebutted the presumption that she would commit homosexual acts. Such a finding, if not inconsistent with the law and regulations, created a legal avenue via which homosexuals could announce their sexuality without being discharged. Shortly afterward, the Department of Defense Office of the General Counsel released a memo,<sup>18</sup> in August 1995, addressing this issue:

A member may not avoid the burden of rebutting the presumption merely by asserting that his or her statement of homosexuality was intended to convey only a message about sexual orientation ..., and not to convey any message about propensity or intent to engage in homosexual acts. To the contrary, by virtue of the statement, the member bears the burden of proof that he or she does not engage in, and does not attempt, have a propensity, [n]or intend to engage in homosexual acts. If the member in rebuttal offers evidence that he or she does not engage in homosexual acts or have a propensity or intent to do so, the offering of the evidence does not shift the burden of proof to the government. Rather, the burden of proof remains on the member throughout the proceeding.<sup>19</sup>

As written, the law makes no mention of sexual “orientation,” and is structured entirely around the concept of sexual “conduct” including statements concerning an individual’s sexuality. Therefore, attempts to implement the statute, or analyze and evaluate it, in terms of “sexual orientation,” have resulted in confusion and ambiguity, and are likely to continue to do so.

More recently, Representative Martin Meehan introduced H.R. 1246, (February 28, 2007), to repeal the 1993 law and establish a policy of nondiscrimination based on sexual orientation in the armed forces. Following Representative Meehan’s retirement from Congress, Representative Ellen O. Tasucher has championed this legislation. The legislation has 143 co-sponsors. On June 3, 2008, former Senator Sam Nunn, Chair of the Senate Armed Services Committee in 1993 when the current law was passed, “said that it could be time to revisit the issue.”<sup>20</sup>

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<sup>18</sup> Scarborough, Rowen, “Pentagon memo removes winning defense for gays,” *Washington Times*, December 29, 1995: A3.

<sup>19</sup> U.S. Department of Defense, General Counsel, Memorandum for the General Counsels of the Military Departments, Judge Advocate General of the Army, Navy, and Air Force, and the Staff Judge Advocate to the Commandant of the Marine Corps, *Policy on Homosexual Conduct in the Armed Forces*, August 18, 1995.

<sup>20</sup> Maze, Rick, Nunn: “Time to revisit military policy on gays,” *Army Times*, June 6, 2008.

## Discharge Statistics

Reports in the media over the last several years have stated that since the implementation of the “don’t ask, don’t tell” policy in 1993, the number of discharges for homosexuality has increased.<sup>21</sup> According to data provided by DOD and reproduced in Table 1, page 12, from the early 1980s until Fiscal Year (FY) 1994, the number of personnel discharged for homosexual conduct (including statements) decreased. From FY1995 to FY2001, the numbers rebounded, only to begin declining thereafter.

In April 1998, the Department of Defense released a review of the implementation of the “Policy on Homosexual Conduct.” This review was instituted after complaints were aired that the increasing rate of discharges was a sign of “witch hunts” or anti-homosexual harassment. In its review, DOD concluded that “for the most part, the policy has been properly applied and enforced.” DOD also stated:

First, we found that the large majority of the discharges for homosexual conduct are based on the statements of service members who identify themselves as homosexual, as opposed to cases involving homosexual acts. The services believe that most of these statements — although not all of them — involve service members who voluntarily elect to disclose their sexual orientation to their peers, supervisors or commanders. The increase in the number of discharges for homosexual conduct since 1994 is attributable to this increase in statement cases. Discharges for homosexual acts and marriages has declined by 20% over the past three years [1994-1997]. Second, most of those discharged under the policy are junior personnel with very little time in the military, and most of the increase in discharges for homosexual conduct has occurred in this sector. The number of cases involving career service members is relatively small. Third, the great majority of discharges for homosexual conduct are uncontested and are processed administratively. Finally, more than 98% of all members discharged in Fiscal Year 1997 under the policy received honorable discharges. (Separation of enlisted members in their first 180 days of military service are generally uncharacterized.) Discharges under other than honorable conditions or court-martial for consensual homosexual conduct are infrequent and have invariably involved aggravating circumstances or additional charges.<sup>22</sup>

With over a decade (1993-2006) of experience under the most recent changes instituted during the Clinton Administration, other explanations as to why individuals may announce their homosexuality have come forward. Most notable is the observation that the vast majority of those discharged for homosexuality are discharged because they made voluntary statements identifying themselves as homosexual, bisexual or having such an “orientation.” Some have speculated

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<sup>21</sup> Marquis, Christopher, “Discharges of Gay Troops Rise, And So Do Bias Incidents,” *New York Times*, March 14, 2002.

<sup>22</sup> U.S. Department of Defense, Office of the Assistant Secretary of Defense (Personnel and Readiness), Report to the Secretary of Defense, *Review of the Effectiveness of the Application and Enforcement of the Department’s Policy on Homosexual Conduct in the Military*, April 1998: 3. This report stated that investigations could only be initiated after commanders receive specific and credible information concerning homosexual conduct and that inappropriate investigations occurred only in isolated instances.

recently that these statements are made by service members so as to enable them to terminate their military obligations before their term of service is completed regardless of their sexual “orientation.”<sup>23</sup>

Advocacy groups have claimed that anti-homosexual harassment has increased since the 1998 review, and that those discharges were brought about by “witch hunts,” or invasive and unwarranted searching and discharging of homosexuals in the ranks.<sup>24</sup> Although cases of aggressive investigations have been reported, the data

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<sup>23</sup> For example, see Moskos, Charles, “The Law Works — And Here’s Why,” *Army Times*, October 27, 2003: 62. “Homosexual separations for whatever reason are one-tenth of 1% of military personnel. Of those discharges, more than 80% are the result of voluntary ‘statements’ by service members. The number of discharges for homosexual ‘acts’ has declined over the past decade. Gay-rights advocates argue that the growth in discharges for statements is due largely to commanders improperly seeking out gays. Undoubtedly, that happens sometimes. Yet commanders also report being worried they might be accused of conducting ‘witch hunts,’ so they tend to process out an alleged homosexual only when a case of ‘telling’ is dumped in their laps. Let me offer another possible explanation. Whether you’re gay or not, saying you are is now the quickest way out of the military with an honorable discharge. And identifying oneself as gay carries less stigma in our society than it once did. Consider that whites are proportionately three times more likely than blacks to be discharged for homosexuality. Are commanders singling out whites and investigating their sexual orientation? Highly unlikely. The stigma against homosexuality is stronger among blacks than whites, and thus blacks are less willing to declare they are gay. Gay advocates are quick to draw an analogy between the exclusion of homosexuals and racial segregation in the military. Many black soldiers find that analogy offensive.” See also: Christenson, Sig, “Recruits Deny Lackland Harassment,” *San Antonio Express-News*, February 7, 1999. These and other articles assert that claims of homosexuality can serve as a means of terminating a military obligation. “Mario isn’t in the Army now. In March he left Fort Bragg with an honorable discharge. Some may find Mario’s willingness to use his homosexuality as a means of shirking his commitment objectionable.” Lamme, Robert, “Dazed in the Military,” *The Advocate*, No. 673, January 24, 1995: 46.

<sup>24</sup> For example, see Langeland, Terje, “Gay Discharges on the Rise,” INews, online at [<http://www.csindy.com/csindy/2002-05-30/news.html>], May 30-June 15, 2002. “[Servicemembers Legal Defense Network] executive director, C. Dixon Osborn, said the numbers show the ‘Don’t Ask, Don’t Tell’ policy has failed... According to Dixon, the policy is being widely disregarded. ‘The idea of ‘Don’t Ask, Don’t Tell is a myth,’ Osborn said. ‘The Pentagon continues to ask and pursue and harass every day, which means that any of the promises that were made have gone by the wayside.’” See also, Myers, Steven Lee, “Gay Group’s Study Finds Military Harassment Rising,” *New York Times*, March 15, 1999. In a recent article, Sharon Alexander, an attorney for SLDN network offered the following possible explanations for the decrease in homosexual discharges, “First, there is a growing acceptance of gays serving in the military, she said, and some commanders, especially younger ones are reluctant to enforce a law they believe to be unfair.... It could be the case, Alexander said, that with a war on, commanders in the field either don’t want to lose able-bodied soldiers or they simply don’t have time to worry about enforcing ‘Don’t Ask, Don’t Tell.’ ... [A Pentagon spokesman, Lt.Col. Joe] Richard dismissed those explanations as a ‘fanciful analysis’ by opponents of the law. There’s never been a concerted effort to go on witch hunts to identify gay soldiers, he said. ‘It is only when they declare themselves or openly practice their sexual preference that we have no alternative but to begin the investigative process and make a determination as to whether or not they

(continued...)

would not appear to support the general use of such tactics. Recently, as the number of discharges has decreased, activists claim the Administration is retaining homosexuals because of the need for manpower as a result of Operations Enduring Freedom and Iraqi Freedom. At the same time, activists bemoan the discharge of a number of linguists who were found to be homosexuals.<sup>25</sup> Critics contend that the activists are trying to have it both ways when “analyzing” data. From the data, it can be seen that homosexuals who are discharged represent an extremely small percentage of the force. For instance, if it is assumed that homosexuals make up only 1.6% of the total active force of approximately 1.4 million,<sup>26</sup> there would be an estimated 22,400 homosexuals in uniform. In 2003, 653 or 2.9% of the estimated homosexuals in uniform were discharged for homosexual conduct.

Some have claimed that discharges decline during time of war, suggesting that the military ignores homosexuality when soldiers are most needed, only to “kick them out” once the crisis has passed.<sup>27</sup> It is notable that during wartime, the military services can, and have, instituted actions “to suspend certain laws relating to ... separation” that can limit administrative discharges. These actions, known as “stop-loss,”<sup>28</sup> allow the services to minimize the disruptive effects of personnel turnover during a crisis. However, administrative discharges for homosexual conduct normally are *not* affected by stop-loss. It can be speculated that a claim of homosexuality during a crisis may be viewed skeptically, but under the policy would require an investigation. Stop-loss, as implemented requires an investigation to determine if the claim is bona fide or being used for some other reason, such as avoiding deployment overseas and/or to a combat zone. If, following an investigation, such a claim were found to be in violation of the law on homosexual conduct, the services could not use “stop-loss” to delay an administrative discharge.<sup>29</sup>

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<sup>24</sup> (...continued)

themselves are homosexual.” Reinert, Patty, “Is The Military Out of Step?”, *Houston Chronicle*, February 6, 2005.

<sup>25</sup> Hull, Anne, “How ‘Don’t Tell’ Translates,” *The Washington Post*, June 18, 2004: A1.

<sup>26</sup> Data concerning the prevalence of homosexuality in society varies, but is reported to be approximately 1.6%. Smith, Tom W., “Adult Sexual Behavior in 1989: Number of Partners, Frequency of Intercourse and Risk of AIDS,” *Family Planning Perspectives*, Vol. 23, No. 3, May/June 1991: 104. The percentage of homosexual individuals in society varies according to definitions used and sampling methods. For a broader discussion, see CRS Report 93-52, *Homosexuals and U.S. Military Personnel Policy*, by David F. Burrelli, January 14, 1993: 12 (archived report reprinted in U.S. Congress, Senate, Hearings, Policy Concerning Homosexuality in the Armed Forces, S. Hrg. 103-845, 103rd Cong., 2nd Sess., March 29, 1993: 20-94.) CRS is unaware of any reliable empirical research supporting the frequent assertion that homosexuals account for 10% of the population. See Muir, J. Gordon, “Homosexuals and the 10% Fallacy,” *Wall Street Journal*, March 31, 1993.

