CRS Issue Brief

# 96029: Homosexuals and U.S. Military Policy: Current Issues

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## CONTENTS

SUMMARY

MOST RECENT DEVELOPMENTS

BACKGROUND AND ANALYSIS

Discharge Statistics
Homosexual Conduct Administrative Separation
Discharge Statistics
Issues
Legal Challenges
ROTC and Campus Policies
Homosexuals and Marriages
Security Clearances
Recent Enactments

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## SUMMARY

In 1993, new laws and regulations pertaining to homosexuals and U.S. military service came into effect. This compromise, colloquially referred to as "don't ask, don't tell," holds that open homosexuality presents an unacceptable risk to morale, cohesion and discipline. Servicemembers are not be asked about nor discuss their homosexuality. This compromise notwithstanding, the issue has remained politically contentious. The House version of the FY1997 National Defense Authorization Act, includes language that would overturn the existing law and implement the pre-1993 policy.

Under the 1993 compromise, the number of individuals discharged for homosexuality has generally declined, though discharges for homosexuality increased slightly from 1994 to 1995 due to an administrative change by the Air Force. Gay rights advocates have renewed their assertions that DOD is conducting witch hunts.

Numerous constitutional challenges to former and current military policies regarding homosexuals followed in the wake of the new 1993 laws and regulations. Based on the U.S. Supreme Court ruling in *Bowers v. Hardwick*, 478 U.S. 186 (1986) that there is no fundamental right to engage in consensual homosexual sodomy, the courts have uniformly held that the military may discharge a service member for overt homosexual behavior. More recently, however, there has been some erosion of judicial consensus on whether a discharge based solely on a statement that a servicemember is homosexual violates equal protection or other federal constitutional protections.

In recent years, a number of academic institutions have enacted rules that protect homosexuals from discrimination on campus. These rules conflict on campus with the DOD policy barring open homosexuals from serving in the military. Consequently, certain colleges, universities, and even high schools have sought to bar military recruiters from their campuses and/or to eliminate Reserve Officer Training Corps (ROTC) programs on campus. Legislation has been enacted that bars giving federal funds to campuses that block access for military recruiters. The actual effect of campus rules blocking military access has been negligible.

Efforts to allow individuals of the same sex to marry legally are unlikely to affect the immediate DOD policy since such individuals are barred from serving in the military. Should such marriages become legal, this policy could be subject to court challenges.

In 1995, President Clinton signed an Executive Order removing "sexual orientation" as grounds for denying someone a security clearance. As implemented, the guidelines are concerned with sexual conduct, concealment, or coercion as relevant factors in the security clearance process. In this context, an individual who conceals his or her sexuality could be regarded a security risk, but homosexuals in the military services are prevented from discussing their sexuality under the "don't tell" provision of the current law. As long as the individual does not tell, and there is no evidence of behavior, the notion of their homosexuality, or concealment thereof, is moot.

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# MOST RECENT DEVELOPMENTS

*On April 5, 1996, the U.S. Fourth Circuit Court of Appeals in the case of Thomasson v. Perry upheld the current law concerning homosexuals and the military. On July 1, 1996, papers were filed asking the Supreme Court to overturn the Fourth Circuit Court's ruling. (The Circuit Court decision stands in contrast to an earlier ruling by a district court which held the law to be unconstitutional. This case was appealed and remanded back to the district court by the Second Circuit.) On October 21, 1996, the Supreme Court rejected the challenge to the current law thereby allowing the Circuit Court decision to stand.*

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# BACKGROUND AND ANALYSIS

This Issue Brief provides an updated survey of the issues concerning homosexuals and U.S. military policy. For a broader discussion, see CRS Report 93-52 F, *Homosexuals and U.S. Military Personnel Policy*, January 14, 1993.

Early in the 1992 presidential campaign, then-candidate Bill Clinton commented that, if elected, he would "lift the ban" on homosexuals serving in the military. The issue drew heated debate among policymakers and the public at large that intensified in the early weeks of his presidency. In response to congressional concerns, President Clinton put into place an interim compromise that allowed the Department of Defense an opportunity to study the issue and report 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. One of the elements of the compromise was an agreement within the Congress not to immediately consider legislation that would have enacted into law the existing regulations. (As a result, an amendment to the Family Leave Act placing the pre-Clinton presidency regulations into law was withdrawn on February 4, 1993. See Congressional Record, February 4, 1993, S1263-S1339.)

