



“Don’t Ask, Don’t Tell”: The Law and Military Policy on Same-Sex Behavior

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Summary

In 1993, new laws and regulations pertaining to homosexuality and U.S. military service came into effect reflecting a compromise in policy. This compromise, colloquially referred to as "don't ask, don't tell," holds that the presence in the armed forces of persons who demonstrate a propensity or intent to engage in same-sex acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion which are the essence of military capability. Under this policy, but not the law, service members are not to be asked about nor allowed to discuss their "same-sex orientation." The law itself does not prevent service members from being asked about their sexuality. This compromise notwithstanding, the issue has remained politically contentious.

Prior to the 1993 compromise, the number of individuals discharged for homosexuality was generally declining. Since that time, the number of discharges for same-sex conduct has generally increased until 2001. However, analysis of these data shows no statistically significant difference in discharge rates for these two periods.

In recent years, several Members of Congress have expressed interest in amending "don't ask, don't tell." At least two bills that would repeal the law and replace it with a policy of nondiscrimination on the basis of sexual orientation—H.R. 1283 and S. 3065—have been introduced in the 111th Congress.

On March 25, 2010, Secretary of Defense Robert M. Gates announced changes in the department's enforcement of the 1993 law. Under these changes, Secretary Gates said only a general or flag officer would have the authority to separate someone who had engaged in homosexual conduct, that information provided by a third party must be given under oath, and that the information given to certain individuals—lawyers, psychotherapists, clergy, and domestic abuse counselors, for example—cannot be used in support of discharge proceedings.

Language was also included in the House and Senate versions of the FY2011 National Defense Authorization Act (H.R. 5136 and S. 3454) that would allow for the repeal of the 1993 law, following certain stipulations. The House passed this bill on May 28, 2010, and sent it to the Senate. On September 21, 2010, the Senate voted on a procedural motion to move S. 3454 forward. A cloture vote failed and the bill was not brought to the floor.

On September 9, 2010, Federal Judge Virginia A. Phillips ruled the 1993 law was unconstitutional. One month later, (October 12, 2010), Judge Phillips enjoined the Department of Defense "from enforcing or applying the 'Don't Ask, Don't Tell' Act."

For more information, see CRS Report R40795, *"Don't Ask, Don't Tell": A Legal Analysis*, by Jody Feder.

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Recent Developments

On January 27, 2010, President Barack Obama stated his desire to work with Congress “to finally repeal the law that denies gay Americans the right to serve the country they love because of who they are.”¹ The House Military Personnel Subcommittee, on March 3, 2010, and the Senate Armed Services Committee (SASC), on February 2 and March 18, 2010, have held hearings on the issue. During the February SASC hearing, Secretary of Defense Robert Gates and the Chairman of the Joint Chiefs of Staff, Admiral Michael Mullen, called for allowing homosexuals to serve openly and have ordered a review by the Department of Defense (DOD) that is expected to continue through the year.² On March 25, 2010, Secretary of Defense Robert M. Gates announced changes in the department’s enforcement of the 1993 law. Under these changes, Secretary Gates said only a general or flag officer would have the authority to separate someone who had engaged in homosexual conduct, that information provided by a third party must be given under oath, and that the information given to certain individuals—lawyers, psychotherapists, clergy, and domestic abuse counselors, for example—cannot be used in support of discharge proceedings.

Language was included in the House version of the FY2011 National Defense Authorization Act (H.R. 5136) that would allow for the repeal of the 1993 law, following certain stipulations. The House passed this bill on May 28, 2010, and sent it to the Senate. Language was also included in the Senate version of this bill (S. 3454) that would allow for repeal, following certain stipulations. On September 21, 2010, the Senate voted on a procedural measure to move S. 3454 forward. A cloture vote failed and the bill was not brought to the floor.

On September 9, 2010, Federal Judge Virginia A. Phillips ruled the 1993 law was unconstitutional. One month later, (October 12, 2010), Judge Phillips enjoined the Department of Defense “from enforcing or applying the ‘Don’t Ask, Don’t Tell’ Act.” According to press reports, an appeal by the Department of Justice appears likely.³ Such an appeal would leave the Obama Administration in the position of defending a law it is seeking to repeal.

Background and Analysis

Early in the 1992 presidential campaign, then-candidate Bill Clinton commented that, if elected, he would “lift the ban” on homosexuals⁴ serving in the military.⁵ Existing policies had been in place since the Carter Administration and, historically speaking, gay, lesbian, and bisexual (same-sex) behavior had not been tolerated in the military services. The issue drew heated debate among

¹ President Barack Obama, White House Office of the Press Secretary, Remarks of the President in the State of the Union Address, January 27, 2010.

² McMichael, William H., Mullen: “Dropping ‘don’t ask’ is ‘the right thing to do,’” *Navy Time*, February 15, 2010: 11, 14.

³ Schwartz, John, “Judge Orders U.S. Military to Stop ‘Don’t Ask, Don’t Tell,’” *New York Times*, October 13, 2010: 1.

⁴ Usage of terms: Although the law and policy refer to ‘homosexuality’ and ‘bisexuality’ this report also refers, interchangeably, to “gays,” “lesbians,” and bisexuals.

⁵ “[H]e elicited approving whoops when he said he would sign an executive order to eliminate discrimination based on sexual orientation in the US military.” Wilkie, Curtis, Harvard tosses warmup queries to Clinton on eve of N.H. debate, *Boston Globe*, October 31, 1991: 22.

policymakers and the public at large. In response to congressional concerns, President Clinton put into place in early 1993 an interim compromise that allowed the Department of Defense an opportunity to study the issue and develop a "draft executive order" that would end discrimination on the basis of "sexual orientation." This interim compromise (announced on January 29, 1993) also provided Congress additional time to more fully exercise its constitutional authority under Article I, Section 8, clause 14, "To make rules for the Government and Regulation of the land and naval Forces," including the consideration of legislation and the holding of hearings on the issue. In announcing the interim agreement, the President noted that the Joint Chiefs of Staff agreed to remove questions regarding sexual orientation from the enlistment application.⁶ One of the elements of the compromise was an agreement within Congress not to immediately enact legislation that would have maintained the prior policy (of barring such individuals from service and continuing to ask recruits questions concerning their sexuality) until after the completion of a congressional review.⁷

The Senate and House Armed Services Committees (SASC and HASC) held extensive hearings on the issue in 1993. By May 1993, a congressional consensus appeared to emerge over what then-SASC Chairman Sam Nunn described as a "don't ask, don't tell" approach. Under this approach, DOD would not ask questions concerning the sexual orientation of prospective members of the military, and individuals would be required to either keep a same-sex orientation to themselves, or, if they did not, they would be discharged if already in the service or denied enlistment/appointment if seeking to join the service.

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

One, service men and women will be judged based on their conduct, not their sexual orientation. Two, therefore the practice ... of not asking about sexual orientation in the enlistment procedure will continue. Three, an open statement by a service member that he or she is a homosexual will create a rebuttable presumption that he or she intends to engage in prohibited conduct, but the service member will be given an opportunity to refute that presumption.... And four, all provisions of the Uniform Code of Military Justice will be enforced in an even-handed manner as regards both heterosexuals and homosexuals. And thanks to the policy provisions agreed to by the Joint Chiefs, there will be a decent regard to the legitimate privacy and associational rights of all service members.⁸

The Administration dubbed this policy, "don't ask, don't tell, don't pursue." It is noteworthy that the President did not mention "don't pursue" in the announcement of the policy on July 19, 1993. The inclusion of "don't pursue" (akin to a "don't investigate" stance advocated by gay rights groups) seemingly created a contradiction in the President's policy.⁹ On the one hand, it maintained the notion of military necessity and privacy as found in the congressional compromise of "don't ask, don't tell," and then appeared to prevent efforts to enforce the regulations and laws

⁶ President's News Conference, in *Public Papers of the Presidents of the United States, William J. Clinton, 1993, Book 1*, January 29, 1993: published 1994: 20.

