

# A POLICY IN DESPERATE SEARCH OF A RATIONALE: THE MILITARY'S POLICY ON LESBIANS, GAYS AND BISEXUALS

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*It is revolting to have no better reason for a rule of law than that it was laid down in the time of Henry IV. It is still more revolting ~f the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.'*

## I. INTRODUCTION

One of the seminal questions the United States Supreme Court may address in the next two to four years is whether the "Don't Ask, Don't Tell, Don't Pursue"

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policy on military service by lesbians, gays and bisexuals violates the Equal Protection Clause of the Fifth Amendment. The United States district courts to date have been divided on this question.<sup>3</sup> The United States district courts and United States courts of appeal are also sharply divided on whether the current policy's

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1. Oliver Wendall Holmes, *The Path of Law*, 10 HARV. L. REV. 457, 469 (1897), quoted in Jeffrey S. Davis, *Military Policy Toward Homosexuals: Scient(fic, Historical and Legal Perspectives*, 131 MIL. L. REV. 55, 81(1991).

2. DEP'T O~ DEFENSE DIRECTIVE NO. 1332.14 (1994); *id.* No. 1332.30 (Dec. 22, 1993).

3. *Able v. United States*, 880 F. Supp. 968 (E.D.N.Y. 1995) (ru ling that "Don't Ask, Don't Tell,

Don't Pursue" violates plaintiffs' Fifth Amendment rights under the Equal Protection Clause); *Thomasson v. Perry*, No. CIV.A95-252-A. 1995 WL 470185 (E.D. Va. June 8, 1995) (ruling that "Don't Ask, Don't Tell, Don't Pursue" did not violate plaintiffs Fifth Amendment rights under the Equal Protection Clause).

predecessor, which bears remarkable resemblance to “Don’t Ask, Don’t Tell, Don’t Pursue,” violated the Equal Protection Clause of the Fifth Amendment.<sup>5</sup>

This article analyzes the equal protection claim that will likely face the United States Supreme Court under the “Don’t Ask, Don’t Tell, Don’t Pursue” policy. It concludes that the military’s policy on lesbians, gays and bisexuals has been one in desperate search of a rationale for fifty years and cannot stand equal protection review, even under the most deferential standard of review courts sometimes accord to military decisions.<sup>6</sup>

## II. EQUAL PROTECTION ANALYSIS UNDER “DON’T ASK, DON’T TELL, DON’T PURSUE”

Equal protection issues under the Fifth Amendment of the United States Constitution arise whenever similarly situated classes of people are treated differently by the federal government.<sup>7</sup> With respect to the United States military’s treatment of lesbians, gays and bisexuals, the United States Supreme Court will have to determine (1) whether the “Don’t Ask, Don’t Tell, Don’t Pursue” policy treats heterosexuals and homosexuals differently for saying or doing the same things;<sup>8</sup> (2) whether the government has a legitimate interest in treating heterosexuals and homosexuals differently;<sup>9</sup> and (3) whether the law and regulations on point are at least rationally related to the government’s purported legitimate interest.<sup>10</sup>

4. The “Don’t Ask, Don’t Tell, Don’t Pursue” policy subjects lesbians, gays and bisexuals to discharge for statements, acts and marriage. The policy also provides that a statement of sexual orientation gives rise to a rebuttable presumption that one has a propensity to engage in homosexual acts. The policy on lesbians, gays and bisexuals in the military, in effect from 1981 to February 27, 1994, also subjected lesbians, gays and bisexuals to discharge for statements, acts and marriage, and also contained the rebuttable presumption. Each of these terms will be further explained in the text, *infra*.

5. *Cammermeyerv. Aspin*, 850 F. Supp. 910,920 (W.D. Wash. 1994); *Dahl v. Secretary of the United States Navy*, 830 F. Supp 1319, 1334 (E.D. Cal. 1993) (holding that the military’s gay ban violated plaintiffs Fifth Amendment rights); *Selland v. Aspin*, 832 F. Supp. 12, 15 (D. D.C. 1993) (granting preliminary injunction and suggesting that plaintiff would likely succeed on the merits that gay ban violated plaintiffs Fifth Amendment rights); *benShalom v. Marsh*, 881 F.2d 454,466 (7th Cir. 1989), *cert. denied*, 494 U.S. 1004(1990); *Steffan v. Perry*, 41 F.3d 677 (D.C. Cir. 1994) (holding that gay ban did not violate plaintiffs Fifth Amendment rights).

6. Kirstin S. Dodge, *Countenancing Corruption: A Civic Republican Case Against Judicial Deference to the Military*, 5 YALE J. L. & FEMINISM 1(1992); Gabriel W. Gorenstein, Note, *Judicial Review of Constitutional Claims Against the Military*, 84 COLUM. L. REV. 387 (1984).

7. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). *See also* Francisco Valdes, *Sexual Minorities in the Military: Charting the Constitutional Frontiers of Status and Conduct*, 27 CREIGHTON L. REV. 381, 430 (1994); JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* 380-94, 588-605 (4th ed. 1991).

8. *Id.*

9. *Id.*

10. *Id.*

### A. Does “Don’t Ask, Don’t Tell, Don’t Pursue” Treat Heterosexuals and Homosexuals Differently?

The first question the United States Supreme Court will have to address is whether the government’s regulations on military service treat heterosexuals differently from lesbians, gays and bisexuals.” On its face,<sup>2</sup> and in substance, the “Don’t Ask, Don’t Tell, Don’t Pursue” policy specifically targets homosexuals and bisexuals, but not heterosexuals, for discharge.

The “Don’t Ask, Don’t Tell, Don’t Pursue” policy provides that homosexuals and bisexuals, but not heterosexuals, may be discharged for statements, acts and marriage. The regulations define “statements” as “a Statement that [the servicemember] is a homosexual or bisexual, or words to that effect, unless there is a further approved finding that the [servicemember] 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>3</sup> The regulations define “acts” as

any bodily contact, actively undertaken or passively permitted, between members of the same sex for purposes of satisfying sexual desires and any bodily contact (for example, hand-holding or kissing, in most circumstances) that a reasonable person would understand to demonstrate a propensity or intent to engage in such an act.<sup>4</sup>

The regulations do not define marriage,<sup>5</sup> but prohibit both marriage and attempted marriage<sup>6</sup> by persons of the same gender. Thus, the plain language of the regulations states:

11. *See City of Cleburne*, 473 U.S. at 439.

12. When the new law was passed by Congress and when the new regulations were promulgated by the Department of Defense, it was clear that the regulations targeted service by homosexuals, not heterosexuals. Congress called its new law “Policy Concerning Homosexuality in the Armed Forces.” 10 U.S.C.A. § 654 (West Supp. 1995). The Department of Defense Directives implementing the law were called “Directives Implementing the New DoD Policy on Homosexual Conduct.” DEP’T OF DEFENSE DIRECTIVE No. 1332.14; *id.* No. 1332.30 (Dec. 22, 1993).

13. DEP’T OF DEFENSE DIRECTIVE NO. 1332.30, end. 2-2(C)(1)(b) (Dec. 22, 1993). It should be noted that there is no other federal, state or local law that prohibits men or women from stating their sexual orientation. *See* Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 VA. L. REV. 1551, 1564 (1993); *Gay Alliance of Students v. Matthews*, 544 F.2d 162, 166 (4th Cir. 1976).

14. DEP’T OF DEFENSE DIRECTIVE No. 1332.30, end. 8-1 (Dec. 22, 1993). It should be noted that there is no other federal, state or local law that prohibits men or women from holding hands or kissing a person of the same gender. *See* Valdes, *supra* note 8, at 441; *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 66SF. Supp. 1361 (N.D. Cal. 1987), *rev’d on other grounds*, 895 F.2d 563 (9th Cir. 1990).

15. There is currently no state or local government that permits marriage by persons of the same gender. By the same token, there is no federal, state or local law that prohibits committed relationships between people of the same gender. *See* Valdes, *supra* note 7, at 470.

16. The plain language of the regulations does not proscribe domestic partnerships that are permitted by some local governments, but the Department of Defense in the past has used evidence of legally sanctioned domestic partnerships as grounds for discharge.

lesbians, gays and bisexuals, but not heterosexuals, will face discharge under “Don’t Ask, Don’t Tell, Don’t Pursue” if they are honest about their sexual orientation by telling friends, family, church and co-workers;

lesbians, gays and bisexuals, but not heterosexuals, will face discharge under “Don’t Ask, Don’t Tell, Don’t Pursue” if they hold hands with, hug, or kiss another consenting adult, even if off-base and in private; and

lesbians, gays and bisexuals, but not heterosexuals, will face discharge under “Don’t Ask, Don’t Tell, Don’t Pursue” if they are in a committed relationship with another consenting adult.’<sup>7</sup>

The United States Supreme Court should have no difficulty concluding that the “Don’t Ask, Don’t Tell, Don’t Pursue” policy treats heterosexuals differently than lesbians, gays and bisexuals for saying and/or doing the same things. The analysis for the Supreme Court then turns on whether the United States government has a legitimate reason for the differential treatment and whether the “Don’t Ask, Don’t Tell, Don’t Pursue” policy is, under the most deferential standard of Congressional and United States Military review, rationally related to the asserted governmental interest.

**B. What Is the Government’s Rationale for “Don’t Ask, Don’t Tell, Don’t Pursue” and Is the Policy Rationally Related to the Government’s Purported Interest?**

The United States government, both in the law enacting the new policy and in the new regulations themselves, currently advances two rationales to support “Don’t Ask, Don’t Tell, Don’t Pursue.” The government argues that the policy is necessary to (1) prevent potential sexual misconduct<sup>9</sup> that violates the Uniform Code of Military Justice, the military’s criminal code of conduct, and (2) preserve “the armed forces’ high standards of morale, good order, discipline, and unit cohesion that are the essence of military capability.”<sup>20</sup>

Assuming, for the sake of argument, that the government’s asserted interests are indeed legitimate,<sup>21</sup> the United States Supreme Court will have to analyze

17. DEP’T OF DEFENSE DIRECTIVE No. 1332.30 end. 8-1 (Dec. 22, 1993).

18. This article does not concede that the rational basis standard of review is necessarily the appropriate standard of review under the Equal Protection Clause for lesbian, gay and bisexual plaintiffs challenging the military’s “Don’t Ask, Don’t Tell, Don’t Pursue” policy. There is strong support for the application of strict scrutiny or intermediate scrutiny to cases challenging the military’s policy. See, e.g., Seth Harris, Note, *Permitting Prejudice to Govern: Equal Protection, Military Deference, and the Exclusion of Lesbians and Gay Men from the Military*, 17 N.Y.U. REV. OF L. & Soc. CHANGE 171(1989-90). This article, however, focuses solely on the rational basis standard of review.

19. “The prohibition against homosexual conduct is a long-standing element of military law that continues to be necessary in the unique circumstances of military service.” 10 U.S.C.A. § 654 (West Supp. 1995).

20. *Id.*

21. There is a strong argument that the government’s criminal regulation of consensual

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adult sex, off-base and in private, for heterosexuals, homosexuals and bisexuals, is not a legitimate government

whether the “Don’t Ask, Don’t Tell, Don’t Pursue” policy is rationally related to the asserted governmental interests.<sup>22</sup> To place the government’s rationales in proper context, however, the United States Supreme Court should critically analyze the various rationales the government has asserted, and then abandoned, in the past under prior policies to justify its differential treatment of lesbians, gays and bisexuals.<sup>23</sup> The historical analysis demonstrates that the military’s policy on homosexuals is one in desperate search of a rationale and should at least give the United States Supreme Court pause when reviewing the current justifications proffered by the United States military.

### **1. The Government’s Rationales from 1945 to 1995 for Treating Lesbians, Gays and Bisexuals in the Military Differently from Heterosexuals.**

The United States military had no official policy on homosexuals from 1776 to 1945.<sup>24</sup> While some individuals were administratively discharged or criminally prosecuted when there was concrete evidence of heterosexual or homosexual sexual misconduct,<sup>25</sup> the United States military did not adopt or enforce any administrative regulations that required separation or exclusion from military service based on an honest declaration of sexual orientation, an act such as handholding that did not violate existing military regulations, or a marriage or attempted marriage.<sup>26</sup>

interest. *See, e.g.*, Cain, *supra* note 13.

22. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985).

23. *See* Pruitt v. Cheney, 963 F.2d 1160(9th Cir. 1991), *cert. denied*, 113 5. Ct. 655 (1992). *See also* Dahl v. Secretary of the United States Navy, 830 F. Supp. 1319 (E.D. Cal. 1993); Cammermeyer v. Aspin, 850 F. Supp. 910 (W.D. Wash. 1994).

24. Indeed, one of only two men deemed “indispensable” to the American Revolutionary War, besides George Washington, was an openly gay man, Baron Frederick William vonSteuben. Benjamin Franklin successfully lobbied to bring vonSteuben from Prussia to America to mold the original thirteen colonies’ militias into the Continental Army. Among his many accomplishments, vonSteuben developed the original plans for a military academy, later to become known as West Point. One commentator noted, “[i]t is the crowning irony that anti-gay policies are defended in the name of preserving the good order and discipline of the U.S. military, when that very good order and discipline was the creation of a gay man.” Randy Shilts, *What’s Fair in Love and War*, NEWSWEEK, Feb. 1, 1993, at 58.

25. VonSteuben notwithstanding, it is also documented that General George Washington drummed at least one soldier out of the army on March 10, 1778 for attempted sodomy. II GEORGE WASHINGTON, THE WRITINGS OF GEORGE WASHINGTON 83-84 (John C. Fitzpatrick ed., U.S.G.P.O., 1934), *reprinted in* KATZ, GAY AMERICAN HISTORY: LESBIANS AND GAY MEN IN THE USA 29 (Crowell ed., 1976). The first formal rules that criminalized heterosexual and homosexual assault with intent to commit anal sodomy were the Articles of War of 1916. *See* Davis, *supra* note 1, at 72-73.