<sup>27</sup> Lambert, Wade, and Stephanie Simon, “U.S. Military Moves to Discharge Some Gay Veterans of Gulf War,” *Wall Street Journal*, July 30, 1991: B6.

<sup>28</sup> 10 U.S.C. 12305, Authority of President to suspend certain laws relating to promotion, retirement, and separation.

<sup>29</sup> U.S. Department of the Army, Information Paper, *Army Stop Loss/Stop Movement* (continued...)

In practice, it is quite possible for an individual, during a crisis, to claim to be a homosexual and to be deployed while awaiting the results of an investigation. Likewise, a claim made during a non-crisis situation would more likely be dealt with in a routine manner, leading to a discharge. Homosexual rights groups assert that commanders tend to be more reluctant to discharge someone during a crisis situation. They contend that differing treatment of gays during crisis and non-crisis situation creates a double standard. Likewise, commanders and others are often more skeptical of such claims made during a crisis.

According to an Army Reserve Component Unit Commander's Handbook,<sup>30</sup> homosexual conduct is one of many criteria necessitating "personnel action during the mobilization process...." According to this document, if a discharge for homosexuality "has been requested and approved prior to the unit's receipt of alert notification, the member will be discharged prior to the unit's effective date of [active duty]." Further, if "discharge is requested but not yet approved, delayed entry will be requested ... pending final determination." Finally, if "discharge is not requested prior to the unit's receipt of alert notification, discharge is not authorized."

Some homosexual activists claim that this is proof that the military retains known homosexuals during a time of crisis/mobilization. This language addresses the possibility of a false claim of homosexuality being used as a means of avoiding a mobilization. If such a claim is made, an investigation is likely to occur. If the claim is false, the individual would be retained (and possibly disciplined for making a false claim). If the claim is found to be true, a discharge would be in order. Retaining individuals who violate the rules pertaining to homosexuals in uniform is a violation of federal law.

Listed in Table 1 are the homosexual discharge statistics from FY1980 to FY2006. In January 1981, the then-current policy on administrative discharges for homosexuality was reinstated under new wording to allow for the continuation of homosexual discharges while addressing legal concerns over the wording of the previous policy.<sup>31</sup> The active duty force numbered approximately 2.1 million throughout the 1980s. By FY2000, active duty personnel numbers fell to a low of 1,384,338. The numbers increased to 1,434,377 in FY2004. Because of this drop in manpower levels, it is important to consider not just the number of homosexual

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<sup>29</sup> (...continued)

*Program*, March 11, 2004, "Soldiers normally not subject to the Army Stop Loss/Stop Movement Program[:] Those soldiers in violation of the Army's homosexual conduct policy." Tice, Jim, "Stop-Loss Extends to All on Active Duty," *Army Times*, February 25, 1991: 16. Those not covered by stop-loss include "soldiers eligible for disability retirement or separation, dependency, hardship, pregnancy, misconduct, punitive actions, unsatisfactory performance and homosexuality."

<sup>30</sup> U.S. Army, FORSCOM Mobilization and Deployment Planning System (FORMDEPS), FORSCOM Regulation 500-3-3, Volume III, Reserve Component Unit Commander's Handbook, Fort McPherson, Georgia, 15 July 1999: 27, 33.

<sup>31</sup> See Burrelli, David F., "An Overview of the Debate on Homosexuals in the U.S. Military," in *Gays and Lesbians in the Military, Issues, Concerns, and Contrasts*, Scott, Wilbur J., and Sandra Carson Stanley, eds., Aldine de Gruyter, New York, 1994: 18-19.

discharges in any particular year, but the changes in discharges as a percentage of the total active force.

The data in Table 1 show the percentage of discharges fell from FY1982 to FY1994. The percentage of discharges rose from FY1994 to FY2001. In FY2001, the number/percentage discharged was smaller than the previous peak of FY1982. Since FY2001, the numbers/percentages have begun to decline. These percentages were declining prior to, and continued to decline following the 1991 Persian Gulf War (Operations Desert Shield/Desert Storm). If, as some have speculated, DOD was using “Stop Loss” to retain homosexuals during that war, we would have expected to see a drop in the wartime discharge rate followed by an increase following the crisis. Such a pattern is not evident in these data.

During the period covered by these data, the average percentage discharged was 0.064%. For the period prior to the implementation of the new policy (and law), i.e. FY1980 to FY1992, the average percentage discharged was 0.060%. For the period FY1993 to FY2005, the average was 0.062%. The difference in the percentage discharged before and following the implementation of the new policy was statistically insignificant. Thus, although the data appear to move in differing directions prior to and following the implementation of the new policy, statistical analysis suggests that such changes may reflect random fluctuations in the data.<sup>32</sup>

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<sup>32</sup> Student’s “t test,” introduced by W.S. Gossett, under the pseudonym “Student,” is used in this instance to measure differences of means between two sets of data taking into consideration the dispersion of data in each set and the number of cases involved in each set as well. These differences in means are considered in terms of their relative probability compared to random sampling distributions of samples of the same size. If the differences are small, as was the case here, the explanation that any difference is due to random factors in the data can not be rejected. In other words, the data do not support a conclusion that the change in policy had a statistical effect on discharge rates. See Blalock, Hubert M., Jr., *Social Statistics*, 2<sup>nd</sup> ed., New York: McGraw-Hill, 1972: 220-241. For these data, prob.  $t=0.2872$  with 25 degrees of freedom.



**Table 1. Homosexual Conduct Administrative Separation Discharge Statistics**

Fiscal Year	Total Number of Homosexual Discharges	Percentage of Total Active Force
1980	1,754	0.086
1981	1,817	0.088
1982	1,998	0.095
1983	1,815	0.085
1984	1,822	0.085
1985	1,660	0.077
1986	1,643	0.076
1987	1,380	0.063
1988	1,101	0.051
1989	996	0.047
1990	941	0.046
1991	949	0.048
1992	730	0.040
1993	682	0.040
1994	617	0.038
1995	757	0.050
1996	858	0.058
1997	997	0.069
1998	1,145	0.081
1999	1,034	0.075
2000	1,212	0.088
2001	1,227	0.089
2002	885	0.063
2003	770	0.054
2004	653	0.046
2005	726	0.052
2006	612	0.044

**Sources:** Data for the years 1980 through 1997 are from U.S. Department of Defense, Office of the Assistant Secretary of Defense (Personnel and Readiness), Report to the Secretary of Defense, *Review of the Effectiveness of the Application and Enforcement of the Department's Policy on Homosexual Conduct in the Military*, April 1998. Percentages may vary slightly due to rounding. Data for later years are from the Department of Defense, Defense Manpower Data Center. Year 2005 data are from Files, John, "Military's discharges for being gay rose in '05," *New York Times*, August 15, 2006. Data from 2006 are from DOD office of Legislative Affairs.

## Issues

### Legal Challenges

Constitutional challenges to former and contemporary military policies regarding homosexuals began to accelerate following implementation of the “don’t ask, don’t tell” compromise in 1993. A lengthy tradition of “special deference” to the political branches led most federal district and appeals courts to affirm the “considered professional judgment” of military leaders to discipline or discharge a service member for homosexual conduct or speech. Based on the 1986 Supreme Court ruling in *Bowers v. Hardwick* that there is no fundamental right to engage in consensual homosexual sodomy,<sup>33</sup> the courts ruled that the military could constitutionally discharge a service member for overt homosexual behavior. Judicial challenges to “don’t ask, don’t tell” focused on the “statements” provision of the new policy which presumes, absent contrary evidence, homosexual activity or a “propensity” to act on the part of any service member who acknowledges his/her homosexuality.<sup>34</sup> The High Court has refused to review the military’s “don’t ask, don’t tell” policy on several occasions, the last in 1999 when it declined to hear the appeal of two former service members who were discharged after declaring their homosexuality to commanding officers. Without comment, the Justices declined to consider arguments that the policy was based on prejudice against homosexuals and violates their free speech rights.<sup>35</sup>

Complicating the legal picture, however, is the Court’s 2003 ruling in *Lawrence v. Texas*,<sup>36</sup> which declared unconstitutional a Texas law that prohibited sexual acts between same sex couples. Justice Kennedy, writing for the majority, held that the “liberty” interest in privacy guaranteed by the due process clause of the Fourteenth Amendment protects a right for adults to engage in private, consensual homosexual conduct. The *Lawrence* majority expressly overruled *Bowers*’ contrary conclusion. Justice Kennedy agreed with the dissent in *Bowers* that “[t]he statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.” The majority opinion continued:

The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. The right to liberty under the Due Process Clause gives them

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<sup>33</sup> 478 U.S. 186 (1986).

<sup>34</sup> Under the “policy” established by 10 U.S.C. §654 (b)(2), a service-member “shall be separated from the armed forces” where there is a finding:

That the member has stated that he or she is a homosexual or bisexual, or words to that effect, unless there is a further finding, made and approved in accordance with procedures set forth in the regulations, that the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.

<sup>35</sup> *Holmes v. California Army Nat’l Guard*, 525 U.S. 1067 (1999).

<sup>36</sup> 539 U.S. 558 (2003).

the full right to engage in their conduct without the intervention of the government. It is a promise of the Constitution that there is a realm of personal liberty which the government cannot enter. The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.<sup>37</sup>

In particular, the community's moral disapproval of homosexuality was no "rational" justification for deploying the power of the state to enforce those views. Justice O'Connor concurred in the judgment, but rather than overrule *Bowers*, would have declared the Texas statute unconstitutional on equal protection grounds because it did not likewise prohibit sodomy between opposite sex couples.

Based on *Bowers*, earlier federal appellate courts uniformly ruled that the military ban on homosexual acts intruded upon no constitutionally protected right and was "rationally related" to legitimate military needs for "unit cohesion" and discipline. Moreover, by equating the admission of homosexuality by individual service members — unless demonstrated otherwise — with "propensity" for illegal conduct, the "don't ask, don't tell" policy successfully avoided equal protection and first amendment challenge as well. After *Lawrence*, however, the constitutional bulwark of *Bowers* has crumbled, arming opponents of Article 125,<sup>38</sup> and "don't ask, don't tell," with an argument that current military policies abridge the due process right to privacy of homosexual service members. But to prevail in that argument, any future challenger may still have to demonstrate that findings by Congress regarding those policies defy minimal rationality, a weighty burden given the deference historically accorded the political branches in the management of military affairs. The precise standard of judicial review, in the wake of *Lawrence*, however, has yet to be firmly established.

A tradition of deference by the courts to Congress and the Executive in the organization and regulation of the military dates from the earliest days of the republic. Motivating development of this constitutional doctrine was the separation of powers among the executive, judicial, and legislative branches. The Constitution grants exclusive authority to raise and support the armed forces to Congress,<sup>39</sup> which has "broad and sweeping" power to make all laws necessary for that purpose.<sup>40</sup> Similarly, the Constitution grants exclusive command of the armed forces to the executive branch, designating the President as "commander-in-chief."<sup>41</sup> Nowhere does the Constitution delineate a specific role for the judiciary in military matters. Judicial authority over the armed forces arises only indirectly as arbiter of constitutional rights. Thus, the policy of extraordinary deference "to the professional

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<sup>37</sup> *Id.* at 578.

