

# IS IT TIME? REFORM OF “DON’T ASK, DON’T TELL” AND ARTICLE 125 OF THE UNIFORM CODE OF MILITARY JUSTICE

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## I. INTRODUCTION

The military prohibition on open homosexuality, colloquially referred to as the “Don’t Ask, Don’t Tell” policy, has been a point of political contention for decades. President Obama is now preparing to overturn the policy in fulfillment of a pledge he made during the 2008 presidential campaign, currently deferring any action until a thorough military review of the impact of a potential repeal on military discipline is complete.<sup>1</sup> Any change in the policy has the potential to have a major impact on military culture as well as on the broader movement for gay rights. Furthermore, as this comment will discuss, the repeal of the policy will not be a simple proposition. Instead, it will require a concerted change of several statutes and regulations and will be the subject of heated congressional and public debate.

Part II of this comment will discuss the two statutes that underlie the “Don’t Ask, Don’t Tell” policy: the military prohibition of sodomy codified in Article 125 of the Uniform Code of Military Justice<sup>2</sup> and the statutory provisions mandating separation of known homosexual servicemembers (the “Don’t Ask, Don’t Tell” statute).<sup>3</sup> Part III will follow this background material with an exploration of the different ways in which Congress could alter existing law and an analysis of the likely impact of each. Part IV will then conclude with substantive recommendations for a repeal of the “Don’t

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1. Sean Langell, *Inside Politics*, WASH. TIMES, Feb. 2, 2009, available at <http://www.washingtontimes.com/news/2009/feb/02/inside-politics-96144010/?page=2>. In a recent speech to a gay rights group, President Obama renewed his pledge to overturn the policy. He stated that members of the Congressional leadership are now involved in his efforts. Sheryl Gay Stolberg, *Obama Pledges Again to End “Don’t Ask, Don’t Tell”*, N. Y. TIMES, Oct. 10, 2009, available at <http://www.nytimes.com/2009/10/11/us/politics/11speech.html>.

2. 10 U.S.C. § 925 (2006).

3. 10 U.S.C. § 654 (2006).

Ask, Don't Tell" statute and for an amendment to Article 125 to permit consensual sodomy.

## II. BACKGROUND

Two principal statutes govern the homosexual conduct of servicemembers. This section will explore these statutes, one of them decades old and one just celebrating its fifteenth anniversary this year.

### A. Article 125—Still Alive and Kicking

Homosexual conduct has long been penalized by a prohibition on sodomy in military law.<sup>4</sup> Modern American military law, as embodied in the Uniform Code of Military Justice ("UCMJ"), traces its history through the Articles of War of 1775 to the British Articles of War of 1749.<sup>5</sup> The British Articles of War prescribed the death penalty for sodomy.<sup>6</sup> Before 1920 the U.S. grouped sodomy together with other crimes under Article of War 96.<sup>7</sup> This article penalized miscellaneous offenses which were not punishable by death, meaning that the U.S. parted ways with the British on the penalty to be imposed for sodomy.<sup>8</sup> In 1920 a revision of the Articles moved the provision penalizing sodomy to Article 93, which penalized sodomy specifically.<sup>9</sup> This provision was unchanged in 1950 when the UCMJ was enacted<sup>10</sup> and has changed little since.<sup>11</sup>

The prohibition of sodomy is now located in Article 125 of the UCMJ.<sup>12</sup> The statute begins with a definition of sodomy: "unnatural carnal copulation with another person of the same or opposite sex or with an animal . . . [p]enetration, however slight, is sufficient to complete the offense."<sup>13</sup> The statute then directs that "sodomy shall be punished as a court-martial may

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4. Sodomy encompasses any "oral and anal copulation" with a man, a woman, or an animal. BLACK'S LAW DICTIONARY 1518 (9th ed. 2009).

5. Eric C. Coyne, *Check Your Privacy Rights at the Front Gate: Consensual Sodomy Regulation in Today's Military Following United States v. Marcum*, 35 U. BALT. L. REV. 239, 244 (2005).