26. The United States military also did not have any formal policy regarding oral or anal sex from 1776 to 1916. In 1916, Congress adopted revisions to the Articles of War that proscribed assault with intent to commit anal sex for both heterosexuals and homosexuals. Articles of War, art. 93 (1916), *reprinted in* MANUAL FOR COURTS-MARTIAL 443(1917). Congress later revised the provisions in the Articles of War (1920) to proscribe oral sex for both heterosexuals and homosexuals. Act of June 4, 1920, ch. 11,41 Stat. 787; MANUAL FOR COURTS-MARTIAL

(1921). The United States military only began to proscribe consensual adult oral sex and anal sex in 1951 with the adoption of Article 125 of the Uniform Code of Military Justice. Article 125 remains unchanged today, and proscribes both oral and anal sex for heterosexuals as well as for homosexuals. U.C.M.J., art. 125, 10 U.S.C.A § 925 (West Supp. 1995).

Since the beginning of World War II, however, the United States has promulgated a variety of policies on service by men and women who were either discovered to be lesbian, gay or bisexual, or who were honest about their identity. Such policies sometimes included banning their service outright, mandating their discharge once discovered, and other times allowing some lesbians, gays and bisexuals to serve at the discretion of their commanders. From 1955 to 1958, for example, the military permitted retention of lesbians and gay men adjudged especially valuable to the military<sup>27</sup> before restoring a policy of mandatory discharge.<sup>28</sup> Again, from 1972 to 1981, the United States military adopted a discretionary policy permitting retention of some known lesbian, gay and bisexual servicemembers.<sup>29</sup>

Nevertheless, since World War II, the government has promulgated a variety of policies to exclude or discharge lesbians, gay men and bisexuals, asserting a laundry list of reasons for the differential treatment, including rationales that lesbians, gays and bisexuals were mentally ill, security risks, and unfit—all of which have been found factually baseless<sup>30</sup> and which the military and the United States government have now abandoned.<sup>31</sup> The United States military now claims, however, that lesbian, gay and bisexual servicemembers are more likely than heterosexual servicemembers to engage in sexual misconduct and to disrupt unit cohesion.<sup>32</sup> These justifications are also factually baseless<sup>33</sup> and are simply the latest in the government's desperate attempt to justify its differential treatment of lesbians, gays and bisexuals.

#### a. Mental Illness

In 1945, at the urging of the psychiatric community,<sup>34</sup> the War Department declared that homosexuals were mentally ill and should either be denied enlistment into the United States military or, once discovered, discharged from military

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service. Official military policy lumped homosexuals into the same category as

27. See Harris, *supra* note 18, at 174-75

28. See, e.g., DEP'T OF ARMY REG. No. 635-89, ¶ 3 (Sept. 8, 1955).

29. The Army's litigation posture in 1977 was that discharge of lesbian and gay personnel was discretionary. DMA-AL 1978/4 168, Jan. 2, 1979. The Navy's litigation posture was the same. See *Champagne v. Schlesinger*, 506 F.2d 979, 983-84 (7th Cir. 1974). The Air Force had specific regulations that provided for exceptions when "the most unusual circumstances exist." See AIR FORCE MANUAL 39-12, ¶ 2-103 (Oct. 21, 1970). See also Davis, *supra* note 1, at 175.

30. Even one of the Department of Defense's top attorneys assigned to defending the gay ban has conceded that the ban is not based upon "a determination of fact." MELISSA WELLS-PETRY, *EXCLUSION: HOMOSEXUALS AND THE RIGHT TO SERVES* (1993).

31. 10 U.S.C.A. § 654 (West Supp. 1995).

32. *Id.*

33. See WELLS-PETRY, *supra* note 30.

34. ALLEN BERUBE, *COMING OUT UNDER FIRE: THE HISTORY OF GAY MEN AND WOMEN IN WORLD WAR* Two 2, 9-21 (1990); Davis, *supra* note 1, at 74; Gregory M.

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Herek, *Sexual Orientation and Military Service*, AM. PSYCHOL. 2 (May 1993).

3S. See Harris, *supra* note 18, at 174; DEP'T OF ARMY REG. No. 615-368, ¶ 1(a)(2) (Mar. 7,

psychopaths, vagabonds, drug addicts, and alcoholics.<sup>36</sup> Official War Department policy, however, stated that homosexuals could be “reclaimed” and returned to active duty.<sup>37</sup>

In 1973, “the American Psychiatric Association voted to stop classifying homosexuality as a mental disorder.”<sup>38</sup> Today, the military does not assert that homosexuals or bisexuals are mentally ill. The military has abandoned that rationale as a reason for excluding lesbians, gays and bisexuals from the military,<sup>39</sup> and instead acknowledges that thousands of lesbians, gays and bisexuals have served capably in the military for many years.<sup>40</sup>

#### b. Security Risk

The Department of Defense established a new policy in 1949, stating that known lesbians and gay men constituted security risks whose discharge from the service branches was mandatory.<sup>41</sup> The military maintained an official policy that lesbians, gay men and bisexuals posed a national security threat to the United States until 1994,<sup>42</sup> despite official military studies and statements indicating that the rationale lacked factual basis. Today, the United States military has completely abandoned the security rationale as lacking in merit.

As early as 1957, for example, a report prepared for the Secretary of the Navy pointedly criticized the idea that lesbians, gays and bisexuals posed a security threat as “without sound basis in fact.”<sup>43</sup> Recent military studies amplify this criticism and conclude that homosexuality bears no relation to the particular character or adjustment problems that may be indications of a potential security risk. A Department of Defense study, for example, noted that “[i]n the 30 years since the Crittenden Report was submitted, no new data have been presented that would refute its conclusion that homosexuals are not greater risks than heterosexuals.”<sup>44</sup> A

36. *Id.*

37. *Id.*

38. DEP’T OF ARMY REG. No. 615-368, ¶ 1(a)(2) (Mar. 7, 1945).

39. See Letter from Christopher Jehn, Assistant Secretary of Defense, to Frank Conahan, Assistant Comptroller General (Apr. 17, 1992), reprinted in GAO, DEFENSE FORCE MANAGEMENT:

DoD’s POLICY ON HOMOSEXUALITY 56 (June 1992) (hereinafter FIRST GAO REPORT) (denying that the military views homosexuality as a mental disorder); DoD Comments on GAO Draft Report, reprinted in FIRST GAO REPORT at 59.

40. *Remarks of President Clinton: July 19, 1993*, WASH. POST, July 20, 1993, at A12.

41. Harris, *supra* note 18, at 166. See also Lawrence R. Deiter, Comment, *Employment Discrimination in the Armed Services—An Analysis of Recent Decisions Affecting Sexual Preference Discrimination in the Military*, 27 VILL. L. REV. 351, 354 (1981).

42. The policy immediately prior to “Don’t Ask, Don’t Tell, Don’t Pursue,” adopted in 1981 and in effect until February 28, 1994, stated that the exclusion of homosexuals was necessary to “prevent breaches of security.” DEP’T OF DEFENSE DIRECTIVE No. 1332.14 (1994); *id.* No. 1332.30 (Dec. 22, 1993); 32 C.F.R. § 41 app. A (adopted on Jan. 29, 1991).

43. REPORT OF THE BOARD APPOINTED TO PREPARE AND SUBMIT RECOMMENDATIONS TO THE NAVY FOR THE REVISION OF POLICIES, PROCEDURES, AND DIRECTIVES DEALING WITH HOMOSEXUALS 6 (1988) (hereinafter CRFITENDEN REPORT).

44. T. SARBIN & K. KAROLS, DEFENSE PERSONNEL SECURITY RESEARCH & EDUCATION CENTER, NONCONFORMING SEXUAL ORIENTATIONS AND MILITARY SUITABILITY 29 (1988) (hereinafter FIRST PERSEREC REPORT).

subsequent revision of that report stated, after a review of psychological and sociological literature, that “[o]ne conclusion stands out: knowing that a person is homosexual tells very little about his or her character.”<sup>45</sup> Even former Bush Secretary of Defense Dick Cheney dismissed the notion of security risk as “a bit of an old chestnut” in testimony before Congress.<sup>46</sup> And recently, President Bill Clinton announced new standards for the issuance of security clearances, stating that lesbians, gays and bisexuals do not pose a security threat.<sup>47</sup> However, President Clinton’s Executive Order only reaffirmed that the security clearance rationale had long been discarded by the United States military and the Department of Justice. The new “Don’t Ask, Don’t Tell, Don’t Pursue” policy does not invoke security risk as a basis for the policy.<sup>48</sup>

### c. Unfit

In 1970, the military branches of service established a new policy stating that known lesbians, gays and bisexuals could not perform military duties and were, therefore, “unfit” or “unsuitable.”<sup>49</sup> The United States military mandated discharge of all servicemembers who were discovered to be lesbian, gay or bisexual, or who were honest about their sexual orientation. However, commanders could, at their discretion, retain especially valuable servicemembers.<sup>50</sup> The military services lumped lesbians, gays and bisexuals into a category consisting of drug addicts, those with weight problems, and those who could not meet physical test requirements, among those who could not meet performance standards.<sup>51</sup> The Department of Defense reaffirmed its overall policy in 1975, describing the “homosexual person as unsuitable for military service.”<sup>52</sup>

45. *Id.* at 24 (noting that, on various psychological tests, the range of variation is the same for heterosexuals and homosexuals, and concluding that “good adjustment and poor adjustment are unrelated to sexual orientation”). See also M. MCDANIEL, DEFENSE PERSONNEL SECURITY RESEARCH & EDUCATION CENTER, PRESERVICE ADJUSTMENT OF HOMOSEXUAL AND HETEROSEXUAL MILITARY ACCESSIONS: IMPLICATIONS FOR SECURITY CLEARANCE SUITABILITY 590 (1989) (concluding, from review of responses to wide-ranging survey administered to recruits and applicants for military service and from information about respondents separated from the service because of homosexuality, that “homosexuals show preservice suitability-related adjustment that is as good [as] or better than the average heterosexual”).

46. See FIRST GAO REPORT, *supra* note 39, at 35; see also DoD Comments on GAO Draft Report, *reprinted in* FIRST GAO REPORT, *supra* note 39, at 57, 72 (reaffirming insignificance of security rationale for exclusion policy).

47. Exec. Order No. 12968 § 3.1(c), (d), 60 Fed. Reg. 40245 (1995).

48. 10 U.S.C.A. § 654 (West Supp. 1995).

49. Harris, *supra* note 18, at 167. See also Deiter, *supra* note 41.

50. See, e.g., DEP’T OF ARMY REG. No. 635-212, Personnel Separations,

Discharges, Unfitness and Unsuitability, ¶ 6 (Jan. 21, 1970); *id.* No. 635-100, Personnel Separations, Officer Personnel, ¶5-5 (Jan. 21, 1970).

51. *Id.*

52. 1975 Revisions to AR 600-443. *See also* Deiter, *supra* note 41; Matlovich v. Secretary of the Air Force, 591 F.2d. 852(D.C. Cir. 1978).

In 1981, the Department of Defense again asserted that “homosexuality is incompatible with military service”<sup>53</sup> and mandated the exclusion of all lesbians, gays and bisexuals without exception. For the first time, however, the Department of Defense articulated a litany of new reasons why lesbians, gays and bisexuals, but not heterosexuals, were deemed unfit. The new regulations stated, in part, that the mere presence of lesbian, gay and bisexual servicemembers adversely affects the ability of the military to:

- foster mutual trust and confidence among servicemembers;
- ensure the system of rank and command;
- facilitate assignment and worldwide deployment of servicemembers who frequently must live and work under close conditions affording minimal privacy;
- recruit and retain members of the Military Services; and
- maintain public acceptability of military service.<sup>54</sup>

Remarkably, the United States military never seriously contended that lesbians, gays and bisexuals could not physically or mentally perform military duties as effectively as heterosexuals.” As early as 1957, a report prepared for the Secretary of the Navy, discussing “fallacies concerning homosexuality,” noted that the concept that homosexuals cannot acceptably serve in the military was “without visible supporting data,” and that “there have been many known instances of individuals who have served honorably and well, despite being exclusively homosexual.”” A more recent study prepared for the military by the Defense Personnel Security Research and Education Center reaffirmed that “having a same-gender or an opposite-gender orientation is unrelated to job performance in the same way as is being left- or right-handed.”<sup>57</sup> In the most comprehensive study ever conducted for the military concerning gay and lesbian servicemembers in 1993, the issue of performance was apparently considered so insignificant that it was not even addressed.<sup>58</sup>

Furthermore, despite the list of concerns generated by the Department of Defense in 1981 about lesbian, gay and bisexual servicemembers, the United States

53. DEP’T OF DEFENSE DIRECTIVE No. 1332.14(1994); *id.* No. 1332.30, 32 C.F.R. § 41, app. A at 84, 89 (adopted on Jan. 29, 1991).

54. DEP’T OF DEFENSE DIRECTIVE No. 1332.14 (1994); *id.* No. 1332.30, 32 C.F.R. § 41, app. A at 84, 89 (adopted on Jan. 29, 1991).

55. Even while defending the gay ban, General Cohn Powell, former Chairman of the Joint Chiefs of Staff, conceded that the reason for the policy “is not an argument of performance on the part of homosexuals who might be in uniform, and it is not saying they are not good enough.” *House Budget Committee Hearing* 112 (1992). Furthermore, Powell characterized gay soldiers as “proud, brave, loyal, good Americans.” *Id.*

56. See CRITrENDEN REPORT, *supra* note 43.

57. See FIRST PERSEREC REPORT, *supra* note 44.

58. See *generally* RAND, NATIONAL DEFENSE RESEARCH INSTITUTE, SEXUAL ORIENTATION AND U.S. MILITARY PERSONNEL POLICY: OPTIONS AND ASSESSMENT (1993) (hereinafter RAND REPORT). In a statement of remarkable candor, the former Commander of the Atlantic Naval Surface Fleet, while urging greater vigilance to find and

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expel lesbians in the military, noted that the task would be difficult because the “stereotypical” lesbian in the Navy is “hardworking, career-oriented, willing to put in long hours on the job and among the command’s top professionals.” FIRST GAO REPORT, *supra* note 39, at 27.

military never contended that the actions of lesbian, gay and bisexual servicemembers *themselves* would ever be responsible for any of the concerns. For example, the United States military has never contended that gay men and lesbians are disqualified from the military because their sexual orientation constitutes some kind of moral flaw that is incompatible with military service. Thus, the military has never even hinted that gay men and lesbians, as a class of persons, are untrustworthy, lacking in character necessary to give and follow orders, or insufficiently brave to face the hazards of war. Nor has the United States military ever suggested that gay men and lesbians, as a class, somehow do not *deserve* the confidence of their superiors or those under their command.

