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Congressional Research Service

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

Abstract
[Excerpt] 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 recently. 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 one bill that would repeal the law and replace it with a policy of nondiscrimination on the basis of sexual orientation—H.R. 1283—has been introduced in the 111th Congress.

Keywords
homosexuality, military service, "dont ask, don't tell", Congress, public policy, discrimination

Comments

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Congressional Research Service

"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 recently. 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 one bill that would repeal the law and replace it with a policy of nondiscrimination on the basis of sexual orientation—H.R. 1283—has been introduced in the 111th Congress.

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Background and Analysis

Early in the 1992 presidential campaign, then-candidate Bill Clinton commented that, if elected, he would "lift the ban" on homosexuals[1] serving in the military.[2] 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 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 (DOD) 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.[3] One of the elements of the compromise was an agreement within the Congress not to immediately enact legislation that would have maintained the prior policy (of barring such individuals from service and continuing to ask recruits questions concerning their sexuality) until after the completion of a congressional review.[4]

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

[1] Usage of terms: Although the law and policy refer to 'homosexuality' and 'bisexuality' this report also refers, interchangeably, to "gays," "lesbians," and bisexuals.

[2] "[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.

[3] 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.

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

> 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.[5]

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.[6] On the one hand, it maintained the notion of military necessity and privacy as found in the congressional compromise of "don't ask, don't tell," and then appeared to prevent efforts to enforce the regulations and laws which implement the broad policy by limiting the military's role via "don't pursue." This problem was discussed at hearings with then-Secretary of Defense Les Aspin. Secretary Aspin indicated that individuals could acknowledge their homosexuality without risking an investigation or discharge;[7] 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.[8] 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.[9] At the same time, some argued that this outcome

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[5] 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.

[6] 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.

[7] "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.

[8] 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.

[9] " ... [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 (continued...)

would not have displeased the Administration, even if it was not the original intent. This thesis held that implementation of the compromise policy would have encouraged judicial intervention and, thereby, would have provided a means to seek a judicial resolution asserting that the compromise was unconstitutional. These critics hypothesized that the Clinton Administration may have been following a strategy of tacitly implementing a muddled regulation, awaiting a legal challenge, then poorly defending the policy—thereby encouraging judicial intervention in finding the policy unconstitutional.[10] Administration officials insisted that the President was merely trying to pursue a compromise that would take into account the concerns of the Congress and the military, but would also minimize discrimination against gays, lesbians and bisexuals.[11]

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

The ambiguities in the Administration's interpretation of the policy, as well as conflicting legal rulings at the time, seemingly encouraged Congress to act. On November 30, 1993, the FY1994 National Defense Authorization Act was signed into law by President Clinton (P.L. 103-160). Section 571 of the law, codified at 10 United States Code 654, describes homosexuality in the ranks as an "unacceptable risk ... to morale, good order, and discipline." The law codified the grounds for discharge as follows: (1) the member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts; (2) the member states that he or she is a homosexual or bisexual; or (3) the member has married or attempted to marry someone of the same sex. The law also stated that DOD would brief new entrants (accessions) and members about the law and policy on a regular basis. Finally, 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

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(...continued)

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.

[10] "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.

[11] 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.

[12] 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.

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.[13]

However, the policy—not the law it ostensibly implemented—stated that "sexual orientation is considered a personal and private matter, and homosexual orientation is not a bar to service entry or continued service unless manifested by homosexual conduct." According to this statement of DOD regulations, "sexual orientation" was defined as "A sexual attraction to individuals of a particular sex." Following Aspin's resignation and the confirmation of William Perry as the new Secretary of Defense in February 1994, DOD reportedly accepted the recommendation of certain Senators to delete from DOD regulations the phrase, "homosexual orientation ... is not a bar to military service."[14] 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.[15]

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.[16]

The elusiveness of the definition of "orientation" is apparent. Under the Administration's original definition, "orientation" is a sexual attraction. Under the revised definition, it is an abstract preference. Other sources define sexual "orientation" to include overt sexual behavior.[17]

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—i.e., no longer private and personal, nor abstract—an investigation and discharge may well occur.

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

[14] 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.

[15] U.S. Department of Defense, Office of the Assistant Secretary of Defense (P&R), *Qualification Standards for Enlistment, Appointment and Induction*, Directive1304.26, December 21, 1993, incorporating change 1, March 4, 1994: 9.

[16] 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.

[17] "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.

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,[18] in August 1995, addressing this issue:

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

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," and at least one bill that would repeal the law and replace it with a policy of nondiscrimination on the basis of sexual orientation—H.R. 1283—has been introduced in the 111th Congress. A Senator was reportedly planning to introduce an amendment to the National Defense Authorization Act (H.R. 2647/S. 1390) that would have temporarily prohibited DOD from initiating investigations or discharges pursuant to "don't ask, don't tell," but, according to news reports, the Senator has reconsidered and has adopted a wait-and-see approach with regard to amending "don't ask, don't tell."[20]

Discharge Statistics

Reports in the media over the last several years have stated that since the implementation of the "don't ask, don't tell" policy in 1993, the number of discharges for homosexuality has increased.[21] According to data provided by DOD and reproduced in **Table 1** from the early 1980s until Fiscal Year (FY) 1994, the number of personnel discharged for homosexual conduct

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

[19] 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.