6. *Id.*

7. Federal Possession and Control Act, 64 Cong. ch. 418, §3, 39 Stat. 619, 666, *see also* U.S. v. Harris, 8 M.J. 52, 53 (C.M.A., 1979), Coyne, *supra* note 5, at 244 n. 55.

8. Coyne, *supra* note 5, at 244 n. 55.

9. *Harris*, 8 M.J. at 53.

10. *Harris*, 8 M.J. at 53.

11. Coyne, *supra* note 5, at 245.

12. 10 U.S.C. § 925 (2006).

13. *Id.* at § 925(a).

direct.”<sup>14</sup> The brief treatment accorded to the offense is further developed in the Manual For Courts Martial.<sup>15</sup> That document states:

It is unnatural carnal copulation for a person to take into that person’s mouth or anus the sexual organ of another person or of an animal; or to place that person’s sexual organ in the mouth or anus of another person or of an animal; or to have carnal copulation in any opening of the body, except the sexual parts, with another person; or to have carnal copulation with an animal.<sup>16</sup>

The penalty prescribed for the offense varies, with the maximum punishment in most cases being dishonorable discharge, loss of pay and allowances, and five years imprisonment.<sup>17</sup> Sodomy involving a child between the ages of twelve and fifteen permits a court to extend the prison sentence to twenty years, while where sodomy is forcible and non-consensual or where the offense is committed with a child under the age of twelve the maximum term of imprisonment is life without possibility of parole.<sup>18</sup> The statute’s statement that any degree of penetration is enough to constitute sodomy has been interpreted to require some penetration in order to find that sodomy has been committed.<sup>19</sup>

#### B. The “Don’t Ask, Don’t Tell” Policy—Evolution in Attitudes

President Bill Clinton promised a major change in official policy on the military service of homosexuals during the course of his first campaign for the Presidency.<sup>20</sup> One reason he made this pledge was the vicious murder of Navy sailor Allen Schindler, a killing motivated by anti-gay prejudice.<sup>21</sup> Upon entering office in 1993, President Clinton instituted an interim program which

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14. *Id.* at § 925(b).

15. MANUAL FOR COURTS MARTIAL, UNITED STATES pt. IV ¶51 (2008).

16. *Id.* at ¶ 51(c).

17. *Id.* at ¶ 51(e)(4).

18. *Id.* at ¶ 51(e)(1)-(3).

19. *U.S. v. Cox*, 18 M.J. 72, 73 (C.M.A., 1984).

20. David F. Burrelli & Charles Dale, *Homosexuals and U.S. Military Policy: Current Issues*, 1 (Congressional Research Service, May 27, 2005), available at [https://www.policyarchive.org/bitstream/handle/10207/905/RL30113\\_20050210.pdf?sequence=1](https://www.policyarchive.org/bitstream/handle/10207/905/RL30113_20050210.pdf?sequence=1).

21. Robert I. Corrales, *Don’t Ask, Don’t Tell: A Dying Policy on the Precipice*, 44 CAL. W. L. REV. 413, 416–417 (2008). Schindler was beaten to death in a public restroom in Sasebo, Japan by two of his shipmates from the U.S.S. Belleau Wood. His injuries were compared by a pathologist to those suffered from a “high-speed auto accident or a low-speed aircraft accident.” Schindler had previously asked a ship’s legal officer about being transferred. Jesse Green, *What the Navy Taught Allen Schindler’s Mother*, N. Y. TIMES, September 12, 1993, §6, at 58, available at <http://www.nytimes.com/1993/09/12/magazine/what-the-navy-taught-allen-schindler-s-mother.html>.

gave the Secretary of Defense (“the Secretary”) time to study methods of removing prohibitions on military service based upon sexual orientation and also gave Congress time to consider legislation on the subject.<sup>22</sup> This interim program not only required the Department of Defense (“DOD”) to stop asking recruits whether they were a homosexual, but also required the DOD to place any person who declared him or herself to be a homosexual into the Standby Reserve, thereby removing him or her from active duty and suspending his or her pay.<sup>23</sup> Prior to the institution of this interim program, homosexuals were entirely barred from military service.<sup>24</sup>