<sup>38</sup> The Uniform Code of Military Justice, Article 125, provides for court-martial and punishment as the court-martial may direct, for acts of sodomy committed by military personnel.

<sup>39</sup> U.S. Const. art. I, § 8.

<sup>40</sup> *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

<sup>41</sup> U.S. Const. art. II, § 2.

judgment of military authorities” has emerged from case law,<sup>42</sup> particularly “when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged.”<sup>43</sup>

Originally framed as a doctrine of noninterference, the early Court avoided all substantive review of military disciplinary proceedings, provided only that jurisdictional prerequisites were met. A more skeptical judicial attitude emerged during the Warren Court era, which frequently questioned the scope and operation of military rules, particularly as applied to on-base civilians and non-duty-related conduct of service members. But the pendulum returned to what has been described as the “modern military deference doctrine” with a series of Burger Court decisions in the mid-1970s. Rather than abandoning all substantive review, the current judicial approach is to apply federal constitutional standards in a more lenient fashion which, with rare exception, favors military needs for obedience and discipline over the rights of the individual servicemen. “The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it.”<sup>44</sup>

Among leading contemporary precedents are the Supreme Court rulings in *Goldman v. Weinberger* and *Rostker v. Goldberg*.<sup>45</sup> Goldman was an Orthodox Jew and rabbi serving as a commissioned officer and psychologist for the Air Force. For five years, he wore a yarmulke while in uniform, without objection from superiors until he testified as a defense witness in a court martial proceeding. The prosecuting attorney at the court martial complained to Goldman’s commanding officer that wearing the yarmulke violated Air Force regulations that prohibited wearing of headgear indoors. Goldman was ultimately separated from the service for refusal to remove the yarmulke.

Goldman argued that the Air Force regulation banning headgear “infringed upon his First Amendment freedom to exercise his religious beliefs.” Writing for a five-to-four Supreme Court majority, Justice Rehnquist disagreed:

Our review of military regulation challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society. The military need not encourage debate or tolerate protest to the extent that such tolerance is required of the civilian state by the First Amendment; to accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps. The essence of military service ‘is the subordination of the desires and interests of the individual to the needs of the service.’<sup>46</sup>

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<sup>42</sup> *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986).

<sup>43</sup> *Rostker v. Goldberg*, 453 U.S. 57 (1981).

<sup>44</sup> *Parker v. Levy*, 417 U.S. 733, 758 (1974).

<sup>45</sup> 475 U.S. 503 (1986); 453 U.S. 57 (1981).

<sup>46</sup> *Id.* at 507, quoting *Orloff v. Willoughby*, 345 U.S. 83, 92 (1953).

Because the Air Force argued that standardized uniforms were necessary to “encourage the subordination of personal preferences,” the majority deferred to the “professional judgment” of the Air Force. The ramifications of the majority’s “subrational-basis standard — absolute, uncritical deference” drew a vigorous dissent from Justice Brennan, and separately from Justice O’Connor who objected:

The Court rejects Captain Goldman’s claim without even the slightest attempt to weigh his asserted right to the free exercise of his religion against the interest of the Air Force in uniformity of dress within the military hospital. No test for free exercise claims in the military context is even articulated, much less applied. It is entirely sufficient for the Court if the military perceives a need for uniformity.<sup>47</sup>

In *Rostker v. Goldberg*,<sup>48</sup> the Supreme Court dealt specifically with an equal protection challenge to gender-based military classifications — namely, Congress’ decision to register men, but not women, for the military draft. In applying the “intermediate scrutiny” test of *Craig v. Boren*,<sup>49</sup> the majority found the draft law did not reflect “unthinking” gender stereotypes, but was the product of extensive congressional deliberations on the role of women in combat and the necessities of military mobilization. The purpose of registration was to create a pool from which combat troops could be drawn as needed. Because women were barred from combat by another law, they were not “similarly situated” to men, and their exemption from registration was “not only sufficiently but closely related to” an “important” governmental purpose. As important to the outcome, however, was the Court’s articulation of the “healthy deference” due the political branches in managing military affairs. Thus, according to the majority opinion, “[t]he military constitutes a specialized community governed by a separate discipline from that of the civilian,” such that “Congress is permitted to legislate both with greater breadth and with greater flexibility when prescribing the rules by which [military society] shall be governed...” Constitutional rules apply, and may not be disregarded, but “the different character of the military community and of the military mission requires different application of those principles.”<sup>50</sup>

Equal deference to the military’s judgment was apparent in four federal appeals court rulings to uphold the “don’t ask, don’t tell” policy before *Lawrence*. First to rule was the Fourth Circuit in an appeal by Lt. Paul G. Thomasson, who had been honorably discharged under the policy after he announced in March 1994 that he was homosexual. Writing for the nine-member majority in *Thomasson v. Perry*,<sup>51</sup> Chief Judge J. Harvie Wilkinson III stressed Congress’ “plenary control” of the military and the “deference” owed both the Executive and Legislative Branches in matters of national defense as factors calling for judicial restraint when faced with challenges to military decision making. “What Thomasson challenges,” the opinion notes, “is a

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<sup>47</sup> *Id.* at 528 (O’Connor J., dissenting).

<sup>48</sup> 453 U.S. 57 (1981).

<sup>49</sup> 429 U.S. 190 (1976)

<sup>50</sup> *Id.* at 64-68.

<sup>51</sup> 80 F.3d 915 (4<sup>th</sup> Cir.), *cert. denied*, 519 U.S. 948 (1996).

statute that embodies the exhaustive efforts of the democratically accountable branches of American government and an enactment that reflects month upon month of political negotiation and deliberation.” Under this standard, Judge Wilkinson concluded that the government articulated a “legitimate purpose” for excluding individuals who commit homosexual acts — that of maintaining unit cohesion and military readiness — and that the law’s rebuttable presumption was a “rational means” of preventing individuals who engage in, or have a “propensity” to engage in, homosexual conduct from serving in the military. Similarly, Thomasson’s First Amendment claims were rejected for the reason that:

[t]he statute does not target speech declaring homosexuality; rather it targets homosexual acts and the propensity or intent to engage in homosexual acts and permissibly uses the speech as evidence. The use of speech as evidence in this manner does not raise a constitutional issue — the First Amendment does not prohibit the evidentiary use of speech to establish the elements of a crime, or, as is the case here, to prove motive or intent.<sup>52</sup>

Subsequently, the Fourth Circuit relied on *Thomasson* to affirm a ruling by federal District Judge Ellis in *Thorne v. U.S. Department of Defense*.<sup>53</sup> After reviewing the record in eight other administrative separation proceedings where the presumption that a declared homosexual has a propensity to engage in forbidden conduct was successfully rebutted, Judge Ellis in *Thorne* held that conduct rather than speech was the target of the “don’t ask, don’t tell” policy.

In *Richenberg v. Perry*,<sup>54</sup> the Eighth Circuit upheld the “statement” provision of “don’t ask, don’t tell” as applied to the discharge of an Air Force captain who had informed his commanding officer that he was homosexual. As in *Thomasson*, the policy was alleged to violate equal protection and free speech rights by targeting declarations of “homosexual orientation or status” unrelated to conduct and for “irrational catering to prejudice against and hatred of homosexuals.” Agreeing with the Fourth Circuit, however, the *Richenberg* court found that the policy ban on homosexual acts was justified by legitimate military needs and rationally served by the rebuttable presumption of a “propensity” to act on the part of declared homosexuals. And because the focus of “don’t ask, don’t tell” is to “identify and exclude those who are likely to engage in homosexual acts,” while prohibiting direct inquiries into an applicant’s sexual orientation, there was no basis for a First Amendment challenge, the court concluded.

In appeals from three district court rulings during 1997, the Ninth Circuit approved the discharge of a naval petty officer who admitted to sexual relations with other men, *Philips v. Perry*,<sup>55</sup> and of a California National Guardsman and Navy lieutenant who had submitted written documents to their commanding officers

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<sup>52</sup> *Id.* at 931.

<sup>53</sup> 945 F. Supp. 924 (E.D.Va. 1996), *aff’d per curiam*, 139 F.3d 893 (4<sup>th</sup> Cir. 1998).

<sup>54</sup> 97 F.3d 256 (8<sup>th</sup> Cir. 1996), *cert. denied*, 522 U.S. 807 (U.S. 1997).

<sup>55</sup> 106 F.3d 1420 (9<sup>th</sup> Cir. 1997).

acknowledging that they were homosexual.<sup>56</sup> In the former case, the appeals court ruled that homosexuals are not members of a “suspect class” for purposes of federal equal protection analysis, that the military ban on homosexual “acts” was rationally related to legitimate governmental interest in “maintaining effective armed forces,” and that evidentiary use of admitted homosexuality did not violate a service member’s First Amendment rights. Because sufficient homosexual acts were alleged to justify discharge, the *Perry* court declined considering the constitutionality of the rebuttable presumption and statements prong of the military policy. That issue was revisited in *Holmes and Watson*, however, where the Ninth Circuit ruled that military personnel who “tell,” without also presenting evidence to rebut the inference that they engage in homosexual acts, may constitutionally be discharged from the service. Writing for a divided three-judge panel, Circuit Judge Wiggins “agree[d] with the Second, Fourth, and Eighth Circuits on this issue. Although the legislature’s assumption that declared homosexuals will engage in homosexual conduct is imperfect, it is sufficiently rational to survive [equal protection] scrutiny. . .”<sup>57</sup>

In *Able v. United States*,<sup>58</sup> upholding the “don’t ask, don’t tell” policy, the Second Circuit faulted a contrary federal district judge’s decision for failing to give proper deference to Congress and the military judgment. The opinion emphasized a judicial tradition of applying “less stringent standards” of constitutional review to military rules than to laws and regulations governing civilian society. Judicial deference was warranted by the need for discipline and unit cohesion within this “specialized community,” matters for which courts “are ill-suited to second-guess military judgments that bear upon military capability and readiness.” In addition, “extensive Congressional hearings and deliberation” provided a “rational basis” for the government’s contention that the prohibition on homosexual conduct “promotes unit cohesion, enhances privacy and reduces sexual tension.” Consequently, the court concluded, “[g]iven the strong presumption of validity we give to classifications under rational basis review and the special respect accorded to Congress’ decisions regarding military matters, we will not substitute our judgment for that of Congress.”

Some argue that the *Lawrence* ruling in 2003 altered the constitutional framework for analyzing both Article 125 and the “don’t ask, don’t tell” policy. According to this view, by finding a fundamental liberty interest in consensual homosexual activity, *Lawrence* demands closer scrutiny of both the means and ends of the current military policy. Under traditional equal protection doctrine, the legislature has broad latitude to draw lines based on any “non-suspect” classification — homosexuality included — provided only that the policy is “rationally related” to a “legitimate” governmental interest. In the past, the military has satisfied this “lenient” test by invoking the need for unit cohesion, discipline, and morale — interests uniformly affirmed by pre-*Lawrence* appellate courts to uphold the “don’t ask, don’t tell” policy. The government generally bears a far greater burden, however,

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<sup>56</sup> *Holmes v. California Army Nat’l Guard; Watson v. Cohen*, 124 F.3d 1126 (9<sup>th</sup> Cir 1997), cert. denied, 525 U.S. 1067 (U.S. 1999).

