

“DON’T ASK, DON’T TELL:” HAS THE POLICY MET ITS GOALS?

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I believe the policy I am announcing today represents a real step forward The policy . . . is, in my judgment, the right thing to do and the best way to do it We now have a policy that is a substantial advance over the one in place when I took office Thus, on the grounds of both principle and practicality, this is a major step forward.

~ President William J. Clinton, July 19, 1993²

[I]t is clear that the policy, as implemented, is not working.

~ President William J. Clinton, August 12, 2003³

In the short run, I got the worst of both worlds — I lost the fight, and the gay community was highly critical of me for the compromise

~ President William J. Clinton, excerpt from My Life, 2004⁴

INTRODUCTION

Why is President Clinton’s hopeful new policy regarding homosexuals in the military essentially deemed a failure today? Has the policy—hailed at the time as “the right thing to do” and “a major step forward”⁵—gone completely wrong? Did it fail to meet its goals?⁶ This

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² William J. Clinton, *President’s Remarks Announcing the New Policy on Gays and Lesbians in the Military*, 29 Wkly. Comp. Pres. Docs. 1369-72 (July 19, 1993) [hereinafter *President’s Remarks*].

³ Ltr. from William Jefferson Clinton, former Pres., U.S., to the Servicemembers Leg. Def. Network (SLDN), *Comments on the Military’s Don’t Ask Don’t Tell Policy*, (Aug. 12, 2003) (copy on file with SLDN and published on their website at www.sldn.org).

⁴ William Jefferson Clinton, *My Life* 486 (Vintage Books 2004).

⁵ *President’s Remarks*, *supra* n. 2, at 1369-72.

Article will use the latest data to argue otherwise.

President Clinton and the drafters⁷ of “Don’t Ask, Don’t Tell”—in colloquial parlance⁸—carefully crafted the policy with two express purposes. First, they envisioned that homosexuals could honorably serve in the military without fear of discharge because of their homosexual orientation.⁹ In essence, the military would only separate members for homosexual *conduct*, not orientation. Second, its drafters sought to discourage harassment of homosexual service members due to their sexual orientation.¹⁰ For instance, the policy placed more stringent limits on when a commander could investigate alleged homosexual conduct.¹¹

But today, President Clinton and most gay rights advocates consider the policy a dismal failure—in some respects even worse than the one in place before it.¹² Yet the most recent data suggests the policy, as refined, is largely working as originally envisioned.

Section I of this Article will briefly recount the political compromise that led to the “Don’t Ask, Don’t Tell” policy, as well as the

⁶ This Article will not advocate a position on whether gays, lesbians, or bisexuals should be permitted to serve in the United States Armed Forces. Instead, it will objectively evaluate the “Don’t Ask, Don’t Tell” policy using the stated goals at the time President Clinton implemented it. This Article will also not address the financial costs involved in discharging personnel for homosexual conduct, since those numbers are not accurately known and those concerns were not part of the President’s stated goals for the policy. See *Military Personnel – Financial Costs and Loss of Critical Skills Due to DoD’s Homosexual Conduct Policy Cannot Be Completely Estimated*, GAO-05-299 (U.S. Gen. Acctg. Off. Feb. 23, 2005) [hereinafter 2005 GAO Report].

⁷ President Clinton has acknowledged that Sociologist and Professor Charles Moskos is the primary author of “Don’t Ask, Don’t Tell.” The President has referred to Mr. Moskos by name in several of his remarks regarding the formation of the policy. See Clinton, *supra* n. 4, at 484; *President’s Remarks*, *supra* n. 2, at 1371; see also Charles Moskos & Michelle M. Benecke, *Suffering in Silence*, Wash. Post A23 (July 18, 2000) (identifying Moskos as “the author” of the policy).

⁸ See Les Aspin & Jamie Gorelick, News Conf., *Regarding the Regulations on Homosexual Conduct in the Military* (Dec. 22, 1993) [hereinafter *DoD News Conference*] (available at <http://dont.stanford.edu/regulations/NewsConf.pdf>) (referring to the new policy as “Don’t ask; Don’t tell; Don’t pursue”).

⁹ President Clinton proclaimed that the new policy would “provide[] greater protection to those who happen to be homosexual and want to serve their country honorably in uniform, . . . [S]ervice men and women will be judged based on their conduct, not their sexual orientation.” *President’s Remarks*, *supra* n. 2, at 1370, 1372.

¹⁰ President Clinton argued, “[T]his is an end to witch hunts that spend millions of taxpayer dollars to ferret out individuals who have served their country well. Improper conduct, on or off base, should remain grounds for discharge. But we will proceed with an even hand against everyone, regardless of sexual orientation.” *Id.* at 1372. See also *White House Background Briefing Concerning the Issue of Gays in the Military* (July 16, 1993) [hereinafter *Background Briefing*] (available at <http://dont.stanford.edu/regulations/briefing.pdf>) (calling the “most significant advance” of the new policy “no witch hunts, no pursuit policy”).

¹¹ See *infra* notes 100 to 104 and accompanying text.

¹² See Janet E. Halley, *Don’t: A Reader’s Guide to the Military’s Anti-Gay Policy* 1 (Duke U. Press 1999) (arguing “The new military policy is *much, much worse* than its predecessor”); see also Diane H. Mazur, *Word Games, War Games*, 98 Mich. L. Rev. 1590, 1591 (2000) (agreeing that “the climate for gay service members has become much, much worse since the 1993 debate,” but blaming this change for the worse on the notion that the military now has “a greater institutional commitment to enforcing the exclusionary policy [of gays.]”); SLDN, *Conduct Unbecoming: The Tenth Annual Report on “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass”* 16, http://www.sldn.org/binary-data/SLDN_ARTICLES/pdf_file/1411.pdf (accessed Sept. 9, 2004) (stating “It quickly became clear that far from a liberalization of the prior regulations, ‘Don’t Ask, Don’t Tell’ was a ban on gay service of the most insidious kind”).

justification behind the exclusion of practicing homosexuals. Section II will explore how the policy has succeeded in allowing homosexuals to serve without fear of discharge based on sexual orientation. It will consider the newest statistics and practices not previously evaluated in the scholarly literature. Section III will examine how the policy has allowed homosexuals to serve without pursuit and harassment, and will suggest areas for improvement. Finally, Section IV will consider the future of the policy in light of recent judicial pronouncements.

I. FORMING PRESIDENT CLINTON’S POLICY: FROM NAÏVE IDEALISM TO STATUTORY LAW

A. *Military Resistance to President Clinton’s Desire to End the Ban*

During autumn of 1991, at Harvard University, then-candidate William Clinton vowed that, as president, he would issue an executive order to overturn the military’s policy excluding homosexuals, just as President Truman had done to abolish racial segregation.¹³ Candidate Clinton campaigned on this issue throughout 1992¹⁴ and, following his election, showed no signs of backing off this campaign promise.¹⁵ Following his inauguration, however, President Clinton met with the Joint Chiefs of Staff,¹⁶ at their behest, to hear concerns about overturning the ban.¹⁷ As a result of this meeting, the President postponed lifting the ban for six months to allow senior military leadership time to offer their views.¹⁸

Resistance to the President’s plan stemmed from a longstanding

¹³ See Craig A. Rimmerman, *Promise Unfulfilled: Clinton’s Failure to Overturn the Military Ban on Lesbians and Gays*, Gay Rights, Military Wrongs 111, 113 (Garland Publishing 1996); see also Tom Morganthau, Douglas Waller, Daniel Glick, Mark Miller, & John Barry, *Gays and the Military: How Far Will Clinton Go?*, Newsweek 52 (Feb. 1, 1993).

¹⁴ *Where the Candidates Stand on the Issues*, Associated Press, Oct. 31, 1992 (quoting Candidate Clinton as saying, “I support repeal of the ban on gays and lesbians serving in the United States armed forces, in accord with a Pentagon study which stated that allowing gays and lesbians to serve would have no detrimental impact on our military strength”).

¹⁵ *Evans and Novak*, (Cable News Network (CNN) television broadcast, Dec. 5, 1992, transcript at 6) (quoting George Stephanopoulos, President-elect Clinton’s communications director: “Governor Clinton will fulfill his commitment, the commitment he made in his campaign, to end discrimination against homosexuals, against gays, in the military . . .”). See also Cragg Hines, *Clinton Renews Promise to Allow Gays in Military*, Houston Chron. A1 (Nov. 12, 1992) (quoting Clinton as promising to fulfill his campaign promise to allow homosexuals to serve in the military).

¹⁶ “The Joint Chiefs of Staff [JCS] consist of the Chairman, the Vice Chairman, the Chief of Staff of the Army, the Chief of Naval Operations, the Chief of Staff of the Air Force, and the Commandant of the Marine Corps The Chairman of the Joint Chiefs of Staff is the principal military advis[or] to the President, Secretary of Defense, and the National Security Council (NSC)” See Joint Chiefs of Staff, *Chairman Joint Chiefs of Staff*, <http://www.dtic.mil/jcs/> (accessed Sept. 9, 2005). The Joint Chiefs of Staff at the time of this meeting with the President consisted of Army General Colin Powell, Chairman of the Joint Chiefs of Staff, Admiral David Jeremiah, Vice Chairman of the Joint Chiefs of Staff, General Gordon Sullivan, Chief of Staff of the Army, Admiral Frank Kelso, Chief of Naval Operations, General Merrill A. McPeak, Chief of Staff of the Air Force, and General Carl E. Mundy, Jr., Commandant of the Marine Corps. See *id.* (listing prior JCS members).

¹⁷ See Clinton, *supra* n. 4, at 485.

¹⁸ See *id.*

military belief that openly gay members should be excluded from its ranks.¹⁹ Military leaders have articulated three reasons to exclude homosexuals.²⁰ The first argument—mental illness—fell by the wayside in the 1970s when the American Psychological Association began to modify its characterization of homosexuality as a mental disorder.²¹ The second rationale—national security—depreciated in the 1980s after reports found little basis for this security concern.²² The third justification, however, remained: the impact on morale, good order, and discipline.²³ The most compelling facet of this argument maintains that allowing openly gay members to serve will harm the armed forces in light of the forced intimacy and lack of privacy that permeate military life.²⁴

A fourth rationale—not often articulated by military leaders—

¹⁹ See Daniel R. Plane, *Comments: Don't Mess with "Don't Ask, Don't Tell,"* 79 Marq. L. Rev. 377, 381-84 (1995) (documenting the history of the ban from the Continental Army through 1993).

²⁰ Robin Ingli, *Gays in the Military: A Policy Analysis of "Don't Ask, Don't Tell" and the Solomon Amendment*, 20 Hamline J. Pub. L. & Policy 89, 89-93 (1998) (analyzing various reasons given by military leaders to exclude gays).