In addition, the military has never contended that gay men and lesbians resist discipline, reject orders from their commanding officers, or refuse to become “part of the team.” Rather, in the military’s view, the threat to military effectiveness resides in the possibility that heterosexuals will feel uncomfortable around homosexuals. The military once believed, at least in theory, that heterosexuals would ostracize homosexuals (thus impairing “mutual trust and confidence”), refuse to take orders from them (adversely affecting rank and command as well as discipline), harass them (impairing good order), or, in an extreme version of the scenario, refuse to deploy<sup>59</sup> or resign from the military service.<sup>60</sup>

Today, the United States military has abandoned its rationale that lesbians, gays and bisexuals are unfit or incapable of serving both honorably and well.<sup>61</sup> The United States military has also abandoned the rationale that lesbians, gays and bisexuals will somehow hinder the military’s ability to foster mutual trust and confidence among servicemembers, ensure the system of rank and command, facilitate assignment and worldwide deployment of servicemembers, recruit and retain members of the Military Services, and maintain public acceptability of

59. The concern about worldwide deployment does not appear to be truly separate from that about privacy, namely, that servicemembers may be forced to share close quarters when deployed overseas. The attitudes of the United States’ NATO military partners are, on the whole, more tolerant towards the service of gay men and lesbians than the American policy, not less so. FIRST GAO REPORT, *supra* note 59, at 65-104. Moreover, when the military faced urgent overseas personnel needs during World War II, the Korean War, and the Vietnam War, it relaxed the ban on service by gay men and lesbians. During Operations Desert Shield and Desert Storm, the military knowingly deployed openly gay and lesbian servicemembers to Saudi Arabia, which may have the most hostile environment towards homosexuality in the world. See David F. Burrelli, HOMOSEXUALS AND U.S. MILITARY POLICY: CRS REPORT FOR CONGRESS. *reprinted in* 139 CONG. REC. §§1308, 1309 (daily ed. Feb. 4, 1993); Wade Lambert & Stephanie Simon, *U.S. Military Moves to Discharge Some Gay Veterans of Gulf War*. WALL ST. J., July 30, 1991, at B6; Shilts, *supra* note 24, at 58-59.

60. It is also important to note that:

According to ...Dr. Lawrence Korb, the Assistant Secretary of Defense who was directly

responsible for military personnel matters between 1981 and 1985, there is no evidence supporting the defendants' assertion that allowing homosexuals to serve in the military will adversely affect recruitment and retention of military personnel . . . . The RAND report similarly concludes that lifting the ban would likely have no effect on recruitment and only nominal effect on reenlistment.

*Cammermeyer v. Aspin*, 850 F. Supp. 910, 923 (W.D. Wash. 1994).

61. 10 U.S.C.A. § 654 (West Supp. 1995).

military service. In 1993, both the Senate<sup>63</sup> and House,~ as well as the Commander-in-Chief, President Bill Clinton, recognized that many lesbians, gays and bisexuals have served with distinction and will continue to serve with distinction.<sup>65</sup> The new “Don’t Ask, Don’t Tell, Don’t Pursue” policy now states that sexual orientation is not a bar to military service, and does not recite the laundry list of concerns attached to the 1981 policy.<sup>66</sup>

#### **d. Sexual Misconduct**

Having discarded the rationales of the last fifty years that lesbians, gays, and bisexuals were mentally ill, constituted security risks, or were incapable of performing up to military standards, the Department of Defense implemented yet another policy on February 28, 1994.<sup>67</sup> The “Don’t Ask, Don’t Tell, Don’t Pursue” policy again mandated discharge of those who were discovered to be lesbians, gays or bisexuals or who were honest about their sexual orientation. The proffered reasons for the current policy are that the policy is necessary to (1) prevent potential sexual misconduct<sup>68</sup> that violates the Uniform Code of Military Justice, and (2) preserve “the armed forces’ high standards of morale, good order, discipline, and unit cohesion that are the essence of military capability.”<sup>69</sup>

The military, however, does not contend that homosexuals are more predisposed than heterosexuals to commit forms of sexual misconduct that could be the basis for discipline.<sup>70</sup> For example, the military has never argued that gay and lesbian personnel are more likely than heterosexuals to make unwanted sexual advances towards other personnel, to ogle personnel, to engage in sexual harassment, to make public displays of affection where and when such displays would be inappropriate for both heterosexuals or homosexuals, or to fraternize with other servicemembers.<sup>71</sup>

62. DEP’T OF DEFENSE DIRECTIVE No. 1332.14 (1994); *id.* No. 1332.30 (Dec. 22, 1993); 32 C.F.R. § 41 app. A (adopted on Jan. 29, 1991).

63. *Policy Concerning Homosexuality in the Armed Forces. Hearings Before the Senate Comm. on Armed Services*, 103rd Cong., 2d Sess. (1993).

64. *Policy Implications of Lifting The Ban on Homosexuals in the Military: Hearings Before the House Comm. on Armed Services*, 103d Cong., 1st Sess. 5 (1993).

65. See *Remarks of President Clinton*, *supra* note 40.

66. DEP’T OF DEFENSE DIRECTIVE No. 1304.26, *Qualification Standards for Enlistment, Appointment and Induction*, end. 2-5(B)(8)(a). Oddly, though, the new policy maintains the same bases for separation as under the 1981 policy: statements, acts and marriage.

67. See generally *supra* note 12.

68. “The prohibition against homosexual conduct is a long-standing element of military law that continues to be necessary in the unique circumstances of military service.” 10 U.S.C.A. § 654 (West Supp. 1995).

69. *Id.*

70. *Remarks of President Clinton, supra* note 40 (“[T]here is no study showing [homosexuals] to be less capable or more prone to misconduct than heterosexual soldiers.”).

71. *See* Herek, *supra* note 34, at 9 (no data to indicate that lesbians and gay men are less able than heterosexuals to control sexual urges or to refrain from abuse of power); *id.* at 10 (64% of women responding to DoD surveys had experienced unwanted sexual attention during previous year, mostly from men).

Furthermore, the United States military does not argue that the “Don’t Ask, Don’t Tell, Don’t Pursue” policy is justified because homosexuals are more likely than heterosexuals to violate Article 125 of the Uniform Code of Military Justice,<sup>72</sup> which criminalizes sodomy. First, sodomy is not homosexuality, and Article 125 applies equally to heterosexuals as well as to homosexuals. Article 125 expressly prohibits unnatural carnal copulation “with another person of the *same or opposite sex*,” and, as construed by the Manual for Courts Martial and the case law, covers oral and anal sex by both heterosexuals and homosexuals.<sup>73</sup> Second, not all gay men and lesbians engage in those acts and such acts are common among heterosexuals. The United States military, however, does not argue that heterosexuals should be excluded from the military because of their “predisposition” to commit sodomy.<sup>74</sup>

The government also fails to explain why it needs a completely separate administrative regime for lesbians, gays and bisexuals, but not for heterosexuals. That is the essence of the equal protection claim: Why does the government need a “Don’t Ask, Don’t Tell, Don’t Pursue” policy that targets lesbians, gays and bisexuals, but not heterosexuals?<sup>75</sup> If the government promulgated regulations that discharged heterosexuals for statements of sexual orientation, acts such as hand-holding, and marriage or attempted marriage, there would be no equal protection issue.

Some federal courts have misunderstood the basic Equal Protection issue presented to them by the “Don’t Ask, Don’t Tell, Don’t Pursue” policy and its immediate predecessor. These courts have accepted the government’s misstatement of the issue, which does not present a true equal protection claim. In *Thomasson v. Perty*, for example, Justice Hilton accepted the government’s suggestion that a rational basis review of “Don’t Ask, Don’t Tell, Don’t Pursue” is limited to the question of whether it is rational to presume that a person who states that he is homosexual will engage in sexual conduct commensurate with that identity.<sup>76</sup> Furthermore, Justice Silberman, in *Steffan v. Perry*,<sup>77</sup> and Justice Zilly, in

72. 10 U.S.C.A. § 925 (West Supp. 1995).

73. *United States v. Henderson*, 34 M.J. 174 (C.M.A. 1992) (consensual heterosexual oral sex) (emphasis added). *See also* *United States v. Hall*, 34 M.J. 695 (A.C.M.R. 1991) (consensual heterosexual anal sex); *United States v. Fagg*, 34 M.J. 179 (C.M.A. 1992); FIRST PERSEREC REPORT, *supra* note 44, at 2; DoD Comments on GAO Draft Report, *reprinted in* FIRST GAO REPORT, *supra* note 39, at 66.

74. *See, e.g.,* SAMUAL S. JANUS & CYNTHIA L. JANUS, THE JANUS REPORT ON SEXUAL BEHAVIOR (1993) (cited in RAND REPORT, *supra* note 58, at 57) (88% of men and 87% of women view oral sex as “very normal” or “all right”); J. Billy et al., *The Sexual Behavior of Men in the United States*, 25 FAM. PLAN. PERSP. 52-60 (Mar/Apr. 1993), *reprinted in* RAND REPORT, *supra* note 58 (among men aged 20-39, 75% have performed and 79% have received oral sex, and 32% and 34%, respectively, have done so in past four weeks);

WILLIAM MASTERS & VIRGINIA JOHNSON, MASTERS AND JOHNSON ON SEX AND HUMAN LOVING 328-29 (1986) (85% of married American women reported having oral sex often or occasionally, as many as 43% reported engaging in anal sex, and over 50% reported that anal sex was an acceptable sexual practice).

75. See Valdes, *supra* note 7.

76. Thomasson v. Perry, No. CIV.A.95-252-A, 1995 WL470185, at \*10 (E.D.Va. June 8, 1995).

77. 41 F.3d 677 (D.C. Cir. 1994).

*Cammermeyer v. Aspin*<sup>78</sup> both limited their rational basis inquiries to the same question.

Each respective court answered the question differently. Some concluded that it would be irrational to conflate sexual identity and sexual conduct,<sup>79</sup> as the weight

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Others co

of social science evidence suggests. Others concluded that the military's presumption is rational. More fundamentally, however, each court entirely misapprehended the basic equal protection issue. The equal protection issue is, as stated before, whether it is rational for the United States military to develop and implement a completely separate administrative regime for lesbians, gays and bisexuals, but not for heterosexuals.<sup>81</sup> In cases where the only evidence before the court is a servicemember's statement of his or her sexual identity, the fundamental question is whether it is rational to discharge lesbians, gays and bisexuals, but not heterosexuals if they are honest about their sexual orientation by telling friends, family, church and co-workers.

The government has urged that a mere statement of sexual orientation, an honest declaration to friends, family, church and co-workers, raises a presumption that he or she will engage in sexual misconduct. The government, however:

- does not apply the same presumption to heterosexuals;<sup>82</sup>
- concedes that lesbians, gays and bisexuals are not more prone to sexual misconduct than heterosexuals,<sup>83</sup> and therefore the presumption does not apply with any more force to homosexuals than to heterosexuals; and
- concedes that it has regulations in place that govern sexual misconduct evenhandedly for heterosexuals as well as lesbians, gays and bisexuals.<sup>84</sup>

The United States Supreme Court must be careful not to fall into the same trap as have several of the federal district courts and circuit courts of appeal when addressing the rationality of the military's policy on lesbians, gays and bisexuals.

78. 850 F. Supp. 910 (W.D. Wash. 1994).

79. See Cain, *supra* note 13, at 1625.

Self identified homosexuals surely have an identity apart from their sexual conduct. Recognition of intense emotional attachments to persons of the same sex may be a sufficient indicator of sexual identity. A woman who chooses another woman as her life partner may attribute her lesbian identity to aspects of her relationship and events in her life apart from actual sexual conduct. Thus, the reality for many gay men and lesbians is that sexual identity (status) is something much broader than sexual conduct....

*Id.* (footnote omitted).

80. See Janet E. Halley, *The Politics of the Closet: Towards Equal Protection for Gay,*

*Lesbian,*

*and Bisexual Identity*, 36 UCLA L. REV. 915, 943-44 (1989) (citing Carla Golden, *Diversity and*

*Variability in Women's Sexual Identities*, reprinted in LESBIAN PSYCHOLOGIES: EXPLORATIONS AND

CHALLENGES 19, 25 (Boston Lesbian Psychologies Collective ed. 1987)); Gary J. McDonald, *Individual Differences in the Coming Out Process for Gay Men: Implications for Theoretical Models*,

8 J. HOMOSEXUALITY 47 (1982).

81. See Valdes, *supra* note 7.

82. The application of a presumption against lesbians, gays and bisexuals, but not heterosexuals, raises an additional equal protection claim, separate from, but closely related to, the claim that the government subjects to discharge lesbians, gays and bisexuals, but not heterosexuals, for statements, acts and marriage.

83. *Remarks of President Clinton*, *supra* note 40.

84. *Id.*

In the final analysis, it is clear that even if the government has a legitimate interest in proscribing certain sexual misconduct, the “Don’t Ask, Don’t Tell, Don’t Pursue” policy is not rationally related to that interest in that it treats heterosexuals differently from lesbians, gays and bisexuals, without any rational basis for the distinction.<sup>85</sup>

e. Unit Cohesion

Ultimately, the United States military argues that it must exclude known lesbians, gays and bisexuals, but not heterosexuals, from the military in order to preserve morale, good order and discipline, which all seem to be synonymous with unit cohesion. This rationale is contained directly in the “Don’t Ask, Don’t Tell, Don’t Pursue” regulations<sup>86</sup> and can be traced back to both the 1981<sup>87</sup> and 1975 policies<sup>88</sup> on service by lesbians, gays and bisexuals.

The United States military does not state how good order, discipline, morale or unit cohesion are in any way affected by the presence of known lesbians, gays and bisexuals. As noted above, the United States military has never argued that there is anything inherent about lesbians, gays and bisexuals, as a class of persons, that makes them untrustworthy, lacking in character necessary to give and follow orders, or insufficiently brave to face the hazards of war. Nor has the military ever suggested that gay men and lesbians, as a class, somehow do not *deserve* the confidence of their superiors or those under their command. Furthermore, the military has never contended that gay men and lesbians resist discipline, reject orders from their commanding officers, or refuse to become “part of the team.”