<sup>57</sup> 124 F.3d at 1135. See also *Jackson v. Dep’t of the Air Force*, 132 F.3d 39 (9<sup>th</sup> Cir. 1997) (holding that homosexuals are not members of a suspect class, that the military’s regulations are rationally related to a legitimate government interest, and are not arbitrary or irrational).

<sup>58</sup> 155 F.3d 628 (2d Cir. 1998).

when defending any action that interferes with individual rights or liberty interests deemed “fundamental” for due process purposes. To pass constitutional muster, the challenged measure or policy must be “narrowly tailored” to a “compelling” governmental interest.<sup>59</sup>

In this regard, Article 125 has been criticized by its opponents for codifying the same “moral disapproval” as the Texas statute involved in *Lawrence* and for being over-broad and underinclusive. One commentator stated:

This broad ban does not limit itself to sodomy on military premises, nor to acts of sodomy between superiors and inferiors in the chain of command . . . It is not limited to any context in which one might think there were secondary effects separate from moral disapproval. *Lawrence* tells us that mere disapproval, standing alone, is an inadequate basis for such a law.<sup>60</sup>

Consequently, some argue that military interests in good order and discipline previously accepted by the courts are not sufficient to trump the liberty interest identified by *Lawrence*. Supporters of the continued viability of Article 125 and the “don’t ask, don’t tell” policy, however, argue that there is no immediate parallel between constitutional precedent as applied to the civilian and military sectors. Thus, the unbroken line of appellate decisions supporting current homosexual policies, aided by the modern military deference doctrine, would as likely tilt the balance in the government’s favor in any future judicial contest. Moreover, some argue that whatever implications *Lawrence* may have on Article 125, a penal statute, may not be directly translatable to the “don’t ask, don’t tell” policy, which provides for administrative separation from the military, but no criminal penalty.

The task of parsing these issues has fallen to the courts as they confront a new generation of legal challenges to the military’s homosexual policies. In 2004, for example, the U.S. Court of Appeals for the Armed Forces, which is the military’s highest judicial tribunal, issued a decision regarding the appeal of an Air Force linguistic specialist who was convicted by court martial on sex-related charges, including consensual sodomy with a subordinate. That case, *United States v. Marcum*, appears to have established the current standard that military courts use to evaluate post-*Lawrence* challenges to military policies regarding homosexuals.<sup>61</sup> A central issue in the case was whether *Lawrence* nullifies Article 125 and compels reversal of the service-member’s sodomy conviction. The appeals court upheld Marcum’s conviction, but not strictly on the basis of homosexual activity, instead pointing to the inappropriateness of sex between subordinate and superiors in the same chain of command. In *dicta*, the court strongly suggested that *Lawrence*’s ban on laws prohibiting sexual intimacy may apply to the military as well. It even went on to “assume without deciding” that Marcum’s conduct did fall within the protections of *Lawrence*. Such protection, however, was insufficient to shield him from the gender-neutral charge of sex with a subordinate.

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<sup>59</sup> *Griswold v. Connecticut*, 381 U.S. 479 (1965).

<sup>60</sup> “Gay rights ruling gets test in military,” *NLJ*, vol. 27, No. 7. pp 1, 33 (quoting David Cruz of the University of Southern California Law School).

<sup>61</sup> 60 M.J. 198 (C.A.A.F. 2004).



In reaching its decision, the *Marcum* court established a test that provides guidance on how to apply the principles of *Lawrence* to the military environment. Any challenge to convictions under Article 125 are reviewed on a case-by-case basis according to the following three-part test:

First, was the conduct that the accused was found guilty of committing of a nature to bring it within the liberty interest identified by the Supreme Court? Second, did the conduct encompass any behavior or factors identified by the Supreme Court as outside the analysis in *Lawrence* [e.g., involving public conduct, minors, prostitutes, or persons who might be injured/coerced or who are situated in relationships where consent might not easily be refused]? Third, are there additional factors relevant solely in the military environment that affect the nature and reach of the *Lawrence* liberty interest?<sup>62</sup>

In the wake of *Marcum*, some courts appear to be skeptical of challenges to Article 125 and “don’t ask, don’t tell,” especially when other factors, such as homosexual activity with a subordinate, are involved. For example, in *Loomis v. United States*, the United States Court of Federal Claims applied the *Marcum* test to the case of a lieutenant who was discharged for homosexual conduct.<sup>63</sup> Because the lieutenant was of significantly higher rank than the private with whom he had had sexual relations, the court found that “the nature of the relationship between plaintiff and the PFC ... is such that consent might not easily be refused and thus it is outside of the liberty interest protected by *Lawrence*.”<sup>64</sup> In other cases, however, courts have been more receptive to *Lawrence*-based challenges to military policies regarding homosexuals. For example in *United States v. Bullock*,<sup>65</sup> the U.S. Army Court of Criminal Appeals relied on *Lawrence* to overturn the guilty plea of a male soldier who engaged in consensual oral sodomy with a female civilian in a military barracks. Although the case involved heterosexual conduct, it appears to be the first decision by a military tribunal to recognize a right to engage in consensual adult sodomy, under principles that may be equally applicable to Article 125 prosecutions targeting homosexual activity.<sup>66</sup>

Meanwhile, only two federal courts of appeals have issued decisions in cases involving post-*Lawrence* challenges to “don’t ask, don’t tell,” and both of these courts have grappled with questions regarding the standard of review that should apply. The problem is that the *Lawrence* decision did not explicitly deem the right to engage in private consensual homosexual conduct to be a “fundamental” liberty interest, nor did the Court specifically identify the standard of review to be used in the future. Indeed, the decision appeared to apply neither traditional rational basis review nor strict scrutiny.

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<sup>62</sup> Id. at 206-07.

<sup>63</sup> 68 Fed. Cl. 503 (Ct. Cl. 2005)

<sup>64</sup> Id. at 519. See also, *United States v. Barrera*, 2006 CCA LEXIS 215 (A.F. Ct. Crim. App. 2006).

<sup>65</sup> Army 20030534 (mem. op. November 30, 2004).

<sup>66</sup> But see *United States v. Stephens*, 2007 CCA LEXIS 428 (N-M.C.C.A. October 11, 2007).

Identifying the standard of judicial review to apply was the central issue in *Witt v. Department of the Air Force*,<sup>67</sup> a recent decision in which the Court of Appeals for the Ninth Circuit reinstated a lawsuit against the military's "don't ask, don't tell" policy. In 2004, Major Margaret Witt, a decorated Air Force officer who had been in a long-term relationship with another woman was placed under investigation for being a homosexual. Although Witt shared a home 250 miles away from base with her partner, never engaged in homosexual acts while on base, and never disclosed her sexual orientation, the Air Force initiated formal separation proceedings against her due to her homosexuality. Witt filed suit in district court, claiming that the "don't ask, don't tell" policy violated her constitutional right to procedural due process, substantive due process, and equal protection, but the district court dismissed her suit for failure to state a claim.<sup>68</sup> The Ninth Circuit affirmed the district court's dismissal of the equal protection claim, but remanded the procedural and substantive due process claims to the district court for further consideration.

Finding that the result in *Lawrence* was "inconsistent with the minimal protections afforded by traditional rational basis review" and that the cases upon which the *Lawrence* Court relied all involved heightened scrutiny, the Ninth Circuit ultimately held that "*Lawrence* applied something more than traditional rational basis review," but left open the question whether the Court had applied strict scrutiny, intermediate scrutiny, or a different type of heightened scrutiny.<sup>69</sup> Hesitating to apply traditional strict scrutiny to Witt's claim in the absence of the application of "narrow tailoring" and "compelling governmental interest" requirements in *Lawrence*, the Ninth Circuit instead looked to another Supreme Court case that had applied a heightened level of scrutiny to a substantive due process claim.<sup>70</sup> Extrapolating from its analysis of this case, the Ninth Circuit concluded:

We hold that when the government attempts to intrude upon the personal and private lives of homosexuals, in a manner that implicates the rights identified in *Lawrence*, the government must advance an important governmental interest, the intrusion must significantly further that interest, and the intrusion must be necessary to further that interest. In other words, for the third factor, a less intrusive means must be unlikely to achieve substantially the government's interest.... In addition, we hold that this heightened scrutiny analysis is as-applied rather than facial.... Under this review, we must determine not whether ['don't ask, don't tell'] has some hypothetical, post hoc rationalization in general, but whether a justification exists for the application of the policy as applied to Major Witt.<sup>71</sup>

Although the court ruled that the government clearly advances an important governmental interest in management of the military, the court was unable to determine from the existing record whether "don't ask, don't tell" satisfies the second

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<sup>67</sup> 527 F.3d 806 (9th Cir. 2008).

<sup>68</sup> *Witt v. United States Dep't of the Air Force*, 444 F. Supp. 2d 1138 (W.D. Wash. 2006).

<sup>69</sup> 527 F.3d 806, 817 (9th Cir. 2008).

<sup>70</sup> *Sell v. United States*, 539 U.S. 166 (U.S. 2003).

<sup>71</sup> 527 F.3d 806, 819 (9th Cir. 2008).

and third factors and therefore remanded the case to district court for further development of the record. It is important to note that even if the district court does ultimately find in favor of Major Witt, the decision would not invalidate the “don’t ask, don’t tell” policy. Unlike a facial claim, in which the constitutionality of a statute is evaluated on its face as if it applies to all hypothetical plaintiffs, the Ninth Circuit directed that the constitutional inquiry in *Witt* be conducted on an “as applied” basis. As a result, the impact of any decision by the district court would be limited to Major Witt and would not apply to other plaintiffs, who would be required to file their own individual claims.

Shortly after the Ninth Circuit issued its opinion in the *Witt* case, the Court of Appeals for the First Circuit handed down a decision upholding a lower court’s dismissal of a challenge to “don’t ask, don’t tell” brought by 12 gay and lesbian veterans who had been discharged under the policy. In the case, *Cook v. Gates*,<sup>72</sup> the First Circuit agreed with much of the Ninth Circuit’s reasoning in *Witt*, although the opinions differed in some important respects. Like the Ninth Circuit, the First Circuit concluded that the *Lawrence* case “did indeed recognize a protected liberty interest for adults to engage in private, consensual sexual intimacy and applied a balancing of constitutional interests that defies either the strict scrutiny or rational basis label.”<sup>73</sup> In contrast to the Ninth Circuit, however, the First Circuit evaluated the claim as a facial challenge and concluded that the plaintiffs’ challenge failed. According to the court, the *Lawrence* decision recognized only a narrowly defined liberty interest in consensual adult sexual activity that excludes other types of sexual conduct, including homosexual conduct by service members.<sup>74</sup> Although the First Circuit noted that an as-applied challenge might involve conduct that does fall within *Lawrence*’s protected liberty interest — such as homosexual conduct occurring off-base between consenting adults — the court nevertheless concluded that such as-applied challenges fail when balanced against the governmental interest in preserving military effectiveness.<sup>75</sup> As a result, the court dismissed the plaintiffs’ as-applied challenge.

In summary, historically undergirding the judicial approach to military policies regarding homosexuals has been a tradition of deference to Congress and the Executive in the regulation of military affairs. The *Lawrence* decision marked out a constitutional safe harbor for private homosexual conduct between consenting adults in the civilian sphere founded on due process principles. Cases pending now and in the future may call on the courts to reconcile these precedents in evaluating the constitutionality of “don’t ask, don’t tell” and Article 125.