⁷ See *Congressional Record*, February 4, 1993, S2163-S2245.

⁸ President's News Conference, in *Public Papers of the Presidents of the United States, William J. Clinton, 1993, Book 1*, July 19, 1993: published 1994: 1111.

⁹ According to a Senior Administration official " ... [W]e think that probably the most significant advance is heightened—no witch hunts, no pursuit policy. So I think it's fair to call this policy 'don't ask, don't tell, don't pursue.'" White House Briefing, Federal News Service, July 16, 1993.

which implement the broad policy by limiting the military's role via "don't pursue." This problem was discussed at hearings with then-Secretary of Defense Les Aspin. Secretary Aspin indicated that individuals could acknowledge their homosexuality without risking an investigation or discharge;¹⁰ later he said that individual statements might not be credible grounds for investigating if the commander so decided, but, if investigated, such statements could be credible grounds for a discharge proceeding. Ultimately, the Secretary agreed that statements are grounds for investigations and possible discharge.

In these same hearings, held from March 29, 1993, through July 22, 1993, Senators raised numerous questions as to what behavior, if any, would justify the commencement of an investigation, and what grounds would justify an administrative discharge.¹¹ Since commanders and noncommissioned officers are not usually lawyers, many critics argued that such rules created legal technicalities that would prove dysfunctional in a military setting, and/or lead to an expansion of unpredictable court remedies.¹² At the same time, some argued that this outcome would not have displeased the Clinton Administration, even if it was not the original intent. This thesis held that implementation of the compromise policy would have encouraged judicial intervention and, thereby, would have provided a means to seek a judicial resolution asserting that the compromise was unconstitutional. These critics hypothesized that the Clinton Administration may have been following a strategy of tacitly implementing a muddled regulation, awaiting a legal challenge, then poorly defending the policy—thereby encouraging judicial intervention in finding the policy unconstitutional.¹³ Administration officials insisted that President Clinton was

¹⁰ "The previous policy was, ask, do not tell, investigate. The [proposed] policy is, do not ask, do not tell, do not investigate." Secretary of Defense, Les Aspin, U.S. Congress. Senate. Committee on Armed Services, Hearings, Policy Concerning Homosexuality in the Armed Forces, Senate Hearings 103-845, 103rd Cong., 2nd Sess., 1994: 746. "And even Secretary of Defense Les Aspin seemed a bit confused about the Clinton administration's new policy allowing homosexuals in the military, expressing doubt as to whether a single acknowledgment of homosexuality by a service member would constitute grounds for discharge... But grasping [the policy's] details could prove difficult, as Aspin himself demonstrated yesterday in response to a question from Sen. Jeff Bingaman (D-N.M.). The senator asked Aspin what would happen in the case of a homosexual soldier who reveals his sexual orientation to another soldier, who then reports the conversation to a commander. At first, Aspin said flatly that such a disclosure would not be grounds for dismissal.... But that brought a puzzled response from [committee chairman, Sen.] Nunn, who quoted Aspin as saying in his opening remarks that homosexual 'statements' were a form of prohibited conduct.... At that point, Aspin seemed to shift position." Lancaster, John, "Senators Find Clinton Policy on Gays in the Military Confusing," *Washington Post*, July 21, 1993: A12.

¹¹ An administrative discharge is designated as 'Honorable,' 'General,' or 'Other than Honorable,' and is provided by an executive decision reflecting the nature of the service performed by the member. A 'Bad Conduct' or 'Dishonorable' discharge can only be awarded via a court-martial during sentencing. As discussed in the section entitled "Discharge Statistics," the vast majority of gays, lesbians and bisexuals who are discharged receive administrative discharges and most of those are designated 'Honorable.'

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

¹² " ... [T]he complex nature of the compromise was evident in the puzzlement of committee members who described [the policy] as confusing, contradictory and an invitation to endless litigation in the courts." Lancaster, July 21, 1993. "Clinton interpreted this language at a news conference yesterday to mean that gay service personnel do 'not necessarily' have to remain in the closet. The senior Pentagon official acknowledged, however, that homosexuals probably will not be able to disclose their sexual orientation." Lancaster, John, "Policy Tosses Issue to Courts, Ambiguity Seen Leading to Protracted Litigation," *Washington Post*, July 20, 1993: A1.

¹³ "Clinton was also asked by a reporter whether he would direct his Justice Department, which had days before been in ... [court] arguing for the ban, not to appeal the anti-ban ruling, but he did not answer.... Today, the Clinton Department of Justice has not only appealed the anti-ban ruling but is arguing in court that the government can discriminate on the basis of sexual orientation." Burr, Chandler, reprinted from *California Lawyer Magazine*, June, 1994.

merely trying to pursue a compromise that would take into account the concerns of Congress and the military, but would also minimize discrimination against gays, lesbians, and bisexuals.¹⁴

The policy announced by the Clinton Administration was based in large part, on sexual "orientation."¹⁵ This term has generated problems concerning its practical definition. Some view a sexual "orientation" as non-behavioral while others do not exclude behavioral manifestations when speaking of a sexual "orientation." As will be discussed below, the Clinton Administration's use of the term was subject to varying interpretations.

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

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

A Service member may also be separated if he or she states that he or she is a homosexual or bisexual, or words to that effect. Such a statement creates a rebuttable presumption that the member engages in homosexual acts or has a propensity or intent to do so. The Service member will have the opportunity to rebut that presumption, however, by demonstrating that he or she does not engage in homosexual acts and does not have a propensity or intent to do so.¹⁶

However, the policy—not the law it ostensibly implemented—stated that "sexual orientation is considered a personal and private matter, and homosexual orientation is not a bar to service entry or continued service unless manifested by homosexual conduct." According to this statement of DOD regulations, "sexual orientation" was defined as "a sexual attraction to individuals of a

¹⁴ Secretary of Defense, Les Aspin stated, "The Chiefs understood that the Commander-in-Chief wanted to change the existing policy to end discrimination based solely on status. The President understood that it was extremely important that any changes occur in a way that maintained the high level of morale and unit cohesion which is so important for military readiness and effectiveness." Secretary of Defense, Les Aspin, (with DOD General Counsel, Jamie Gorelick), News Conference, Reuter Transcript Report, December 23, 1993: 1.

¹⁵ U.S. Department of Defense, Secretary of Defense, *Memorandum for the Secretaries of the Army, Navy, Air Force, and Chairman of the Joint Chiefs of Staff*, July 19, 1993.

¹⁶ Office of the Assistant Secretary of Defense, (Public Affairs), News Release, December 22, 1993.

particular sex." Following Aspin's resignation and the confirmation of William Perry as the new Secretary of Defense in February 1994, DOD reportedly accepted the recommendation of certain Senators to delete from DOD regulations the phrase, "homosexual orientation ... is not a bar to military service."¹⁷ In its place, DOD inserted the statement:

A person's sexual orientation is considered a personal and private matter, and is not a bar to service or continued service unless manifested by homosexual conduct.¹⁸

In addition, the definition of "sexual orientation" was modified:

An abstract sexual preference for persons of a particular sex, as distinct from a propensity or intent to engage in sexual acts.¹⁹

The elusiveness of the definition of "orientation" is apparent. Under the Clinton Administration's original definition, "orientation" is a sexual attraction. Under the revised definition, it is an abstract preference. Other sources define sexual "orientation" to include overt sexual behavior.²⁰

Current regulations, therefore, are based on conduct, including verbal or written statements. Since sexual "orientation" is "personal and private," DOD is not to ask and personnel are not to tell. Should an individual choose to make his or her homosexual "orientation" public—that is, no longer private and personal, nor abstract—an investigation and discharge may well occur.