Reduced to its essentials, the military’s justification is simply that some heterosexuals in the services hold prejudices against gay men and lesbians, and that these prejudices are so strong that the mere presence of gay men and lesbians in the armed services may cause the heterosexuals to disrupt the military’s smooth operation.<sup>89</sup> The military defers to these perceived prejudices so much that it excludes gay men and lesbians who are discovered or who are honest about their

85. See *supra* note 7.

86. DEP’T OF DEFENSE DIRECTIVE No. 1332.14(H)(1)(a) (1994); 32 C.F.R. § 41 app. A (adopted on Jan. 29, 1991).

87. *Id.* See also DEP’T OF DEFENSE DIRECTIVE No. 1332.30; 32 C.F.R. § 41 app. A (adopted on Jan. 29, 1991).

88. 1975 Revisions to AR 600-443. See also Deiter, *supra* note 41, at 354; Matlovich v. Secretary of the Air Force, 591 F.2d 852 (D.C. Cir. 1978).

89. Indeed, President Clinton, as Commander-in-Chief of the U.S. military, acknowledged in announcing the new policy that “those who oppose lifting the ban are clearly focused not on the conduct of the individual gay servicemember, but on how nongay servicemembers feel about gays in general.” *Remarks of President Clinton, supra* note 40. Edwin Dom, the Assistant Secretary of Defense responsible for promulgating the “Don’t Ask, Don’t Tell, Don’t

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Pursue” directives, expressly acknowledged that “much of the resistance to gays is grounded in fear and prejudice.” Deposition Testimony of Assistant Secretary Edwin Dom in *Cammermeyer v. Aspin* (Feb. 15, 1994). In addition, Lt. Gen. John P. Otjen, who chaired the Military Working Group responsible for formulating the current policy, also admitted that absent fear and prejudice among heterosexuals, there would be no basis for the military’s purported unit cohesion rationale. Deposition Testimony of Lt. Gen. Otjen in *Cammermeyer v. Aspin*, (Feb. 16, 1994).

identity solely because it believes that *some* heterosexuals may dislike *some* homosexuals because they are “different.”

This justification cannot survive even rational basis review, because its accommodation of prejudice and stereotypes does not serve a *legitimate* governmental purpose.<sup>90</sup> However, it is also crucial to understand that the military’s arguments are factually flawed. The exclusion policy rests on the assumption that, in most, if not all circumstances, the mere presence of gay men and lesbians is disruptive to the military environment. In fact, the evidence is to the contrary.

First, the social science evidence regarding unit cohesion suggests that lesbians, gays and bisexuals will not affect unit cohesion any more than heterosexuals, if judged by the same objective criteria. Second, many lesbians, gays and bisexuals have served openly, with honor and distinction, and have contributed to their units’ good order, discipline and morale. Third, to the extent that there is any concern that heterosexuals would react negatively to the mere presence of known lesbians, gay men and bisexuals, the United States military can readily manage disruptive heterosexuals through clear standards of behavior and leadership. This is apparent from the experience of foreign militaries, including those of American allies, from reports by officers and personnel of domestic paramilitary institutions like police and fire departments, and from the history of the integration of African Americans into the military. Fourth, the practical effect of the “Don’t Ask, Don’t Tell, Don’t Pursue” policy and its predecessors is that exclusionary policies breed contempt and suspicion among troops which in turn lead to witch hunts and other disruptions that are themselves harmful to unit cohesion.<sup>91</sup>

### (1) The Theory of Unit Cohesion

The military’s argument that the presence of acknowledged lesbian, gay and bisexual servicemembers will disrupt unit cohesion runs counter to common sense as well as to all the available evidence concerning the nature of team performance, both within and outside the military. As several of the Pentagon’s experts testified before Congress in 1993, the crucial matter for unit cohesion is not identity of social background or behavior but common identity as a member of the group in dedication to the military mission. After all, while the racial and ethnic makeup of the military today is more diverse than ever before, and more diverse than the makeup of the civilian population,<sup>92</sup> unit cohesion is strong, and this strength is patently due to successful training and inculcation of military values, not commonality of social background.

Thus, according to Colonel William Darryl Henderson, a retired Research Fellow at the National War College, unit cohesion depends primarily on whether servicemembers have such “core soldier values” as “[f]ighting skill, physical fitness,

90. See *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985).

91. William N. Eskridge, *Gaylegal Narratives*, 46 STAN. L. REV. 607, 617 (1994) (“What harms morale...[is] the terrorizing witch hunts, which prey upon people arbitrarily, encourage an atmosphere of snitching, and threaten to transform productive human behavior (e.g., rebuffing inappropriate sexual advances or befriending people of the same sex) into criminal behavior.”).

92. For example, 12.3% of the general population is African American, STATISTICAL ABSTRACT OF THE UNITED STATES 16 (1992 ed.), but 21% of the military today is black. See generally Scott Shepard, *Report Says Black GIs Don 't Face Unfair Risks*, ATLANTA J. & CONST., Apr. 7, 1991, at A3.

stamina, and self-discipline, teamwork, duty or selfless service, and loyalty to unit and leaders.”<sup>93</sup> Similarly, Dr. David H. Marlowe of the Walter Reed Army Institute of Research emphasizes the need for “shared organizational structure and values” and “common status and primary identity *as soldiers*,”<sup>94</sup> not commonality of background, identity, or interests in non-military matters. Successful integration into the military, according to Dr. Marlowe, “depend[s] entirely upon the way in which the individual presents him or herself to the group and the primary identity that the individual interacts with the group with [sic].”<sup>95</sup> These views are echoed by several of the military’s most respected Generals. Major General (Ret.) Vance Coleman, one of the first African-American Generals in the United States military, has stated in support of treating lesbian, gay and bisexual servicemembers the same as heterosexual servicemembers, “most servicemembers, especially those in combat positions, care about one thing only—can the soldier next to them fight.”<sup>96</sup> Brigadier General Evelyn Foote, one of the first female Generals in the United States military, has similarly declared that in support of lesbian, gay and bisexual servicemembers, “military personnel are concerned above all else with job performance.”<sup>97</sup>

Of course, if a gay or lesbian soldier presented himself or herself to the rest of their team as homosexual first and soldier second, that person’s integration into the military could be difficult. This integration would also be difficult if a sailor presented himself or herself as an African American man or a Jewish woman first. A fundamentalist Christian who took every opportunity available to proselytize could well disrupt unit cohesion and find herself ostracized, just as could a gay man who made his sexuality “difficult” for his colleagues. But gay men and lesbians are not “predisposed” to separate themselves from their teams in this way any more than individuals whom the military deems fit for service.<sup>98</sup>

Indeed, given the personal experiences of most gay men and lesbians with exclusion, the reverse is likely to be true. As social science evidence demonstrates,

stigmatized individuals.. . understand [that] in order to normalize their relations with non-stigmatized others, they [must] go to great lengths to establish their competence and loyalty “above” and “beyond.” “Invisible” stigmas like homosexuality provide an advantage in this regard; invisibly stigmatized individuals can establish their competence and loyalty before revealing the stigma.<sup>99</sup>

93. See S. REP. No. 112, 103d Cong., 1st Sess. 307 (1993).

94. *Id.* at 308 (emphasis added).

95. *Id.* at 310.

96. Declaration of Major General Vance Coleman in *Cammermeyer v. Aspin*, 850 F. Supp.

910 (W.D. Wash. 1994) (No. C92-942Z).

97. Declaration of Brigadier General Evelyn Foote in *Cammermeyer*, 850 F. Supp 910 (No. C92-942Z).

98. For example, General Otjen testified in deposition that a Muslim who forced his views on subordinates would disrupt unit cohesion, but acknowledged that the military does not exclude Muslims from the armed forces, nor should it. Deposition Testimony of Lt. Gen. Otjen at 328-30 (Feb. 16, 1994) in *Cammermeyer*, 850 F. Supp. 910 (No. C92-942Z).

99. See RAND REPORT, *supra* note 58, at 321.

In short, gay men and lesbians can dedicate themselves to the military mission with capability and confidence, and have done so for many years. Similarly, heterosexuals can accept those gay and lesbian servicemembers who perform and fit in, and have done so for many years.

## (2) The Experience of Gay Personnel

The military's contention that it must exclude lesbian, gay and bisexual servicemembers who are honest about themselves to friends, family, church and coworkers because heterosexual servicemembers will not be able to work with them belies the evidence that many lesbian, gay and bisexual servicemembers are liked and respected members of their units. Indeed, one of the cruel ironies of the military's policy on lesbians, gays and bisexuals is that the policy forces separation of officers and enlisted personnel often over the objections of their superiors and subordinates.<sup>9</sup> Federal court cases, government records, and other literature support the fact that open lesbian, gay and bisexual servicemembers contribute to their units' cohesion, morale, good order and discipline, contrary to the military's assertions.

### (a) *Sergeant Miriam benShalom*

Former Army Reserve Sergeant Miriam benShalom was discharged for making a statement that she is a lesbian. Her homosexuality was well-known, having "publicly acknowledged her homosexuality at various times during her enlistment:

in conversations with fellow reservists, in an interview with her division newspaper, and while teaching drill sergeant candidate class." The District Court for the Western District of Wisconsin, which originally ordered her reinstatement, observed that "[t]he [military does] not dispute the fact that she was a fine candidate for drill sergeant school, a capable soldier and an excellent instructor." The court further noted that "the record is clear that her sexual preferences made no difference to her immediate supervisors or her students. The court is satisfied from the record that her sexual preferences had as much relevance to her military skills as did her gender or the color of her skin."<sup>102</sup> Despite the findings that benShalom contributed to her unit's good order, discipline and morale, the Department of Army persisted in its attempts to have her discharged and ultimately prevailed.<sup>103</sup>

100. Eskridge, *supra* note 91 at 607, 614 ("Legal scholarship is inevitably narrative. . . [I]ndividual stories reveal the substantial social costs of the exclusionary policy and also put a human face on the policy's victims. Hearing these victims' stories makes abstract prejudice more difficult to justify").

101. GAO/NSIAD 92-98, *DoD's Policy on Homosexuality*, App. 1, "Examples of Expulsions for Which Performance Was Not An Issue," p. 47-48.

102. *benShalom v. Secretary of Army*, 489 F. Supp. 964, 973 (E.D. Wis. 1980); *benShalom v. Marsh*, 690 F. Supp. 774 (E.D. Wis. 1988); *benShalom v. Marsh*, 703 F. Supp. 1372 (E.D. Wis. 1989), *rev'd*, 881 F.2d 454 (7th Cir. 1989), *cert. denied*, *benShalom v. Stone*, 494 U.S. 1004 (1990).

103. *Id.*

*(b) Colonel Margarethe Cammermeyer*

Colonel Margarethe Cammermeyer currently serves in the Washington State National Guard as an open lesbian.<sup>7</sup> She received a Bronze Star for her service as Head Nurse of the 24th Evacuation Hospital in Long Binh, Vietnam, during a period that included the Tet Offensive.<sup>105</sup> She subsequently published scholarly articles on military medicine, obtained a Ph.D. in nursing, served as Head Nurse of the State of Washington, and received the highest award for recognition of professional accomplishment within the Army Medical Department.<sup>106</sup>

Cammermeyer truthfully revealed her sexual orientation during a routine security clearance in 1989.<sup>107</sup> “Notwithstanding this admission, Cammermeyer was told by the Washington State National Guard that she could continue to serve as Chief Nurse, and that the Guard would not pursue her discharge ‘unless forced to do so by the Department of the Army.’”<sup>108</sup> “Cammermeyer continued to serve in her position as Chief Nurse for more than three years after she admitted that she is a

The Department of Army temporarily succeeded in having Cammermeyer discharged over the objections of her colleagues. At her discharge board, Cammermeyer’s former Chief Nurse, Colonel Patsy Thompson, stated that she “openly regretted her ‘sad duty’ of reading the Board’s adverse recommendation to ‘one of the great Americans.’ ~ 10 Colonel Thompson stated that Cammermeyer” ‘has consistently provided superb leadership and has many outstanding accomplishments to her credit.’”<sup>109</sup>

Cammermeyer was reinstated to active duty in July 1994 by court order after winning in District Court on a motion for summary judgment. Upon her return to base, Cammermeyer was greeted “with cheers and smiles from all ranks.”<sup>110</sup> The government has decided not to seek her discharge, thus permitting a true heroine to remain on active duty, a lesbian who concededly contributes to her unit’s cohesion and morale.<sup>111</sup>

104. Camp Murray, *Army Reinstates Lesbian*, NAT’L L. J., July 25, 1994, at A8; Vanessa Ho, *Cammermeyer Back In Uniform*, SEATTLE TIMES, July 11, 1994, at B2.

105. *Cammermeyer v. Aspin*, 850 F. Supp. 910 (W.D. Wash. 1994).

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Cammermeyer*, 850 F. Supp. 910.

111. *Id.*

112. *See* Murray, *supra* note 104.

113. The government has appealed Cammermeyer's case to the Ninth Circuit Court of Appeals on the question of whether *Meinhold* or *Pruitt* is the controlling law of the Circuit. The government has conceded that Cammermeyer should be retained. *See* Appellant's Brief, *Cammermeyer v. Aspin* 850 F. Supp. 910 (W.D. Wash. 1994) (No. C92-942Z).