## **Actions Following the Murder of Private Barry Winchell**

Following the murder of Army Private First Class (Pfc.) Barry Winchell in 1999 at Fort Campbell, KY, efforts were made by numerous groups to change or create new policies due to allegations of homosexual harassment on military bases.

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<sup>72</sup> 528 F.3d 42 (1st Cir. 2008).

<sup>73</sup> *Id.* at 52.

<sup>74</sup> *Id.* at 56.

<sup>75</sup> *Id.* at 60.

The killing of Pfc. Winchell had implications beyond the specifics of his case, including judicial, legislative, and administrative actions. Some of these involved administrative and legislative actions concerning hate crimes. Others involved legislative and administrative actions involving those in the chain of command, including the reassignment of individuals and senatorial holds being placed on the consideration of certain promotions. This case generated a large amount of media and political attention.<sup>76</sup>

Winchell's death was connected in part to his off-duty romantic relationship with a biologically male pre-operative transsexual. This relationship became intertwined with a relationship Winchell had with another soldier, his roommate, Specialist Justin Fisher. The complications of these relationships led to a fight between Winchell and a third soldier during a barracks party. Winchell, it is reported, had the upper hand in the fight. On July 6, 1999, Private Calvin Glover, who had lost the fight, entered the hallway where Winchell was sleeping and bludgeoned him to death with a baseball bat. Fisher, soon after, entered the hallway and reportedly tried to assist Glover in cleaning up the scene. Both Glover and Fisher were arrested.<sup>77</sup> Press reports of the incident labeled it a 'hate crime.'<sup>78</sup> Glover was tried by court-martial and received a life sentence. Fisher was sentenced to 12 and ½ years imprisonment as part of a plea bargain.<sup>79</sup>

Winchell's murder became an example and focal point for gay-rights groups and some in the media who criticized military leaders at Fort Campbell over the incident.<sup>80</sup> Some suggested that the "don't ask, don't tell" policy was responsible for Winchell's death. They claimed that "don't ask don't tell" reinforces negative attitudes toward

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<sup>76</sup> The Winchell case is cited routinely in press reports, particularly when changes to the military's homosexual policy are considered. It is primarily for that reason that it is described here. Other cases have received considerably less attention. For instance, see Jacobs, Sally, "Sexual Assault in the Shadows, Male victims in military cite devastating impact on career, life," *Boston Globe*, September 12, 2004: 1 or Price, Jay, "Guardsmen Killed Iraqi After Sex," *Raleigh News & Observer*, December 18, 2004: 1.

<sup>77</sup> For a more thorough reading of the events surrounding Winchell's murder, see France, David, "An Inconvenient Woman," *The New York Times Magazine*, May 28, 2000: 24.

<sup>78</sup> "Although Army officials have not disclosed a motive for the attack — Winchell had gotten the best of the soldier in a fight a few days before the killing — local and national gay rights groups contend there is mounting evidence that Winchell was the victim of a hate crime." Pressley, Sue Anne, "Hate May Have Triggered Fatal Barracks Beating," *Washington Post*, August 11, 1999: 1.

<sup>79</sup> *U.S. v. Justin Fisher*, affirmed, U.S. Court of Appeals for the Armed Forces, June 17, 2003, 58 M.J. 300(2003), Fisher's 14-year sentence was reduced as a result of a plea bargain; *U.S. v. Glover*, summarily affirmed, U.S. Court of Appeals for the Armed Forces, December 17, 2003, 59 M.J. 225(2003).

<sup>80</sup> Critics contend that gay rights advocates used the death of Winchell as a means of pursuing a larger agenda. "Even though cases of homosexual harassment in the military are few, a brutal murder at Fort Campbell following a 4<sup>th</sup> of July brawl has been cited as evidence of the need for anti-harassment sensitivity training." Donnelly, Elaine, "Activists keep pushing homosexual agenda for the armed forces," *Center for Military Readiness*, Issue no. 52, September 1999: 3.

homosexuals in uniform, because the policy treats homosexuals differently than heterosexuals in uniform. As such, it is claimed that this policy fostered an atmosphere of “homophobia” in the military that encouraged violence against homosexuals. Others contend that Winchell’s death occurred in spite of the policy and that the incidents in question would not have occurred had he and Fisher abided by its provisions. Under this policy, homosexual behavior does not become an issue for those in uniform because it must be kept “personal and private.” These individuals cite the death of Winchell and the incarceration of Fisher and Glover as classic examples of how open homosexuality in the ranks can lead to “disruptions to good order and discipline” that “don’t ask, don’t tell” was designed to prevent.

Many in the media and homosexual rights advocacy groups viewed the Winchell murder as representative of homophobia in the services or, at the least, lax attitudes toward preventing the harassment of those suspected of being homosexual. Partly in response to Winchell’s murder, in October 1999, President Clinton signed an executive order modifying the Uniform Code of Military Justice (UCMJ) by allowing evidence to be presented during the sentencing phase of a trial that a violent crime can be considered a hate crime.<sup>81</sup>

In response to concerns over the handling of the case, both the Army and DOD Inspectors General (IG) investigated the incident. Later, the DOD IG released a report on March 24, 2000. “The [DOD] IG found the command climate at Winchell’s post, Fort Campbell, Ky., was generally supportive and healthy. But the report said Winchell’s company in the 101<sup>st</sup> Airborne Division (Air Assault) was marred by poor morale because of an abusive first sergeant who has since been replaced.... The Defense Department IG, in March, found that anti-gay attitudes were ‘commonplace’ and widely tolerated in the military. When the report was released, Defense Secretary William Cohen launched a task force headed by Air Force Under Secretary Carol DiBattiste, to develop a plan to reduce harassment of all kinds within the ranks.”<sup>82</sup>

On July 21, 2000, little more than a year after Winchell’s murder, Under Secretary of Defense (Personnel and Readiness), Bernard Rostker, announced the introduction of a DOD Anti-Harassment Action Plan (AHAP) adopting the principle of “treating all individuals with dignity and respect” and noting that “mistreatment, harassment, [including that based on sexual orientation], and inappropriate comments or gestures,” have no place in the armed forces.<sup>83</sup> Then-Secretary of Defense, William Cohen, approved the plan and forwarded it to the Services for

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<sup>81</sup> E.O. 13140, 1999 Amendments to the Manual for Courts-Martial, United States, sec. 1(d), 64 F.R. 55115, October 6, 1999.

<sup>82</sup> Crowley, Vince. “Anti-harassment Policy Stresses Respect,” *The [Army] Times*, August 7, 2000: 24.

<sup>83</sup> This language was incorporated into various military training and other documents. These include the U.S. Army Basic Training Study Guide, *Dignity and Respect: A training guide on Homosexual Conduct Policy*, U.S. Army, 1 May 2001 and Army Regulation 350-1, Army Training and Education, 1-7(c)(1): “Treating soldiers with dignity and respect is an Army bedrock value. Soldiers will be treated with dignity and respect.... Harassment of soldiers for any reason, to include race, religion, national origin, sex, and perceived sexual orientation, will not be tolerated.”

implementation.<sup>84</sup> The AHAP is a 13 point plan recommending anti-harassment training, reporting of harassment, enforcement against harassment, and measurement to assess adherence to anti-harassment policies as well as the effectiveness of such policies.

Following a report in May, 2003, by the Servicemembers Legal Defense Network (SLDN) claiming that the military had failed to issue a directive regarding AHAP, several Members of Congress wrote a letter to Secretary of Defense Rumsfeld asking DOD to implement the AHAP. Although the AHAP has been implemented, it appears that SLDN's focus is on the lack of an overarching DOD Directive. In a recent report, SLDN states:

The Bush Administration and its Pentagon leaders continue to ignore a growing epidemic of anti-gay harassment within the armed forces.... Despite the adoption of a comprehensive Anti-Harassment Action Plan ... Defense Department leaders refuse to implement the plan and continue to turn a blind eye to dangerous harassment within the ranks.... [T]he plan continues to collect dust on Pentagon shelves.<sup>85</sup>

In response, the Under Secretary of Defense (Personnel and Readiness), David Chu, in a June 24, 2004 letter to Congress, described existing Service policies and programs as "sufficient to address" harassment.<sup>86</sup>

The Department has determined the over-arching directive recommended by the Plan is not necessary. The Services' policies and programs are sufficient to address this important issue. It is the Department's view that all service members should be treated with dignity and respect. This is a value held by all four Services and a cornerstone of our leadership and human resource strategies that is reflected in the core values and institutional training throughout the Department.<sup>87</sup>

In this letter, Under Secretary Chu describes anti-harassment efforts implemented by the Services, including training, reporting, measurement and enforcement.

Independent of these actions, Winchell's parents filed a \$1.8 million wrongful death claim against the military and were twice rebuffed.<sup>88</sup>

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<sup>84</sup> Garamone, Jim, "Dignity, Respect at Heart of Anti-Harassment Plan," *Armed Forces Information Service*, July 21, 2000.

<sup>85</sup> Servicemembers Legal Defense Network, *Conduct Unbecoming: The 10<sup>th</sup> Annual Report on "Don't Ask, Don't Tell, Don't Pursue, Don't Harass,"* 2004: 6, from an on-line press release.

<sup>86</sup> Crea, Joe, "Harassment Policy 'Not Necessary': Official," *The Washington Blade* at [<http://www.washblade.com/2004/7-30/news/national/pentagon.cfm>].

<sup>87</sup> U.S. Department of Defense, Under Secretary of Defense (Personnel and Readiness), David S.C. Chu, Letter to The Honorable James Langevin, June 24, 2004.

<sup>88</sup> "Army Denies Kin's Claim in Killing of Private," *New York Times*, October 1, 2000, Associate Press, "Wrongful-Death Appeal Rejected," *Washington Times*, May 22, 2001: A8.

Critics continued their focus on the military leadership at Fort Campbell. The Army IG investigation found nothing to implicate the Commanding General of the 101<sup>st</sup> Airborne Division at Fort Campbell, Maj. Gen. Robert T. Clark, who convened the court-martial of Fisher and Glover. Later, when the Army decided to transfer Clark (for reasons unrelated to the Winchell murder) to become vice director of operations for the Joint Chiefs of Staff (JCS) at the Pentagon, gay rights advocates and several Members of Congress objected, with 30 Members of the House writing to then-Secretary of Defense William Cohen “urging that he hold the general responsible for what appears to have been a highly charged environment at Fort Campbell in the months before Private Winchell’s death.”<sup>89</sup> In October 2002, when Clark was nominated for promotion to Lieutenant General as Commander of the Fifth U.S. Army, Winchell’s parents, gay rights groups, and People for the American Way, asked the Senate to block his nomination.<sup>90</sup> A hold was placed on the 2002 nomination of Clark to prevent a floor vote. Over a year later, the Senate approved the nomination.<sup>91</sup> In November, 2003, Clark became the Commanding General, Fifth United States Army, Fort Sam Houston, TX. Lieutenant General Robert T. Clark on retired February 1, 2007.