The ambiguous nature of the term "orientation" and its usage has not been without problems. In 1994, a Navy tribunal decided not to discharge Lt. Maria Zoe Dunning after she had made the statement "I am a lesbian" at a January 1993 rally. Her attorneys argued that she was not broadcasting her intentions to practice homosexuality but merely acknowledging her "sexual orientation." In the view of the reviewing officers, she had successfully rebutted the presumption that she would commit homosexual acts. Such a finding, if not inconsistent with the law and regulations, created a legal avenue via which homosexuals could announce their sexuality without being discharged. Shortly afterward, the Department of Defense Office of the General Counsel released a memo,²¹ in August 1995, addressing this issue:

A member may not avoid the burden of rebutting the presumption merely by asserting that his or her statement of homosexuality was intended to convey only a message about sexual orientation ... and not to convey any message about propensity or intent to engage in

¹⁷ U.S. Department of Defense, Office of the Assistant Secretary of Defense (Public Affairs), News Release, No. 605-93, *Directives Implementing the New DOD Policy on Homosexual Conduct in the Armed Forces*, December 22, 1993.

¹⁸ U.S. Department of Defense, Office of the Assistant Secretary of Defense (P&R), *Qualification Standards for Enlistment, Appointment and Induction*, Directive 1304.26, December 21, 1993, incorporating change 1, March 4, 1994: 9.

¹⁹ U.S. Department of Defense, Assistant Secretary of Defense (P&R), Directive, *Enlisted Administrative Separations*, No. 1332.14, December 21, 1993, Incorporation Change March 4, 1994: 9. See Scarborough, Rowen, "White House cuts Phrase restricting gay discharges," *Washington Times*, February 10, 1994: A1, and, "Defense Policy on Gays Takes Effect," *Washington Post*, March 2, 1994.

²⁰ "Today's preferred terms and the term 'sexual orientation' itself have a variety of definitions in the literature but these generally comprise one or both of two components: a 'psychological' component and a 'behavioral' component. Not all definitions include both components, ..., definitions that include both of these components use either the conjunction 'and' or 'or' to join them." Sell, Randall L., "Defining and Measuring Sexual Orientation: A Review," *Archives of Sexual Behavior*, Vol. 26, No. 6, 1997: 646.

²¹ Scarborough, Rowen, "Pentagon memo removes winning defense for gays," *Washington Times*, December 29, 1995: A3.

homosexual acts. To the contrary, by virtue of the statement, the member bears the burden of proof that he or she does not engage in, and does not attempt, have a propensity, [n]or intend to engage in homosexual acts. If the member in rebuttal offers evidence that he or she does not engage in homosexual acts or have a propensity or intent to do so, the offering of the evidence does not shift the burden of proof to the government. Rather, the burden of proof remains on the member throughout the proceeding.²²

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

In recent years, several Members of Congress have expressed interest in amending "don't ask, don't tell," the latest of which would repeal the law and replace it with a policy of nondiscrimination on the basis of "sexual orientation." These bills, H.R. 1283 and S. 3065, have been introduced in the 111th Congress. The two bills vary in their definition of "sexual orientation." In H.R. 1283, "the term 'sexual orientation' means heterosexuality, homosexuality, or bisexuality, whether the orientation is real or perceived, and includes statements and consensual sexual conduct manifesting heterosexuality, homosexuality, or bisexuality." In S. 3065, "the term 'sexual orientation' means heterosexuality, homosexuality, or bisexuality, whether the orientation is real or perceived, and includes statements and consensual conduct that is not otherwise illegal manifesting heterosexuality, homosexuality, or bisexuality." These definitions differ from the current definition of "sexual orientation" as applied in the current regulations (see the previous two pages).

On January 27, 2010, President Barack Obama stated his desire to work with Congress "to finally repeal the law that denies gay Americans the right to serve the country they love because of who they are."²³ During the second session of the 111th Congress, the House Military Personnel Subcommittee (on March 3, 2010), and the Senate Armed Services Committee (on February 2 and March 18, 2010), held hearings on the issue. It should also be noted that the House Military Personnel Subcommittee held a hearing on July 23, 2008. During the February 2, 2010, SASC hearing, Secretary of Defense Robert Gates and Chairman of the Joint Chiefs of Staff Admiral Michael Mullen called for allowing homosexuals to serve openly and ordered a review, expected to continue through the year.²⁴ On March 25, 2010, Secretary Gates announced changes in the enforcement of "Don't Ask, Don't Tell" policy. According to the Department of Defense:

"Today, I have approved a series of changes to the implementation of the current statute," Gates told reporters at a Pentagon news conference. "They were developed with full participation of the department's senior civilian and military leadership, and the changes are unanimously supported by Chairman Mullen, Vice Chairman Cartwright and the entire Joint Chiefs of Staff."

The changes include:

²² U.S. Department of Defense, General Counsel, Memorandum for the General Counsels of the Military Departments, Judge Advocate General of the Army, Navy, and Air Force, and the Staff Judge Advocate to the Commandant of the Marine Corps, *Policy on Homosexual Conduct in the Armed Forces*, August 18, 1995.

²³ President Barack Obama, White House Office of the Press Secretary, Remarks of the President in the State of the Union Address, January 27, 2010.

²⁴ McMichael, William H., Mullen: "Dropping 'don't ask' is 'the right thing to do,'" *Navy Time*, February 15, 2010: 11, 14.

—Only a general or flag officer may separate an enlisted member believed at the conclusion of an investigation to have engaged in homosexual conduct. Under previous policy, a colonel—or for a captain in the Navy and Coast Guard—could order separation.

—A revision in what's needed to begin an inquiry or a separation proceeding. Information provided by a third party now must be given under oath, "discouraging the use of overheard statements and hearsay," Gates said.

—Certain categories of confidential information—such as information provided to lawyers, clergy and psychotherapists—no longer will be used in support of discharges. Information provided to medical personnel in furtherance of treatment, or to a public-health official in the course of seeing professional assistance for domestic or physical abuse also is excluded, as well as information obtained in the process of security-clearance investigations, in accordance with existing Pentagon policies.

"These changes reflect some of the insights we have gained over 17 years of implementing the current law, including the need for consistency, oversight and clear standards," the secretary said. "I believe these changes represent an important improvement in the way the current law is put into practice—above all, by providing a greater measure of common sense and common decency to a process for handling what are difficult and complex issues for all involved." The military services have 30 days to conform their regulations to the changes. The new policies, however, took effect immediately upon Gates' announcement, meaning that they apply to all open cases, he said."²⁵

Language was subsequently included in the House version of the FY2011 National Defense Authorization Act (H.R. 5136), via an amendment (H.Amdt. 672, became Sec. 536) that would allow for the repeal of the 1993 law, following certain stipulations. Under this language, Sec. 654 of Title 10 USC (and the "Don't Ask, Don't Tell" policy) is repealed: (1) after receipt of the Pentagon's comprehensive review of how to implement a repeal is completed (due December 1, 2010); (2) the Secretary of Defense, Chairman of the Joint Chiefs of Staff and the President certify that the repeal is consistent with military readiness, military effectiveness, unit cohesion and recruiting, and that DoD has prepared the necessary policies and regulations for implementing the repeal; and (3) after a 60-day waiting period following certification. The House passed this bill on May 28, 2010, and sent it to the Senate. Identical language was also included in the Senate version of this bill (S. 3454, Sec. 591) that would allow for repeal, following these same stipulations. The Senate report noted that the committee intends to hold hearings following receipt of the comprehensive review.²⁶ On September 21, 2010, the Senate voted on a procedural measure to move S. 3454 forward. A cloture vote failed and the bill was not brought to the floor.