*(c) Lieutenant Commander Zoe Dunning*

Navy Lieutenant Commander Zoe Dunning was recently recommended for retention in the United States Navy,<sup>114</sup> despite her statement in January 1993 that she was a lesbian.<sup>115</sup> Prior to her announcement, Lieutenant Commander Dunning received the Navy Commendation Medal and the prestigious Admiral Zumwalt Award for the best managed barracks in the Navy.<sup>116</sup> Her fitness reports describe her as “the key to supply department success,” “capable of superior performance in the most demanding assignments,” and “clearly one of the best junior officers on the ship.”<sup>117</sup> At her discharge hearing, her former commander stated that, “if it were up to me, I would retain Lt. Dunning in the Navy.. [I]t is clear that her status as a lesbian had no detrimental effect on her performance.”<sup>118</sup> Colleagues submitted declarations on her behalf stating that they “would not feel uncomfortable sharing a room now, even after knowing [she] is a lesbian,” and that the disclosure of her sexual orientation “had absolutely no detrimental effect on the unit,”<sup>119</sup> and that “[w]e are all looking forward to having her back in the unit permanently.”<sup>120</sup> Since being open about her sexuality, Lieutenant Commander Dunning has recently been promoted from Lieutenant.<sup>121</sup>

*(d) Sergeant Justin Elzie*

As of this writing, Sergeant Justin Elzie faces discharge from the United States Marine Corps, even though he was named Marine of the Year in 1989.<sup>122</sup> Formerly given the high honor of being an embassy guard, Elzie stood guard at the Bush-Gorbachev summit in Helsinki, Finland, and was personally responsible for the safety of Secretary of State James Baker and National Security Advisor Brent Scowcroft.<sup>123</sup> At every step in his career, Elzie has been commended for outstanding performance of duty.<sup>124</sup> The Marine Corps’ own discharge board recognized that Elzie was “an exemplary Marine,” and one heterosexual Marine who had faced enemy fire testified at Elzie’s discharge hearing that, if he were ever in such a

114. Reynolds Holding, *Navy Quits Trying To Boot Lesbian Officer*, S.F. CHRON., June 16, 1995, at A16.

115. Joyce Murdoch, *Sailor Who Disclosed Homosexuality Now Finds Himself in Legal Limbo*, WASH. POST, Feb. 8, 1993, at A6.

116. RECORD OF ADMINISTRATIVE DISCHARGE BOARD, Nov. 29-30, Dec. 1, 1994.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. RECORD OF ADMINISTRATIVE DISCHARGE BOARD, Nov. 29-30, Dec. 1, 1994.

122. Since Dunning’s victory at her administrative discharge board, the Department of

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Defense has issued a memorandum forbidding the use of a Dunning-type defense on behalf of lesbian, gay and bisexual servicemembers at future discharge boards. Memorandum from Judith Miller to Counsels of the Military Departments 2 (Aug. 18, 1995).

123. Elzie v. Aspin, No. CIV.A.93-1853, 1995 WL 510163, at \*3 (D.C. Cir. Aug. 14, 1995).

124. *Id.*

125. *Id.*

situation again, he would want Sergeant Elzie by his side. At Sergeant Elzie's discharge hearing, soldier and civilian alike described the ten-year veteran as "a model marine," an "outstanding" professional, and "the finest of a fine tradition."<sup>126</sup> Although the military recommended Sergeant Elzie's discharge, he remains on active duty pursuant to court order as his case proceeds through further military administrative proceedings and possibly federal court.<sup>127</sup> On Elzie's first day back on duty, colleagues welcomed him back with remarks such as "great to have you back" and "let's get the job done."<sup>128</sup>

*(e) Technical Sergeant Leonard Matlovich*

The most infamous example of a discharge from the military because of homosexuality is probably that of Air Force Technical Sergeant Leonard Matlovich. Matlovich received a Bronze Star, Purple Heart, and Meritorious Service Medal for duty in Vietnam.<sup>129</sup> In addition, Matlovich "engaged in hazardous duty on more than one occasion, [was] wounded in a mine explosion, volunteered, ... excelled in the Service as a training officer, [and] at all times [was] rated at the highest possible ratings by his superiors in all aspects of his performance."<sup>130</sup> Matlovich was discharged under an earlier policy that permitted the services to waive discharge under certain circumstances, sued, and won on the ground that the Air Force had not addressed circumstances that might warrant his retention.<sup>131</sup> The military changed its regulations in response to his case precisely to eliminate any consideration of merit or of a servicemember's positive influence on unit cohesion.<sup>132</sup>

*(f) Petty Officer Keith Meinhold*

Petty Officer Keith Meinhold currently serves in the United States Navy as an openly gay man.<sup>133</sup> At one point, the Department of Navy attempted to discharge Meinhold, but Meinhold obtained a preliminary injunction and then a permanent injunction to remain on active duty.<sup>134</sup> On motions for summary judgment, the District Court observed that "[o]n numerous occasions throughout his naval career, Meinhold publicly acknowledged his gay orientation to various Navy representatives, including senior officers. Meinhold was sufficiently open about his

126. Ann Lolordo, *Exemplary Gay Marine to be Discharged*, HOUSTON CHRON., Apr. 1, 1993, at All.

127. *Dismissal of Gay Marine Blocked*, L.A. TIMES, Nov. 11, 1993, at 23; *Elzie v. Aspin*, 841 F. Supp. 439 (D. D.C. 1993).

128. *Gay Marine Sergeant Gets Welcome on Return to Duty*, ORLANDO SENTINEL, Oct. 22, 1993, at A10.

129. *Matlovich v. Secretary of Air Force*, 591 F.2d 852 (D.C. Cir. 1978).

130. *Id.*

131. *Id.*

132. *Id.*

133. Lynn Rosellini, *One True Gay Life in the Navy, When the "Faggot" Met the "Bigot from Hell" and his Pals, Strange Things Soon Happened*, U.S. NEWS & WORLD REP., Feb. 6, 1995, at 60.

134. *Meinhold v. United States Dep't of Defense*, 808 F. Supp. 1454 (C.D. Cal. 1993).

sexual orientation that his status became common knowledge within his unit. The court further noted that

[d]uring his twelve years of service, Meinhold rose through the ranks to become, by the Navy's own admission, one of its very best airborne sonar analysts and

instructors. He was respected and praised by superiors and subordinates alike.

In recognition of his achievements, the Navy appointed Meinhold to selective positions, so that he might serve as an example to others. By May 1992, Meinhold was rated in the top ten percent of all Navy... •136

Meinhold continues to serve on active duty, contributing to his unit's cohesion and morale.<sup>37</sup> His unit was recently named the most combat-ready unit in the Pacific Fleet.<sup>38</sup> One co-worker, a flight engineer named Chumley who admits to being "the bigot from hell," recently remarked that Meinhold had "totally changed" his attitude toward gays.<sup>39</sup> Another servicemember who works with Meinhold also commented, "I don't see him being gay as having any relevance to anything."<sup>40</sup> Indeed, the relationship between Meinhold and his nongay co-workers is so strong that one observer concluded, "Meinhold has been not only tolerated by the majority of his colleagues, he has been embraced by them."<sup>41</sup>

(g) *Captain Pam Mindt*

Captain Pam Mindt currently serves as an open lesbian in the Minnesota National Guard.<sup>42</sup> Mindt revealed her sexual orientation to both her commander and the local press in July, 1992.~~ Mindt's discharge board met on May 23, 1993 and recommended an honorable discharge."<sup>43</sup> Mindt was not separated. "After the new regulations went into effect in February, 1994, all action was dropped against Mindt."<sup>44</sup> Mindt continues to drill with her unit.<sup>45</sup> She also "has taken her partner to the Guard's 'family day' picnic and to its Christmas party."<sup>46</sup> In addition, she has introduced her to colleagues and her commanders."<sup>47</sup> And, according to Captain Gutknecht, Deputy Public Affairs Officer for the Minnesota National

135. *Id.*

136. *Id.*

137. Rosellini, *supra* note 133.

138. *Id.*

139. *Id.*

140. *Id.* See I. Jaffe, *Straight Co-Workers Accept Keith Meinhold* (National Public Radio, Weekend Edition broadcast, Nov. 26, 1994).

141. *Id.*

142. Chris Ison, *Lesbian Stays In National Guard—at Least for Now*, STAR TRIB., Jan. 9, 1995, at A1.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. Ison, *supra* note 142.

148. *Id.*

149. *Id.*

Guard, no present action is contemplated against Captain Mindt at this time, claiming that “Pam Mindt is now an officer in good ~

*(/\*) Captain Rich Richenberg*

At this writing, Captain Richard Richenberg faces discharge from the United States Air Force for being gay, even though his co-workers have testified that his sexual orientation has no bearing on their work.<sup>53</sup> The loss of a top electronic warfare officer decorated for his service during the Persian Gulf War has led to diminished efficiency in his unit.<sup>52</sup> Captain Richenberg has served openly since the spring of 1993.” As acting commander of his unit during Operation Desert Storm, Richenberg, according to his performance report by Lieutenant Colonel James R. Taylor, “led his crew’s outstanding performance under combat conditions and was rated the best by the squadron operations officer.”<sup>54</sup> One fellow officer told the discharge board that “knowing what I now know about Captain Richenberg, I would not in any way be affected by the prospect of deploying or flying with him again. I would not feel any less comfortable about being on a cramped airplane with him or living in close quarters while on [deployment.]”<sup>55</sup> Indeed, since his declaration of sexual orientation, Captain Richenberg has received overwhelming support from his unit which recently threw a surprise birthday party for him.<sup>56</sup>

*(i) Lieutenant (j-g.) Dirk Selland*

On January 21, 1993, in response to increasing rumors and speculation about his sexual orientation, Lieutenant (j.g.) Dirk Selland told his chaplain that he was gay. The chaplain then instructed Selland to tell his submarine commander.<sup>57</sup> Selland has remained on active duty since that time and remains “a highly rated

150. *Id.*

151. Jason Gertzen, *Gay Officer Faces Honorable Discharge*, OMAHA WoRLD-HERALD, June 22, 1994, at 14.

152. Jason Gertzen, *Relief Finally on Horizon for Specialists*, OMAHA WoRLD-HERALD, Aug. 17, 1995, at 1 (“The Air Force [has] a 20% shortfall [of electronic warfare officers like Richenberg].” Colonel Steve German, commander of the 55th Operations Group at Offutt Air Force Base where Richenberg is stationed, said that “his air crews are under such a strain.”). *See also* Eric Schmitt, *US*.

*Agencies Split Over Legal Tactics on Gay Troop Plan*, N.Y. TIMES, Dec. 19, 1993; Anna Quindlen,

*A Military Mess*, N.Y. TIMES, Dec. 3, 1994, at A23.

153. Jason Gertzen, *Year Later, Gay Officer Awaits Air Force Ruling*, OMAHA WORLD-HERALD, June 21, 1995, at 13SF.

154. Amicus Brief for Servicemembers Legal Defense Network at 7, *Steffan v. Perry*, 41 F.3d 677 (D.C. Cir. 1994) (No. 91-5409) (on file with author).

155. *Id.*

156. Gertzen, *supra* note 152. See also Eric Schmitt, *The New Rules on Gay Soldiers: A Year Later, No Clear Results*, N.Y. TIMES, March 13, 1995, at A2.

157. Paul W. Valentine, *Judge in Baltimore Blocks Navy's Dismissal of Gay Officer*, WASH. POST, Apr. 27, 1995, at A7.

ships supply officer.”<sup>58</sup> Selland has been so welcomed by his unit members that even the Admiral’s wife asked Selland to dance with her at a unit function.<sup>59</sup>

*~j) Lieutenant Paul Thomasson*

Former Lieutenant Paul Thomasson worked at the Bureau of Naval Personnel for Admiral Konetzni, the admiral in charge of the Navy’s policy on homosexuals.<sup>60</sup> Shortly after the new “Don’t Ask, Don’t Tell, Don’t Pursue” policy went into effect, Thomasson told Admiral Konetzni and three other admirals for whom he worked that he is gay.<sup>61</sup> On September 9, 1994, Thomasson faced a board of inquiry.<sup>62</sup> Nineteen of Lieutenant Thomasson’s colleagues, including his commanding officer, filed affidavits in support of his continued service in the military.<sup>63</sup> Despite such overwhelming support, the discharge board unanimously recommended his honorable discharge.<sup>64</sup>

One year after announcing his sexual orientation, Admiral Konetzni issued a performance evaluation stating that Lt. Thomasson was the “finest young officer” with whom he had served and rated Thomasson first ahead of his peers for promotion to Lieutenant Commander.<sup>65</sup> Admiral Konetzni further stated in the performance evaluation that, following Thomasson’s disclosure of sexual orientation, he still “commands the respect of his subordinates and seniors alike through honesty, integrity and forthright communications.”<sup>66</sup> Subordinates have also praised Lieutenant Thomasson after his disclosure. Petty Officer Jack Turnbull said recently, “[o]f course it was a shock at first, but it was really no big deal. What a person does in his own time doesn’t make any”<sup>67</sup>

Lieutenant Thomasson’s statement has had no negative effect upon his performance as an officer, no negative effect upon the performance of his unit, and would have had no significance if he were heterosexual. Despite his positive influence on his unit, and over the objections of his co-workers, including the Navy admiral charged with enforcing “Don’t Ask, Don’t Tell, Don’t Pursue,” the District Court for the Eastern District of Virginia ruled against Thomasson,<sup>68</sup> and forced his separation from the U.S. Navy, a decision Thomasson is now appealing.

*(k) Lieutenant Tracy Thorne*

Lieutenant Tracy Thorne publicly announced his sexual orientation on the ABC News Program “Nightline” in May 1992 as part of a discussion pending

158. *Id.*  
159. Interview with Lieutenant (j.g.) Dirk Selland, in New York, N.Y. (Apr. 26, 1995).

160. Appellant's Brief, Thomasson v. Perry, No. CIV.A.95-252-A, 1995 WL 470185 (E.D. Va. June 8, 1995).

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. Fitness Report for Lieutenant Thomasson (Feb. 27, 1995).

166. *Id.*

167. Schmitt, *supra* note 156.

168. Thomasson v. Perry, No. CIV.A.95-252-A, 1995 WL 470185 (E.D. Va. June 8, 1995).

legislation proposing that the then-existing gay ban be repealed.<sup>69</sup> Lieutenant Thorne is a naval bombardier navigator and at all times has been praised for his abilities and contributions to the United States Navy, even while as an openly gay man.<sup>70</sup> Thorne's sexual orientation has created no morale problems for his unit. One fellow seaman, for example, said, "I would have flown with him."<sup>72</sup> Furthermore, Thorne's own commander, Commander Craig Luigart, said that Thorne is "[t]he most dynamic and ingenious Lieutenant I have had the pleasure to command.... [He] ranks number one among all Lieutenants with whom I have dealt in the naval service."<sup>73</sup> Indeed, even while serving as an openly gay man, Lieutenant Thorne was awarded the Navy Achievement Medal for exemplary service.<sup>74</sup> Thorne has now been discharged despite the objections of his colleagues and is suing to return to the Naval Reserves.<sup>75</sup> Once it was apparent that Thorne would be discharged, Commander Luigart stated to the press, "[m]y biggest administrative nightmare right now is trying to figure out how to replace him."<sup>76</sup>

### (I) Staff Sergeant Perry Watkins

According to a General Accounting Office report to Congress,

Former Staff Sergeant Perry Watkins was a 14-year active duty veteran in the United States Army, who had served tours in Vietnam and Korea. He had been completely candid about his homosexuality from the start of his Army career and had been allowed to reenlist on three occasions (in 1971, 1974 and 1979) with the Army's full knowledge of his homosexuality.<sup>77</sup>

The report further noted that Watkins' record indicated in all respects that Watkins was an outstanding soldier.<sup>78</sup> He became, in the words of his commanding officer, "one of our most respected and trusted soldiers."<sup>79</sup> This official stated that "from daily personal contact I can attest to the outstanding professional attitude, integrity, and suitability for assignment."