During this period, efforts to include hate crime legislation in both the FY2001 and FY2005 National Defense Authorization Acts failed.<sup>92</sup> In both years, the Senate bills included language that would permit the Attorney General to provide assistance at the request of state, local, and Indian tribe officials in the investigation and prosecution of hate crimes. This language also included a provision that would allow the Attorney General to award grants to state, local, and Indian tribe law enforcement officials to assist with the investigation and prosecution of such crimes. The language would also amend chapter 13 of title 18 United States Code to “establish a substantive federal prohibition of certain specific hate crime acts.” However, in both instances, the House bill contained no similar provision and the Senate receded, thereby dropping the provisions in conference.

H.R. 1585, the National Defense Authorization Act for Fiscal Year 2008, was passed by both the House and the Senate. It contained language concerning hate crimes that would involve substantial changes in Title 18, United States Code. These changes were not necessarily specific to the military. Objecting to this and other provisions in H.R. 1585, the President vetoed the bill on December 28, 2007. Much of the language in this bill (excluding the provisions on hate crimes) was reintroduced

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<sup>89</sup> Myers, Steven Lee, “Transfer of General at Site of Anti-Gay Killing is Protested,” *New York Times*, June 9, 2000.

<sup>90</sup> McHugh, Jane, “Slain Soldier’s Parents Fight General’s Promotion,” *Army Times*, May 26, 2003: 9; “A Controversial Appointment,” *Army Times*, September 29, 2003: 4.

<sup>91</sup> Maze, Rick, “Robert Clark gets controversial third star,” *Army Times*, December 1, 2003: 28.

<sup>92</sup> U.S. Congress. House, Conference Committee, Enactment of Provisions of H.R. 5408, The Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, 106<sup>th</sup> Cong., 2<sup>nd</sup> Sess., H.Rept. 106-945, October 6, 2000: 859; *Congressional Record*, October 8, 2004: H9561.

as H.R. 4986, and was passed by Congress and signed by the President, becoming Public Law 110-118 on January 29, 2008.

## Recruiting, JROTC, ROTC and Campus Policies

Congressional concerns over military access to campuses for recruiting purposes have led to the enactment of legislative proposals over the years. Colloquially known as the “Solomon amendments”<sup>93</sup> or “Solomon-Pombo amendments,” [P.L. 103-337; 108 Stat. 2776; October 5, 1994] in recognition of its earlier proponents, this language sought to afford military recruiters and Reserve Officer Training Corps access to campuses and students.

Many colleges, universities, and in some cases, high school campuses, have been in the vanguard of the effort to expand civil rights for homosexuals. In certain cases, schools have sought to challenge DOD policy pertaining to homosexuals including taking steps to limit or eliminate various types of military presence on campus. For example, in certain instances, military personnel have been prevented from recruiting on campus, and actions have been taken to limit or sever Reserve Officer Training Corps (ROTC) connections with the campus.

Generally speaking, efforts to recruit on high school and college campuses have been addressed separately in legislation. For purposes of clarity, they are also treated separately here.

**High Schools.** In 1982, as part of long-standing recruiting concerns, Congress passed language *allowing* the Secretary of Defense to “collect and compile directory information pertaining to each student who is 17 years of age or older or in eleventh grade ... or higher and who is enrolled in a secondary school in the United States or its territories, possessions, or in the Commonwealth of Puerto Rico.”<sup>94</sup> The collection of this information was limited to three years for any individual, and further limited to name, address, telephone listing, date and place of birth, level of education, degrees received, and most recent educational agency or institution attended, and was required to be kept confidential. Nothing in the law required or authorized the Secretary to *require* any educational institution to furnish the information.<sup>95</sup> The collection of this

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<sup>93</sup> This is not to be confused with earlier amendments offered by Rep. Solomon involving student assistance and compliance with Selective Service registration. As a result of these more recent amendments, some have termed the first amendments “Solomon I” and the latter as “Solomon II.” See Fraas, Charlotte, David Osman, Robert Goldich and David Ackerman, “Student Financial Aid and Draft Registration Compliance,” CRS MB3213, Archived July 18, 1985.

<sup>94</sup> P.L. 97-252; 96 Stat. 748; September 8, 1982.

<sup>95</sup> This law was implemented under U.S., Department of Defense, Assistant Secretary of Defense, (MI&L), Directive 1304.24, *Use of Directory Information on Secondary School Students for Military Recruiting Purposes*, April 20, 1984.



information, or further, the matter of recruiter access to the campuses, however voluntary, were not without some controversy.<sup>96</sup>

For example, in 1998, two high schools broke with the Portland (OR) School Board by allowing military recruiters on campus.<sup>97</sup> Proponents of the ban insisted they were opposing discrimination against homosexuals by the military. Critics contend the school board was merely, and “hypocritically” substituting discrimination against the military in favor of a homosexual rights agenda.<sup>98</sup>

In recent years, the congressional legislative activity concerning the recruiting of high school students has increased. In 1999, Congress enacted language *requesting* secondary schools to provide DOD with the “same access to secondary school students, and to directory information concerning such students, as is provided generally to post-secondary educational institutions or to prospective employers of those students.”<sup>99</sup> Despite this change — previously, DOD had been *allowed* to compile such information — recruiter access to secondary schools in some cases continued to meet resistance.<sup>100</sup>

The following year (2000), Congress enacted language stating that the educational agencies concerned *shall* provide such recruiter access to campus and to directory information. If a request for this access were denied, this language instructed the services to send an appropriate designated officer or official to meet with the agency. If, after a meeting, such access continued to be denied, the services were to notify the designated state official (such as a Governor) and request access. Should the denial of access continue, the Secretary of Defense was instructed to notify the Secretary of Education. Upon determination by the Secretary of Defense that the denial is extended to at least two of the military services (including the Coast Guard), congressional committees, and the respective Senators and Representatives of the jurisdictions involved were to be notified. Certain schools could be excluded from this process: specifically, private schools that maintained a religious objection to service in the armed forces; or, in the case of a local educational agency, a policy resulting from majority vote of denying such access.<sup>101</sup>

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<sup>96</sup> Mathews, Jay, “Oakland Bars Releasing Student Data to Military,” *Washington Post*, January 18, 1991: A4.

<sup>97</sup> Two schools defy district ban on military recruiters, Associated Press, December 24, 1998.

<sup>98</sup> “Lift Ban On Military Recruiters,” *Portland Oregonian*, July 24, 2000.

<sup>99</sup> P.L. 106-65; 113 Stat. 622; October 5, 1999.

<sup>100</sup> “Lift Ban On Military Recruiters,” *Portland Oregonian*, July 24, 2000.

<sup>101</sup> P.L. 106-398; 114 Stat. 1654A-131; October 30, 2000. These changes were prompted by service complaints regarding the denial of access issue. “Approximately 2,000 public high schools have policies that bar military recruiters from one or more services, and high schools barred recruiters more than 19,000 times last year, according to a Pentagon spokeswoman.” Easier Access For Military Recruiters, *Tampa Tribune*, July 6, 2000. Protesting the military’s policy on homosexuals has been a common, but not the only explanation, offered in denying military access to campuses. For the purposes of this law,

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In 2001, Congress strengthened this language by *requiring* local educational agencies who are receiving assistance under the Elementary and Secondary Educational Act to provide recruiters with the access to students and directories that had been *requested* in 1999. In addition, the language provided that students with parental consent, or the parent alone on behalf of the student, could opt out of having the student's information released.<sup>102</sup>

In 2002, the “No Child Left Behind Act” stated that as a condition of receiving funds under the act, local educational institutions were required, upon request, to provide recruiter access and access to directory information. Opt-out provisions were included as before, as were exceptions for private schools with religious objections to military service.<sup>103</sup>

It has been reported that certain educational agencies and others have taken an active role in limiting such access. Primarily, this is done by sending ‘opt-out’ forms to students and/or parents.<sup>104</sup> Many educational agencies and secondary schools, however, *have* provided recruiter access and access to directory information. Also, hundreds of thousands of secondary students participate in federally funded Junior Reserve Officers Training Corps at affiliated secondary schools.<sup>105</sup>

Finally, in 2003, Congress amended the law by removing the provision that had allowed for a majority vote of the local educational agency to deny recruiter access or access to directory information thereby removing one impediment to such access.<sup>106</sup>

In 2007, DOD announced changes concerning how it treats information in its military recruiting database following a settlement with the New York Civil Liberties Union. DOD agreed to use the database only for recruiting and not to share that data with other government agencies. DOD agreed to destroy information on individuals after three rather than five years. DOD also agreed to collect social security numbers only from the Selective Service System.<sup>107</sup>

<sup>101</sup> (...continued)

a “local educational agency” is defined under sec. 14101(18) of the Elementary and Secondary Education Act of 1965 (20 United States Code 8801(18)).

<sup>102</sup> P.L. 107-107; 115 Stat. 1113; December 28, 2001.

<sup>103</sup> P.L. 107-110; 115 Stat. 1983; January 8, 2002. For more information, see CRS Report RS22362, *Military Recruitment Provisions Under the No Child Left Behind Act: A Legal Analysis*, by Jody Feder.

<sup>104</sup> Hayasaki, Erika, “Districts Taking On Recruiters,” *Los Angeles Times*, February, 13, 2003; Hayasaki, Erika, “Campus Military Recruitment Roils Students,” *Los Angeles Times*, February 8, 2004; and, Lewin, Tamar, “Uncle Sam Wants Student Lists, And Schools Fret,” *New York Times*, January, 29, 2003.

<sup>105</sup> In 2003, the Department of Defense reported that the “total number of cadets in JROTC was 450,000 students in 3,050 schools worldwide.” Leong, Brenda K., Major, OASD(P&R), letter to Susan Sanford, CRS, April 7, 2003.

<sup>106</sup> P.L. 108-136; 117 Stat. 1478; November 24, 2003.

<sup>107</sup> Liptak, Adam, Defense Dept. Settles Suit On Database For Recruiting, *New York Times*,  
(continued...)

Objecting to the DOD policy on homosexuals, the San Francisco Board of Education, on November 14, 2006, voted to phase out Junior ROTC by the 2008-2009 school year.<sup>108</sup> The Board also created a Task Force to consider alternative ways to present academic subjects covered in JROTC, such as Leadership Development. Following the Task Force's request for more time, the Board delayed the phase out of JROTC to the 2009-2010 school year.<sup>109</sup> Given the history of this issue, such an action is likely to invite congressional consideration of the matter.

**Colleges and Universities.** Even prior to the 1993 “don’t ask, don’t tell” compromise, the exclusion of homosexuals from military service, and hence, ROTC, had proven to be problematic on some college campuses.<sup>110</sup> (From 1986 to 1994, 28 students reportedly were discharged from ROTC on grounds of homosexuality and nine were ordered to repay their scholarships.) In May 1990, for example, it was reported that two students from Harvard and the Massachusetts Institute of Technology were dismissed from the Navy ROTC program at MIT. The Navy sought recoupment of its scholarship funds (totaling over \$80,000 for both students). The provost of MIT, John Deutch, wrote to then-Secretary of Defense Richard Cheney, stating that it was “wrong and shortsighted” to maintain “the ROTC policy not to accept gay or lesbian students into its programs and to require avowed homosexuals to disenroll and pay back their scholarship funds.” After reviewing the cases on the merits, the Navy made a decision not to seek recoupment from these two students.<sup>111</sup>

On May 17, 1994, then-Deputy Defense Secretary John Deutch issued a directive. Under that directive, and based on the “don’t ask, don’t tell” compromise, Service secretaries could seek recoupment of ROTC scholarships when there were violations of military law; however, the Service secretaries would not seek recoupment for homosexuality. Individuals using a claim of homosexuality as a means of avoiding military service were likely to be required to repay their scholarships.<sup>112</sup>

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<sup>107</sup> (...continued)

January 10, 2007: 19.