On September 9, 2010, Federal Judge Virginia A. Phillips rules the 1993 law was unconstitutional. One month later, (October 12, 2010), Judge Phillips enjoined the Secretary of Defense, or the Department of Defense in general, "from enforcing or applying the 'Don't Ask, Don't Tell' Act." As noted earlier, an appeal appears likely.

²⁵ Carden, Michael J., Army Sgt. 1st Class, Department of Defense, *News, American Forces Press Service*, March 25, 2010.

²⁶ U.S. Congress, Senate, Committee on Armed Services, National Defense Authorization Act for Fiscal Year 2011, 111th Cong., 2nd Sess., S. Rept. 111-201: 136.

Discharge Statistics

Early reports in the media stated that since the implementation of the “don’t ask, don’t tell” policy in 1993, the number of discharges for homosexuality had increased.²⁷ According to data provided by DOD and reproduced in **Table 1** from the early 1980s until FY1994, the number of personnel discharged for homosexual conduct (including statements) decreased. From FY1995 to FY2001, the numbers rebounded, only to begin leveling off, and decreased thereafter.

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

First, we found that the large majority of the discharges for homosexual conduct are based on the statements of service members who identify themselves as homosexual, as opposed to cases involving homosexual acts. The services believe that most of these statements—although not all of them—involve service members who voluntarily elect to disclose their sexual orientation to their peers, supervisors or commanders. The increase in the number of discharges for homosexual conduct since 1994 is attributable to this increase in statement cases. Discharges for homosexual acts and marriages has declined by 20% over the past three years [1994-1997]. Second, most of those discharged under the policy are junior personnel with very little time in the military, and most of the increase in discharges for homosexual conduct has occurred in this sector. The number of cases involving career service members is relatively small. Third, the great majority of discharges for homosexual conduct are uncontested and are processed administratively. Finally, more than 98% of all members discharged in Fiscal Year 1997 under the policy received honorable discharges. (Separation of enlisted members in their first 180 days of military service are generally uncharacterized.) Discharges under other than honorable conditions or courts-martial for consensual homosexual conduct are infrequent and have invariably involved aggravating circumstances or additional charges.²⁸

With over a decade (1993-2009) of experience under the most recent changes instituted during the Clinton Administration, other explanations as to why individuals may announce their homosexuality or bisexuality have come forward. Most notable is the observation that the vast majority of those discharged for homosexuality are discharged because they made voluntary statements identifying themselves as gay, lesbian, bisexual, or having such an “orientation.” Some have speculated that these statements were made by service members so as to enable them to terminate their military obligations before their term of service was completed regardless of their sexual “orientation.”²⁹

²⁷ Marquis, Christopher, “Discharges of Gay Troops Rise, And So Do Bias Incidents,” *New York Times*, March 14, 2002.

²⁸ U.S. Department of Defense, Office of the Assistant Secretary of Defense (Personnel and Readiness), Report to the Secretary of Defense, Review of the Effectiveness of the Application and Enforcement of the Department’s Policy on Homosexual Conduct in the Military, April 1998: 3. This report stated that investigations could only be initiated after commanders receive specific and credible information concerning homosexual conduct and that inappropriate investigations occurred only in isolated instances.

²⁹ For example, see Moskos, Charles, “The Law Works—And Here’s Why,” *Army Times*, October 27, 2003: 62. “Homosexual separations for whatever reason are one-tenth of 1% of military personnel. Of those discharges, more than 80% are the result of voluntary ‘statements’ by service members. The number of discharges for homosexual ‘acts’ (continued...) ”

Advocacy groups have claimed that anti-gay, lesbian, and/or bisexual harassment has increased since the 1998 review, and that those discharges were brought about by "witch hunts," or invasive and unwarranted searching and discharging of gays, lesbians and bisexuals in the ranks.³⁰

Although cases of aggressive investigations have been reported, the data would not appear to support the general use of such tactics. Recently, as the number of discharges has decreased, activists claim the Bush Administration was retaining gays, lesbians, and bisexuals because of the need for manpower as a result of Operations Enduring Freedom and Iraqi Freedom. At the same time, activists bemoan the discharge of "mission-critical" linguists who were found to be gay, lesbian, or bisexual.³¹ In 2005, the then-Assistant Secretary of Defense (Personnel and Readiness), Dr. David Chu, addressed the loss of these individuals. "We looked at the linguist issue, sir. My recollection of the numbers is that the majority of those people did not actually complete training. So they were not really linguists; they were in training when they violated the norms that Congress has set forth in statute and which is our responsibility to uphold."³²

Critics contend that the activists are trying to have it both ways when "analyzing" data. From the data, it can be seen that such individuals who are discharged represent an extremely small percentage of the force. For instance, if it is assumed that gays, lesbians, and bisexuals make up

(...continued)

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

³⁰ For example, see Langeland, Terje, "Gay Discharges on the Rise," *INews*, online at <http://www.csindy.com/csindy/2002-05-30/news.html>, May 30-June 15, 2002. "[Servicemembers Legal Defense Network] executive director, C. Dixon Osborn, said the numbers show the 'Don't Ask, Don't Tell' policy has failed... According to Dixon, the policy is being widely disregarded. 'The idea of 'Don't Ask, Don't Tell' is a myth,' Osborn said. 'The Pentagon continues to ask and pursue and harass every day, which means that any of the promises that were made have gone by the wayside.'" See also, Myers, Steven Lee, "Gay Group's Study Finds Military Harassment Rising," *New York Times*, March 15, 1999. In a recent article, Sharon Alexander, an attorney for SLDN network offered the following possible explanations for the decrease in homosexual discharges, "First, there is a growing acceptance of gays serving in the military, she said, and some commanders, especially younger ones are reluctant to enforce a law they believe to be unfair.... It could be the case, Alexander said, that with a war on, commanders in the field either don't want to lose able-bodied soldiers or they simply don't have time to worry about enforcing 'Don't Ask, Don't Tell.' ... [A Pentagon spokesman, Lt.Col. Joe] Richard dismissed those explanations as a 'fanciful analysis' by opponents of the law. There's never been a concerted effort to go on witch hunts to identify gay soldiers, he said. 'It is only when they declare themselves or openly practice their sexual preference that we have no alternative but to begin the investigative process and make a determination as to whether or not they themselves are homosexual.'" Reinert, Patty, "Is The Military Out of Step?," *Houston Chronicle*, February 6, 2005.

³¹ Hull, Anne, "How 'Don't Tell' Translates," *The Washington Post*, June 18, 2004: A1.

³² U.S. Congress, House, Committee on Armed Services, Military Personnel Subcommittee, The Current Status of Military Recruiting and Retention, Hearings, 109th Cong., 1st Sess., July 19, 2005: 31.

only 1.6% of the total active force of approximately 1.4 million,³³ there would be an estimated 22,400 gays, lesbians and bisexuals in uniform. In 2003, 653, or 2.9%, of the estimated gays, lesbians, and bisexuals in uniform were discharged for homosexual conduct. By 2009, that number dropped to 428, or approximately 1.9%.