²¹ See *id.* at 91. The APA first backed away from classifying homosexuality as a mental disorder in its Diagnostic and Statistical Manual (DSM) II in 1973, eventually dropping any classification altogether in 1987 upon release of the DSM IV. See *id.* at 91.

²² See SLDN, *supra* n. 12, at 6. Critics of the policy cite four key reports to demonstrate the lack of evidence, especially regarding the idea that homosexuals are greater security risks: 1) the Report of the Board of Appointed to Prepare and Submit recommendations to the Secretary of the Navy for the Revision of Policies, Procedures and Directives Dealing with Homosexuality ["the Crittenden Report"] (Mar. 15, 1957); 2) Theodore R. Sarbin, Ph.D. & Kenneth E. Karols, M.D., Ph.D., *Defense Personnel Security Research and Education Center, Nonconforming Sexual Orientation and Military Suitability* ["the PERSEREC Report"] (1988); 3) M. McDaniel, *Defense Personnel Security Research and Education Center, Preservice Adjustment of Homosexual and Heterosexual Military Accessions: Implications for Security Clearance Suitability* (1999); 4) RAND Corp., *Sexual Orientation and U.S. Military Personnel Policy, Options and Assessment* (1993). It is notable that the Crittenden Report never questioned the underlying premise of the DoD policy. See *DoD's Policy on Homosexuality*, GAO/NSIAD-92-98 30-31 (U.S. Gen. Acctg. Off. June 12, 1992) [hereinafter 1992 GAO Report] (discussing the report). In fact, the Crittenden Report found no data to prove homosexuals were *more* of a security risk "than those engaged in other unsocial or immoral activity." *Id.* The report still found, however, that "the propensities and vulnerabilities associated with homosexual activity, . . . do provide serious security implications." *Id.* Similarly, the PERSEREC Report, finalized in 1991, found no evidence that would support the notion that homosexuals are a greater security risk. See *id.* at 33-34. PERSEREC went beyond its mandate and also commented on the compatibility of homosexuals in the military service, criticizing the premise of incompatibility. See *id.* In the wake of this report, DoD officials backed away from the notion that security risk is a major factor in the exclusion of homosexuals from military service. See *id.* at 35 (quoting 1991 statements of the Secretary of Defense and the Chairman of the Joint Chiefs of Staff).

²³ Robin Ingli notes two justifications for this argument 1) concerns with reaction to openly gay service members from those who believe such a lifestyle is immoral; and, 2) the possibility of cliques forming in military units based on one's sexual orientation, resulting in "subcultures that could lead to disruption of unit functioning due to favoritism . . ." Ingli, *supra* n. 20, at 92.

²⁴ See Plane, *supra* n. 19, at 379. The reality of military life is that "vast numbers of service members reside in open-bay barracks or in cramped living areas on board ships or submarines. Privacy, . . . is simply inconsistent with the exigencies of military duty, . . . [S]ervice members have little or no choice in their duty station . . ." *Id.* There are also real issues such as gender segregation and same-sex couples occupying the same barrack room, in violation of the policy forbidding heterosexual couples from this rooming situation. *Id.* at 386-87. Moreover, some high-risk homosexual activities could compromise the required "extremely high state of physical readiness" in the military. *Id.* at 388-89. See also Charles Moskos, Editorial, "Don't Ask, Don't Tell: 10 years, 2 views; The Law Works Fine – and Here's Why," A.F. Times 62 (Oct. 27, 2003) (stating "Nowhere in our society are the sexes forced to undress in front of each other. Most women dislike being stripped of privacy before the opposite sex. Similarly, most heterosexual men dislike being exposed to male homosexuals.").

emphasizes the “general societal commitment that homosexuality is a morally objectionable lifestyle” that should not be “encouraged” by the military.²⁵ In 1993, Americans supported that societal commitment; but public opinion is shifting.²⁶ Still, despite Department of Defense (DoD) acknowledgments that many discharged homosexuals “have exemplary records and have held important positions within their units,”²⁷ the policy of excluding openly gay members continues to find strong support within the armed forces. In a 2005 poll only 25 percent of surveyed service members favored allowing openly gay service members in their ranks—65 percent opposed such a change.²⁸

B. *Congressional Resistance Leads to the Codification of “Don’t Ask, Don’t Tell”*

Many Democrats and Republicans in Congress reacted to President Clinton’s plan by threatening to codify the ban as law—an action which would have destroyed any hope of modifying the ban.²⁹ So the President compromised. He ordered Secretary of Defense Les Aspin to work with the Joint Chiefs of Staff on an arrangement that could please the military, Congress, and the President’s constituents who wanted the ban lifted.³⁰ This compromise became “Don’t Ask, Don’t Tell.”³¹ Whereas *candidate* Clinton had hoped to permit gays to serve openly, *President* Clinton settled for simply preventing gays from being excluded from the armed forces because of status alone.³² The President’s modified stance sought to allow homosexuals to serve in the military “unless their conduct disqualifies them from doing so.”³³ The DoD implemented the new policy on July 19, 1993.³⁴

²⁵ Gary L. Young, Jr., *Symposium: “Don’t Ask Don’t Tell: Gays in the Military the Price of Public Endorsement:” A Reply to Mr. Marosson*, 64 Marq. L. Rev. 99, 107 (1995) (reframing the debate to focus on this societal interest but, noting that practical difficulties of incorporating homosexuals into military life can be worked out).

²⁶ David F. Burrelli & Charles Dale, *Homosexuals and U.S. Military Policy: Current Issues*, 6-7 (Cong. Research Serv. Rpt. for Cong. 2005) (citing a July 1993 poll that showed 40% of those surveyed in favor of and 52% opposed to allowing openly gay people to serve in the military, compared with a November 2004 poll that showed 62% in favor and 32% opposed).

²⁷ 1992 GAO Report, *supra* n. 22, at 38. *But see* Moskos, *supra* n. 24, at 62 (acknowledging that gays serving discreetly in the military have proven to be successful, which is “the point—they cause no ill feelings precisely because they’re discreet.”).

²⁸ Burrelli & Dale, *supra* n. 26, at 6-7.

²⁹ *See* Clinton, *supra* n. 4, at 484; *See also* Kenneth T. Walsh, Matthew Cooper, Steven V. Roberts, & Bruce B. Auster, *Why Clinton Fights for Gays*, U.S. News & World Rpt. 36 (Feb. 8, 1993) (discussing the political resistance to President Clinton’s hope to change the military’s policy).

³⁰ *See* Clinton, *supra* n. 4, at 485; *see also* *Background Briefing*, *supra* n. 10, at 16.

³¹ *See DoD News Conference*, *supra* n. 8, at 4 (explaining the development of the new policy). There is no doubt that the new policy was a compromise that did not entirely please the President. When presenting his new policy, President Clinton acknowledged, “[This policy] is not a perfect solution. It is not identical with some of my own goals. And it certainly will not please everyone, perhaps not anyone, and clearly not those who hold the most adamant opinions on either side of the issue.” *President’s Remarks*, *supra* n. 2, at 1372.

³² *See* President’s News Conference, 29 Wkly. Comp. Pres. Docs. 108, 109 (Jan. 29, 1993).

³³ *Id.* at 109. The Clinton Administration referred to this as a *very conduct-based policy*. *DoD News Conference*, *supra* n. 8, at 4.

³⁴ *See* Memo. from Les Aspin, Sec. of Def., to the Sec. of the Army, Sec. of the Navy, Sec. of the A.F. and Chairman, Jt. Chiefs of Staff, *Policy on Homosexual Conduct in the Armed Forces* (July 19, 1993) [hereinafter *DoD Memo*]. DoD-wide instructions and directives later set out specific guidance on the

The policy stated, “A person’s sexual orientation is considered a personal and private matter, and is not a bar to service entry or continued service unless manifested by homosexual conduct”³⁵

On November 30, 1993, Congress codified the “Don’t Ask, Don’t Tell” policy as law, making fifteen key findings.³⁶ Invoking its constitutional authority to regulate the military,³⁷ Congress emphasized the military’s purpose to “prepare for and to prevail in combat” and the requirement for “high morale, good order and discipline, and unit cohesion.”³⁸ Acknowledging the fundamental difference between civilian and military life, Congress found that service members must “involuntarily” live and work in “forced intimacy with little or no privacy.”³⁹ Congress then noted the “longstanding” prohibition against homosexual conduct in military law.⁴⁰ Finally, it found that those who engage in such conduct—or “demonstrate a propensity or intent to engage in” it—“create an unacceptable risk” to the standards that are “the essence of military

policy, investigations into homosexual conduct, and what conduct or statements constituted a violation of the policy. *See Investigations of Sexual Misconduct by the Defense Criminal Investigative Organizations and Other DoD Law Enforcement Organizations*, Dept. of Def. Instr. (DoDI) 5505.8, para. 4 (June 6, 2000) (setting out the policy that criminal investigative services “shall not conduct an investigation solely to determine whether a Servicemember is a heterosexual, a homosexual, or a bisexual.”); *Enlisted Administrative Separations*, Dept. of Def. Directive (DoDD) 1332.14, para. E3.A4 (Dec. 21, 1993) and *Separation Procedures for Regular and Reserve Commissioned Officers*, DoDI 1332.40, para. E8 (Sep. 16, 1997) (outlining guidelines for fact-finding inquiries into homosexual conduct and limiting the initiation of such investigations to the member’s commander). Each service passed their own regulations to uniquely implement the DoD guidance. *See Army Command Policy*, Army Regulation (AR) 600-20, para. 4-19 (May 13, 2002) (covering general Army policies on homosexual conduct); *Active Duty Enlisted Administrative Separations*, AR 635-200, ch. 15 (July 15, 2004) (covering Army enlisted separations); *Officer Transfers and Discharges*, AR 600-8-24, para. 4-22 (Feb. 24, 2005) (covering Army officer discharges); *Administrative Discharge Procedures for Commissioned Officers*, Air Force Instruction (AFI) 36-3206, attch. 2 (June 9, 2004) (covering investigation and discharge of officer homosexual conduct cases); *Separating Commissioned Officers*, AFI 36-3207, para. 3.16.1.4 (June 9, 2004) (covering officer separations); *Administrative Separation of Airmen*, AFI 36-3208, attch. 4 (July 9, 2004) (covering enlisted homosexual investigations and discharges); *Administrative Separation of Officers*, Sec. of the Navy Instr. (SECNAVINST) 1920.6B, encl. 3(c) (Dec. 13, 1999) (covering officer discharges); *Enlisted Administrative Separations*, SECNAVINST 1910.4B, encl. 1H (May 29, 1996) (covering enlisted discharges); *Marine Corps Separation Manual* (MARCORSEPMAN) MCO P1900.16.E, para. 4103(3) (covering officer discharges) and para. 6207 (covering enlisted discharges) (Apr. 10, 2000) (covering homosexual conduct separations); *Coast Guard Personnel Manual*, COMDTINST M1000.6, Ch. 12-E (Mar. 8, 2005) (covering discharges of enlisted or officers).