The interim policy stated that DOD would cease asking recruits questions on their homosexuality, but that anyone who announces his or her homosexuality would be placed in the nonactive duty, nonpay status of a member of the Standby Reserve of the armed force (10 USC 10152). During the interim period, the Administration instructed the Secretary of Defense to study the issue and to draft an Executive Order for presidential consideration by July 15, 1993. In addition, the Administration instructed the Rand Corporation to conduct a study on the issue. Rand was instructed to study **how** to implement an order ending discrimination against homosexuals, not **whether** a policy of admitting open homosexuals into the military was prudent.

During the interim period, the Senate Armed Services Committee (SASC) held extensive hearings on the issue. The House Armed Services Committee, now known as the House National Security Committee (HNSC), also held hearings. By May 1993, a congressional consensus appeared to emerge over what SASC chairman Sam Nunn described as a "don't ask, don't tell" approach. Under this approach, the Department of Defense would not ask questions concerning the homosexuality of prospective members of the military, and individuals would be required to keep their homosexuality to themselves or 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 compromise: "don't ask, don't tell, don't pursue." 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. On the one hand, it maintains the notion of military necessity and privacy as found in the congressional compromise of "don't ask, don't tell," and then appears to prevent efforts to enforce regulations and laws 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 at one moment that individuals could acknowledge their

homosexuality without risking an investigation or discharge; later he said that individual statements may 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 discharge.

The President's policy is based on sexual "orientation." This term has generated problems concerning its practical definition. This policy also declared:

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

Such language places the service member in a (perhaps impossible) position of presenting evidence that he or she does not have such a propensity or intention of engaging in homosexual acts even if the individual may have asserted that he or she had a homosexual "orientation." (A difficulty arises in that the individual may need to prove a negative.)

In hearings, 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. 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. Some have argued that this outcome would not displease the Administration even if it was not the original intent. The thesis here is that this implementation of the compromise policy would encourage judicial intervention and, thereby, would provide a means to seek a judicial resolution asserting the compromise is unconstitutional. These critics note that the task of defending the compromise is left in control of the Administration via the Justice Department and hypothesize that the Administration could implement a muddled regulation, await a legal challenge, then poorly defend the policy, thereby encouraging judicial intervention in finding the policy unconstitutional. Other observers have noted 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 homosexuals.

The HASC and the SASC reports on the FY1994 National Defense Authorization Act were filed shortly after the 1993 hearings. Both explicitly referred to the constitutional authority granted to Congress to make rules and regulations for the military, and the Senate report noted at length the traditional deference granted by the courts to Congress in the control of the military. Both recognized unique needs and demands of military life and the necessity for maintaining order, discipline, and unit cohesion. The House language included a reiteration of the statement that homosexuality is incompatible with military service; the Senate language does not. Both House and Senate DOD

Authorization reports found that homosexuality represents an unacceptable risk to the military necessity of unit cohesion, morale and discipline.

On November 30, 1993, the FY1994 National Defense Authorization Act was signed into law by President Clinton (P.L. 103-160). In many ways, this law was a reiteration of the pre-1993 policy. Viewing homosexuals in the ranks as an "unacceptable risk ... to morale, good order, and discipline," the law codifies the grounds for discharge: 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 states that DOD will brief new entrants (accessions) and members on a regular basis. Finally, the law instructs that asking questions of new recruits concerning sexuality may be resumed -- having been halted in January, 1993 -- on a discretionary basis. As such, this law represents a "discretionary don't ask, definitely don't tell policy."

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." (For example, the policy 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.") However, with 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." (Scarborough, Rowan, White House Cuts Phrase Restricting Gay Discharges, *Washington Times*, February, 10, 1994.) 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 unless manifested by homosexual conduct. (See Defense Policy on Gays Takes Effect, *Washington Post*, March 2, 1994.)

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

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

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.

Current regulations 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 are

likely to result. So long as the services don't ask and the member does not tell, the issue of sexual "orientation" remains private, personal, and without significant consequence to tenure in the service.

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 Z. 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 at least inconsistent with the intent of 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, 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.

## Discharge Statistics

Recent reports in the media have stated that since the implementation of the "don't ask, don't tell" policy, the number of discharges for homosexuality have increased. Homosexual rights advocates cite these data as evidence that the military "has resumed witch hunts." (For a more complete discussion of this issue, see CRS Rept. 93-52F: 23-25.) Upon close examination, other factors appear to account for most of the changes in these very recent numbers.

According to the General Accounting Office (GAO):

During fiscal years 1980 through 1990, approximately 17,000 servicemen and women (an average of about 1,500 per year) were separated from the services under the category of "homosexuality."