More recently, an estimate reported by a "gay rights policy center" (the Williams Institute at the UCLA School of Law) suggested that homosexuals and bisexuals constitute 66,000 people in uniform.³⁴ CRS is unaware of any refereed journal or independent research that has sought to replicate, evaluate, or verify this claim. However, even if it is accepted at face value, it shows that the armed forces are discharging an even smaller percentage of homosexuals. In 2009, the 428 discharged would account for 0.6% of the "estimated" gays in uniform and only approximately 0.017% percent of all active and Reserve Component personnel. In a total force of approximately 2,500,000 active and Reserve Component personnel, the administrative separation of such a small number is practically insignificant. Although many blame the "Don't Ask, Don't Tell" policy for these discharges, supporters counter that it is the very individuals discharged who are responsible for violating the law that Congress enacted and the military is required to enforce. Despite the true estimate of homosexuals in the military, it appears that many gays, lesbians, and bisexuals, who serve in silence under the current policy, are not discharged for homosexual behavior. Likewise, although gay advocates are critical of gays having to serve in silence, supporters of the Don't Tell law point out that the armed forces is "all-volunteer" and there is no constitutional right to serve in the military. In other words, gays know the law and are free to serve under these rules or abstain from joining if they cannot abide by the rules.

Some have claimed that discharges decline during time of war, suggesting that the military ignores same-sex conduct when soldiers are most needed, only to "kick them out" once the crisis has passed.³⁵ It is notable that during wartime, the military services can, and have, instituted actions "to suspend certain laws relating to ... separation" that can limit administrative discharges. These actions, known as "stop-loss,"³⁶ allow the services to minimize the disruptive effects of personnel turnover during a crisis. However, administrative discharges for same-sex conduct normally are *not* affected by stop-loss. It can be speculated that a claim of homosexuality during a crisis may be viewed skeptically, but under the policy would require an investigation. Stop-loss, as implemented, requires an investigation to determine if the claim is bona fide or being used for some other reason, such as avoiding deployment overseas and/or to a combat zone. If, following an investigation, such a claim was found to be in violation of the law on homosexual conduct, the services could not use "stop-loss" to delay an administrative discharge.³⁷

³³ Data concerning the prevalence of homosexuality in society varies, but is reported to be approximately 1.6%. Smith, Tom W., "Adult Sexual Behavior in 1989: Number of Partners, Frequency of Intercourse and Risk of AIDS," *Family Planning Perspectives*, Vol. 23, No. 3, May/June 1991: 104. The percentage of homosexual individuals in society varies according to definitions used and sampling methods. For a broader discussion, see CRS Report 93-52, *Homosexuals and U.S. Military Personnel Policy*, by David F. Burrelli, January 14, 1993: 12 (archived report reprinted in U.S. Congress, Senate, Hearings, Policy Concerning Homosexuality in the Armed Forces, S. Hrg. 103-845, 103rd Cong., 2nd Sess., March 29, 1993: 20-94.) CRS is unaware of any reliable empirical research supporting the frequent assertion that homosexuals account for 10% of the population. See Muir, J. Gordon, "Homosexuals and the 10% Fallacy," *Wall Street Journal*, March 31, 1993.

³⁴ O'Keefe, Ed, "Eye Opener: Estimate: 66,000 gays in the military," *The Washington Post*, January 27, 2010.

³⁵ Lambert, Wade, and Stephanie Simon, "U.S. Military Moves to Discharge Some Gay Veterans of Gulf War," *Wall Street Journal*, July 30, 1991: B6.

³⁶ 10 U.S.C. 12305, Authority of President to suspend certain laws relating to promotion, retirement, and separation.

³⁷ U.S. Department of the Army, Information Paper, *Army Stop Loss/Stop Movement Program*, March 11, 2004, (continued...)

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

According to an *Army Reserve Component Unit Commander's Handbook*,³⁸ homosexual conduct is one of many criteria necessitating "personnel action during the mobilization process." According to this document, if a discharge for homosexuality "has been requested and approved prior to the unit's receipt of alert notification, the member will be discharged prior to the unit's effective date of [active duty]." Further, if "discharge is requested but not yet approved, delayed entry will be requested ... pending final determination." Finally, if "discharge is not requested prior to the unit's receipt of alert notification, discharge is not authorized."

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

Listed in **Table 1** are the homosexual discharge statistics from FY1980 to FY2009. In January 1981, the then-current policy on administrative discharges for homosexuality was reinstituted under new wording to allow for the continuation of homosexual discharges while addressing legal concerns over the wording of the previous policy.³⁹ The active duty force numbered approximately 2.1 million throughout the 1980s. By FY2000, active duty personnel numbers fell to a then low of 1,384,338. The numbers increased to 1,434,377 in FY2004 and seemed to level off and then decline thereafter. Because of this drop in manpower levels, it is important to consider not just the number of homosexual discharges in any particular year, but the changes in discharges as a percentage of the total active force.

The data in **Table 1** show the percentage of discharges fell from FY1982 to FY1994. The percentage of discharges rose from FY1994 to FY2001. In FY2001, the number/percentage discharged was smaller than the previous peak of FY1982. Since FY2001, the numbers/percentages have begun to decline and later level off. These percentages were declining

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

³⁸ U.S. Army, FORSCOM Mobilization and Deployment Planning System (FORMDEPS), FORSCOM Regulation 500-3-3, Volume III, Reserve Component Unit Commander's Handbook, Fort McPherson, Georgia, 15 July 1999: 27, 33.

³⁹ See Burrelli, David F., "An Overview of the Debate on Homosexuals in the U.S. Military," in *Gays and Lesbians in the Military, Issues, Concerns, and Contrasts*, Scott, Wilbur J., and Sandra Carson Stanley, eds., Aldine de Gruyter, New York, 1994: 18-19.

prior to, and continued to decline following the 1991 Persian Gulf War (Operations Desert Shield/Desert Storm). If, as some have speculated, DOD was using "Stop Loss" to retain gays, lesbians and bisexuals during that war, one would expect to see a drop in the wartime discharge rate followed by an increase following the crisis. Such a pattern is not evident in these data.

During the period covered by these data, the average percentage discharged was 0.063%. For the period prior to the implementation of the "Don't Ask, Don't Tell" policy (and the "Don't Tell" law), that is, FY1980 to FY1992, the average percentage discharged was 0.068%. For the period FY1993 to FY2009, the average was 0.057%. The difference in the percentage discharged before and following the implementation of this policy was statistically insignificant. Thus, although the data appear to move in differing directions prior to and following the implementation of the new policy, statistical analysis suggests that such changes may reflect random fluctuations in the data.⁴⁰

Table 1. Homosexual Conduct Administrative Separation Discharge Statistics

Fiscal Year	Total Number of Homosexual Discharges	Percentage of Total Active Force
1980	1,754	0.086
1981	1,817	0.088
1982	1,998	0.095
1983	1,815	0.085
1984	1,822	0.085
1985	1,660	0.077
1986	1,643	0.076
1987	1,380	0.063
1988	1,101	0.051
1989	996	0.047
1990	941	0.046
1991	949	0.048
1992	730	0.040
1993	682	0.040
1994	617	0.038
1995	757	0.050
1996	858	0.058

⁴⁰ Student's "t test," introduced by W.S. Gossett, under the pseudonym "Student," is used in this instance to measure differences of means between two sets of data taking into consideration the dispersion of data in each set and the number of cases involved in each set as well. These differences in means are considered in terms of their relative probability compared to random sampling distributions of samples of the same size. If the differences are small, as was the case here, the explanation that any difference is due to random factors in the data cannot be rejected. In other words, the data do not support a conclusion that the change in policy had a statistical effect on discharge rates. See Blalock, Hubert M., Jr., *Social Statistics*, 2nd ed., New York: McGraw-Hill, 1972: 220-241. For these data, $t=1.6479$, prob. > 0.05 , with 28 degrees of freedom, with equal variances.