At one of Watkins' discharge boards, the Ninth Circuit Court of Appeals noted that the board unanimously found that "Watkins is suitable for retention in the military service" and stated, "In view of the findings, the Board recommends that

169. *Nightline* (ABC television broadcast, July 14, 1994).

170. *Id.*

171. *Id.*

172. *Id.*

173. Plaintiff's Brief, *Thorne v. Perry*, No. 95-369-A (E.D. Va. July 21, 1995) (copy of brief on file with author).

174. David C. *Morrison, Not Asking or Telling, No Remedy?*, NAT'L J., Mar. 25, 1995, at 748.

175. *See* Plaintiffs Brief, *supra* note 173.

176. *Navy Hails Achievement of Gay Lt. Tracy Thorne*, VA. PILOT-LEDGER STAR, Mar. 1, 1995, at A2.

177. GAO/NSIAD 92-98, *DoD's Policy on Homosexuality*, app. 1 at 47-48, *Examples of Expulsions for Which Performance Was Not An Issue*.

178. *Id.*

179. *Id.*

180. *Id.*

5P5 Perry J. Watkins be retained in the military service because there is no evidence suggesting that his behavior has had either a degrading effect upon unit performance, morale or discipline, or upon his own job performance. <sup>181</sup>

Even while Watkins' case was proceeding through the federal courts, the General Accounting Office report noted,

the Army rated his performance and professionalism. He received 85 out of 85 possible points, including perfect scores for the categories "earns respect," "integrity," "loyalty," "moral courage," "self-discipline," "military appearance," "demonstrates initiative," "performs under pressure," "achieves results," "displays sound judgment," "communicates effectively," "develops subordinates," "demonstrates technical skills," and "physical fitness."<sup>82</sup>

Indeed, in the case recited above, and in thousands of others, there has been no evidence that the presence of lesbians, gays and bisexuals who are honest about themselves to others in any way impedes the military. To the contrary, the overwhelming evidence suggests that exactly the opposite is true: that a policy of honesty, not deception, improves discipline, good order, morale and unit cohesion. Colonel Lucian K. Truscott, III, an openly heterosexual, fourth-generation Army man, testified during the 1993 House hearings on gays in the military, that the many homosexuals with whom he worked in Korea and Vietnam were good soldiers and excellent team members. "I have never, ever heard of any trouble in any unit caused by gay soldiers. Ever. I don't know anyone who has."<sup>83</sup>

### (3) The Role of Leadership and Discipline

To the extent that there is any concern that heterosexuals would react negatively to the mere presence of acknowledged lesbians, gays and bisexuals, the United States military can readily manage disruptive heterosexuals through clear standards of behavior and leadership.<sup>84</sup> Indeed, the United States military has many models of successful integration and/or accommodation<sup>85</sup> from which to learn. Most of the leading foreign militaries of the world, for example, have already successfully accommodated lesbians, gays, and bisexuals into their services. United States paramilitary institutions, including fire and police departments, have also successfully accommodated lesbians, gays and bisexuals into their ranks, and some departments even actively recruit lesbian, gay and bisexual personnel. The United States military can look to itself for a successful model of how to integrate African

181. *Watkins v. United States Army*, 875 F.2d 699, 702 (9th Cir. 1989) (en banc), cert. denied, 498 U.S. 957 (1990).

182. GAO/NSIAD 92-98, *DoD's Policy on Homosexuality*, app. 1 at 47-48, EXAMPLES OF EXCLUSIONS FOR WHICH PERFORMANCE WAS NOT AN ISSUE, p. 47-48.

183. Eskridge, *supra* note 91, at 615.

184. Judith Hicks Stiehm, *Managing the Military's Homosexual Exclusion Policy: Text and Subtext*, 46 U. MIAMI L. REV. 685 (1992) ("leadership, discipline and training should certainly be able to train individuals to overcome their prejudice and to refrain from violence against their peers").

185. It is important to note the use of the term "accommodated." Lesbians, gays and bisexuals are already serving in the military and do not need to be integrated. The question is whether an integral team member will be valued or saddled with rules and regulations that specifically target him or her for reasons unrelated to performance.

Americans, a once unpopular “out-group,” at a time when segregation in the United States was very strong.

(a) The Experience of Foreign Militaries

DoD’s categorical assumption that heterosexuals will not tolerate homosexuals in the military is directly contrary to the experience of the armed services of several foreign countries with cultural and political similarities to the United States, including Canada, Israel, France, Sweden, Norway and the Netherlands.<sup>186</sup> Particularly instructive are the examples of Canada and Israel.

The Canadian Government revoked its ban on military service by gay men and lesbians in 1992 in response to a decision by the Federal Court of Canada, and, according to officials of the Canadian Department of National Defense (DND), the standards of conduct for gay and lesbian servicemembers are now identical to those for heterosexual members.<sup>187</sup> Since that time, virtually all concerned sectors of Canadian society, including military officials, veterans organizations, and homosexual rights groups, have expressed satisfaction with the new policy.<sup>188</sup> In particular, DND officials report that the new policy has not affected any of the various interests once or still cited by American military officials. There has been no impairment of rank and command, mutual trust and confidence, good order, recruitment, or public confidence in the Canadian military. “Mass resignations, lower recruitment, morale and cohesiveness problems, gay bashing incidents, and more open displays of homosexual behavior... have not materialized.”<sup>189</sup>

DoD has suggested that the Canadian experience may not be on point, despite Canada’s close cultural similarity to the United States, because the lifting of the ban there is relatively recent (although one would expect the greatest problems to arise at the earliest point), because Americans have greater moral and religious objections to homosexuality than do Canadians,<sup>190</sup> and because Canadian troops are primarily used for peacekeeping purposes so that the need for unit cohesion may not be so great as it is in the American military. Even assuming these objections have some foundation, the short answer to them is illustrated by the experience of the Israeli military.

186. Additional countries that do not ban lesbians, gays and bisexuals from their militaries include, but are not limited to, Austria, Australia, Belgium, Denmark, Finland, Germany, Hungary, Luxembourg, New Zealand, Norway, Portugal, Spain, Sweden and Switzerland. See F. Pond, *A Comparative Survey and Analysis of Military Policies With Regard To Service By Gay Persons* 15 (1993) (unpublished article on file with author).

187. GAO, *HOMOSEXUALS IN THE MILITARY: POLICIES AND PRACTICES OF FOREIGN COUNTRIES* 30 (June 1993) (hereinafter *SECOND GAO REPORT*).

188. *Id.* at 31.

189. *Id.* at 31-32. Accord *RAND REPORT*, *supra* note 58, at 79 (“no fights or violent

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incidents, no resignations (despite previous threats to quit), no problems with recruitment, and no diminution in unit cohesion, morale, or organizational effectiveness”).

190. In fact, the gay ban is opposed by numerous American religious groups and spiritual figures, including the United Methodist Church, the Union of American Hebrew Congregations, the United Church of Christ, the American Society of Friends, the Unitarian Universalist Association, and the Presiding Bishop of the American Episcopal Church. *See also* THE CHRISTIAN ARGUMENT FOR GAYS AND LESBIANS IN THE MILITARY: ESSAYS BY MAINLINE CHURCH LEADERS (J. Carey ed. 1993).

Gay men and lesbians have been allowed to serve in the Israeli military since the founding of the country in 1948, even though attitudes toward homosexuality in Israel are notably less tolerant than they are in the United States.<sup>91</sup> Because Israel has been in a state of war or near-war since 1948, the need of the Israeli military for combat readiness, and therefore for a cohesive military environment, is obviously compelling. The importance of cohesion is accentuated by the fact that Israeli society views military service as the single most important event in national socialization of Israeli citizens. It is no exaggeration to say that, in Israel, a primary purpose of military service is cohesion, on a national basis. This task is rendered all the more urgent because of the very diverse backgrounds of immigrants to Israel.<sup>92</sup>

Given the impressive record of the Israeli military, the suggestion that gay men and lesbians have impaired its performance or combat readiness would obviously be fanciful. The Israeli military has not reported any problems from the presence of gay men and lesbians relating to the laundry list of concerns once or still raised by DoD. Invasion of privacy, for example, has not been an issue for the Israeli military, even though “[t]he living conditions for soldiers are not conducive to privacy[;] . . . common bathrooms are the rule.”<sup>93</sup> Yet “[e]ven for the few openly homosexual soldiers, the [Israeli Defense Force] reports no problems connected to homosexuality regarding privacy, showers, or unwanted sexual advances.”<sup>94</sup> In addition, Israeli military officials stated that homosexuals adjusted to military life as well as heterosexuals,<sup>95</sup> and that, despite forty-five years of experience, the military had not encountered problems with unit readiness, effectiveness, cohesion, or morale related to the presence of lesbians and gay men.<sup>96</sup> Consequently, it is not surprising that the Israeli military has recently removed the few remaining restrictions on promotion of gay men and lesbians in the military, having found the experience with their service satisfactory.<sup>97</sup>

The experience of other Western countries that have admitted lesbians and gay men into the military is similar. Officials in Norway and Sweden, for example, report no problems with lesbians and gay men in the military.<sup>98</sup> In France, the pervasive view of the military establishment about homosexuality is that “there is no policy and there is no problem. . . . Although there may be some discomfort with those who are too “openly” homosexual, this is because “[i]t is against custom to behave sexually (either heterosexually or homosexually) in a military context.”<sup>200</sup> And while “openly public” homosexual behavior (*not mere orientation*) may retard one’s career in the French military, “behavior in private is not a concern of the military” in France.<sup>201</sup>

191. See RAND REPORT, *supra* note 58, at 86.

192. See *id.* at 12, 85-88; SECOND GAO REPORT, *supra* note 187, at 42.

193. RAND REPORT, *supra* note 58, at 88.

194. *Id.*

195. SECOND GAO REPORT, *supra* note 187, at 42.

196. *Id.* at 43.

197. *See* RAND REPORT, *supra* note 58, at 87.

198. *See id.* at 97-98 (Norway); SECOND GAO REPORT, *supra* note 187, at 48-49 (Sweden).

199. RAND REPORT, *supra* note 58, at 80.

200. *Id.* at 82.

201. *Id.*

(b) The Experience of American Police and Fire Departments

There has also been considerable experience with the service of lesbians and gay men in American quasi-military institutions such as police and fire departments. Although the functions of those institutions are not identical with those of the military, many of their concerns are similar, and, given the urgency of their public safety function, police and fire departments place a premium on their "combat readiness."<sup>202</sup> This is particularly true for fire departments: Firefighters typically live together in a firehouse while on-duty, sometimes for days at a time. Close living quarters and issues related to privacy, especially in older firehouses, are thus part of their experience, even if for shorter stretches of a time. The work of fighting fires is done in coordinated fashion against a common enemy.<sup>203</sup>

It is undisputed that lesbians and gay men serve in police and fire departments in considerable numbers.<sup>204</sup> It is also true that *some* anti-homosexual feeling exists among *some* members of those forces. That does not mean, however, that the presence of gay men and lesbians, even "open" ones, impedes the function of those forces. To the contrary, a study of several of these forces revealed that "[u]t was the shared consensus of leaders across each of the departments [studied] that a policy of non-discrimination had in no way compromised their ability to perform their mission."<sup>205</sup> Those leaders expressed the view that the elements crucial to their departments' mission effectiveness, such as good order, morale, and respect for rank and command, depended on "professionalism, a shared mission, the cultivation of a common 'police persona,' and the existence of common external threats," rather than a feeling that everyone in the group was identical.<sup>206</sup> Even officers who expressed personal anti-homosexual sentiments adhered to a strong ethic of professionalism that allowed them to work with lesbians and gay men as coworkers: "good officers, they believed, 'judged each other as cops,'" and the officers "made a point of not allowing any personal animosity they might feel towards homosexuals to interfere with their mission or the overall goals of their department."<sup>207</sup> Perhaps most significantly, even the "open" lesbians and gay men in those departments report satisfaction with their experiences.<sup>208</sup> In short, gay and lesbian police officers and firefighters have made themselves part of the group, dedicated themselves to the task at hand, and performed in the expected manner. Furthermore, there have been no problems with cohesion or mutual trust and confidence within the departments.

202. See FIRsT GAO REPORT, *supra* note 39, at 41 (police and fire departments all cite need for "unit/team cohesiveness, discipline and good order, morale, trust and confidence, and a system of command rank and respect").

203. RAND REPORT, *supra* note 58, at 108.

204. See, e.g., Richard A. Serrano, *Gay Police Leave the Shadows*, L.A.

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TIMES, Sept. 3, 1990, at A1.

205. RAND REPORT, *supra* note 58, at 141.

206. *Id.* at 142.

207. *Id.* at 134.

208. *Id.* at 130, 135.