GAO noted that the number of discharges peaked in 1982 and declined thereafter. The number discharged in that year has been explained by the fact that the previous policy concerning homosexuals was being challenged in the courts. In January, 1981, the Carter Administration issued new language concerning the discharge policy, thereby allowing a backlog of cases, in which regulatory guidance was unclear, to be disposed of as commanders became familiar with the new policy. The data on the number of DOD discharges is presented below. Data for the years 1980 through 1990 are from GAO. Data

from 1991 through 1995 are from DOD. It is important to note that in 1993, the interim policy was put into place by the President until Congress enacted language in the FY1994 National Defense Authorization Act pertaining to homosexuality. As noted above, DOD regulations were then finally promulgated in the early months of 1994.

***TABLE or GRAPHIC not shown here***

A number of explanations have been put forward bearing on these data. It has been suggested that the heightened awareness of the issue, including explicit discussion of the rules and laws, has served to minimize prohibited behavior via either willful misconduct or ignorance of the rules and laws. Second, it can be argued that commanders are now more tolerant of questionable behavior. Third, some claim that the regulations,o as promulgated, as well as the politically volatile nature of the issue, have had the effect of putting a "chill" on commanders willingness to investigate suspected homosexuals and, thereby, have created a sanctuary for most undemonstrative homosexuals in uniform. Finally, the argument has been made that with the downsizing, and new regulations, some homosexuals have either left the service voluntarily or been "encouraged" to leave rather than face a career in which their propensities must remain hidden.

## Issues

### Legal Challenges

Numerous constitutional challenges to former and current military policies regarding homosexuals followed in the wake of the compromise "don't ask, don't tell" agreement negotiated between Congress and the President and enacted into law in 1993. A lengthy tradition of "special deference" to the military has historically characterized court decisions declining to disturb the "considered professional judgment" of military leaders to discipline or discharge a service member for homosexual conduct or speech. Based on the U.S. Supreme Court ruling in *Bowers v. Hardwick*, 478 U.S. 186 (1986) that there is no fundamental right to engage in consensual homosexual sodomy, the courts have held that the military may constitutionally discharge a service member for overt homosexual behavior. More recently, however, there has been some erosion of judicial consensus as to whether a discharge based solely on a stated acknowledgement that a service member is homosexual violates Equal Protection or other federal constitutional safeguards. The likely impact of the Supreme Court ruling this term in *Romer v. Evans*, No. 94-1039, 64 U.S.L.W. 4353 (5-20-96), on the development of law in this area remains uncertain. As discussed below, the courts in the military discharge cases already apply a rationality standard of equal protection similar to that applied by the *Romer* Court to defeat Colorado's "Amendment 2," and far greater judicial tolerance generally has marked scrutiny into affairs of the military than civilian authorities.

Three federal district courts in the Ninth Circuit have ruled that the pre-1993 military policy violated the Constitution's Equal Protection guarantee since it was not rationally related to the government's declared objective of "discipline, good order, and morale." In *Meinhold v. United States*, 808 F. Supp. 1455 (C.D.Cal. 1993), *aff'd in part and rev'd and vacated in part*, 34 F.3d 1469 (9th Cir. 1994), the district court found in favor of a service member who had disclosed his homosexual "orientation" on a national television news program and enjoined the Department of Defense from "discharging or denying

enlistment to any person based on sexual orientation in the absence of sexual conduct which interferes with the military mission. . ." On appeal, the Ninth Circuit recognized that equating status with prohibited acts or conduct is "problematic," but avoided reaching the constitutional question because it construed the former policy as permitting discharge from service only where the servicemember makes "statements that show a concrete, fixed, or express desire to commit homosexual acts." Meinhold's "statement of orientation alone and ... his classification as a homosexual," manifested no such commitment, said the court, and the Navy's action "arbitrarily went beyond what DOD's policy seeks to prevent." Similarly, in *Dahl v. Secretary of Navy*, 830 F. Supp. 1319 (E.D. Cal. 1993) and *Cammermeyer v. Aspin*, 850 F. Supp. 910 (W.D. Wash. 1994) the courts found the old exclusion policy unconstitutional under rational basis review on motions for summary judgment.

Those courts upholding discharges have equated homosexual "orientation" with homosexual conduct as a potential threat to unit cohesion and combat readiness and decided that the "military need not wait until a homosexual acts on his or her sexual desires." *Ben-Shalom v. Marsh*, 881 F. 2d 454, 464 (7th Cir. 1989). *Steffan v. Perry*, 41 F.3d 677 (D.C.Cir. 1994) reviewed the separation of an admitted homosexual midshipman whose request for a diploma from the U.S. Naval Academy was denied after he was forced to resign shortly before graduation. Because "the class of self-described homosexuals is significantly close to the class of those who engage or intend to engage in homosexual conduct," and "homosexuality, like all forms of sexual orientation, is tied closely to sexual conduct" the *en banc* majority concluded that both the Navy Academy mandatory discharge regulation and 1982 DOD Directive were constitutional. In addition, the "special deference we owe the military's judgment" influenced the scope of the court's inquiry into the "rationality of the military's policy." Steffan decided not to appeal the D.C. Circuit's decision, thereby leaving a conflict between the D.C. Circuit and the Ninth Circuit in *Meinhold* concerning the pre-1993 policy.