³⁵ *Qualification Standards for Enlistment, Appointment, and Induction*, DoDD 1304.26, para. E1.2.8.1 (Dec. 21, 1993).

³⁶ *See* 10 U.S.C. § 654(a)(1)–(15) (2000). Congress investigated the issue fully before making these findings. For instance, the Senate Armed Services Committee staff “interviewed thousands of military personnel on 21 bases. In six hearings, including field hearings, talking with soldiers, sailors, airmen where they live and work, thousands of pages of testimony were collected.” 139 Cong. Rec. S7603 (daily ed. June 22, 1993) (statement of Sen. Dan Coats (R-IN)).

³⁷ *See* 10 U.S.C. § 654(a)(1)–(3) (2000) (invoking Article I, Section 8’s delegation to “raise and support armies, provide and maintain a Navy, and make rules for the government and regulation of the land and naval forces.”).

³⁸ *Id.* at § 654(a)(4)–(7).

³⁹ *Id.* at § 654(a)(8)–(12). During Congress’s investigation, one sailor clearly explained the forced intimacy inherent in military life. “On one submarine we were on, some of the torpedoes were removed, thanks to the demise of the cold war, and some of that space was used for sleeping area Sailors had to crawl over each other to enter their bunk and to leave their bunk. They were then required to share a shower, 63 to share 2 showers. Sexual privacy is virtually nonexistent.” 139 Cong. Rec. S7605 (daily ed. June 22, 1993) (statement of Sen. Dan Coats (R-IN)).

⁴⁰ 10 U.S.C. § 654(a)(13) (2000).

capability.”⁴¹

Based on its findings, Congress mandated three grounds for the separation of homosexuals. First, a service member “shall” be discharged if he or she engages in, attempts to engage in, or solicits “a homosexual act.”⁴² This discharge can be avoided *only* if the member demonstrates that these actions 1) were not his or her “usual and customary behavior;” 2) are “unlikely to recur;” and 3) were not accomplished through “force, coercion, or intimidation.”⁴³ The member must also show that his or her “continued presence” is consistent with the military’s interests and that he or she “does not have a propensity or intent to engage in homosexual acts.”⁴⁴ Second, Congress required that a member be discharged for stating “that he or she is a homosexual or bisexual,” unless he or she can also demonstrate “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.”⁴⁵ Third, a member must be discharged for marrying or attempting to marry someone of the same sex.⁴⁶

Congress provided flexibility, however, by allowing retention of members who violated the policy simply to escape military service or whose separation “would not be in the best interest of the armed forces.”⁴⁷ To ensure dissemination of the policy, Congress required that it be included on enlistment and appointment documents and briefed to all service members upon entry into the service and “periodically thereafter.”⁴⁸

II. “DON’T ASK, DON’T TELL” HAS ALLOWED HOMOSEXUALS TO SERVE WITHOUT FEAR OF DISCHARGE DUE TO THEIR SEXUAL ORIENTATION

A. “Don’t Ask” and “Don’t Tell”

The most striking difference between President Clinton’s “Don’t Ask, Don’t Tell” policy and previous DoD policies is the elimination of any questions related to the sexual orientation of those applying for or entering the armed forces—“Don’t Ask.”⁴⁹ The DoD codified “Don’t Ask” in a

⁴¹ *Id.* at § 654(a)(14)-(15).

⁴² *Id.* at § 654(b)(1). Congress defined a “homosexual act” to include “any bodily contact . . . for the purpose of satisfying sexual desires; and any bodily contact which a reasonable person would understand to demonstrate a propensity or intent to engage in an act . . .” *Id.* at § 654(f)(3).

⁴³ *Id.* at § 654(b)(1)(A)-(C).

⁴⁴ *Id.* at § 654(b)(1)(D)-(E).

⁴⁵ *Id.* at § 654(b)(2). The DoD clarified what it meant by the term propensity: “Propensity to engage in homosexual acts means more than an abstract preference or desire to engage in homosexual acts; it indicates a likelihood that a person engages in or will engage in homosexual acts.” *Separation of Regular and Reserve Commissioned Officers*, Dept. of Def. Dir. (DoDD) 1332.30, para. 2-2(C)(1)(b) (Mar. 14, 1997).

⁴⁶ *See id.* at § 654(b)(3).

⁴⁷ *Id.* at § 654(e)(2).

⁴⁸ *Id.* at § 654(c)-(d).

⁴⁹ *See* 1992 GAO Report, *supra* n. 22, at 38 (providing a concise summary of the Department of Defense’s previous policy on homosexual conduct). In brief, the previous policy—formed in 1982—partly stated, “Homosexuality is incompatible with military service. The presence in the military environment of persons who engage in homosexual conduct or who, by their statements, demonstrate a

directive, prohibiting the armed forces from asking applicants “whether they are heterosexual, homosexual or bisexual” and whether “they have engaged in homosexual conduct”⁵⁰ Congress warily supported “Don’t Ask” when it codified the policy as law.⁵¹

The “Don’t Tell” aspect of the policy requires service members to refrain from revealing their homosexual or bisexual orientations,⁵² including statements as simple as: I am gay.⁵³ The old DoD policy contained a similar prohibition.⁵⁴ President Clinton believed his new policy placed the burden squarely on the individual to keep such personal matters purely private or risk discharge.⁵⁵ His administration expected homosexual service members to comply with military regulations—including those prohibiting homosexual conduct—“at all times and in all places.”⁵⁶

B. “Don’t Tell” is Truly Conduct-Based

Some of the staunchest critics of the policy concede that “Don’t Ask” is a success.⁵⁷ Since applicants are no longer questioned about their sexual orientation, homosexuals have joined the military “without any entry barriers.”⁵⁸ “Don’t Tell,” however, has been greatly maligned.

“Statement” cases under “Don’t Tell” comprise 83 percent of all homosexual conduct separations in the armed forces.⁵⁹ It is no wonder then that it has become the target of intense criticism. Gay advocacy groups argue that “Don’t Tell” is a *status-based* policy masquerading as a *conduct-*

propensity to engage in homosexual conduct, seriously impairs the accomplishment of the military mission.” *Id.* at 2.

⁵⁰ DoDD 1304.26, *supra* n. 35, at 9, para. E1.2.8.1. Although applicants are not asked these questions, the DoD Directive allows the rejection of applicants based on homosexual conduct when such evidence is “received” “in the course of the accession process.” *Id.* at E1.2.8.2.1.

⁵¹ See *National Defense Authorizations Act For FY94*, Pub. L. No. 103-160, § 571(d), 107 Stat. 1547, 1673 (1993) (“It is the sense of Congress that - (1) the suspension of questioning concerning homosexuality as part of the processing of individuals for accession into the Armed Forces under the interim policy of January 29, 1993, should be continued, but the Secretary of Defense may reinstate that questioning . . . as he considers appropriate . . .”).

⁵² See 10 U.S.C. § 654(b).

⁵³ See *id.*; DoDD 1332.14, *supra* n. 34, at E3.A4.1.4.3; DoDI 1332.40, *supra* n. 34, at E8.4.3.

⁵⁴ See 1992 GAO Report, *supra* n. 22, at 11-12. See also Mazur, *supra* n. 12, at 1595 (arguing that the revisions to the military policy in 1993-94 were “distinction[s] without a difference”).

⁵⁵ See *President’s Remarks*, *supra* n. 2, at 1372 (“Just as is the case under current policy, unacceptable conduct, either heterosexual or homosexual, will be unacceptable 24 hours a day, 7 days a week from the time a recruit joins the service until the day he or she is discharged.”).

⁵⁶ *President’s Remarks*, *supra* n. 2, at 1372. See also *DoD Memo*, *supra* n. 34.

⁵⁷ See Halley, *supra* n. 12, at 49. See also SLDN, *supra* n. 12, at 19 (“Over time, command-directed asking and pursuing decreased.”).

⁵⁸ Young, *supra* n. 25, at 113 (referencing *Preliminary DoD Policy Guidelines on Homosexuals in the Military* (July 19, 1993); 10 U.S.C. § 654 (1994); and *Secretary of Defense Directives Implementing the New DoD Policy on Homosexual Conduct in the Armed Forces* (Feb. 5, 1994)).

⁵⁹ See 2005 GAO Report, *supra* n. 6, at 11. This GAO Report indicates that from fiscal years 1994 through 2003, 83% of military separations under the DoD’s homosexual conduct policy were because the member “stated he or she is a homosexual, bisexual, or words to that effect.” Further, Charles Moskos argues that “more than 80 percent” of homosexual conduct discharge cases in the military “are the result of voluntary ‘statements’ by service members.” Moskos, *supra* n. 24, at 62. He adds, “the number of discharges for homosexual ‘acts’ has declined over the past decade.” *Id.* As to the motive behind the making of such statements, Mr. Moskos claims, “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 society than it once did.” *Id.*

based prohibition. They believe it inhibits free speech and forces members to hide their gay identities even where they follow the DoD’s policy on conduct.⁶⁰ “[N]othing short of celibacy and complete secrecy would be necessary for gay service members to avoid discharge under [‘Don’t Tell’],” they conclude.⁶¹ They also argue that forcing homosexuals to prove their “celibacy” devalues human dignity and sexual expression.⁶² But these criticisms miss the mark.

Concededly, “Don’t Tell” states that the outward acknowledgment of one’s homosexual or bisexual orientation creates a rebuttable presumption that one intends to engage in homosexual conduct.⁶³ But this issue has been litigated under both the old and the new DoD policies, with courts recognizing that this type of rebuttable presumption is in fact conduct-based.⁶⁴ Open statements of one’s homosexual orientation are closely associated with engaging in the homosexual acts that can serve as the basis for discharge—the military may rely on such presumptions “that avoid the administratively costly need to adduce proof of conduct or intent....”⁶⁵ And for those who do not intend to engage in the prohibited conduct, due process affords them a full administrative hearing.⁶⁶ The criticisms about free speech and human dignity are actually attacks on the more general policy determination to exclude service members who engage in homosexual conduct. “Don’t Ask, Don’t Tell” merely seeks to implement that broader policy in the fairest way.

The Servicemembers Legal Defense Network (SLDN)—a military gay-rights group—has recently documented numerous examples of individuals who “came out” openly but successfully used discharge hearings

⁶⁰ Halley, *supra* n. 12, at 27-56 (arguing that the new policy is status-based). See also Mazur, *supra* n. 12, at 1591 (arguing it is a mistake to distinguish “status” from “conduct” because it is a faulty “assumption that it is possible to be just metaphysically gay – a sterile, stark orientation or status – and not engage in conduct, or have any propensity to engage in conduct, that is inextricably associated with that status.”).