Fiscal Year	Total Number of Homosexual Discharges	Percentage of Total Active Force
1997	997	0.069
1998	1,145	0.081
1999	1,034	0.075
2000	1,212	0.088
2001	1,227	0.089
2002	885	0.063
2003	770	0.054
2004	653	0.046
2005	726	0.052
2006	612	0.044
2007	635	0.046
2008	634	0.045
2009	428	0.030

Sources: Data for the years 1980 through 1997 are from U.S. Department of Defense, Office of the Assistant Secretary of Defense (Personnel and Readiness), Report to the Secretary of Defense, *Review of the Effectiveness of the Application and Enforcement of the Department's Policy on Homosexual Conduct in the Military*, April 1998. Percentages may vary slightly due to rounding. Data for later years are from the Department of Defense, Defense Manpower Data Center. Year 2005 data are from Files, John, "Military's discharges for being gay rose in '05," *New York Times*, August 15, 2006. Data from 2006-2009 are from DOD office of Legislative Affairs.

Recent Legislation

H.R. 1283, Rep. Ellen O. Tauscher (Rep. Patrick Murphy), March 3, 2009 (verbatim).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the 'Military Readiness Enhancement Act of 2009'.

SEC. 2. PURPOSE.

The purpose of this Act is to institute in the Armed Forces a policy of nondiscrimination based on sexual orientation.

SEC. 3. REPEAL OF 1993 POLICY CONCERNING HOMOSEXUALITY IN THE ARMED FORCES.

The following provisions of law are repealed:

- (1) Section 654 of title 10, United States Code.
- (2) Subsections (b), (c), and (d) of section 571 of the National Defense Authorization Act for Fiscal Year 1994 (10 U.S.C. 654 note).

SEC. 4. ESTABLISHMENT OF POLICY OF NONDISCRIMINATION BASED ON SEXUAL ORIENTATION IN THE ARMED FORCES.

(a) Establishment of Policy- (1) Chapter 37 of title 10, United States Code, is amended by adding at the end the following new section:

`Sec. 656. Policy of nondiscrimination based on sexual orientation

`(a) Policy- The Secretary of Defense, and the Secretary of Homeland Security with respect to the Coast Guard when it is not operating as a service in the Navy, may not discriminate on the basis of sexual orientation against any member of the Armed Forces or against any person seeking to become a member of the Armed Forces.

`(b) Discrimination on Basis of Sexual Orientation- For purposes of this section, discrimination on the basis of sexual orientation is--

`(1) in the case of a member of the Armed Forces, the taking of any personnel or administrative action (including any action relating to promotion, demotion, evaluation, selection for an award, selection for a duty assignment, transfer, or separation) in whole or in part on the basis of sexual orientation; and

`(2) in the case of a person seeking to become a member of the Armed Forces, denial of accession into the Armed Forces in whole or in part on the basis of sexual orientation.

`(c) Personnel and Administrative Policies and Action- The Secretary of Defense, and the Secretary of Homeland Security with respect to the Coast Guard when it is not operating as a service in the Navy, may not establish, implement, or apply any personnel or administrative policy, or take any personnel or administrative action (including any policy or action relating to promotions, demotions, evaluations, selections for awards, selections for duty assignments, transfers, or separations) in whole or in part on the basis of sexual orientation.

`(d) Rules and Policies Regarding Conduct- Nothing in this section prohibits the Secretary of Defense, and the Secretary of Homeland Security with respect to the Coast Guard when it is not operating as a service in the Navy, from prescribing or enforcing regulations governing the conduct of members of the Armed Forces if the regulations are designed and applied without regard to sexual orientation.

`(e) Re-Accession of Otherwise Qualified Persons Permitted- Any person separated from the Armed Forces for homosexuality, bisexuality, or homosexual conduct in accordance with laws and regulations in effect before the date of the enactment of this section, if otherwise qualified for re-accession into the Armed Forces, shall not be prohibited from re-accession into the Armed Forces on the sole basis of such separation.

`(f) Sexual Orientation- In this section, the term `sexual orientation' means heterosexuality, homosexuality, or bisexuality, whether the orientation is real or perceived, and includes statements and consensual sexual conduct manifesting heterosexuality, homosexuality, or bisexuality.'

(2) The table of sections at the beginning of such chapter is amended--

(A) by striking the item relating to section 654; and

(B) by adding at the end the following new item:

`656. Policy of nondiscrimination based on sexual orientation in the Armed Forces.'

(b) Conforming Amendments- Title 10, United States Code, is amended as follows:

(1) Section 481 is amended--

(A) In subsection (a)(2), by inserting `, including sexual orientation discrimination,' after `discrimination' in subparagraphs (C) and (D); and

(B) in subsection (c), by inserting `and sexual orientation-based' after `gender-based' both places it appears.

(2) Section 983(a)(1) is amended by striking `(in accordance with section 654 of this title and other applicable Federal laws).'

(3) Section 1034(i)(3) is amended by inserting `sexual orientation,' after `sex,'.

SEC. 5. BENEFITS.

Nothing in this Act, or the amendments made by this Act, shall be construed to require the furnishing of dependent benefits in violation of section 7 of title 1, United States Code (relating to the definitions of 'marriage' and 'spouse' and referred to as the 'Defense of Marriage Act').

SEC. 6. NO PRIVATE CAUSE OF ACTION FOR DAMAGES.

Nothing in this Act, or the amendments made by this Act, shall be construed to create a private cause of action for damages.

SEC. 7. REGULATIONS.

(a) In General- Not later than 90 days after the date of the enactment of this Act, the Secretary of Defense shall revise Department of Defense regulations, and shall issue such new regulations as may be necessary, to implement section 656 of title 10, United States Code, as added by section 4(a). The Secretary of Defense shall further direct the Secretary of each military department to revise regulations of that military department in accordance with section 656 of title 10, United States Code, as added by section 4(a), not later than 180 days after the date of the enactment of this Act. Such revisions shall include the following:

(1) Revision of all equal opportunity and human relations regulations, directives, and instructions to add sexual orientation nondiscrimination to the Department of Defense Equal Opportunity policy and to related human relations training programs.

(2) Revision of Department of Defense and military department personnel regulations to eliminate procedures for involuntary discharges based on sexual orientation.

(3) Revision of Department of Defense and military department regulations governing victims' advocacy programs to include sexual orientation discrimination among the forms of discrimination for which members of the Armed Forces and their families may seek assistance.

(b) Regulation of Conduct- The Secretary of Defense, and the Secretary of Homeland Security with respect to the Coast Guard when it is not operating as a service in the Navy, shall ensure that regulations governing the personal conduct of members of the Armed Forces shall be written and enforced without regard to sexual orientation.

(c) Definition- In this section, the term 'sexual orientation' has the meaning given that term in section 656(f) of title 10, United States Code, as added by section 4(a).

S. 3065, Sen. Joseph I. Lieberman, March 3, 2010, (verbatim),

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the 'Military Readiness Enhancement Act of 2010'.

SEC. 2. PURPOSE.

The purpose of this Act is to institute in the Armed Forces a policy of nondiscrimination based on sexual orientation.

SEC. 3. REPEAL OF 1993 POLICY CONCERNING HOMOSEXUALITY IN THE ARMED FORCES.

The following provisions of law are repealed:

(1) Section 654 of title 10, United States Code.