The full Fourth U.S. Circuit Court of Appeals has upheld the military's "don't ask, don't tell" policy towards homosexuals in a case now on appeal to the U.S. Supreme Court. The plaintiff, Lt. Paul G. Thomasson, was honorably discharged under the policy after he announced in March 1994 that he was homosexual. Writing for the nine-member majority in *Thomasson v. Perry*, 80 F.3d 915 (1996), Chief Judge J. Harvey Wilkinson III stressed Congress' "plenary control" of the military and the "deference" owed both the Executive and Legislative by virtue of "the unique role that national defense plays in a democracy" as factors calling for judicial restraint when faced with challenges to military decisionmaking. "What Thomasson challenges," the opinion notes, "is a statute that embodies the exhaustive efforts of the democratically accountable branches of American government and an enactment that reflects month upon month of political negotiation and deliberation." Consequently, because "homosexuals do not constitute a suspect class," the court declined to apply "strict scrutiny" to the plaintiff's equal protection claims and settled for "rational basis review" as the proper constitutional standard.

Under this standard, Judge Wilkinson concluded that the government articulated a "legitimate purpose" for excluding individuals who commit homosexual acts -- that of maintaining unit cohesion and military readiness -- and that the law's rebuttable

presumption was a "rational means" of preventing individuals who engage in, or have a "propensity" to engage in, homosexual conduct from serving in the military. "Given that it is legitimate for Congress to proscribe homosexual acts, it is also legitimate for the government to seek to forestall these same dangers by trying to prevent the commission of such acts." Similarly, Thomasson's First Amendment claims were rejected for the reason that "[t]he statute does not target speech declaring homosexuality; rather it targets homosexual acts and the propensity or intent to engage in homosexual acts, and permissibly uses the speech as evidence. The use of speech as evidence in this manner does not raise a constitutional issue -- the First Amendment does not prohibit the evidentiary use of speech to establish the elements of a crime," or, as in the case here, **to prove motive or intent**." On October 21, 1996, the Supreme Court rejected the challenge to the current law thereby allowing the Circuit Court decision to stand.

The new law regarding homosexuals in the military was also recently before the Second Circuit in *Abel v. United States*, 1996 U.S. App. LEXIS 15737 (July 1, 1996). Federal District Judge Nickerson had denied the plaintiffs standing to challenge on equal protection grounds the statutory prohibition on homosexual "acts" but ruled that the policy and directives providing for separation of a service member based upon a "statement" concerning his or her "status" or "propensity" violated the First Amendment. The "statements presumption" in the law was held to place impermissible "content" restrictions on free speech rights by subjecting the service member to discharge for "a mere statement of homosexual orientation" with only a "hypothetical" opportunity for rebuttal.

On appeal, the Second Circuit vacated and remanded the district court's order. The appellate court disagreed with Judge Nickerson's conclusion, finding a "strong correlation between those who state that they are homosexual and those who engage or are likely to engage in homosexual acts. Consequently, while the presumption may place an "incidental" burden on constitutionally protected speech, it also "substantially furthers" a purportedly important interest of the government in preventing homosexual acts in the military. This saved the law from First Amendment infirmity at this stage. What the district court's analysis lacked, however, was the essential determination of whether the basic military ban on homosexual conduct was itself unconstitutional. The speech and conduct provisions of the law had to "rise and fall together" because if treating conduct involving same-sex and opposite-sex partners differently is unconstitutional, then the government would have no substantial interest in preventing speech evidencing a propensity or likelihood of such conduct. Consequently, the Second Circuit remanded the case for further consideration of the equal protection issue surrounding the military prohibition on homosexual acts which the district court had avoided earlier.