⁶¹ SLDN, *supra* n. 12, at 16. “An honest statement by a gay service member of his or her sexual orientation to anyone, at anytime, anywhere may lead to discharge,” the SLDN organization charges. *Id.* at 13. But see Plane, *supra* n. 19, at 379, 398-99 (arguing that the policy gives homosexuals the ability to serve “without the stigma of having to lie about their sexuality during their military career” and that with “a modicum of self-restraint and discretion, homosexual service members will now be able to serve proudly in all branches of the Armed Forces.”).

⁶² See Halley, *supra* n. 12, at 3-5 (criticizing the policy for forcing members to prove they are not homosexual).

⁶³ See DODD 1332.14, *supra* n. 34, at 70, para. E3.A4.4.5 (discussing the rebuttable presumption in enlisted separations).

⁶⁴ See *Thomasson v. Perry*, 80 F.3d 915 (4th Cir. 1996) (finding that speech declaring homosexuality is the equivalent of a homosexual act or the propensity or intent to engage in homosexual acts); *Steffan v. Perry*, 41 F.3d 677 (D.C. Cir. 1994) (finding that homosexual statements put a member in a sufficiently close class to those who engage in or intend to engage in homosexual conduct).

⁶⁵ See *Steffan*, 41 F.3d at 686 (noting that “the military certainly furthers its policy of discharging those members who either engage in, or are likely to engage in, homosexual conduct when it discharges those who state that they are homosexual.”).

⁶⁶ See DODD 1332.14, *supra* n. 34, at para. E3.A4.4.5 (providing service members the opportunity to present evidence in order to rebut the presumption).

to convince the board to retain them.⁶⁷ While most gay service members do not demand a hearing,⁶⁸ the noted successes illustrate “Don’t Tell’s” workability. If a homosexual can demonstrate the capability to follow conduct-based rules, he or she may be retained. In the end, *conduct*—not orientation—expels the member from military service.

C. *Increases in Homosexual Conduct Separations Do Not Indicate a Policy Failure*

The number of homosexual conduct separations under “Don’t Ask, Don’t Tell” pales in comparison to other reasons for separation from the armed forces.⁶⁹ Yet gay rights advocates have repeatedly called for a repeal of “Don’t Ask, Don’t Tell,” arguing that the policy hurts the military by wasting talented personnel.⁷⁰ The most recent backlash against the policy came in 2003 when the military discharged 37 gay linguist students—some studying Arabic—from the Defense Language Institute in Monterey, California.⁷¹ Condemnation of these discharges was rampant, with major newspapers citing the incident as yet another reason to overturn the ban.⁷²

1. Do the Statistics Add Up?

It is understandable why many believed “Don’t Ask, Don’t Tell” would lessen the number of homosexual conduct separations. Common sense suggests that the loosening of restrictions should result in fewer violations. But it is also reasonable to believe the number of separations after 1993 should have increased because “applicants [would] no longer [be] asked about their sexual orientation when enlisting in the Armed Forces,” leading more of them to make statements of homosexuality once they are in the military.⁷³ In any event, critics view statistics of “increased”

⁶⁷ See SLDN, *supra* n. 12, at 17, 22-23 (citing various cases where openly gay members were allowed to continue to serve); *see also* Mazur, *supra* n. 12, at 1591 (criticizing the hyperbole of some gay advocates that unreasonably allege that the military discharges people for behavior that merely “looks gay,” noting that discharge boards have never forced a member to disprove propensity on any other basis than a statement of homosexuality).

⁶⁸ See Office of the Under 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*, Summary of Findings I (1998) [hereinafter OSD Report] (noting that the “great majority of discharges for homosexual conduct are uncontested and are processed administratively.”).

⁶⁹ For instance, while discharges under “Don’t Ask, Don’t Tell” have comprised just over one third of 1% of all military discharges, almost four times as many members were discharged for not complying with weight standards and almost three times as many were discharged due to pregnancy. See 2005 GAO Report, *supra* n. 6, at 42.

⁷⁰ In its Tenth Annual Report after “Don’t Ask, Don’t Tell,” the SLDN noted, “This irrational policy of exclusion has cost our nation, and our security, almost 10,000 dedicated and trained Americans over the past ten years.” SLDN, *supra* n. 12, at 2; *see also* Mazur, *supra* n. 12, at 1591 (noting that gay advocacy has tended to “exaggerate the irrationality of the policy” and that “the policy is quite irrational on its own.”).

⁷¹ See Vincent J. Schodolski, *Military Loses Able Recruits with Gay Rule; Ousted Linguists’ Skills Badly Needed*, Chi. Trib. N8 (Jan. 23, 2003).

⁷² *See id.*

⁷³ See OSD Report, *supra* n. 68, at § Discussion (I)(A).

homosexual conduct separations as proof that the policy has failed.⁷⁴

Under the prior policy, the DoD annually discharged almost 1,500 homosexuals between 1980 and 1990, a total of about 17,000 discharges.⁷⁵ But in the decade since “Don’t Ask, Don’t Tell,” the DoD discharged approximately 9,500 homosexuals⁷⁶—an apparent decrease. Yet although the total number of discharges has decreased under “Don’t Ask, Don’t Tell,” the *relative* number of discharges has remained statistically the same on average because the DoD significantly reduced the number of military personnel after the Cold War.⁷⁷ Moreover, from 1994 through 2001 the yearly number of homosexual conduct separations rose each year (with the exception of 1999), reaching a high of 1,217 discharges in 2001.⁷⁸ The discharge numbers sharply dropped off, however, in 2002 and 2003.⁷⁹

But a closer study of the numbers indicates there is more to the issue than first meets the eye. A full 83 percent (7,900) of the discharges under “Don’t Ask, Don’t Tell” through 2003 were “statement” cases of individuals who voluntarily admitted they were homosexual or bisexual.⁸⁰ Moreover, almost 75 percent of the separations came within the first few months or years of service.⁸¹ Some who study these statistics, such as Charles Moskos—a sociologist and key drafter of “Don’t Ask, Don’t Tell”—suggest that most “statement” cases are initiated by those who find military life

⁷⁴ See Eric Schmitt, *The Nation: Close Quarters; How is this Strategy Working? Don’t Ask*, N.Y. Times 4, 1 (Dec. 19, 1999) (noting that the “soaring” number of homosexual conduct discharges in 1998 was almost double the 1993 number, and that critics “say the policy has failed”); SLDN, *supra* n. 12, at 19, 22 (noting the “increased” discharges as examples of the policy’s failure).

⁷⁵ See 1992 GAO Report, *supra* n. 22, at 3; see also SLDN, *supra* n. 12 at 23 (noting that these numbers hit a peak of 2000 discharges in 1982).

⁷⁶ 2005 GAO Report, *supra* n. 6, at 6. According to the report, the numbers of discharges for each year were as follows: 1994-615; 1995-757; 1996-858; 1997-997; 1998-1,145; 1999-1,033; 2000-1,213; 2001-1,217; 2002-884; 2003-769. See *id.* at 8.

⁷⁷ From 1980-84, the percentage of homosexual discharges was .086 to .095 of the active duty end strength. See OSD Report, *supra* n. 68, at Table I. In 1985-86, that number dropped to .78 and .76 of the end strength. *Id.* It continued to drop in the late 1980s: 1987-.064%; 1988-.052%; 1989-.047%; 1990-.046%; 1991-.047%; and 1992-.039%. *Id.* In the first few years of “Don’t Ask, Don’t Tell,” the number stayed low before beginning to rise again: 1993-.040%; 1994-.038%; 1995-.050%; 1996-.058%; and 1997-.069%. *Id.* Then in 1998, the numbers jumped significantly before dropping off again in 2002: 1998-.081%; 1999-.075%; 2000-.088%, 2001-.089%, 2002-.063%; and 2003-.054%; see Burrelli & Dale, *supra* n. 26, at 11 and 12 (citing data obtained from the Defense Manpower Data Center and concluding that “the difference in the percentage discharged before and following the implementation of the new policy was statistically insignificant.”).

⁷⁸ See 2005 GAO Report, *supra* n. 6, at 8.

⁷⁹ See *id.* Critics cite this drop-off in discharges during the War on Terror as yet another historical example of the military ignoring the policy during times of war when more members are needed to put their lives on the line for their country. See SLDN, *supra* n. 12, at 22.

⁸⁰ See 2005 GAO Report, *supra* n. 6, at 11. In comparison, only 16% (1,520) of the discharged actually committed, attempted, or solicited homosexual acts, and only 1% (57) married or attempted to marry another homosexual. See *id.* This is a significant decrease in the number of “acts” cases from the older policy. See Moskos, *supra* n. 24, at 62.

⁸¹ Almost 20% of the separations (1,747) occurred during recruit training, with an additional 11% (1,037) occurring in follow-on training—all within the first six months of military service. See 2005 GAO Report, *supra* n. 6, at 17, 31. All told, almost 60% of the discharges (5,446) occurred within one and a half years of initial service. See *id.* Another 16% (1,458) were separated within the next year, leaving only 25% (2,335) to be separated after the two and one half year mark. See *id.*

unpleasant and wish to terminate their obligations early.⁸² Moskos puts it simply: “Whether you’re gay or not, saying you are is now the quickest way out of the military with an honorable discharge.”⁸³ And in 1998, the Clinton Administration itself defended the high number of “statement” cases under the policy by arguing that most of those discharged had “voluntarily opted out” of the military.⁸⁴

2. Testing Moskos’s Hypothesis: Changes at Lackland Air Force Base (AFB).

If Moskos is correct, “Don’t Tell” may be allowing some military members—heterosexuals and homosexuals alike—to improperly use the policy to avoid military service and obtain an honorable discharge. Moskos’s hypothesis has found empirical support at Lackland AFB, Texas, where—since 1999—the Air Force has significantly changed its handling of homosexual “statement” cases during basic military training (BMT). The results are striking.

All enlisted Air Force recruits receive six weeks of BMT at Lackland AFB. Under “Don’t Ask, Don’t Tell,” Air Force homosexual conduct separations during BMT skyrocketed, comprising 65 percent of the total Air Force discharges by 1998.⁸⁵ But discharge numbers beginning in 1999 decreased dramatically at BMT⁸⁶ because of a bold new policy for handling homosexual “statement” cases. Lackland wanted to deny recruits an “easy out” of rigorous military training by claiming to be homosexual. “[B]ecause of the stress of Basic Military Training, they want to leave and they want to leave right now,” explained Colonel Sharon Dunbar, the commander of the 737th Training Group at Lackland AFB.⁸⁷

The Lackland regulation governing homosexual conduct separations now states, “Trainees who make a homosexual admission will remain in training, in their original flight, until separation action is approved by the [Wing Commander] or a credible recant statement is made to an officer

⁸² See Burrelli & Dale, *supra* n. 26, at 8 (citing various authorities who have proposed this theory).