(2) Subsections (b), (c), and (d) of section 571 of the National Defense Authorization Act for Fiscal Year 1994 (10 U.S.C. 654 note).

SEC. 4. ESTABLISHMENT OF POLICY OF NONDISCRIMINATION BASED ON SEXUAL ORIENTATION IN THE ARMED FORCES.

(a) Establishment of Policy-

(1) IN GENERAL- Chapter 37 of title 10, United States Code, is amended by adding at the end the following new section:

`Sec. 656. Policy of nondiscrimination based on sexual orientation in the armed forces

`(a) Policy- The Secretary of Defense, and the Secretary of Homeland Security with respect to the Coast Guard when it is not operating as a service in the Navy, may not discriminate on the basis of sexual orientation against any member of the armed forces or against any person seeking to become a member of the armed forces.

`(b) Discrimination on Basis of Sexual Orientation- For purposes of this section, discrimination on the basis of sexual orientation is--

`(1) in the case of a member of the armed forces, the taking of any personnel or administrative action (including any action relating to promotion, demotion, evaluation, selection for an award, selection for a duty assignment, transfer, or separation) in whole or in part on the basis of sexual orientation; and

`(2) in the case of a person seeking to become a member of the armed forces, denial of accession into the armed forces in whole or in part on the basis of sexual orientation.

`(c) Personnel and Administrative Policies and Action- The Secretary of Defense, and the Secretary of Homeland Security with respect to the Coast Guard when it is not operating as a service in the Navy, may not establish, implement, or apply any personnel or administrative policy, or take any personnel or administrative action (including any policy or action relating to promotions, demotions, evaluations, selections for awards, selections for duty assignments, transfers, or separations) in whole or in part on the basis of sexual orientation.

`(d) Rules and Policies Regarding Conduct- Nothing in this section prohibits the Secretary of Defense, and the Secretary of Homeland Security with respect to the Coast Guard when it is not operating as a service in the Navy, from prescribing or enforcing regulations governing the conduct of members of the armed forces if the regulations are designed and applied without regard to sexual orientation.

`(e) Re-Accession of Otherwise Qualified Persons Permitted- Any person separated from the armed forces on the basis of sexual orientation in accordance with laws and regulations in effect before the date of the enactment of this section, if otherwise qualified for re-accession into the armed forces, shall not be prohibited from re-accession into the armed forces on the sole basis of such separation.

`(f) Sexual Orientation- In this section, the term `sexual orientation' means heterosexuality, homosexuality, or bisexuality, whether the orientation is real or perceived, and includes statements and consensual sexual conduct that is not otherwise illegal manifesting heterosexuality, homosexuality, or bisexuality.'

(2) CLERICAL AMENDMENTS- The table of sections at the beginning of chapter 37 of such title is amended--

(A) by striking the item relating to section 654; and

(B) by adding at the end the following new item:

`656. Policy of nondiscrimination based on sexual orientation in the armed forces.'

(b) Conforming Amendments- Title 10, United States Code, is amended as follows:

(1) Section 481 is amended--

(A) In subsection (a)(2), by inserting `, including sexual orientation discrimination,' after `discrimination' in subparagraphs (C) and (D); and

(B) in subsection (c), by inserting 'and sexual orientation-based' after 'gender-based' both places it appears.

(2) Section 983(a)(1) is amended by striking '(in accordance with section 654 of this title and other applicable Federal laws)'.

(3) Section 1034(i)(3) is amended by inserting 'sexual orientation,' after 'sex,'.

SEC. 5. BENEFITS.

Nothing in this Act, or the amendments made by this Act, shall be construed to require the furnishing of dependent benefits in violation of section 7 of title 1, United States Code (relating to the definitions of 'marriage' and 'spouse' and referred to as the 'Defense of Marriage Act').

SEC. 6. NO PRIVATE CAUSE OF ACTION FOR DAMAGES.

Nothing in this Act, or the amendments made by this Act, shall be construed to create a private cause of action for damages.

SEC. 7. REVIEW AND IMPLEMENTATION.

(a) Pentagon Working Group-

(1) ESTABLISHMENT- The Secretary of Defense shall establish in the Department of Defense a working group (to be known as the 'Pentagon Working Group') to make recommendations to the Secretary regarding the implementation of this Act and the amendments made by this Act.

(2) TREATMENT OF EXISTING WORKING GROUP- If there exists in the Department as of the date of the enactment of this Act a working group on recommendations regarding the repeal of section 654 of title 10, United States Code, the Secretary may treat the working group as the working group required by paragraph (1) for purposes of this section.

(b) Working Group Recommendations-

(1) SUBMITTAL TO SECRETARY OF DEFENSE- Not later than 270 days after the date of the enactment of this Act, the working group under subsection (a) shall submit to the Secretary of Defense a written report setting forth such recommendations as the working group considers appropriate for a revision of Department of Defense regulations, or the issuance of new regulations, to implement this Act and the amendments made by this Act.

(2) SUBMITTAL TO CONGRESS- The report under paragraph (1) shall also be submitted to the Committees on Armed Services of the Senate and the House of Representatives.

(c) Regulations-

(1) REVISIONS REQUIRED- Not later than 60 days after receipt of the report required by subsection (b)(1), the Secretary of Defense shall revise Department of Defense regulations, and shall issue such new regulations as may be necessary, to implement this Act and the amendments made by this Act. The Secretary of Defense shall further direct the Secretary of each military department to revise regulations of that military department in accordance with this Act, not later than 120 days after the Secretary of Defense receives the report required by subsection (b)(1).

(2) ELEMENTS- The revisions required by paragraph (1) shall include the following:

(A) Revision of all equal opportunity and human relations regulations, directives, and instructions to add sexual orientation nondiscrimination to the Department of Defense Equal Opportunity policy and to related human relations training programs.

(B) Revision of Department of Defense and military department personnel regulations to eliminate procedures for involuntary discharges based on sexual orientation.

(C) Revision of Department of Defense and military department regulations governing victims' advocacy programs to include sexual orientation discrimination among the forms of discrimination for which members of the Armed Forces and their families may seek assistance.

(D) Revision of any Department of Defense and military department regulations as necessary to ensure that regulations governing the personal conduct of members of the Armed Forces are written and enforced without regard to sexual orientation.

(d) Sexual Orientation Defined- In this section, the term `sexual orientation' has the meaning given that term in section 656(f) of title 10, United States Code, as added by section 4(a).

SEC. 8. REPORT.

Not later than 180 days after the date of the enactment of this Act, the Secretary of Defense shall submit to the Committees on Armed Services of the Senate and the House of Representatives a report setting forth an assessment of the compliance of institutions of higher education with section 983 of title 10, United States Code (as amended by section 4(b)), and describing the actions, if any, taken by the Secretary to effect the denial of funds authorized in that section to an institution of higher education that continues to prohibit, or in effect prevent, the Secretary or a military department from maintaining, establishing, or operating a unit of the Senior Reserve Officers' Training Corps at that institution (or any subelement of that institution).

H.R. 5136, sec. 536 and S. 3454, sec. 591, National Defense Authorization Act for Fiscal Year 2011 (verbatim),

DEPARTMENT OF DEFENSE POLICY CONCERNING HOMOSEXUALITY IN THE ARMED FORCES.

(a) Comprehensive Review on the Implementation of a Repeal of 10 U.S.C. 654-

(1) IN GENERAL- On March 2, 2010, the Secretary of Defense issued a memorandum directing the Comprehensive Review on the Implementation of a Repeal of 10 U.S.C. 654 (section 654 of title 10, United States Code).