**(c) The Integration of African Americans Within the American Military**

The American military's salient experience with the integration of a group once treated as an "out-group" is the integration of African Americans within the services after President Truman's promulgation of Executive Order 9981 in 1948. President Truman ordered this integration despite an environment at least as hostile as attitudes towards the service of homosexuals are today. At the time, 63% of American adults endorsed the separation of blacks and whites in the military and 61% of white Army enlisted personnel and officers opposed integration if it meant that blacks and whites had to sleep in the same barracks and eat in the same mess hall.<sup>209</sup> Moreover, much of the opposition to integration—which was shared by the highest-ranking officers, including Generals Dwight Eisenhower,<sup>210</sup> George Marshall,<sup>211</sup> and Omar Bradley<sup>212</sup>—rested on the feared disruption of unit cohesion based on concerns of white resistance and stereotypes very similar to those raised today when the military predicts that heterosexuals will not accept gay men and lesbians in their midst.<sup>213</sup> Military luminaries stressed at the time that "[m]any white Americans (especially Southerners) responded with visceral revulsion to the idea of close physical contact with blacks,"<sup>214</sup> and they doubted that "better quality" whites

209. RAND REPORT, *supra* note 58, at 184.

210. J. MORRIS MACGREGOR, JR., INTEGRATION OF THE ARMED FORCES: 1940-1965 227 (Wash., D.C.: Center of Military History, United States Army, 1981) (Eisenhower suggesting that integration would lead to riots and racial disturbances). *See also* CONG. REC. 7358 (1948) ("One of them is that there is race prejudice in this country, and when you put it in the same organization and make live together under the most intimate circumstances men of different races, we sometimes have trouble."); Gary Bass, *Their Words*, NEW REPUBLIC, Feb. 22, 1993, at 15 ("I do not believe that if we attempt merely by passing a lot of laws to force someone to like someone else, we are just going to get into trouble.").

211. In giving advice to the Secretary of War, General Marshall said, "either through lack of educational opportunities or other causes, the level of intelligence and occupational skill of the Negro population is considerably below that of the white. . .[and] experiments within the Army in the solution of social problems are fraught with danger to efficiency, discipline and morale." U. LEE, U.S.

ARMY IN WORLD WAR II: SPECIAL STUDIES: THE EMPLOYMENT OF NEGRO TROOPS 140 (Wash., D.C.: USGPO, 1966).

212. General Bradley testified before the Fahy Committee, which was charged with implementing President Truman's Executive Order integrating the services, stating "integration might seriously affect morale and battle efficiency.... If we try to force integration on the Army before the country is ready to accept these customs, we may have difficulty attaining high morale along the lines I mentioned." Fahy Committee testimony, Gen. Omar Bradley, at 71-72. *See also* Bass, *supra* note 210.

213. *See, e.g.*, Hearings before President's Committee on Equality of Treatment and Opportunity in the Armed Services 6 (March 28, 1949) (comments by former Secretary of Army,

Kenneth Royall, in support of segregation, that “In war, it is even more important that they have confidence in both their leaders and in the men that are to fight by their sides. Effective comradeship in battle calls for a warm and close personal relationship within a unit.”); Reddick, *The Negro in Navy in World War 11*, J. NEGRO HIST. 203 (Apr. 1947) (comments by former Secretary of Navy Frank Knox that to end segregation would “provoke discord and demoralization;” and comments by Admiral Chester W. Nimitz that “[a]fter many years of experience, the policy of not enlisting men of the Colored race for any branch of the naval service except the messmen’s branch was adopted to meet the best interests of general ship efficiency”).

214. RAND REPORT, *supra* note 58, at 160.

would enlist or serve with enthusiasm among blacks. The military also feared the adverse reaction of foreign militaries to African American soldiers and sailors, and cited prevailing stereotypes about blacks' promiscuity<sup>25</sup> and carriage of sexually transmitted diseases.<sup>26</sup>

The history of race relations in the military since 1948 is complex, but the story is unquestionably a success. For decades, African Americans have served with high distinction in the armed forces, and there has been no mass resignation of white soldiers, negative effect on enlistment, breakdown in combat readiness, or diminution of military effectiveness. Unit cohesion is strong, and probably stronger because of the more diverse enlistment and officer pool. The important factors in this success have been strong military and civilian leadership, commitment to the policy of integration, and more particularly, the necessity of civil race relations (even while hostile attitudes towards African Americans have continued to exist in the general American population).

With such commitment and strong leadership, racial integration did not 'destroy' unit cohesion and military effectiveness, as so many opponents had argued it would. Evidence from World War II, Korea, and Vietnam indicates that unit cohesion and military effectiveness did not necessarily depend on a group identity arising from racial homogeneity. In other words, people of different races did not have to like each other or change their attitudes about racial differences to get the job done. Integrated units performed just as well as all-white units. Further, there was no evidence that white soldiers refused to take orders from black officers or non-commissioned officers—a fear often expressed concerning homosexual leaders.<sup>27</sup>

This experience indicates that, just as the military's concerns about the integration of African Americans within the services were exaggerated then, their fears about heterosexual resistance to service by gay men and lesbians are now exaggerated. Of course, future leadership will be essential to the successful integration of gay men and lesbians within the services, just as it was essential to the integration of African Americans and to all personnel policy changes. In this regard, the prognosis is favorable: Polling data indicate that 79% of college students, who make up the overwhelming number of tomorrow's military officers, believe that "sexual preference" is one's own business.<sup>28</sup>

215. For example, Senator Richard Russell, Chair of the Senate Armed Services Committee, stated: "As to the crime of rape the ratio was 13 times as great among the Negro troops per hundred thousand as it was in the case of the white troops.... In the crime of sodomy the rate was 2.5 times as great." CONG. REC. 7361 (June 8, 1948).

216. *Id.* at 7361-62 ("The incidence of syphilis, gonorrhea, chancre, and all other venereal diseases is appallingly higher among members of the Negro race than among members of the

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white race....The incidence of tuberculosis...is almost unbelievable; and of course, tuberculosis is a highly communicable disease.”).

217. RAND REPORT, *supra* note 58, at 189.

218. *See id.* at 204-05.

#### (4) The Effect of Witch Hunts and Other Disruptions on Unit Cohesion

In stark contrast to the United States military's assertion that "Don't Ask, Don't Tell, Don't Pursue" is necessary for unit cohesion, the evidence is that the current policy and its predecessors themselves have hurt morale and military effectiveness.<sup>219</sup> The policies have resulted in the massive loss of military talent, the diversion of scarce military resources and relentless attempts by some military commanders to "witch hunt" or otherwise "ferret-out" lesbian, gay and bisexual servicemembers.

From 1980 to 1990, for example, the United States military discharged 16,919

members from the service solely because of their homosexuality.<sup>220</sup> From 1991 to

1994, the United States military discharged an additional 2,936 men and women.<sup>221</sup>

Even with the "Don't Ask, Don't Tell, Don't Pursue" policy in effect for much of

1994, the discharge rate of homosexual servicemembers remained at four percent

of total active force, the same rate as in fiscal years 1993, 1992, and 1991.<sup>222</sup>

The loss of talent reflected in the discharge figures is only a partial accounting, as many extraordinary servicemembers chose to leave military service quietly, without ever admitting their homosexuality to their superiors or subordinates.<sup>223</sup> Retired Major Andrea Hollen, for example, the first woman graduate from West Point and a Rhodes Scholar, resigned from the United States Army in 1992 as a matter of conscience.<sup>224</sup> Having discovered that she was a lesbian after entering the Army, Hollen was facing a background investigation for employment at the White House Communications Office, in which she would have to lie about her sexual orientation. Major Hollen chose not to make her reasons for resigning a matter of record to "avoid triggering an investigation and discharge proceedings and a court challenge."<sup>225</sup> During her twelve years of service, Major Hollen's Officer Evaluation Reports lauded her talent, dedication, and professionalism, describing her at one point as "far and above, the most talented and best company grade officer in

219. Stiehm, *supra* note 184, at 694 ("[T]he very process of investigating and enforcing the discharge of homosexuals itself causes disorder that threatens discipline and lowers morale."). See also BERUBE, *supra* note 34; Shilts, *supra* note 24; MARY ANN HUMPHREY, MY COUNTRY, MY RIGHT TO SERVE (1988).

220. GAO, DEFENSE FORCE MANAGEMENT: STATISTICS RELATED TO DoD's POLICY ON HOMOSEXUALITY 32 (June 1992).

221. C. DIXON Osniui~ & MICHELLE M. BENECKE, SERVICEMEMBERS LEGAL DEFENSE NETWORK, CONDUCT UNBECOMING CONTINUES: THE FIRST YEAR UNDER "DON'T ASK, DON'T TELL, DON'T PURSUE" 13 (Feb. 28, 1995) (copy on file with

author).

222. Art Pine, *Few Benefit from New Military Policy On Gays*, L.A. TIMES, Feb. 6, 1995, at A1, A8.

223. Bobbi Bernstein, *Power, Prejudice and the Right to Speak: Litigating ~~Outness" Under The Equal Protection Clause,*" 47 STAN. L. REV. 269, 287 (1995) ("Ironically, by 'coming out of the closet' to protest against discriminatory legislation and practices, homosexuals expose themselves to the very discrimination they seek to eliminate. As a result, the voices of many homosexuals are not even heard, let alone counted.") (citing *Watkins v. United States Army*, 875 F.2d 699, 711, *cert. denied*, 498 U.S. 957 (1990)).

224. Kevin Simpson, *A Matter of Conscience*, DENVER POST, Jan. 15, 1995, at COL. 225. *Id.*

this battalion.”<sup>226</sup> The same reports describe how she earned the respect of “every

“227 - consummate

“228

to

member of the 3d Infantry Division. A officer, according her evaluations, Major Hollen’s discharge exemplifies the human loss, to servicemembers and the military, caused by the ban on service by lesbians and gay men.

The military’s exclusion of lesbian, gay and bisexual servicemembers has also diverted substantial financial resources that the military would otherwise have had available for national defense and peacekeeping operations. From 1980 to 1990, the military spent \$498,555,244 to recruit and train replacements for the lesbian, gay and bisexual servicemembers discharged.<sup>229</sup> From 1991 to 1994, the military spent an additional estimated \$86,515,643 in recruitment and training costs.<sup>230</sup> And, in fiscal year 1994, while the new “Don’t Ask, Don’t Tell, Don’t Pursue” policy was in effect for one-half of the fiscal year, the military still spent an estimated \$17,591,907 in recruitment and training costs.<sup>231</sup> The reported costs did not include the substantial costs of conducting investigations and discharge proceedings in each of these cases.<sup>232</sup>

The involuntary separation of competent, nondisruptive lesbian, gay and bisexual personnel imposes a staggering cost upon the service, not only in loss of human talent and fiscal costs, but in the splintering of effective military units.<sup>233</sup> “Don’t Ask, Don’t Tell, Don’t Pursue” and its predecessors have created an atmosphere of suspicion, fear and retribution, where snitching is rewarded rather than job performance.<sup>234</sup>

The military’s investigations of gay and lesbian servicemembers, for example, have been characterized by particularly offensive investigatory techniques.<sup>235</sup> Not only has the military threatened personnel with discharge and imprisonment if they did not confess and implicate other servicemembers,<sup>236</sup> but victims of interrogation

226. Amicus Brief for Servicemembers Legal Defense Network at 7, *Steffan v. Perry*, 41 F.3d 677 (D.C. Cir. 1994) (No. 91-5409) (on file with author).

227. *Id.*

228. *Id.*

229. GAO, DEFENSE FORCE MANAGEMENT: STATISTICS RELATED To DoD’s POLICY ON HOMOSEXUALITY (June 1992). See also GAO, DEFENSE FORCE MANAGEMENT: DoD’s POLICY ON HOMOSEXUALITY 25 (June 1992) (DoD spends \$28,226 on recruitment and initial training to replace every enlisted person discharged for homosexuality and \$120,772 in similar costs to replace every discharged officer).

230. OsBURN & BENECKE, *supra* note 221.

231. *Id.* It should be noted that an interim policy substantially similar to the ultimate “Don’t Ask, Don’t Tell, Don’t Pursue” policy was in effect for the first half of the fiscal year.

232. OsBURN & BENECKE, *supra* note 221.

233. Chris Black, *Gays in Military Find Backlash*, BOSTON GLOBE, Feb. 5, 1995, at A1

(The new policy “has spawned a virulent backlash, contributing to an even more threatening environment.

234. “What does threaten morale are the prolonged investigations, the questioning of friends and co-workers, the searches of barracks for magazines and letters, the witch hunts. What threatens cohesion is the inability of gay servicemembers to be on easy footing with their fellows because the regulations demand subterfuge.” Quindlen, *supra* note 152.

235. 5. Shuger, *American Inquisition: The Military v. Itself*, NEW REPUBLIC, Dec. 7, 1992, at 23.

236. *See, e.g.*, Michelle Benecke & Kirstin Dodge, *Military Women in Nontraditional Job Fields*:

have been denied access to attorneys,<sup>237</sup> and at least one Navy petty officer was threatened with the loss of custody of her six-month old child.<sup>238</sup> Incredibly, servicemembers have been forced to appear in the nude before their disposition board, while subjected to interrogation regarding the most intimate aspects of their personal life.<sup>239</sup> One interrogation even involved attaching sensors to an Army lieutenant's head with pins to test for "neurological damage," causing blood to pour down his face.<sup>240</sup> The gay ban has even led to the discharge and resignation of heterosexuals, particularly women accused of being lesbians (in retaliation for rebuffing male sexual advances) or "associating" with lesbians.<sup>241</sup>

At its worst, the practice of lesbian baiting has culminated in full-scale witch hunts:<sup>242</sup> mass investigations of women within a single command, initiated on the basis of nothing more than rumor by male heterosexual servicemembers whose sexual advances are rebuffed. In one now-infamous incident, almost half of the 246 women stationed at the Marine Corps Recruit Training Depot at Paris Island, South Carolina were interrogated about suspected lesbians, resulting in the departure of sixty-five women, at least twenty-seven of whom were discharged, many of whom were, in fact, heterosexual.<sup>243</sup> The phenomenon of lesbian baiting is simply one of the starkest examples of what one district court recently described under "Don't Ask, Don't Tell, Don't Pursue" as a matter of "common sense: that a policy of secrecy, indeed what might be called a policy of deception or dishonesty, will call unit cohesion into question.

Despite the promise that the "Don't Ask, Don't Tell, Don't Pursue" policy would be a "step forward"<sup>245</sup> and would bring to an end to the witch hunts and harassment of lesbian, gay and bisexual servicemembers, the evidence demonstrates that the new policy has changed little, and that the witch hunts and harassment have

*Casualties of the Armed Forces' War on Homosexuals*, 13 HARV. WOMEN'S L.J. 215, 229-31 (1990).

237. See, e.g., RANDY SHILTS, CONDUCT UNBECOMING: GAYS AND LESBIANS IN THE U.S. MILITARY 587 (1993).

238. See Benecke & Dodge, *supra* note 236, at 224; SHILTS, *supra* note 237, at 586.

239. BERUBE, *supra* note 35, at 204.

240. See Sf-TILTS, *supra* note 238, at 231.

241. *id.* at 622, 637, 640, 650-54, 658, 671; accord Benecke & Dodge, *supra* note

236, at 215,  
229-31.