⁸³ Moskos, *supra* n. 24, at 62. See also 2005 GAO Report, *supra* n. 6, at 7 (indicating that of 5,763 “characterized” discharges, 82% received Honorable discharges, 13% received General, Under Honorable Conditions discharges, and 5% received Under Other Than Honorable Conditions discharges; another 3,304 discharges were “uncharacterized” and occurred during the initial six months of training as “entry level” separations).

⁸⁴ Gregory L. Vistica & Evan Thomas, *Backlash in the Ranks*, Newsweek 27 (Apr. 20, 1998) (quoting William Cohen, President Clinton’s second Secretary of Defense).

⁸⁵ See Brent Staples, *Tinkering at the Margins of Anti-Gay Bigotry*, N.Y. Times A24 (Nov. 8, 1999).

⁸⁶ See Rod Hafemeister, *Claiming Homosexuality not an Easy Out in Basic Training*, A.F. Times 16 (Sep. 22, 2003). In 1999, the Air Force “invited SLDN to visit the base and assist in a review of the implementation” of the “Don’t Ask, Don’t Tell” policy. SLDN, *supra* n. 12, at 32. Although SLDN was generally pleased with the decrease in Lackland discharges since 1999, the organization has not taken credit for the change. See *id.* Indeed, the SLDN has criticized the use of Lackland’s new “troubling” policy because it “require[s]” airmen to “convince officials of their sexual orientation” and officials are selectively applying the policy by “ignoring statements of sexual orientation made by airmen while in training.” *Id.* (citing Hafemeister).

⁸⁷ See Hafemeister, *supra* n. 86, at 16 (quoting Colonel Dunbar).

within the chain of command.”⁸⁸ The regulation requires officials to review the trainee’s records, speak with instructors, and interview the trainee personally.⁸⁹ The interviewing officer confirms that the trainee understands “Don’t Ask, Don’t Tell” and the role of each official in the process.⁹⁰ Most important, the officer tells the trainee that he or she may “recant” the statement until the commander “signs the discharge paperwork,” which could take some time.⁹¹ Thus, the trainee continues normal training for the foreseeable future. If the trainee recants, the commander judges the “credibility” of the recant statement—if it is deemed credible, the trainee returns to training as though the trainee “never made [the statement].”⁹² If the recantation is not credible, the commander finalizes the trainee’s discharge.⁹³ This new practice is consistent with the broader “Don’t Ask, Don’t Tell” policy because Congress has never required the separation of persons who make statements about their sexual orientation for the purpose of avoiding military service.⁹⁴

The Lackland policy is working. Since its initiation, the number of homosexual conduct discharges during BMT has dropped from its high of 326 in 1998 to 19 in 2002 and only five in 2003.⁹⁵ “A majority of them recant their statement,” explained Lieutenant Colonel Matt Crabbe, commander of the 319th Training Squadron at Lackland AFB.⁹⁶ Since the recruits continue training—which is both difficult and confidence-building—while awaiting discharge, many of them realize that there is no “easy out.” Thus, the theory goes, trainees maintain only the truest statements of homosexual identity, recanting most improperly motivated statements.

The Lackland data supports Moskos’s hypothesis that most “statement” cases are initiated by those who find military life unpleasant and wish to terminate their obligations early. Homosexual recruits may serve in the Air Force despite an ill-judged statement made under great stress—as long as they can follow the conduct-based prohibitions on homosexual acts.

⁸⁸ 737 Training Group Instruction (TRGI) 36-3, Vol I, *Basic Military Training*, para. 10.3 (Nov. 1, 2004).

⁸⁹ Within three days of making the statement of homosexuality or bisexuality, a discharge package is initiated. *See id.* at para. 10.3.1. Prior to meeting with the trainee who made the statement, an operations officer will review the trainee’s records and speak with the trainees military training instructors (MTIs) to “determine the circumstances and nature of the disclosure/statement and the trainee’s progress in training.” *Id.* at para. 10.3.4.1. Then, the officer will brief the trainee in a “non-intimidating environment” about the homosexual conduct discharge process, inquire about any problems in training or at home, and allow the trainee to make a phone call home. *Id.* at para. 10.3.5.3.

⁹⁰ *Id.* at para. 10.3.6-7. The officer also ensures that nobody coerced the trainee into making the statement. *See id.*

⁹¹ *Id.* at para. 10.3.7.1-2.

⁹² *Id.* at para. 10.3.10, 13; *see also* Hafemeister, *supra* n. 86, at 16 (quoting Colonel Durbar regarding the effect after a recanted statement).

⁹³ *See* 737 TRGI 36-3, *supra* n. 88, at para. 10.3.15.

⁹⁴ *See* 10 U.S.C. § 654(e)(1) (2000) (noting as a rule of construction that the policy does not require separation of those who “engaged in conduct or made statements for the purpose of avoiding or terminating military service”).

⁹⁵ *See* Hafemeister, *supra* n. 86, at 16.

⁹⁶ *See id.* (quoting Lieutenant Colonel Crabbe).

Moreover, heterosexual recruits no longer have an incentive to fabricate homosexual statements to find an “easy out.” Since the overwhelming number of homosexual conduct separations are “statement” cases made during training or early in a member’s career, Moskos is surely correct—the “increased” discharge numbers are not proof the policy has failed. Given the small number of “acts” cases, it appears that homosexual members who wish to serve in the military can do so if they avoid open statements about their homosexuality. To avoid continued misuses of the policy, therefore, the armed services should more cautiously enforce “Don’t Tell” using a model similar to that at Lackland AFB.⁹⁷

III. HAS “DON’T PURSUE, DON’T HARASS” ALLOWED HOMOSEXUALS TO SERVE WITHOUT FEAR OF HARASSMENT DUE TO THEIR SEXUAL ORIENTATION?

A. “Don’t Pursue” and “Don’t Harass”

The Clinton Administration hoped its new policy would end harassment and *witch hunts* against homosexuals in the military. The President sought an end to “witch hunts . . . to ferret out individuals who have served their country well.”⁹⁸ He wanted to create a “zone of privacy in the military for individuals.”⁹⁹ These desires led to the creation of the “Don’t Pursue” and “Don’t Harass” prongs of the policy. While “Don’t Pursue” has achieved a large measure of success, “Don’t Harass” persists as the area most in need of improvement.

The “Don’t Pursue” prong of the policy focuses primarily on the conduct of military commanders, with emphasis on deterring investigations into homosexuality.¹⁰⁰ Military law enforcement can neither investigate a member’s sexual orientation nor consensual sexual conduct—that discretion is left to a member’s commander.¹⁰¹ To investigate, a commander must

⁹⁷ The Army has been using a similar policy to deal with Reservists or National Guard members who first make statements about their sexual orientation when they are called onto active duty in order to deploy in support of Army operations. See Lou Chibbaro Jr., *Out Gay Soldiers Sent to Iraq*, WASHINGTON BLADE ONLINE Sep. 23, 2005. According to FORSCOM Reg 500-3-3, *FORMDEPS, Volume III, Reserve Component Unit Commander’s Handbook (RCUCH)* (1999), if a separation based on a homosexual statement “is not requested prior to the unit’s receipt of alert notification, the discharge is not authorized. Member will enter AD [active duty] with the unit.” *Id.*

⁹⁸ *President’s Remarks*, *supra* n. 2, at 1372.

⁹⁹ *Background Briefing*, *supra* n. 10, at 1.

¹⁰⁰ See *id.* at 13 (“You will not as easily have investigations as you do today . . . [B]efore an investigation into homosexual conduct . . . is triggered, make sure the people . . . have credible information.”).

¹⁰¹ See DoDI 5505.8, *supra* n. 34, at 2-3, para. 6. DoD law enforcement organizations do not have authority to initiate investigations to determine whether someone is heterosexual, homosexual or bisexual. *Id.* at 2, para. 4. Also, an investigation into adult private consensual sexual misconduct can usually be initiated only at the request of the service member’s commanders. *Id.* An exception to this policy allows for a commander, director or principal deputy of a defense criminal investigative organization to initiate an investigation upon a finding of “credible information” as well as a finding that such investigation is an appropriate use of investigative resources. *Id.* at 2-3, para. 6. In addition to the DoD guidance, some services have erected additional obstacles. For instance, the Air Force requires commanders who desire to initiate inquiries into homosexual conduct to “consult through the chain of command with a commander possessing general court-martial convening authority (GCMCA) and the

have “credible information” of homosexual *conduct*, not merely evidence of homosexual orientation.¹⁰² This information must come from a “reliable person” who directly observed a homosexual “act” or “statement” that would lead a reasonable person to believe the member engages in, or intends to engage in, homosexual conduct.¹⁰³ The commander cannot consider certain activities—such as presence at a gay bar or gay rights rally—as “credible information.”¹⁰⁴

The “Don’t Harass” aspect of the policy sought to eliminate harassment of homosexuals by other service members. Secretary of Defense Les Aspin issued this guidance in 1993: The Armed Forces do not tolerate harassment or violence against any service member, for any reason.¹⁰⁵ A major DoD focus¹⁰⁶ on anti-gay harassment did not occur, however, until after the 1999 murder of Army Private First Class (PFC) Barry Winchell—a homosexual. A fellow soldier bludgeoned PFC Winchell to death with a bat as he slept in the barracks at Fort Campbell, Kentucky.¹⁰⁷ Following the murder, Secretary of Defense William Cohen ordered a DoD Inspector General (IG) study,¹⁰⁸ which found that during the previous year 80 percent of the study’s respondents had heard derogatory anti-gay remarks, 37 percent had witnessed anti-gay harassment,¹⁰⁹ and 5 percent had observed “serious” anti-gay harassment in the form of physical assaults, vandalism, or denial of training or career opportunities.¹¹⁰

As a result of this study, Secretary Cohen convened a DoD working group to develop “better measures to address harassment based upon perceived sexual orientation.”¹¹¹ Based upon the group’s findings, Secretary Cohen directed the four military services to implement a thirteen-point Anti-Harassment Action Plan (AHAP).¹¹² This plan called for military-wide harassment prevention training, comprehensive harassment reporting

servicing staff judge advocate of the initiating commander must consult with the servicing staff judge advocate of the GCMCA.” AFI 36-3208, attach. 4.

¹⁰² See DoDD 1332.14, *supra* n. 34, at 69, para. E3.A4.3.1; DoDI 1332.40, *supra* n. 34, at 27, para. E8.3.

¹⁰³ See DoDD 1332.14, *supra* n. 34, at 69, para. E3.A4.3.4.3; DoDI 1332.40, *supra* n. 34, at 27, para. E8.4.3.

¹⁰⁴ See DoDD 1332.14, *supra* n. 34, at 69, para. E3.A4.1.4.3; DoDI 1332.40, *supra* n. 34, at 29, para. E8.4.3.