Several other federal district court judges have questioned the "don't ask, don't tell" policy in decisions which may soon become vehicles for further appeal. In *Thorne v. U.S. Department of Defense*, 916 F. Supp. 1358 (E.D.Va. 1996), Judge Ellis called for clarification of the issue whether, as implemented, the policy permits rebuttal, short of recantation, of the presumption that a declared homosexual has a propensity to engage in forbidden conduct, failing which he would find the statute and regulations to be an unconstitutional "content-based" speech restriction. Similarly, in *Holmes v. California*

*Army National Guard*, 920 F. Supp. 1510 (N.D. Cal. 1996) Judge Armstrong found "illusory" any purported distinction between status and conduct under the Act and directives and that the policy therefore discriminated against service members on the basis of "homosexual status" in violation of Equal Protection. On the other hand, in *Selland v. Perry*, 905 F. Supp. 260 (E.D.Md 1995), the court decided that the Navy could constitutionally separate a service member for prohibited homosexual acts based on inferences drawn from his statement that he was homosexual and in a monogamous relationship. The policy was also upheld as applied in *Richenberg v. Perry*, 909 F. Supp. 1303 (D.Neb. 1995)(discharge of Air Force Captain for stating he is a homosexual); *Philips v. Perry*, 883 F. Supp. 539 (W.D.Wash. 1995)(Petty Officer was discharged for stating he engaged in homosexual acts and was a homosexual); and *Watson v. Perry*, 918 F. Supp 1403 (W.D.Wash. 1996)(Navy could properly infer from servicemember's narrow denial of prohibited conduct while on base that he had engaged in or had an intent or propensity to engage in off-base homosexual conduct).

**ROTC and Campus Policies**

Many college and university (and in some cases, high school) campuses have been in the vanguard of the effort to expand civil rights for homosexuals. In a number of instances, these efforts predate the current debate over homosexuals and the military. In certain cases, schools have sought to challenge DOD policy pertaining to homosexuals including taking steps to limit or eliminate the military presence on campus. Military personnel have been prevented from recruiting on campus, and action has been taken to limit or sever Reserve Officer Training Corps (ROTC) connections with the campus. At least one school has denied academic credit for those participating in ROTC. Not all efforts have been entirely successful. For example, Harvard University was accused of withholding financial support for ROTC. In response, an alumni group reportedly established a trust fund to cover the cost of the program. (Alumni pay to keep Harvard ROTC open, Navy Times, February 20, 1995: 23.) Rather than attacking ROTC, some schools (sometimes with state support) have taken a broader approach of preventing recruiters from having access to the campus because of objections to DOD's policies concerning homosexuals.

Even prior to the 1993 compromise, the exclusion of homosexuals from ROTC had proven to be problematic. (From 1986 to 1994, 28 students were discharged from ROTC on grounds of homosexuality and nine were ordered to repay their scholarships.) In May 1990, two students from Harvard and the Massachusetts Institute of Technology were dismissed from the Navy ROTC program at MIT. The Navy sought recoupment of its scholarship funds (totalling over $80,000 for both students). The provost of MIT, John Deutch, wrote to then-Secretary of Defense Richard Cheney, stating that it was "wrong and shortsighted" to maintain "the ROTC policy not to accept gay or lesbian students into its programs and to require avowed homosexuals to disenroll and pay back their scholarship funds." (Lewin, Tamar, Navy Drops Efforts to seek Repayment From 2 Gay Students, New York Times, May 9, 1990: 19.) After reviewing the cases, the Navy terminated its efforts to seek recoupment from these two students.

On May 17, 1994, then-Deputy Defense Secretary John Deutch issued a directive. Under that directive, and based on the "don't ask, don't tell" compromise, service secretaries can seek recoupment of ROTC scholarships when there are violations of military law.

However, secretaries are no longer forced to seek recoupment. In some respects, the recoupment policy seeks to draw a distinction between behavior and "orientation." According to the *Air Force Times*, "acts short of sodomy" do not constitute a basis for recoupment, but if the student is discharged for criminal conduct or under less than honorable conditions, recoupment procedures could be expected with the final decision resting with the secretary concerned. Likewise, individuals using a claim of homosexuality as a means of avoiding military service are likely to be required to repay their scholarships. (See Hudson, Neff, Gays ousted from ROTC get break, *Air Force Times*, June 27, 1994.) John Deutch was later selected by President Clinton to be the Director of Central **Intelligence** .

In response to these issues, legislation was enacted in the National Defense Authorization Act for FY1995 (P.L. 103-337, October 5, 1994, 108 Stat. 2776) to limit efforts to interfere with military access to schools:

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

The law further instructs the Secretary of Defense to consult with the Secretary of Education in prescribing regulations to determine when an educational institution denies or prevents access.

More recently, Congress enacted language pertaining to ROTC. The National Defense Authorization Act for FY1996 (P.L. 104-106, February 10, 1996, Section 541) states:

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

This law requires the Secretary to notify the Secretary of Education, SASC and House National Security Committee when such a determination has been made. In addition, every 6 months the Secretary is required to publish a list of ineligible institutions in the Federal Register.