242. The United States military has targeted both men and women in witch hunts. *See* Stiehm, *supra* note 184, at 697; SHILTS, *supra* note 237; OSBURN & BENECKE, *supra* note 221.

243. Benecke & Dodge, *supra* note 236, at 224.

244. *Able v. United States*, 880 F. Supp. 968 (E.D.N.Y. 1995).

245. *Remarks of President Clinton*, *supra* note 40.

continued?<sup>46</sup> A report issued on February 28, 1995, the first year anniversary of “Don’t Ask, Don’t Tell, Don’t Pursue,” found, among other things:

- 340 total violations of “Don’t Ask, Don’t Tell, Don’t Pursue” by military commanders;
- 15 actual or attempted witch hunts in violation of the new regulations; and
- 10 cases where servicemembers faced death threats because of their actual or perceived sexual orientation in direct violation of the new regulations.<sup>247</sup>

Among other incidents, the report documents (1) a classic witch hunt in Okinawa, Japan, in which more than twenty-one servicemembers were asked about their sexual orientation and that of others in direct violation of the new policy, and (2) an incident in which a Navy psychologist turned in a servicemember simply for asking questions about sexuality, something which the military astonishingly concedes is permissible.<sup>248</sup>

(a) **The Witch Hunt in Okinawa: The Story of Cornoral Crai2 Haack**

In the Spring of 1994, Craig Haack, a twenty-two year-old, young man from Portland, Oregon, was coming to the end of his tour of duty as a Marine Corporal in Okinawa, Japan.<sup>249</sup> Early one evening, however, without any warning, military investigators came to his barracks room and announced, so that all of his co-workers could hear, that Haack was under investigation for homosexuality.<sup>250</sup> In direct violation of the “Don’t Ask, Don’t Tell, Don’t Pursue” policy, they proceeded to tear his room apart for nearly two hours, looking for any evidence of homosexual conduct.<sup>251</sup> The military investigators found and read Haack’s personal diary and personal correspondence in front of him.<sup>252</sup> They seized his word processor, his computer disks, all of his photos of friends and family, and even a pair of 1970’s

246. See *The Military and Gays: Still Asking*, HARPER’S, June 1995, at 18; Morrison, *supra* note 174; Lawrence Korb & C. Dixon Osburn, *Asked, Told, Pursued*, N.Y. TIMES, March 19, 1995, at E1S;

Jonathan Landay, *New Policy on Gays in Military Draws Fire One Year Later*, CHRISTIAN SCI. MONITOR, Mar. 17, 1995, at 3; Schmitt, *supra* note 156; Pine, *supra* note 222. at A1; Black, *supra* note

233; Sarah Miles, *Don’t Ask, It’s Hell*, OUT, Feb. 1995, at 61; MacNeill, *ehrer News Hour: Don’t Ask, Don’t Tell* (PBS television broadcast, June 13, 1995); *NBC Evening News. Interview with C. Dixon*

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*Osburn* (NBC television broadcast, March 13, 1995); *CBS Evening News. Interview with C. Dixon*

*Osburn* (CBS television broadcast, March 13, 1995); *CNN Headline News* (CNN television broadcast,

Feb. 28, 1995); *Interview with Michelle M Benecke* (NPR, Morning Edition broadcast, March 15,

1995); *see generally* OSBURN & BENECKE, *supra* note 221.

247. *Id.*

248. Lincoln Caplan, “*Don ‘tAsk, Don’t Tell*”—*Marine Style*, *NEWSWEEK*, June 13, 1994, at 28.

249. Miles, *supra* note 246, at 61.

250. *Id.*

251. *Id.*

252. *Id.*

style platform shoes, saying that they were somehow evidence of homosexual conduct.<sup>253</sup> The next day, the tires on Haack's car were slashed.<sup>254</sup>

Over the course of the next several weeks, in direct violation of the "Don't Ask, Don't Tell, Don't Pursue" policy, military investigators questioned at least twenty-one Marines about Haack and others, asking whether any of those named had demonstrated "homosexual proclivities."<sup>255</sup> When questioned himself, Haack refused to cave in.<sup>256</sup> As a result, Haack was detained beyond his tour of duty and threatened with adverse action because he did not cooperate and provide the information sought by the investigators.<sup>257</sup>

Only after months of intensive outside intervention by the Servicemembers ~Legal Defense Network in Washington, D.C., the New York-based firm of Skadden, Arps, Slate, Meagher & Flom, and Congressional inquiries, did the U.S. Marine Corp finally relent and allow Corporal Haack to end his tour of duty.<sup>258</sup> The Department of Defense has yet to discipline any military individual responsible for violating the "Don't Ask, Don't Tell, Don't Pursue" policy, effectively giving tacit approval to witch hunts as usual.<sup>259</sup>

### **(b) The Lack of Confidentiality: The Story of CorDoral Kevin Blaesin!**

Corporal Kevin Blaesing was stationed with the U.S. Marine Corps Security Force Company in Charleston, South Carolina.<sup>260</sup> Corporal Blaesing is an exemplary young man, having excelled at every post where he has served.<sup>261</sup> Among other awards and honors, he had been named Marine of the Month and Marine of the Quarter for his unit.<sup>262</sup>

In May 1994, Corporal Blaesing went to a military base psychologist because of stress.<sup>263</sup> During the course of the private, confidential counseling session he asked questions about his sexual orientation.<sup>264</sup> He thought that his questions would remain private and be held in confidence.<sup>265</sup> They were not.<sup>266</sup> The psychologist turned Blaesing into his commanding officer.<sup>267</sup>

Corporal Blaesing's first Commanding Officer, Lieutenant Colonel Ronald Rueger, was great and did what he was supposed to do—nothing.<sup>268</sup> He said, "I felt the young fella gave us really good service ... and deserved to go all the way

253. *Id.*

254. Miles, *supra* note 246, at 61.

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.*

259. See OSBURN & BENECKE, *supra* note 221.

260. See Caplan, *supra* note 248.

261. RECORD OP ADMINISTRATIVE DISCHARGE BOARD, Nov. 29-30, Dec. 1, 1994.

262. *Id.*

263. See Caplan, *supra* note 248.

264. *Id.*

265. *Id.*

266. *Id.*

267. *Id.*

268. See Caplan, *supra* note 248.

through” his term of service.<sup>269</sup> But Lieutenant Colonel Rueger retired and the new Commanding Officer, Lieutenant Colonel M.J. Martinson, pressured Blaesing to

quit. When Blaesing refused to leave “voluntarily,”<sup>270</sup> Martinson ordered the military attorneys, against their advice, and in direct violation of “Don’t Ask, Don’t Tell, Don’t Pursue,” to initiate discharge proceedings against Corporal Blaesing, using as the sole basis for discharge the questions Corporal Blaesing had raised with his base psychologist.<sup>271</sup> A board of Marine Corps officers voted, two to one, to discharge him.<sup>272</sup>

The board recommendation demonstrates that, left to its own devices, the military will pursue and “ferret out” all servicemembers even remotely suspected of being gay. Corporal Blaesing never stated that he was gay.<sup>273</sup> Even the military psychologist, the government’s key witness, stated at the discharge board that she did not know whether or not Corporal Blaesing was gay.<sup>274</sup>

Again, only after intense intervention by Servicemembers Legal Defense Network, a private attorney from South Carolina, and Congressional inquiries, was the recommended discharge action overturned. The Department of Defense, however, disciplined no one for the violations of “Don’t Ask, Don’t Tell, Don’t Pursue,” and again effectively signaled that it was acceptable to target servicemembers who are, or are suspected of being, lesbian, gay or bisexual for persecution and discharge.

These stories are only two of the hundreds under “Don’t Ask, Don’t Tell, Don’t Pursue.”<sup>275</sup> The stories suggest that the U.S. military is insincere when it claims that the new policy is a “step forward”<sup>276</sup> and “sexual orientation is not a bar to military service.”<sup>277</sup> More profoundly, these stories and the hundreds of violations cited by Servicemembers Legal Defense Network show that no policy that encourages witch hunts, fishing expeditions or other forms of retribution against servicemembers solely for their sexual orientation will reinforce discipline, good order or morale.<sup>278</sup>

Given the cost to mission effectiveness of the military’s gay ban, which requires the services (1) to discharge some of their most valued members and highest performers, (2) to spend millions of dollars on far-reaching investigations, discharge proceedings, training, and recruitment, and (3) to mandate deception, mistrust and suspicion, one might well wonder why the military persists in maintaining such a counterproductive policy. Dozens of leading military figures have also asked this very question in public statements, urging an end to the ban and dismissing the notion that the presence of gay men and lesbians in the military

269. *Id.*

270. *Id.*

271. *Id.*

272. *See* RECORD OF ADMINISTRATIVE DISCHARGE BoARD, Nov. 29-30, Dec. 1,

1994.

273. *See* Caplan, *supra* note 248.

274. *Id.*

275. *See* OSBURN & BENECKE, *supra* note 221.

276. *Remarks of President Clinton, supra* note 40.

277. DEP'T OF DEFENSE DIRECTIVE No. 1332.14(1994); *Id.* No. 1332.30 (Dec. 22, 1993).

278. *See* OSBURN & BENECKE, *supra* note 221.



impedes the functioning of the services in any way.<sup>279</sup> Thus, contrary to the military's assertion that the "Don't Ask, Don't Tell, Don't Pursue" policy is essential for unit cohesion, ample evidence demonstrates that the end of the policy is essential to unit cohesion.<sup>280</sup>

### III. CONCLUSION

It is astounding that the United States military clings to a policy that treats lesbians, gays and bisexuals differently from heterosexuals for being honest about themselves to family, friends, church and co-workers. By reviewing the last fifty years of military policy, it is clear that the United States military has been desperately searching for a rationale to justify its differential treatment.

The military has asserted, and then abandoned, the notion that gays are mentally ill, security risks or unable to adequately perform. Even now, despite written policy, the military acknowledges that "Don't Ask, Don't Tell, Don't Pursue" is not truly aimed at preventing sexual misconduct because, as it concedes, lesbians, gays and bisexuals are no more prone to sexual misconduct than are heterosexuals, and the military already has in place evenhanded regulations governing sexual misconduct for both heterosexuals and homosexuals. Furthermore, the military concedes that the truth underlying its unit cohesion rationale is not that gay soldiers will in any way impair unit cohesion, but that some heterosexuals are uniquely unable to control themselves in the presence of lesbians, gays and bisexuals, and as such those heterosexuals will disrupt good order, discipline and morale.

Perhaps most profound is that every serious military or government study of the military's treatment of lesbians, gays and bisexuals has sharply criticized the differential treatment.<sup>281</sup> The Crittenden Report of 1957, the several Pentagon studies of the 1980s known as the PERSER.EC Reports, and the 1993 RAND Study, the most comprehensive study ever commissioned by the Pentagon on gays in the military, have all concluded that the military's ban on homosexuals cannot be

279. See, e.g., Statements by Gen. Barry Goldwater, USAF (Ret.) (WASH. POST, June 10, 1993);

Gen. Benjamin O. Davis, USAF (Ret.) (BUFFALO NEWS, Dec. 2, 1993); Maj. Gen. Vance Coleman,

US Army (Ret.) (*MacNeil/Lehrer/Tewshour*, Mar. 29, 1993); Brig. Gen. Evelyn P. Foote, US Army

(S. E. CHRON, Apr. 6, 1993); Captain Lawrence Korb, USN (Ret.) (former Assistant Secretary

of  
Defense for Readiness and Manpower, under President Reagan) (ATLANTA J. AND CONST.,  
Nov. 22,  
1992); Captain William K. Yates, USN (Ret.) (NEW LONDON DAY, June 2, 1993); Col. Ronald  
C.  
Anderson, US Army (Ret.) (May 13, 1993 letter to Senate Armed Services Committee); Col. Karl  
Cropsey, US Army (Ret.) (KANSAS CITY STAR, May 30, 1993); Col. Lucian Truscott, III, US  
Army  
(Ret.) (L. A. TIMES, Apr. 30, 1993); Col. Sam J. Tumbull, US Army (Ret.) (June 10, 1993 letter to  
Members of Congress); Col. Joseph B. Holt, USAF (Ret.) (CHIC. TRIB., May 11, 1993); Cmr.  
William  
R. Bryant, USN (Ret.) (May 16, 1993 letter to Senate Armed Services Committee); Lt. Col.  
Charles  
H. Nixon, USAF (Ret.) (INT'L HERALD TRIB., June 25, 1993); Capt. Thomas W. Ratliff,  
USAF (May  
14, 1993 letter to Senator Sam Nunn); Lt. David Zeni, USN (Ret.) (May 19, 1993 letter to Senator  
Joseph Lieberman); Lt. George Cooper, USN (Ret.) (NPR, Feb. 24, 1993).

280. Stiehm, *supra* note 184, at 698-99 (The policy "creates an atmosphere of hypocrisy,  
secrecy, fear, divisiveness .

281. *See, e.g.*, CRF FENDEN REPORT, *supra* note 43; FIRST PERSEREC REPORT,  
*supra* note 44; FIRST GAO REPORT, *supra* note 39; SECOND GAO REPORT, *supra*  
note 187; RAND Report, *supra* note

supported. Even the Pentagon leadership, including Lawrence Korb, President Reagan's Assistant Secretary of Defense in charge of the gay policy, Edwin Dorn, President Clinton's Assistant Secretary of Defense in charge of the gay policy, and Lieutenant General Otjen, who chaired the Military Working Group which argued in favor of a ban on gays and drafted the current policy, all concede that the policy is based purely on the perceived prejudice of some heterosexuals.

It is quite clear that the military's class-based exclusion of gay men and lesbians lacks any rational foundation. The policy is, as President Clinton and countless others have said, based on fear: fear of the unknown, fear of adverse public reaction, fear of something and someone "different." However, that fear cannot outweigh the fundamental right of gay men and lesbians to be treated as individuals, free from class-based prejudices. This right to be treated as an individual person, not as a stereotype, is the bedrock principle of equal protection in this country's constitutional system. Therefore, because the military's ban is based solely on those prejudices, it cannot stand.