¹⁰⁵ *DoD Memo*, *supra* n. 34, at attachment (“Policy Guidelines on Homosexual Conduct in the Armed Forces”).

¹⁰⁶ The DoD did not have an active anti-harassment policy prior to the Winchell murder. Despite a thorough search, the authors of this Article were unable to locate evidence of any meaningful DoD anti-gay harassment measures, regulations, or policy guidance issued between 1993 and 1999.

¹⁰⁷ See Off. of the Asst. Sec. of Def. (Public Affairs). *DoD News Briefing*, http://www.defenselink.mil/transcripts/2000/t07212000_t721rost.html (accessed Sept. 9, 2005); SLDN, *supra* n. 12, at 20-22 (outlining facts of the murder).

¹⁰⁸ See Off. of the Dept. of Def. Inspector Gen., *Report on the Military Environment With Respect to the Homosexual Conduct Policy*, <http://dont.stanford.edu/commentary/evaluation101.pdf> (accessed Sept. 9, 2005) [hereinafter IG Report].

¹⁰⁹ See IG Report, *supra* n. 108, at 4.

¹¹⁰ See IG Report, *supra* n. 108, at 18.

¹¹¹ Linda D. Kozaryn, *DoD Seeks Public Views on Homosexual Harassment*, [http://www.defenselink.mil/news/Apr2000/n04202000\)20004202.html](http://www.defenselink.mil/news/Apr2000/n04202000)20004202.html) (accessed Sept. 7, 2005).

¹¹² U.S. Dept. of Def., *Department of Defense Issues Anti-Harassment Guidelines*, http://www.dod.mil/releases/2000/b07212000_b432-00.html (accessed Sept. 14, 2005) [hereinafter *Guidelines*].

mechanisms, appropriate disciplinary action against those who violate the anti-harassment policy, and inspection programs to measure the policy's effectiveness.¹¹³ None of the services ever completely implemented AHAP; instead, in 2004 the DoD, under the Bush Administration, stated that the existing anti-harassment policies and programs were "sufficient to address this important issue."¹¹⁴

B. *"Don't Pursue" Has Brought an End to Most "Witch Hunts"*

One of the oft-repeated criticisms of "Don't Pursue" is that it has not been sufficiently disseminated to the lowest levels of command, leading to numerous violations of the policy's strict limits on investigations.¹¹⁵ But

¹¹³ See *id.* The 13-point AHAP consisted of the following principles: 1) DoD "should adopt an overarching principle regarding harassment, including that based on sexual orientation: 'Treatment of all individuals with dignity and respect is essential to good order and discipline. Mistreatment, harassment, and inappropriate comments or gestures undermine this principle and have no place in our armed forces. Commanders and leaders must develop and maintain a climate that fosters unit cohesion, esprit de corps, and mutual respect for all members of the command or organization;'" 2) DoD "should issue a single Department-wide directive on harassment. It should make clear that mistreatment, harassment, and inappropriate comments or gestures, including that based on sexual orientation, are not acceptable. Further, the directive should make clear that commanders and leaders will be held accountable for failure to enforce this directive;" 3) "The Services shall ensure feedback or reporting mechanisms are in place to measure homosexual conduct policy training and anti-harassment training effectiveness in the following three areas: knowledge, behavior, and climate;" 4) "The Services shall review all homosexual conduct policy training and anti-harassment training programs to ensure they address the elements and intent of the DoD overarching principle and implementing directive;" 5) "The Services shall review homosexual conduct policy training and anti-harassment training programs annually to ensure they contain all information required by law and policy, including the DoD overarching principle and implementing directive, and are tailored to the grade and responsibility levels of their audiences;" 6) "The Services shall review all avenues for reporting mistreatment, harassment, and inappropriate comments or gestures to ensure they facilitate effective leadership response. Reporting at the lowest level possible within the chain of command shall be encouraged. Personnel shall be informed of other confidential and non-confidential avenues to report mistreatment, harassment, and inappropriate comments or gestures;" 7) "The Services shall ensure homosexual conduct policy training and anti-harassment training programs address all avenues to report mistreatment, harassment, and inappropriate comments or gestures and ensure persons receiving reports of mistreatment, harassment, and inappropriate comments or gestures know how to handle these reports;" 8) "The Services shall ensure that directives, guidance, and training clearly explain the application of the 'don't ask, don't tell,' policy in the context of receiving and reporting complaints of mistreatment, harassment, and inappropriate comments or gestures, including: Complaints will be taken seriously, regardless of actual or perceived sexual orientation; those receiving complaints must not ask about sexual orientation – questions about sexual orientation are not needed to handle complaints; violators will be held accountable; and those reporting harassment ought not tell about or disclose sexual orientation – information regarding sexual orientation is not needed for complaints to be taken seriously;" 9) "The Services shall ensure that commanders and leaders take appropriate action against anyone who engages in mistreatment, harassment, and inappropriate comments or gestures;" 10) "The Services shall ensure that commanders and leaders take appropriate action against anyone who condones or ignores mistreatment, harassment, and inappropriate comments or gestures;" 11) "The Services shall examine homosexual conduct policy training and anti-harassment training programs to ensure they provide tailored training on enforcement mechanisms;" 12) "The Services shall ensure inspection programs assess adherence to the DoD overarching principle and implementing directive through measurement of knowledge, behavior, and climate;" and 13) "The Services shall determine the extent to which homosexual conduct policy training and anti-harassment training programs, and the implementation of this action plan, are effective in addressing mistreatment, harassment, and inappropriate comments or gestures." U.S. Dep. of Def., *DoD Anti-Harassment Action Plan*, <http://www.defenselink.mil/news/Jul2000/plan20000721.htm> (accessed Sept. 14, 2005) [hereinafter *AHAP*].

¹¹⁴ Letter from David S. C. Chu, Under Sec. of Def. (Personnel and Readiness), to the Honorable James Langevin [hereinafter *Chu's Letter*] (June 24, 2004).

¹¹⁵ SLDN, *supra* n. 12, at 19.

if one defines a “witch hunt” as an intense effort to investigate or expose a service member’s suspected orientation without evidence of the member’s homosexual conduct, then “Don’t Pursue” has made important strides. The non-partisan Congressional Research Service has concluded that “the data would not appear to support the general existence of such [witch-hunt] tactics.”¹¹⁶ As a Pentagon spokesman noted, “It is only when [homosexuals] declare themselves or openly practice their sexual preference that we [the DoD] have no alternative but to begin the investigative process”¹¹⁷

Despite the improvement in avoiding improper investigative tactics, critics of “Don’t Pursue” have documented individual cases where commanders and other military officials failed to follow the policy.¹¹⁸ But as one commentator argues, “[T]his list of evils does not say anything more about the [‘Don’t Pursue’] policy than the investigative abuses of all sorts of laws say about their substantive value Whenever laws are enforced, there is a risk of abusive and outrageous conduct on the part of the enforcer.”¹¹⁹ On the whole, “Don’t Pursue” has made progress despite individual failures. It has discouraged improper investigations and required concrete and reliable evidence prior to the commencement of investigations. Even critics of the policy have acknowledged that it has decreased “witch hunts” and criminal investigations of homosexuals.¹²⁰

In short, “Don’t Pursue” in its current form is meeting its goals.

C. “Don’t Harass” Has Not Yet Addressed Anti-Gay Harassment Sufficiently

“Don’t Harass” remains the one area of the policy still in need of significant improvement. Critics charge that the DoD has failed to

¹¹⁶ Burrelli & Dale, *supra* n. 26, at 9.

¹¹⁷ *Id.* (citing Patty Reinert, *Is the Military Out of Step?*, Houston Chron. Feb. 6, 2005).

¹¹⁸ See Samuel A. Marcossou, *A Price Too High: Enforcing the Ban on Gays and Lesbians in the Military and the Inevitability of Intrusiveness*, 64 UMKC L. Rev. 59 (1995) (cataloguing a parade of horrors in enforcement of various bans on homosexual conduct in the military). As one example of “Don’t Pursue’s” failure, critics cite to a Navy memorandum from 1996 that instructs psychologists to report service members who seek counseling for homosexual issues. See SLDN, *supra* n. 12, at 16 (citing Dept. of Navy, NAVMEDP-5134, *General Medical Officer (GMO) Manual* (May 1996)). Critics also reference an Air Force memorandum from Richard A. Peterson that indicates that after a member makes an open statement of homosexuality, investigators should question such people as the member’s parents, siblings, school counselors, and close friends. See SLDN, *supra* n. 12, at 1 (citing Richard A. Peterson, *Commander Inquires on Members Stating They are Homosexual* (Nov. 3, 1994)). While the Navy’s memorandum may violate the spirit of President Clinton’s policy, the criticism of the Peterson memo misses its mark. The memo only allows questioning of friends and family after a service member has initiated the discharge process by voluntarily making a prohibited statement. Once this statement is made, military commanders must have the flexibility to investigate. To do otherwise would be to allow any individual to end his service early with an honorable discharge simply by making an unsubstantiated statement. As seen with the Lackland experiment, it is possible that these statements are falsely made to avoid military service. See *supra* n. 82-83, and accompanying text. The most reasonable way to verify such statements is to ask those who know the individual best.

¹¹⁹ Young, *supra* n. 25, at 103 (defending the policy).

¹²⁰ SLDN, *supra* n. 12, at 19. In fact, the SLDN admits that the new rules over time began to be “generally observed,” citing security clearance procedures and requirements that investigations receive approval by higher headquarters before initiation. *Id.*

implement the AHAP, as Secretary Cohen ordered in 1999.¹²¹ The DoD, under the Bush Administration, has responded that sufficient measures are already in place to guard against anti-gay harassment.¹²² In reality, each of the military services *has* implemented some degree of anti-harassment training.¹²³ But this training is much smaller in scope and detail than that contemplated by the AHAP.¹²⁴ Critics see this as a retreat from the DoD's commitment to the goal of eradicating anti-gay harassment in the military;¹²⁵ however, there is no solid data on whether the current level of training is adequate. Therefore, more research needs to be done in this area.

Although the AHAP does not mandate confidential reporting of anti-gay harassment, it does anticipate that confidential reporting will sometimes be available.¹²⁶ Not surprisingly, members may hesitate to report harassment if they believe they will be investigated and discharged. This is an area that requires further action. While victims of other types of harassment—such as that based on race and gender—are free to report harassment without fear of adverse consequences,¹²⁷ victims of anti-gay harassment have no such protections. For instance, victims of anti-gay harassment may not file complaints with military equal employment opportunity offices.¹²⁸ And although they may file complaints with their

¹²¹ See SLDN, *supra* n. 12, at 6-7.

¹²² See *Chu's Letter*, *supra* n. 114.