(2) OBJECTIVES AND SCOPE OF REVIEW- The Terms of Reference accompanying the Secretary's memorandum established the following objectives and scope of the ordered review:

(A) Determine any impacts to military readiness, military effectiveness and unit cohesion, recruiting/retention, and family readiness that may result from repeal of the law and recommend any actions that should be taken in light of such impacts.

(B) Determine leadership, guidance, and training on standards of conduct and new policies.

(C) Determine appropriate changes to existing policies and regulations, including but not limited to issues regarding personnel management, leadership and training, facilities, investigations, and benefits.

(D) Recommend appropriate changes (if any) to the Uniform Code of Military Justice.

(E) Monitor and evaluate existing legislative proposals to repeal 10 U.S.C. 654 and proposals that may be introduced in the Congress during the period of the review.

(F) Assure appropriate ways to monitor the workforce climate and military effectiveness that support successful follow-through on implementation.

(G) Evaluate the issues raised in ongoing litigation involving 10 U.S.C. 654.

(b) Effective Date- The amendments made by subsection (f) shall take effect 60 days after the date on which the last of the following occurs:

(1) The Secretary of Defense has received the report required by the memorandum of the Secretary referred to in subsection (a).

(2) The President transmits to the congressional defense committees a written certification, signed by the President, the Secretary of Defense, and the Chairman of the Joint Chiefs of Staff, stating each of the following:

(A) That the President, the Secretary of Defense, and the Chairman of the Joint Chiefs of Staff have considered the recommendations contained in the report and the report's proposed plan of action.

(B) That the Department of Defense has prepared the necessary policies and regulations to exercise the discretion provided by the amendments made by subsection (f).

(C) That the implementation of necessary policies and regulations pursuant to the discretion provided by the amendments made by subsection (f) is consistent with the standards of military readiness, military effectiveness, unit cohesion, and recruiting and retention of the Armed Forces.

(c) No Immediate Effect on Current Policy- Section 654 of title 10, United States Code, shall remain in effect until such time that all of the requirements and certifications required by subsection (b) are met. If these requirements and certifications are not met, section 654 of title 10, United States Code, shall remain in effect.

(d) Benefits- Nothing in this section, or the amendments made by this section, shall be construed to require the furnishing of benefits in violation of section 7 of title 1, United States Code (relating to the definitions of 'marriage' and 'spouse' and referred to as the 'Defense of Marriage Act').

(e) No Private Cause of Action- Nothing in this section, or the amendments made by this section, shall be construed to create a private cause of action.

(f) Treatment of 1993 Policy-

(1) TITLE 10- Upon the effective date established by subsection (b), chapter 37 of title 10, United States Code, is amended--

(A) by striking section 654; and

(B) in the table of sections at the beginning of such chapter, by striking the item relating to section 654.

(2) CONFORMING AMENDMENT- Upon the effective date established by subsection (b), section 571 of the National Defense Authorization Act for Fiscal Year 1994 (10 U.S.C. 654 note) is amended by striking subsections (b), (c), and (d).

Appendix. 10 USC §654

10 United States Code §654. Policy concerning homosexuality in the armed forces

(a) Findings.—Congress makes the following findings:

- (1) Section 8 of article I of the Constitution of the United States commits exclusively to the Congress the powers to raise and support armies, provide and maintain a Navy, and make rules for the government and regulation of the land and naval forces.
- (2) There is no constitutional right to serve in the armed forces.
- (3) Pursuant to the powers conferred by section 8 of article I of the Constitution of the United States, it lies within the discretion of the Congress to establish qualifications for and conditions of service in the armed forces.
- (4) The primary purpose of the armed forces is to prepare for and to prevail in combat should the need arise.
- (5) The conduct of military operations requires members of the armed forces to make extraordinary sacrifices, including the ultimate sacrifice, in order to provide for the common defense.
- (6) Success in combat requires military units that are characterized by high morale, good order and discipline, and unit cohesion.
- (7) One of the most critical elements in combat capability is unit cohesion, that is, the bonds of trust among individual service members that make the combat effectiveness of a military unit greater than the sum of the combat effectiveness of the individual unit members.
- (8) Military life is fundamentally different from civilian life in that—
 - (A) the extraordinary responsibilities of the armed forces, the unique conditions of military service, and the critical role of unit cohesion, require that the military community, while subject to civilian control, exist as a specialized society; and
 - (B) the military society is characterized by its own laws, rules, customs, and traditions, including numerous restrictions on personal behavior, that would not be acceptable in civilian society.
- (9) The standards of conduct for members of the armed forces regulate a member's life for 24 hours each day beginning at the moment the member enters military status and not ending until that person is discharged or otherwise separated from the armed forces.
- (10) Those standards of conduct, including the Uniform Code of Military Justice, apply to a member of the armed forces at all times that the member has a military status, whether the member is on base or off base, and whether the member is on duty or off duty.

(11) The pervasive application of the standards of conduct is necessary because members of the armed forces must be ready at all times for worldwide deployment to a combat environment.

(12) The worldwide deployment of United States military forces, the international responsibilities of the United States, and the potential for involvement of the armed forces in actual combat routinely make it necessary for members of the armed forces involuntarily to accept living conditions and working conditions that are often spartan, primitive, and characterized by forced intimacy with little or no privacy.

(13) The prohibition against homosexual conduct is a longstanding element of military law that continues to be necessary in the unique circumstances of military service.

(14) The armed forces must maintain personnel policies that exclude persons whose presence in the armed forces would create an unacceptable risk to the armed forces' high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.

(15) The presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.

(b) Policy.—A member of the armed forces shall be separated from the armed forces under regulations prescribed by the Secretary of Defense if one or more of the following findings is made and approved in accordance with procedures set forth in such regulations:

(1) That the member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts unless there are further findings, made and approved in accordance with procedures set forth in such regulations, that the member has demonstrated that—

(A) such conduct is a departure from the member's usual and customary behavior;

(B) such conduct, under all the circumstances, is unlikely to recur;

(C) such conduct was not accomplished by use of force, coercion, or intimidation;

(D) under the particular circumstances of the case, the member's continued presence in the armed forces is consistent with the interests of the armed forces in proper discipline, good order, and morale; and

(E) the member does not have a propensity or intent to engage in homosexual acts.

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

(3) That the member has married or attempted to marry a person known to be of the same biological sex.

(c) Entry Standards and Documents.—(1) The Secretary of Defense shall ensure that the standards for enlistment and appointment of members of the armed forces reflect the policies set forth in subsection (b).

(2) The documents used to effectuate the enlistment or appointment of a person as a member of the armed forces shall set forth the provisions of subsection (b).

(d) Required Briefings.—The briefings that members of the armed forces receive upon entry into the armed forces and periodically thereafter under section 937 of this title (article 137 of the Uniform Code of Military Justice) shall include a detailed explanation of the applicable laws and regulations governing sexual conduct by members of the armed forces, including the policies prescribed under subsection (b).

(e) Rule of Construction.—Nothing in subsection (b) shall be construed to require that a member of the armed forces be processed for separation from the armed forces when a determination is made in accordance with regulations prescribed by the Secretary of Defense that—

(1) the member engaged in conduct or made statements for the purpose of avoiding or terminating military service; and

(2) separation of the member would not be in the best interest of the armed forces.

(f) Definitions.—In this section:

(1) The term “homosexual” means a person, regardless of sex, who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts, and includes the terms “gay” and “lesbian.”

(2) The term “bisexual” means a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual and heterosexual acts.

(3) The term “homosexual act” means—

(A) any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires; and

(B) any bodily contact which a reasonable person would understand to demonstrate a propensity or intent to engage in an act described in subparagraph (A).

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