Under this language schools may enact or maintain anti-discrimination rules, ordinances or regulations. However, schools are not permitted to prohibit the Secretary of Defense from establishing or maintaining ROTC units while receiving Defense Department funds. In a number of cases, universities have enacted nonbinding anti-discrimination language. Some, including certain members of the media, have erroneously concluded that this language was binding and incorrectly anticipated the removal of the ROTC unit.

In 1994, the State University of New York banned military recruiters from its campuses and failed to appeal a state court decision that such recruitment violated an executive order barring discrimination. Nevertheless, SUNY maintains ROTC units.

Recently, the Connecticut's Supreme Court upheld a lower court ruling that the DOD policy on homosexuality violates the state's "gay rights law" barring discrimination on the basis of sexual "orientation" and, therefore, military recruiters could be permanently banned from the Law School campus in Hartford. (Gay and Lesbian Law Students Association v. Board of Trustees, 236 Conn. 453, 673 A.2d 484 (Conn. 1996)) It is unclear whether or not the university will seek to expand the recruiting ban to its other campuses.

These actions in Connecticut have led to a baffling situation. The University of Connecticut (UConn) has been designated, by the state legislature, a land-grant university. Under the Morrill Act, as signed by President Lincoln in 1862, institutions aided under the act must teach military tactics along with their regular curriculum. Generally speaking, ROTC has served to fulfill this requirement. (During the 1995-96 school year, a total of over 160 students participated in ROTC at UConn. The Air Force and Army have ROTC programs at UConn. UConn also sponsors those partaking in ROTC from Yale University since no such program is available at the Yale campus.) Thus, military recruiters are prohibited from recruiting at the university's law school in Hartford, but the university maintains an ROTC unit at its campus in Storrs. This campus continues to enroll students in ROTC and accept federal funding. The presence of, and continued enrollment by, this ROTC unit would arguably conflict with the state's gay rights law. ROTC officials note that the recruiting ban at UConn's Law School has been followed by a number of smaller vocational and technical schools in the state. Many of these schools are attractive sources for recruiting.

Finally, a faculty task force at the Massachusetts Institute of Technology has recommended that MIT open its ROTC unit to avowed homosexuals, in direct conflict with federal law. (MIT's ROTC unit also hosts students from Harvard, Tufts, and Wellesley.) Under the new law, MIT could reportedly lose $56 million in annual defense contracts. Officials at both MIT and DOD have stated that they are working on resolving this apparent conflict. (See Scarborough, Rowan, MIT may quit ROTC over homosexuality, Washington Times, April 3, 1996: A4.)

Under the language proposed by the House, those participating in ROTC would once again be asked questions concerning their sexuality. This is unlikely to sit well with campus activists. From another perspective, it could provide some protection for taxpayers from those who accept scholarships and later assert the discovery of their homosexual orientation, making it impossible for them to serve. If asked upon enrollment, individuals who deny their homosexuality, and later seek to escape their commitment, would have a more difficult time avoiding repayment of their scholarships because of "fraudulent behavior." Under the current system, it is difficult for the services to positively determine whether or not the individual is making such a claim merely to avoid service. The House language was dropped by the conferees.

The Omnibus Appropriations for FY97 (P.L. 104-208, September 30, 1996) contained language that limits the ability of educational institutions, or subelements thereof (such as a law schools or a satellite campus), to block ROTC programs or recruiter access. Under this language, no funds made available in this or other relevant appropriations, including contracts or grants (such as student aid), are available to any covered institution that denies or prevents access by military recruiters or prevents the maintaining, establishing or the operation of an ROTC program. Three exceptions were written into the law: (1) "the covered educational entity has ceased the policy or practice [of discriminating against the military]; (2) the institution of higher education has a longstanding policy of pacifism based on historical religious affiliation; or (3) the institution of higher education involved is prohibited by the law of any State, or by the order of any State court, from allowing Senior Reserve Officer Training Corps activities or Federal recruiting on campus, except that this paragraph shall apply only during the one-year period beginning on the effective date ...." Thus, under this language, the University of Connecticut law school, for example, may continue its support of the State's gay rights law. However, after the prescribed period, no Federal funds via contract or grant (including student aid) will be available to the law school. This language would not affect other programs in the UConn system that do not discriminate against the military.

**Homosexuals and Marriages**

Under current law, marriages are covered under the domestic relations laws of the various states. A legal ruling by Hawaii's Circuit Court (on remand by the State Supreme Court) held that the state may not prohibit same-sex marriages.