¹²³ See *id.* Even critics of "Don't Harass" recognize that the military services have made some progress in implementing AHAP. The SLDN recently reviewed the recent anti-harassment measures and training implemented by the individual services and noted various implementations. See generally SLDN, *supra* n. 12, at 25-43. Some of the mentioned measures included: 1) improved training for senior noncommissioned officers in the Army (*see id.* at 26); 2) improved training materials for noncommissioned officers Army-wide (*see id.* at 27); 3) Air Force implementation of homosexual conduct policy training tailored to certain audiences (specifically, general audiences, commanders, judge advocates, and law enforcement personnel) which contains anti-harassment guidance (*see id.* at 32); 4) the Navy's inclusion of anti-harassment training in its general military training for equal opportunity, sexual harassment prevention, and grievance procedures (*see id.* at 35); and 5) an effort by the Marine Corps to review and revise its homosexual conduct policy training guidance (*see id.* at 41).

¹²⁴ For example, the AHAP directed that such training be tailored to the grade and responsibility levels of their audiences. *Guidelines*, *supra* n. 112.

¹²⁵ While discrimination against individuals on the basis of race, color, religion, age, physical or mental disability, sex or national origin is explicitly prohibited by DoD regulation, discrimination or harassment against homosexuals does not receive the same level of protection. See *Department of Defense Military Equal Opportunity (MEO) Program*, DoDD 1350.2, para. 4.2 (Dept. of Def., Aug. 18, 1995). For the previously-mentioned protected categories, commanders are required to ensure that MEO programs are understood and executed on all levels, the organizational equal opportunity climate is routinely assessed for effectiveness, MEO programs are continuously reviewed and updated to eliminate unlawful discrimination, and such policies are posted and enforced. *See id.* at para. 6.2.1, 6.2.2, 6.2.3, and 6.2.4. Homosexual harassment prevention does not receive this level of attention.

¹²⁶ See AHAP, *supra* n. 113, Item # 6.

¹²⁷ See *Military Whistleblower Protection*, DoDD 7050.6, para. 4.2-4.4 (June 23, 2000) (providing protections to those who make complaints based on race or gender).

¹²⁸ See *Military Equal Opportunity (MEO) Program*, A.F. Instr. 36-2706, para. 6.1.2 (Dept. of the A.F., July 29, 2004) (providing Air Force guidance that "[t]he MEO office must immediately refer all allegations of homosexual conduct or perceived or alleged harassment based on sexual orientation to the alleged offender's military commander for action."); *Navy Equal Opportunity (EO) Policy*, OPNAVI 5354.1E, para. 6(a) (Dept. of the Navy, Jan. 22, 2001) (addressing in the Navy only unlawful discrimination and sexual harassment against "persons or groups based on race, ethnicity, national origin, sex, or religion," not victims of homosexual harassment); *Equal Employment Opportunity and Affirmative Action*, AR 690-12, para. 1-6(a) (Dept. of the Army, Mar. 4, 1988) (offering Army protection

service’s inspector general (IG), the IG cannot assure them confidentiality.¹²⁹ The only truly confidential military avenues for victims of anti-gay harassment are to seek help from a military chaplain or defense attorney, neither of whom are trained, directed, or empowered to handle such complaints.¹³⁰

Further compounding this problem, commanders who are faced with “credible information” of homosexual conduct have limited options. A commander cannot use a report of anti-gay harassment as a basis to discharge the victim. But that commander *must* initiate discharge proceedings against the victim if an investigation into the harassment turns up credible information of the victim’s homosexual conduct.¹³¹ This problem defies an easy solution, with few real options outside of granting amnesty or immunity to those who report harassment¹³² or creating an entirely separate harassment-investigation office cloaked with confidentiality. Yet, without a more confidential reporting mechanism, “Don’t Harass” may never truly succeed.

The DoD should explore new options for confidential reporting that break the paradigms associated with other types of harassment. Improving confidential reporting would significantly enhance “Don’t Harass.” At the same time, it would help resolve the problems with “Don’t Tell”—

from unlawful discrimination to only those who suffer discrimination based on “race, color, religion, sex, age, national origin, or handicap,” *not* to victims of homosexual harassment).

¹²⁹ See *Inspector General Complaints Resolution*, AFI 90-301, para. 2.3 (quoting “[T]he IG has the responsibility to safeguard the personal identity and complaints of individuals seeking assistance . . . [T]his does not mean that communications made to an IG are privileged or confidential . . .”) and para. 2.39.10 (quoting “[The IG] [h]as no authority to grant express promises of confidentiality to subjects, suspects, complainants or witnesses.”) (Dept. of the A.F., Feb. 8, 2005).

¹³⁰ As with the other services, this is also the case in the Air Force. See *Air Force Military Defense Counsel Charter*, Part B – MDC Services, AFLSA/JAJD OI 1, para. 2 (Dept of A.F., July 1, 1998) (indicating that, while client communications made to Air Force defense counsel are privileged, the processing or pursuit of anti-homosexual harassment complaints are not among the duties allotted to such attorneys). See also *Chaplain – Planning and Organizing*, AFI 52-101, para. 4.1 and 2.1 (Dept. of A.F. May 10, 2005) (providing that communications to Air Force chaplains are privileged, but noting that chaplains serve to “provide spiritual care and ethical leadership,” and “do not perform duties incompatible with their faith group tenets, professional role, or noncombatant status”); see also Moskos & Benecke, *supra* n. 7 (quoting “The Department of Defense must order inspectors general, law enforcement officials, psychologists and doctors not to out gay service members who seek their help. It should forbid military judges and members of discharge boards from considering statements from these officials as evidence of homosexuality.”).

¹³¹ See DoDD 1332.14, *supra* n. 34, at 27, para. E3.A1.1.8.1.2 (“A member shall be separated under this section if one or more of the following approved findings is made . . . [listing homosexual conduct]”); see also DoDI 1332.40, *supra* n. 34, at para. E2.3.1 (“A commissioned officer shall be separated under this section if one or more of the following approved findings is made . . . [listing homosexual conduct]”).

¹³² See Off. of the Dept. of Def. Inspector Gen., *Evaluation of Sexual Assault, Reprisal, and Related Leadership Challenges at the United States Air Force Academy*, (Dec. 3, 2004) (available at <http://www.dodig.osd.mil/foia/ERR/IPO2004C003-report.pdf>) (discussing how the Air Force Academy began a program of amnesty for victims of sexual assault and why that policy was ended). See also DoDD 6495.01, *Sexual Assault Prevention and Response (SAPR) Program*, para. E3.1.4 (Oct. 6, 2005) (recognizing the “need to provide an option for confidential restricted reporting” in sexual assault cases); Memo. from David S. C. Chu, Under Sec. of Def., to the Sec. of the Military Departments, *Sexual Assault Evidence Collection and Preservation Under Restricted Reporting (JTF-SAPR-014)* (June 30, 2005) (holding that “[r]estricted reporting allows sexual assault victims to confidentially disclose the details of their assault to specifically identified individuals . . . without triggering the official investigative process...”).

specifically, the high number of “statement” discharges.¹³³ Critics assert that—since victims cannot report harassment without fear of reprisal—they make homosexual statements to avoid the harassment through discharge.¹³⁴ If this is true, confidential reporting could dramatically reduce the number of homosexual conduct discharges.

In sum, the military has yet to find an effective way to deal with the quagmire of confidential reporting in order to encourage victims to come forward. “Don’t Harass” has thus been the least successful in fulfilling the original purpose and vision of the policy: to allow members the ability to serve without fear of harassment due to their sexual orientation.

IV. THE FUTURE OF “DON’T ASK, DON’T TELL”

Whatever one thinks of “Don’t Ask, Don’t Tell,” the policy is federal law. Neither Congress nor the Executive Branch is politically likely to push for change in the near future.¹³⁵ But the threat of judicial repudiation of the military’s homosexuality policy has always been present.¹³⁶ And though the policy has survived various legal challenges to its constitutionality,¹³⁷ the policy has also suffered judicial setbacks,

¹³³ See review *supra* n. 70-84, and accompanying text.

¹³⁴ See SLDN, *supra* n. 12.

¹³⁵ With a newly elected, more conservative Congress, it is unlikely that any change to the policy will be initiated from the Legislative Branch, although some Democratic members are proposing changes. Congressman Marty Meehan (D-Ma), is currently working on legislation to repeal 10 U.S.C. § 654 and ban military discrimination based on sexual orientation. See Liz Sidoti, *Military Gay Policy Costs Talent*, Associated Press (Feb. 25, 2005) (available at http://www.gaymilitary.ucsb.edu/PressClips/05_0224_AP.htm). If this legislation were successful, it would also forbid the military from re-instituting a “Don’t Ask, Don’t Tell” policy ever again. See *id.*; see also Deborah Funk, *Lawmaker Pitches Bill to Let Gays Openly Serve*, A.F. Times 26 (Mar. 21, 2005) (discussing the proposed legislation and quoting Rep. Meehan as calling “Don’t Ask, Don’t Tell” “a failed policy whose time has passed”). Moreover, President George W. Bush’s administration has supported the policy. See Arnold Abrams, *Taking on ‘Don’t Ask’; More and More, In and Out of Service, Speak Out Against Policy*, *Newsday* A08 (Feb. 17, 2004) (citing President Bush’s support of the policy); see also CNN, *America Votes 2004: The Issues/George Bush*, <http://www.cnn.com/ELECTION/2004/special/president/issues/index.bush.new.html> (accessed Sept. 9, 2005). For that reason, there is little chance that in the next four years any push from the DoD will result in major changes to the policy.

¹³⁶ See *benShalom v. Alexander*, 489 F. Supp. 964 (E.D. Wis. 1980) (finding a substantive due process violation in the Army’s discharge of a lesbian and ordering reinstatement of the soldier in the Army reserves); *Ben-Shalom v. Marsh*, 703 F. Supp. 1372 (E.D. Wis. 1989) (striking down Army enlistment regulation 140-111 as violating the First and Fifth Amendments), *rev’d*, 881 F.2d 454 (7th Cir. 1989) (finding the regulation permissible and allowing the Army to refuse re-enlistment to Ben-Shalom); see also *Beller v. Middendorf*, 632 F.2d 788, 812 (9th Cir. 1980) (upholding pre-policy naval rules on homosexual discharge); *Watkins v. Army*, 875 F.2d 699 (9th Cir. 1989) (estopping the Army from failing to re-enlist gay soldier, where the Army had ignored its own regulations in the past by re-enlisting the same soldier despite knowing of his homosexuality).