<sup>108</sup> Tucker, Jill, “School Board Votes To Dump JROTC Program,” *San Francisco Chronicle*, November 15, 2006: B1.

<sup>109</sup> Information provide by Gentle Blythe, Office of Public Affairs, San Francisco Board of Education, June 19, 2008.

<sup>110</sup> Peterson, Bill, “Faculty Seeks ROTC’s Ouster Over Policy on Gays,” *Washington Post*, December 5, 1989: 14; Lewin, Tamar, “Harvard Protesting R.O.T.C. Rejection of Homosexuality,” *New York Times*, June 15, 1990: 17; and, Behan, Catherine, “For gays, ROTC is one more battlefield,” *Chicago Tribune*, May 9, 1991: 29. While some schools sought to have ROTC removed outright, at least one decided to cease awarding credit for ROTC classes. Matthews, William, “Colleges challenging DOD ban on homosexuals,” *Air Force Times*, October 14, 1991: 18.

<sup>111</sup> Lewin, Tamar, “Navy Drops Efforts to seek Repayment From 2 Gay Students,” *New York Times*, May 9, 1990: 19.)

<sup>112</sup> See Hudson, Neff, “Gays ousted from ROTC get break,” *Air Force Times*, June 27, 1994.

Over the past 10 years, there has been considerable congressional and judicial activity on military access to colleges and universities. The National Defense Authorization Act for FY1995<sup>113</sup> limited efforts to interfere with military access to colleges and universities:

No funds available to the Department of Defense may be provided by grant or contract to any institution of higher education that has a policy of denying, or which effectively prevents, the Secretary of Defense from obtaining for military recruiting purposes - (A) entry to campuses or access to students on campuses; or (B) access to directory information pertaining to students.

The above law (also known as the Solomon Amendment) further instructed the Secretary of Defense to consult with the Secretary of Education in prescribing regulations to determine when an educational institution denies or prevents access.

In 1996, Congress enacted additional language pertaining to ROTC at colleges and universities. The National Defense Authorization Act for FY1996<sup>114</sup> stated:

No funds appropriated or otherwise available to the Department of Defense may be made obligated by contract or by grant (including a grant of funds to be available for student aid) to any institution of higher education that, as determined by the Secretary of Defense, has an anti-ROTC policy and at which, as determined by the Secretary, the Secretary would otherwise maintain or seek to establish a unit of the Senior Reserve Officer Training Corps or at which the Secretary would otherwise enroll or seek to enroll students for participation in a unit of the Senior Reserve Officer Training Corps at another nearby institution of higher education.

This law required the Secretary to notify the Secretary of Education, Senate Armed Services Committee and the then-House National Security Committee (now House Armed Services Committee) when such a determination had been made. In addition, every six months the Secretary was required to publish a list of ineligible institutions in the Federal Register.

The Connecticut Supreme Court, in 1996, upheld a lower court ruling that the DOD policy on homosexuality violated the state's 1991 Gay Rights Law barring discrimination on the basis of "sexual orientation" and, therefore, military recruiters could be permanently banned from the University of Connecticut Law School campus in Hartford.<sup>115</sup> These actions led to a seemingly contradictory situation. Although military recruiters were barred from the law school campus, the University of Connecticut maintained military ROTC units on its Storrs campus. The University of Connecticut (UConn) has been designated, by the state legislature, a land-grant

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<sup>113</sup> P.L. 103-337; 108 Stat. 2776; October 5, 1994.

<sup>114</sup> P.L. 104-106, 110 Stat. 315; February 10, 1996.

<sup>115</sup> *Gay and Lesbian Law Students Association v. Board of Trustees*, 236 Conn. 453, 673 A.2d 484 (Conn. 1996). Judson, George, "Military Recruiting Ban On a Campus is Upheld," *New York Times*, March 20, 1996: B7.

university. Under the Morrill Act,<sup>116</sup> as signed by President Lincoln in 1862, institutions aided under the act must teach military tactics along with their regular curriculum. ROTC fulfills this requirement.<sup>117</sup> Thus, due to the court ruling, military recruiters were prohibited from recruiting at the UConn law school in Hartford, but the university maintains an ROTC unit at its campus in Storrs. This campus continued to enroll students in ROTC and accepted federal funding. The presence of, and continued enrollment by, this ROTC unit may also have been in conflict with the state's 1991 Gay Rights Law prohibiting discrimination on the basis of "sexual orientation."

The Omnibus Appropriations Act for FY1997<sup>118</sup> contained language that limited the ability of educational institutions, or sub-elements thereof (such as a law school or a satellite campus), to block ROTC programs or recruiter access. Under this language, funds made available in this or other relevant appropriations, including contracts or grants (such as student aid), would not be available to any covered institution that denied or prevented access by military recruiters or prevented the maintaining, establishing or the operation of an ROTC program. Three exceptions were written into the law [110 Stat. 3009-270]: (1) "the covered educational entity has ceased the policy or practice [of discriminating against the military]; (2) the institution of higher education has a longstanding policy of pacifism based on historical religious affiliation; or (3) the institution of higher education involved is prohibited by the law of any State, or by the order of any State court, from allowing Senior Reserve Officer Training Corps activities or Federal recruiting on campus, except that this paragraph shall apply only during the one-year period beginning on the effective date ...." In the summer of 1997, DOD published a list of offending schools in the Federal Register. Of the 27 schools on the list, 17 were in Connecticut. By August 22, 1997, the list was reduced to 22 schools, 17 from Connecticut.

In a seemingly ironic twist, service members who receive tuition assistance from the military would see this assistance terminated if they attended one of the schools listed. In order to address this situation, language was included in the FY1998 National Defense Authorization Act conference report:

The conferees are aware that the Connecticut State Legislature and the State Supreme Court have taken steps to prohibit military recruiting on the campuses of state funded colleges and universities. As a result of this prohibition, ... the Department of Defense suspended payment of contract and grant funding to these colleges and universities.

The conferees note that the Connecticut State Legislature is not scheduled to meet until February 1998. The Governor has pledged that he will ensure the

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<sup>116</sup> 12 Stat. 503; July 2, 1862.

<sup>117</sup> During the 1995-96 school year, a total of over 160 students participated in ROTC at UConn at Storrs, CT. The Air Force and Army have ROTC programs at UConn. UConn also sponsored those partaking in ROTC from Yale University since no such program is available at the Yale campus.

<sup>118</sup> P.L. 104-208, 110 Stat. 3009-270; September 30, 1996.

passage of legislation that would remedy the matter concerning access of military recruiters to Connecticut state institutions of higher education.

In order to provide the State of Connecticut with the opportunity to repeal its prohibition, the conferees direct the Secretary of Defense not to use funds that would have been used for contracts or grants to higher education institutions in Connecticut as sources in a reprogramming request nor to submit such funds as part of a rescission offer until March 29, 1998. If the State of Connecticut has not repealed the prohibition as of March 29, 1998, the Secretary of Defense may use the funds in a reprogramming or rescission activity.

Notwithstanding this sequestering of funds, the conferees insist that military recruiters be afforded access to institutions of higher education or face the consequence of loss of federal funds.<sup>119</sup>

In response, on October 29, 1997, the Governor called a one-day special session of the state legislature to consider the matter. “[B]oth houses of the General Assembly approved the change [allowing the military to recruit on state campuses] by overwhelming margins. The Governor signed the bill the next day.”<sup>120</sup>

In 1999, Congress modified the law yet again. Under this modification, federal funds in the form of student financial assistance could not be withheld from students attending schools that violated the law with regard to recruiter access and ROTC.<sup>121</sup>

Opposition to these varied restrictions took a number of forms. Many law schools, in particular, sought ways to mollify, “ameliorate,” or terminate these restrictions. For example, it was reported that law professors Carol Chomsky and Margaret Montoya, co-presidents of the Society of American Law Teachers (SALT), sent a letter to associate deans listing 27 “action items” in response to the “threat” of military recruiting. Among items cited:

Designate a particular person in the Dean’s or Associate Dean’s office to ... make sure on an ongoing basis, that law school resources, including career services, are not used to facilitate any on-campus recruiting by the military ....<sup>122</sup>

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<sup>119</sup> *Congressional Record*, October 23, 1997: H9383; U.S. Department of Defense, “Military Recruiting and Reserve Officer Training Corps Access to Institutions of Higher Education,” *Federal Register*, vol. 63, No. 205, October 23, 1998: 56819. The laws regarding campus access and ROTC were added to Title 10, USC, sec. 983 under P.L. 106-65; 113 Stat. 609; October 5, 1999.

<sup>120</sup> Compart, Andrew, “Connecticut returns recruiters to state colleges,” *Army Times*, November 17, 1997: 6.

<sup>121</sup> P.L. 106-79; 113 Stat. 1260; October 25, 1999. In 2002, relating to the Coast Guard, this language was amended to substitute the Department of Homeland Security for the Department of Transportation. P.L. 107-296; 116 Stat. 2314; November 25, 2002.

<sup>122</sup> Morriss, Andrew, “Law Profs Throw SALT on 9/11 Wounds,” *Wall Street Journal*, November 12, 2001.

While some have viewed these efforts as intended to harass recruiters, others point out that these efforts and others are merely supporting campus non-discrimination policies.

On February 2, 2005, the House of Representatives voted in favor of H.Con.Res. 36 (327-84):

*Resolved by the House of Representatives (the Senate concurring), That —*

(1) Congress remains committed to the achievement of military personnel readiness through vigorous application of the requirements set forth in section 983 of title 10, United States Code, relating to equal access for military recruiters at installations of higher education, and will explore all options necessary to maintain this commitment, including the powers vested under article I, section 9, of the Constitution;<sup>123</sup>

(2) it is the sense of Congress that the executive branch should aggressively continue to pursue measures to challenge any decision impeding or prohibiting the operation of section 983 of title 10, United States Code; and

(3) Congress encourages the executive branch to follow the doctrine of non-acquiescence and not find a decision affecting one jurisdiction to be binding on other jurisdictions.<sup>124</sup>

**Supreme Court Review of the Solomon Amendment.** Under the Solomon Amendment, as noted, specified federal funds may not be provided to an “institution of higher education,” or “subelement” of such an institution, if the institution or subelement “has a policy or practice” that “either prohibits, or in effect prevents” military recruiters from gaining access to campuses or students “in a manner that is at least equal in quality and scope to the access to campuses and to students that is provided to any other employer.”<sup>125</sup> The Solomon Amendment applies to all institutions of higher education except ones with “a longstanding policy of pacifism based on historical religious affiliation.”<sup>126</sup> The act governs all funds made available through the DOD, the Department of Homeland Security, the Department of Health and Human Services, the Central Intelligence Agency, and other enumerated agencies.<sup>127</sup> It does not apply to funds provided to educational institutions or individuals “solely for student financial assistance, related administrative costs, or costs associated with attendance.”<sup>128</sup>

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<sup>123</sup> This may refer to Art. I, Section 8 of the Constitution.

<sup>124</sup> H.Con.Res. 36; Rep. Mike Rogers, February 1, 2005.