Under a different law, as well as the pre-1993 regulations, the Department of Defense does not define marriage, per se. Instead the department relies on state definitions of marriage in providing benefits to married members of the armed services and their dependents. However, current law denies enlistment or continued service to anyone who "has married or attempted to marry someone of the same sex." In other words, even if a state recognized a same sex marriage, federal law requires that any member of such a union would be denied enlistment or continued service in the armed services, i.e., be discharged. Since Hawaii would recognize same-sex marriages, it is unclear what, if any, Federal benefits would accrue to a same-sex spouse via DOD (or the Dept. of Veterans Affairs) based on military service, regardless of when the marriage occurs. For example, it is possible for a member to serve 20 years and retire from the military. The retiree could then marry in a state that recognizes same-sex marriages and seek to provide survivor benefits to the spouse under the military Survivor Benefit Plan. Without a Federal definition of "marriage," efforts to deny benefits to same-sex spouses, or treat them differently from heterosexual marriages, are likely to face court challenges.

Federal legislation has been enacted that would limit reciprocal interstate recognition of same-sex marriages. This legislation also defines "marriage" for Federal agencies as the "legal union between one man and one woman as husband and wife, [with] the word 'spouse' refer[ring] only to a person of the opposite sex who is a husband or a wife." (See H.R. 3396, Representative Barr, May 7, 1996, and S. 1740, Senator Nickles, May 8, 1996.) H.R. 3396 was passed by the House on July 12, 1996 by a 342-67 vote. On Sept.

10, 1996, the Senate passed the Defense of Marriage Act. The President signed the bill into law on September 21, 1996 (P.L. 104-199).

**Security Clearances**

On August 2, 1995, President Clinton signed Executive Order 12968 (Access to Classified Information). Part of this Executive Order removed "sexual orientation" as a reason for denying access to classified information:

The United States Government does not discriminate on the basis of race, color, religion, sex, national origin, disability, or sexual orientation in granting access to classified information.

Under the 1981 policy on homosexuality, one of the reasons cited for denying homosexuals entrance into the military was "to prevent breaches of security." With the enactment of the 1993 law, references to security concerns were removed. In a 1994 letter to Senator John H. Chafee, Assistant Secretary of Defense Emmett Paige, Jr. wrote:

DOD is in full agreement with the [General Accounting Office] and the Attorney General that sexual orientation may not be used as a basis for or negative factor in determining a person's eligibility for a security clearance. However, sexual conduct, whether heterosexual or homosexual, may be considered in clearance or access determinations if such conduct reasonably raises a question as to character, judgment, stability, candor, or indirect susceptibility to coercion, duress, undue influence, pressure or compromise.

DOD's current adjudicative guidelines do not include homosexual orientation as a potentially disqualifying condition for a security clearance. Rather, both the current DOD adjudicative guidelines and the common adjudicative guidelines that are under consideration, focus on conduct, concealment and coercion as relevant factors in security clearance decisions, regardless of sexual orientation.

The DOD Directives for implementing the statute enacted in November 1993 contain a section on Personnel Security which stated:

Policy concerning personnel security investigations is also changed to provide that no investigations or inquiries will be conducted solely to determine an individual's sexual orientation, and that questions pertaining to an individual's sexual orientation will not be asked on personnel security questionnaires. Investigations will be limited to questions concerning sexual **conduct** -- either homosexual or heterosexual -- or concerning concealment of sexual conduct or orientation.

Investigations into allegations of sexual conduct or concealment will proceed only if the sexual conduct or concealment gives rise to a legitimate security concern under the applicable standards. Under those circumstances, inquiry into the conduct may proceed, but should be confined to those aspects that implicate the applicable standards. The new policy specifies that an individual's efforts to follow DOD policy on homosexual conduct in the Armed Forces by not openly acknowledging his or her homosexual orientation do not constitute concealment.

Finally, the new policy makes clear that information about homosexual orientation or conduct obtained during a security clearance investigation will not be used by the Military Departments in separation proceedings.

According to a December 1993 Memorandum entitled "Changes to Defense Investigative Manual -- Sexual Conduct:"

No investigations or inquiries will be conducted solely to determine a subject's sexual orientation. Investigators are not to ask direct questions about sexual orientation unless credible, relevant information has been developed from other sources. Investigators should not ask questions unless the individual introduces the matter or it is developed through other sources. (U.S. General Accounting Office. Security Clearances: Consideration of Sexual Orientation in the Clearance Process, GAO/NSIAD-95-21, March 1995: 9.)