¹³⁷ See *Holmes v. Cal. Army Natl. Guard*, 124 F.3d 1126, 1137 (9th Cir. 1997) (upholding “Don’t Ask, Don’t Tell”); *Richenberg v. Perry*, 97 F.3d 256 (8th Cir. 1998) (upholding policy in face of due process and First Amendment challenges); *Philips v. Perry*, 106 F.3d 1420 (9th Cir. 1997) (upholding policy where member had engaged in homosexual acts and intended to continue homosexual conduct); *Thomason*, 80 F.3d 915 (upholding a statements case discharge because speech declaring homosexuality is the equivalent of a homosexual act or the propensity or intent to engage in homosexual acts); *Steffan*, 41 F.3d 677 (upholding Navy homosexual discharge policy based on statements of homosexuality because this put Steffan in sufficiently close class to those who engaged in or intended to engage in homosexual conduct); *Hoffman v. U.S.*, 70 Empl. Prac. Dec. (CCH) P44,621 (E.D. Pa. 1997) (granting the United States summary judgment in challenge to “Don’t Ask, Don’t Tell” based on First Amendment

including some lower courts striking the policy down as unconstitutional.¹³⁸ And the legal landscape continues to change, both within the military services’ own courts and at the highest federal levels.

In 2003, in *Lawrence v. Texas*,¹³⁹ the Supreme Court struck down a Texas homosexual sodomy statute and recognized for the first time that homosexuals possess a constitutional liberty interest to enter into private sexual relationships and form “enduring” personal bonds—all part of “their dignity as free persons” and their right to live without oppression.¹⁴⁰ Following *Lawrence*, critics questioned whether “Don’t Ask, Don’t Tell” is still constitutional.¹⁴¹ Some predict that *Lawrence* will have an especially far-reaching impact on a multitude of laws.¹⁴²

After *Lawrence*, the Court of Appeals for the Armed Forces (CAAF) considered whether Article 125, UCMJ—which regulates both heterosexual and homosexual sodomy within the military—survives *Lawrence*. In *United States v. Marcum*,¹⁴³ the CAAF chose not to rule on a facial challenge to Article 125, but to evaluate each sodomy case individually to see whether its facts implicated *Lawrence*’s liberty interest.¹⁴⁴ Assessing the facts in *Marcum*—homosexual sodomy within the

grounds); *see also* Burrelli & Dale, *supra* n. 26, at 12-21 (discussing in depth the various legal challenges to the policy); *but see* Kelly E. Henriksen, Student Author, *Note & Comment: Gays, the Military, and Judicial Deference: When the Courts Must Redaim Equal Protection as their Area of Expertise*, 9 Admin. L.J. Am. U. 1273 (1996) (criticizing the courts’ use of rational basis review when evaluating “Don’t Ask, Don’t Tell” under the equal protection clause).

¹³⁸ *See* *Able v. U.S.*, 968 F. Supp. 850 (E.D.N.Y. 1997) (striking down 10 U.S.C. § 654(b)(1) as unconstitutional under the Equal Protection Clause), *rev’d*, 155 F.3d 628 (2nd Cir. 1997); *Hensala v. A.F.*, 343 F.3d 951 (9th Cir. 2003) (reversing summary judgment against Hensala for recoupment based on homosexual discharge on Equal Protection and First Amendment claims); *Meinhold v. U.S. Dept. of Def.*, 1997 U.S. App. LEXIS 35603 (9th Cir. 1997) (finding that the Navy acted in bad faith by discharging member who did not express a genuine homosexual statement); *McVeigh v. Cohen*, 983 F. Supp. 215 (D.D.C. 1996) (finding that the Navy violated its own regulations when investigating alleged homosexual statements and reinstating discharged seaman). *See also* Note, Student Author, *Constitutional Law – First Amendment and Equal Protection – Ninth Circuit Upholds “Don’t Ask, Don’t Tell” Policy for Gays and Lesbians in the Military – Holmes v. California Army National Guard*, 124 F.3d 1126 (9th Cir. 1997), 111 Harv. L. Rev. 1371 (1998) (arguing that the statement prong of the policy should fail both a strict scrutiny analysis and a more deferential analysis).

¹³⁹ 539 U.S. 558, 567 (2003).

¹⁴⁰ *Id.* *Lawrence* unequivocally overruled *Bowers v. Hardwick*, 478 U.S. 186 (1986), which had been used to deny the existence of a constitutionally protected liberty interest in homosexual relationships. *See* Robert C. Post, *The Supreme Court, 2002 Term: Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 Harv. L. Rev. 4, 95-112 (analyzing the *Lawrence* decision).

¹⁴¹ In December 2004, a dozen former military officers raised a challenge to “Don’t Ask, Don’t Tell” in a Boston federal court. *See* “Don’t Ask, Don’t Tell” Faces Court Test, Associated Press (Dec. 6, 2004) (available at <http://www.washingtonimes.com/functions/print.php?StoryID=20041206-120819-7634r>) (discussing the challenge). That decision has not yet been released. *See also* *Burt v. Rumsfeld*, 354 F. Supp. 2d 156 (D. Conn. 2005) (refusing to find the policy unconstitutional after *Lawrence* during a challenge to the Solomon Amendment).

¹⁴² *See* Susan A. Blazier, *Note: The Irrational Use of Rational Basis Review in Lawrence v. Texas: Implications for our Society*, 26 Campbell L. Rev. 21 (2004) (arguing that the Court’s controversial reasoning in *Lawrence* can be used to strike down many types of laws based on morality, including prostitution laws and those forbidding suicide).

¹⁴³ *See* 60 M.J. 198 (App. Armed Forces 2004). In *Marcum*, an Air Force Technical Sergeant was convicted of consensual sodomy with a lower-ranking airman who he supervised within the chain of command. The sodomy occurred in the appellant’s off-base apartment during off-duty hours with no one else present. *See id.* at 207.

¹⁴⁴ The *Marcum* court erected a three-part analysis to determine whether a particular case is outside the scope of the liberty interest articulated in *Lawrence*:

chain of command—the court found such intimate contact was not covered under *Lawrence*'s liberty interest.¹⁴⁵ The court expressly refused to decide what impact, if any, Congress's "Don't Ask, Don't Tell" findings might have on Article 125's constitutionality.¹⁴⁶

Marcum emphasized two rationales that may save "Don't Ask, Don't Tell" from *Lawrence*.¹⁴⁷ First, *Lawrence*'s liberty interest may give way to the military status of the involved homosexuals. In *Marcum*, the court cited exceptions to the *Lawrence* liberty interest, such as sodomy with minors or those "who are situated in relationships where consent might not easily be refused."¹⁴⁸ Seeing the rank structure as an area where consent may not be freely given, the court found that homosexual conduct within the chain of command fell outside *Lawrence*'s protected liberty interest.¹⁴⁹ Second, courts must consider the "military culture" when assessing the "liberty interest" of homosexuals in the armed forces. The CAAF noted that in the military—a "specialized society"—"constitutional rights may apply differently"¹⁵⁰ The court pointed out that "military culture and mission" and "the nuance of military life" must be considered when

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*? Third, are there additional factors relevant solely in the military environment that affect the nature and reach of the *Lawrence* liberty interest?

Id. at 206-207. Thus far, the CAAF and lower military courts have been willing to apply this three-part framework to uphold sodomy convictions. See *U.S. v. Stirewalt*, 60 M.J. 297 (App. Armed Forces 2004) (upholding sodomy conviction between enlisted and officer member on 42-person naval vessel due to special military concerns that took the case out of the ambit of the *Lawrence* decision); *U.S. v. Myers*, 2005 CCA LEXIS 44 (U.S. Navy-Marine Corps. Ct. of Crim. App. 2005) (using the three-part test to distinguish *Lawrence* and uphold conviction for sodomy).

¹⁴⁵ *Marcum*, 60 M.J. at 208.

¹⁴⁶ *Id.*

¹⁴⁷ See Arthur S. Leonard, *Lawrence v. Texas and the New Law of Gay Rights*, 30 Ohio N.U. L. Rev. 189, 207 (2004) (analyzing *Lawrence* and suggesting that "judicial deference to military expertise" may allow Article 125 and "Don't Ask, Don't Tell" to survive judicial scrutiny); see also Diane H. Mazur, *Re-Framing the Debate: Symposium Article: Is "Don't Ask, Don't Tell" Unconstitutional After Lawrence? What It Will Take to Overturn the Policy*, 15 Fla. J.L. & Pub. Policy 423 (2004) (highly criticizing post-*Lawrence* government efforts to defend Article 125, UCMJ, and "Don't Ask, Don't Tell," and arguing that the policy is unconstitutional after *Lawrence*).

¹⁴⁸ *Marcum*, 60 M.J. at 203-04. When discussing *Lawrence*, the court commented:

While finding the Texas statute unconstitutional, the Supreme Court stated that "the present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution." *Id.* The Supreme Court did not expressly state whether or not this text represented an exhaustive or illustrative list of exceptions to the liberty interest identified, whether this text was intended to suggest areas where legislators might affirmatively legislate, or whether this text was intended to do no more than identify areas not addressed by the Court. Nor did the Supreme Court squarely place its analysis within a traditional framework for constitutional review.

Id.; see also *id.* at 203 (noting that the Supreme Court left the door open for the lower courts to explore the scope, nature, and limits of this liberty right).

¹⁴⁹ *Id.* at 208.

¹⁵⁰ *Id.* at 205 (citing *Parker v. Levy*, 417 U.S. 733, 743 (1974)).

evaluating *Lawrence*’s liberty interest.¹⁵¹ But do consensual homosexual acts that occur outside the military rank structure also fall outside of *Lawrence*’s liberty interest? That question remains to be decided.¹⁵²

V. CONCLUSION

When evaluating “Don’t Ask, Don’t Tell” by the measuring stick of its originally stated purposes, the policy is a qualified success. It has allowed homosexuals to enter military service with no “sexual orientation” barriers—“Don’t Ask.” When homosexual members can abstain from prohibited conduct, the policy has permitted them to serve honorably despite their sexual orientation. While keeping one’s sexual orientation secret may be too difficult for some members, those who refrain from self-reporting can achieve a successful military career—“Don’t Tell.” Despite isolated incidents of improper investigating, homosexuals generally can live their military lives without fear of “witch hunts” to uncover their sexual orientation—“Don’t Pursue.” Unfortunately, if those members suffer anti-gay harassment within the ranks, they still face a risk in reporting such harassment—especially where they have violated the prohibitions on homosexual conduct or statements. For that reason, “Don’t Harass” remains the area most in need of improvement.

¹⁵¹ *Id.* at 206-07.

¹⁵² The Army Court of Criminal Appeals has decided two unpublished cases in the past year where the court used the *Lawrence* and *Marcum* cases to find that Article 125, UCMJ, had been applied unconstitutionally against service members. *See* *United States v. Bullock*, Docket # 20030534 (Army Ct. Crim. App. 2004) (unpub. op.) and *United States v. Barber*, Docket # 20000413 (Army Ct. Crim. App. 2004) (unpub. op.). Both cases, however, dealt with consensual heterosexual sodomy between two adults, without any additional factors that might remove the conduct from the protected *Lawrence* liberty interest.