<sup>125</sup> 10 U.S.C. § 983(b)(1).

<sup>126</sup> Id. at § 983(c)(2).

<sup>127</sup> Id. at § 983(d)(1).

<sup>128</sup> Id. at § 983(d)(2).

In *Rumsfeld v. Forum for Academic and Institutional Rights (FAIR)*,<sup>129</sup> the Supreme Court unanimously rejected arguments by the Forum for Academic and Individual Rights, an association of law schools and professors, that it was unconstitutional for the federal government to condition university funding on compliance with the Solomon Amendment. Previously, a divided Third Circuit panel had agreed that the Solomon Amendment had compelled the law schools to convey messages of support for the military's policy of discriminatory exclusion, but the Court reversed the lower court's decision. The appellate panel had relied in part on a 2000 Supreme Court decision, *Dale v. Boy Scouts of America*<sup>130</sup> — which held that the Boy Scouts have an expressive right to exclude gay scoutmasters — for the converse proposition that the nation's universities have a right to “expressive association” in opposing military recruiters where there is a conflict between the DOD stance on sexual orientation and academic nondiscrimination policies.

In the case, the universities objected that because of the military's “don't ask, don't tell” policy, permitting recruiters on campus would undermine their policies against discrimination and that the federal law therefore violated their free speech rights. FAIR's core argument was that the Solomon Amendment amounts to an “unconstitutional condition” because it exacts a penalty for the law schools' engaging in First Amendment expressive conduct. While the government may impose reasonable conditions on the receipt of federal largesse, respondents contended, it “cannot attach strings to a benefit to ‘produce a result which [it] could not command directly.’”<sup>131</sup> When a law school violates the equal access rule, the government threatens loss of funding not only to the law school but to the entire university. Thus, they claimed, requiring equal access forces law schools to “propagate, accommodate, [or] subsidize an unwanted message.”<sup>132</sup>

The government countered by pointing to the plenary powers of Congress to “raise and support armies” and to “provide for the common Defence.”<sup>133</sup> The Third Circuit decision could “undermine military recruitment in a time of war,” it argued, while neither the law schools' right to free speech nor to expressive association were infringed by allowing military recruiters to conduct on campus interviews.<sup>134</sup> In particular, the Solicitor General distinguished the *Boy Scouts* case in that “recruiters are not a part of the institution itself and do not become members through their recruiting activities.”<sup>135</sup> Recruiters speak for their employers, the brief claims, not the schools, unlike the scoutmaster who represented the Boy Scouts in the earlier case. Moreover, the government emphasized that the law schools remain free to protest the military's message as long as they give recruiters equal access. If the schools choose not to allow equal access, it was argued, they simply forego funding.

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<sup>129</sup> 126 S. Ct. 1297 (U.S. 2006).

<sup>130</sup> 530 U.S. 640 (2000).

<sup>131</sup> Brief for Respondents, at p. 36, *Rumsfeld v. FAIR*, No. 04-1152 (filed 9-21-2005).

<sup>132</sup> *Id.* at pp 11-13.

<sup>133</sup> U.S. Const., Art. I, § 8, Cls 1, 12 and 13.

<sup>134</sup> Brief for the Petitioners, at 2, *Rumsfeld v. FAIR*, No. 04-1152 (filed July 2005).

<sup>135</sup> *Id.* at 19.



In general, the Court was receptive to each of the government’s arguments. First, the Court was unmoved by FAIR’s theory of unconstitutional conditions, largely because of fatal flaws they found in the law schools’ First Amendment analysis. This unsettled area of the law, however, may be further obscured by the observation that indirect compulsion by Congress via “a funding condition cannot be unconstitutional if it could be constitutionally imposed directly.” Whether this implies that Congress may even legislate access for military recruiters (to college campuses and elsewhere), regardless of federal funding or federal policy with respect to all other recruiters, may be a fertile subject for future legal debates.

On the question of whether the Solomon Amendment impairs the First Amendment rights of the objecting institutions, the Court’s opinion rejected all three arguments put forward by the law schools. First, while expressive conduct may be subject to First Amendment scrutiny,

there is nothing in this case approaching a Government-mandated pledge or motto that the school must endorse . . . [and] . . . ‘it has never been deemed an abridgement of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language.’<sup>136</sup>

Otherwise, practices having nothing to do with government dictating the content of speech — expressing disapproval of the Internal Revenue Service by refusing to pay taxes, for example — would enjoy First Amendment protection. Requiring law schools to facilitate recruiters’ access by sending out e-mails and scheduling military visits were deemed “a far cry from the compelled speech” found in earlier cases. “Accommodating the military’s message does not affect the law school’s speech, because the schools are not speaking when they host interviews and recruiting receptions.”<sup>137</sup> Nor, the opinion finds, would they be endorsing, or be seen as endorsing, the military policies to which they object. “A law school’s decision to allow recruiters on campus is not inherently expressive.”<sup>138</sup>

Secondly, the Court distinguished the doctrine of “expressive association,” as applied by *Dale v. Boy Scouts of America*.<sup>139</sup> “If the government were free to restrict individuals’ ability to join together and speak, it could essentially silence views that the First Amendment is intended to protect.” Such was not the situation here, however, according to the Court. Merely allowing recruiters on campus and providing them with the same services as other recruiters did not require the schools to “associate” with them. Nor did it prevent their expressing opposition to military policies in other ways. They could put up signs, they could picket, they could make

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<sup>136</sup> *Rumsfeld v. Forum for Academic & Inst. Rights, Inc.*, 126 S. Ct. 1297, 1308 (2006) (citing *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943)(voiding state law requiring school children to recite Pledge of Allegiance and to salute the flag); *Wooley v. Maynard*, 430 U.S. 705, 717 (1977)(holding unconstitutional New Hampshire law requiring state motorist to display state motto — “Live Free or Die” — on their license plates).

<sup>137</sup> *Id.* at 1309.

<sup>138</sup> *Id.* at 1310.

<sup>139</sup> 530 U.S. 640 (2000).

speeches, and they could hold forums of protest. Moreover, unlike the *Boy Scouts* case, no group membership practices or affiliations were implicated by the Solomon Amendment. Recruiters do not become components of the law schools — like the Scout leaders there — but “are, by definition, outsiders who come onto campus for [a] limited purpose” and “not to become members of the school’s expressive association.”<sup>140</sup>

Finally, the Court recognized as “[beyond] dispute” that Congress has “broad and sweeping” powers over military manpower and personnel matters — “includ[ing] the authority to require campus access for military recruiters” — the exercise of which is generally entitled to judicial “deference.” Accordingly, in rejecting FAIR’s position, the Court concluded:

The issue is not whether other means of raising an army and providing for a Navy might be adequate . . . (regulations are not ‘invalid’ simply because there is some other imaginable alternative that might be less burdensome on speech). That is a judgment for Congress, not the courts . . . It suffices that the means chosen by Congress add to the effectiveness of military recruitment.<sup>141</sup>

## Homosexuals and Marriages

Under current law, marriages are covered under the domestic relations laws of the various states. Massachusetts and California are currently the only states to allow same sex marriages.<sup>142</sup> However, Title 10, U.S.C. sec. 654(b)(3) requires the separation of service members who have married or attempted to marry a same-sex partner. Some have speculated that legal challenges to this prohibition on same-sex marriage should be anticipated. Others wonder about the ultimate resolution of a case in which individuals who have served and retired from the services then marry a same-sex partner, and then make claims for service-related benefits, such as benefits under the Survivor Benefits Plan. Currently, the Defense of Marriage Act<sup>143</sup> prohibits extending federal benefits to same-sex partners, and the U.S. Supreme Court has not ruled on the constitutionality of this law. What effect the changing legal landscape regarding same-sex marriage will have on military service or benefits is not clear at this time. According to DOD, it has not encountered a situation in which a retiree married to a same-sex partner has sought benefits for his or her partner.

## Foreign Military Experiences

A number of foreign militaries, notably those of Great Britain, have voluntarily changed or been ordered (by court decree, for example) to change their policies with regard to homosexuals. In the case of Great Britain, the ban on homosexuals serving was lifted in January 2000, following a European Court of Human Rights ruling that the ban was unlawful. The press has reported that “A confidential Ministry of

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<sup>140</sup> Forum for Academic & Inst. Rights, Inc., 126 S. Ct. at 1312.

<sup>141</sup> Id. at 1311.

<sup>142</sup> CRS Report RL31994, *Same-Sex Marriages: Legal Issues*, by Alison M. Smith.

<sup>143</sup> P.L. 104-199; 110 Stat. 2419; September 21, 1996.

Defense review states that the introduction of gays has had no adverse effects on the operational effectiveness of the forces.”<sup>144</sup> Australia voluntarily lifted its ban by government decree in November 1992 seemingly without problems.<sup>145</sup> Conversely, in July 2003, Russia lifted its ban, but the head of the Defense Ministry’s health commission, Major General Valery Kulikov said, “I would not advise such persons to publicize their sexual orientation. In the army they are not liked and will probably be beaten.”<sup>146</sup>

Foreign military experiences were given substantial consideration by the U.S. Senate in its 1993 hearings on homosexuality and the military. Although information concerning these military experiences may prove useful to U.S. policy makers, their relevance is not entirely clear. During the hearings, Prof. Charles Moskos stated:

Comparative analysis can shed light on some of the policy issues with regards to gays and straights in the armed forces. Due attention must be paid to both points of difference and similarity. For sure, certain lessons can be drawn from the experience with gays in the militaries of other countries. But inasmuch as the United States has the most formidable military force in the world, it could also be argued that such countries might draw lessons from the United States.<sup>147</sup>

Indeed, there are problems in considering foreign military comparisons. For example, international variations in the definition of “homosexual” or “orientation” make comparisons difficult. Additionally, military recruiting structures (e.g., draft versus volunteers), force structures (certain foreign armed forces personnel are represented by unions), roles and missions (home guard, para-military forces, or forces subject to international deployment) suggest limits on the relevance of any such foreign comparison to actually making policy. As noted in the hearings, many countries maintain a distinction between the stated policies and the policy in practice. In addition, as noted during the hearings, “A look at official [foreign] regulations and statements rarely captures the realities of how persons of different sexual orientations are treated in their respective militaries.” Furthermore, certain countries allow homosexuals to serve but do so in a manner that would arguably not be legally allowed in the United States. For example, some countries allow open homosexuals to serve, but they can “opt out” of such service if they choose (e.g., Netherlands). Other countries allow homosexuals to serve, but their promotion opportunities may be limited (e.g., Germany). Some countries have religious and/or other principles that prevent openly homosexual individuals from serving (e.g., Saudi Arabia, Iran).

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<sup>144</sup> Summerskill, Ben, “Brits’ Lifting Of Military Ban On Gays Not Found To Hurt Morale,” *San Diego Union-Tribune*, December 25, 2000.

<sup>145</sup> Branigin, William, “Australian Military Adjusting To Policy Allowing Gay Troops,” *Washington Post*, March 30, 1993: 6.

<sup>146</sup> “Army Welcomes Gays,” *Moscow Times*, November 8, 2003: 4.

<sup>147</sup> U.S. Congress. Senate. Committee on Armed Services, Hearings, Policy Concerning Homosexuality in the Armed Forces, Comments by Prof. Charles Moskos, Senate Hearings 103-845, 103rd Cong., 2nd Sess., 1994: 352.