Further, according to a General Accounting Office (GAO) report, the 1993 Defense Investigative Service Manual for Personnel Security Investigations:

These procedures are applicable to investigations of civilian and contractor personnel. Under certain circumstances (e.g., when sexual acts, conduct, or behavior include acts performed with a minor, involving coercion, force, or violence, or acts committed for money), investigators can expand an investigation, but investigations or inquiries will not be conducted solely to determine an individual's sexual orientation.

Allegations of an individual's sexual conduct should be designed to elicit information that adjudicative authorities consider in accordance with clearance denial criteria. DOD's current definition of "moral conduct" includes sexual conduct which may or may not be technically illegal in any given jurisdiction. (GAO: 9.)

GAO noted that DOD officials told them that investigators no longer use this definition of "moral conduct."

Finally, current DOD guidelines treat concealment as a security concern. According to GAO, coworkers and family members must be informed by the individual of the applicant's homosexual "orientation," if a claim of nonconcealment is to be supported. It is expected that DOD has or will soon revise its guidelines to eliminate this language. This language is most problematic under "don't ask, don't tell." Individuals are not allowed to "tell their homosexual orientation." However, concealment could result in a denial of a clearance. Conversely, if a person does not tell and does not engage in homosexual acts, as required by law, the entire issue is moot. Investigators, who cannot ask, will have no information that leads them to believe the person is concealing his or her homosexuality. This raises the questions whether any such revision is needed in the first place. Critics contend that any revision will arguably serve only to protect individuals who have already broken DOD rules. Conversely, it is expected that these guidelines will be revised in order to make them consistent with current law and regulations. GAO noted that prior to 1991, 16 cases of security clearance decisions involving homosexuality were made by DOD involving civilians or contract employees. Of these, eight clearances were revoked because the individuals concealed their sexual

"orientation." Taking into consideration that 6 million clearance and access decisions have been entered into the Defense Clearance and Investigation Index, these eight cases represent an extraordinarily small proportion of the total.

According to data collected by GAO, 1,945 security clearances were denied, revoked, or suspended in FY1993 by DOD for any reason. Army, Navy, and Air Force records accounted for 954 of these. Using haphazard sampling techniques (i.e., not scientific), GAO found that for other agencies (including civilians at the Defense Mapping Agency), only 9 cases out of 129 cited factors in security clearance actions related to sexual misconduct (including one case categorized as "sexual misconduct/drugs"). To extrapolate from these questionable data, approximately 67 DOD personnel would have had their clearances denied, revoked, or suspended, based on sexual misconduct if this rate held across agencies.

There are reasons to believe that this extrapolation represents an overestimate. First, prior to 1993, DOD barred open homosexuality. Since then, "don't ask, don't tell" has been in effect. These rules would serve to discourage individuals from joining the military or, once in, discourage them from allowing their sexuality to become an issue. Second, as far back as the 1950s, individuals were to be discharged on the basis of homosexuality, and not as security problems unless there existed an explicit security issue. Without criminal charges, commanders could avoid many problems by taking the administrative route of discharging open homosexuals. Last, there has been at least one case of an individual entering the military and being allowed to reenlist numerous times despite his acknowledgement of being a homosexual and despite routine security investigations. Thus, even if an individual was known to be a homosexual and was subjected to security clearance investigations, it was not assured that he or she would be discharged.

By issuing his Executive Order, the President has arguably removed the issue from consideration. However, this may have little or no impact on the handling of security clearances by DOD. Questions can be raised concerning what "inferences" would justify a more thorough investigation. Conversely, how would this language dissuade investigators when "inferences" exist that could lead to discovery of UCMJ violations? Ultimately, this is a matter of professional interpretation by those investigating and adjudicating cases. Under DOD regulations, an individual who **states** that he or she is homosexual or "words to that effect" is allowed to rebut the presumption that he or she has a propensity to engage in homosexual acts. This presumptive language may be contradicted by language that prevents an inference from being raised. As such, this language could be a source of confusion and contradiction.

## Recent Enactments

**National Defense Authorization Act for FY1994:** P.L. 103-160, Section 571, codifies the "don't ask, don't tell" policy concerning homosexuals and military service

**National Defense Authorization Act for FY1995:** P.L. 103-337, Section 558, denies Defense funds to campuses that block recruiter access.

**National Defense Authorization Act for FY1996**: P.L. 104-106, Section 541, denies Defense funds to campuses that block ROTC access.

**Defense of Marriage Act**: P.L. 104-199, defines marriage for Federal purposes.

**Omnibus Appropriations for Fiscal Year 1997**: P.L. 104-208, limits the ability of educational institutions to discriminate against the military.

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