[20] Josh Rogan, "No Telling If "Don't Ask" Policy Will Continue," *CQ Weekly*, July 20, 2009, p. 1694.

[21] Marquis, Christopher, "Discharges of Gay Troops Rise, And So Do Bias Incidents," *New York Times*, March 14, 2002.

(including statements) decreased. From FY1995 to FY2001, the numbers rebounded, only to begin leveling off 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.[22]

With over a decade (1993-2008) 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 recently that these statements are made by service members so as to enable them to terminate their military obligations before their term of service is completed regardless of their sexual "orientation."[23]

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[22] 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.

[23] For example, see Moskos, Charles, "The Law Works—And Here's Why," *Army Times*, October 27, 2003: 62. "Homosexual separations for whatever reason are one-tenth of 1% of military personnel. Of those discharges, more than 80% are the result of voluntary 'statements' by service members. The number of discharges for homosexual 'acts' has declined over the past decade. Gay-rights advocates argue that the growth in discharges for statements is due largely to commanders improperly seeking out gays. Undoubtedly, that happens sometimes. Yet commanders also report being worried they might be accused of conducting 'witch hunts,' so they tend to process out an alleged homosexual only when a case of 'telling' is dumped in their laps. Let me offer another possible explanation. Whether you're gay or not, saying you are is now the quickest way out of the military with an honorable discharge. And identifying oneself as gay carries less stigma in our society than it once did. Consider that whites are proportionately three times more likely than blacks to be discharged for homosexuality. Are commanders singling out whites and investigating their sexual orientation? Highly unlikely. The stigma against homosexuality is stronger among blacks than whites, and thus blacks are less willing to declare they are gay. Gay advocates are quick to draw an analogy (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.[24] 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 Administration is 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 a number of linguists who were found to be gay, lesbian, or bisexual.[25] 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 only 1.6% of the total active force of approximately 1.4 million,[26] 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.

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.[27] It is notable that during wartime, the military services can, and have, instituted

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(...continued)

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.

[24] 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.

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

[26] 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.

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

actions "to suspend certain laws relating to ... separation" that can limit administrative discharges. These actions, known as "stop-loss,"[28] 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.[29]

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 situation creates a double standard. Likewise, commanders and others are often more skeptical of such claims made during a crisis.

According to an Army Reserve Component Unit Commander's Handbook,[30] 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 FY2008. 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.[31] The active duty force numbered

[28] 10 U.S.C. 12305, Authority of President to suspend certain laws relating to promotion, retirement, and separation.

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

[30] 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.

[31] 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.

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 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 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, we would have expected to see a drop in the wartime discharge rate followed by an increase following the crisis. Such a pattern is not evident in these data.

During the period covered by these data, the average percentage discharged was 0.063%. For the period prior to the implementation of the new policy (and law), i.e., FY1980 to FY1992, the average percentage discharged was 0.068%. For the period FY1993 to FY2008, the average was 0.059%. The difference in the percentage discharged before and following the implementation of the new policy was statistically insignificant. Thus, although the data appear to move in differing directions prior to and following the implementation of the new policy, statistical analysis suggests that such changes may reflect random fluctuations in the data.[32]

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

[32] Student's "t test," introduced by W.S. Gossett, under the pseudonym "Student," is used in this instance to measure differences of means between two sets of data taking into consideration the dispersion of data in each set and the number of cases involved in each set as well. These differences in means are considered in terms of their relative probability compared to random sampling distributions of samples of the same size. If the differences are small, as was the case here, the explanation that any difference is due to random factors in the data can not be rejected. In other words, the data do not support a conclusion that the change in policy had a statistical effect on discharge rates. See Blalock, Hubert M., Jr., *Social Statistics*, 2nd ed., New York: McGraw-Hill, 1972: 220-241. For these data, t=1.3445, prob. > 0.05, with 27 degrees of freedom.

Fiscal Year	Total Number of Homosexual Discharges	Percentage of Total Active Force
1989	996	0.047
1990	941	0.046
1991	949	0.048
1992	730	0.040
1993	682	0.040
1994	617	0.038
1995	757	0.050
1996	858	0.058
1997	997	0.069
1998	1,145	0.081
1999	1,034	0.075
2000	1,212	0.088
2001	1,227	0.089
2002	885	0.063
2003	770	0.054
2004	653	0.046
2005	726	0.052
2006	612	0.044
2007	635	0.046
2008	634	0.045

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 2006-2008 are from DOD office of Legislative Affairs.

Recent Legislation

H.R. 1283, the Military Readiness Enhancement Act of 2009 would repeal current Department of Defense (DOD) policy concerning homosexuality in the Armed Forces. It would prohibit 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 discriminating on the basis of sexual orientation against any member of the Armed Forces or any person seeking to become a member. Further, the act would authorize the re-accession into the Armed Forces of otherwise qualified individuals previously separated for homosexuality, bisexuality, or homosexual conduct.

Finally, the act would require such Secretaries to ensure that regulations governing the personal conduct of members of the Armed Forces are written and enforced without regard to sexual orientation.[33]

[33] Reprinted from the Legislative Information Service of the U.S. Congress, August 12, 2009.

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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