In May of that year the House and Senate Armed Services Committees came to agreement on a proposal for a final program.<sup>25</sup> The military would continue the policy of not questioning recruits regarding their sexuality and would institute a policy preventing any person who stated that they were a homosexual from enlisting or remaining in the military.<sup>26</sup> This proposal was described by Senator Sam Nunn as a policy of “don’t ask, don’t tell.”<sup>27</sup>

### *1. The President’s Proposal—Close, But No Cigar*

In July 1993, President Clinton announced his version of the program, which differed from the proposal considered by the armed services committees in several ways.<sup>28</sup> First, President Clinton announced that the policy would focus on the conduct of servicemembers and not on sexual orientation alone.<sup>29</sup> This focus on conduct was reinforced by a second difference between the two programs. Rather than have a declaration of homosexuality be sufficient in itself to warrant exclusion from the military (as in the congressional proposal), in the President’s proposal a declaration of homosexual orientation by a servicemember merely established a rebuttable presumption that the servicemember “intended to engage in prohibited [homosexual] conduct.”<sup>30</sup>

A third, and much more dramatic, difference was the policy against “witch hunts” of homosexuals characterized by one administration official as a “don’t pursue” policy.<sup>31</sup> Secretary of Defense Les Aspin, in a muddy

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22. Burelli & Dale, *supra* note 20, at 1.

23. David F. Burrelli, *Homosexuals and U.S. Military Policy: Current Issues*, ¶ 9 (Congressional Research Service, December 12, 1996), available at <http://www.fas.org/man/crs/96-029.htm>.

24. Correales, *supra* note 21, at 416.

25. Burrelli & Dale, *supra* note 20, at 1.

26. *Id.*

27. *Id.*

28. *Id.* at 2.

29. *Id.*

30. *Id.* (quoting President’s News Conference, 3 PUB. PAPERS 1111 (July 19, 1993)).

31. Burelli and Dale, *supra* note 20, at 2 n. 5.

explanation of this element, stated that a single statement by a person that they are a homosexual *would not* be investigated. Aspin later acknowledged, however, that a single statement *could* be investigated and would be enough to warrant a discharge.<sup>32</sup> This “don’t pursue” policy appeared to work against the rest of the President’s proposal because it indicated that the rules the President was advocating would never be enforced because violations would never be investigated.<sup>33</sup> Many members of Congress questioned the Administration on what behavior would justify an investigation and discharge, while some critics of the policy alleged that the President planned to institute a policy that would invite a judicial challenge and lead to a finding that the policy was unconstitutional.<sup>34</sup>

During this process of crafting a new policy on the military service of homosexuals, several studies of the subject were published. One of these was published by a Military Working Group chaired by General John Otjen.<sup>35</sup> That report concluded that homosexuality, whether overt or covert, was “incompatible with military service.”<sup>36</sup> The report also noted a study of military discharges for homosexuality occurring in fiscal years 1989–1992 which concluded that actual homosexual conduct was involved in at least 79 percent of all discharges for homosexuality.<sup>37</sup> Contrasting with this report were reports from the General Accounting Office and the RAND Corporation which generally indicated that there was no incompatibility between military service and an openly homosexual lifestyle.<sup>38</sup> It is notable that the RAND Corporation study was commissioned by the DOD, yet was never presented to the Senate Armed Services Committee.<sup>39</sup>

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32. *Id.* at 2–3. During a hearing, Secretary Aspin was asked by a senator what would happen if a soldier reported a disclosure of homosexual orientation by a fellow soldier to his commanding officer. “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.” Burrelli & Dale, *supra* note 20, at 2 n.6 quoting John Lancaster, *Senators Find Policy on Gays in the Military Confusing*, WASH. POST, July 21, 1993, at A12 (brackets added by Burrelli & Dale).

33. Burrelli and Dale, *supra* note 20, at 3.

34. *Id.* These critics alleged that the Clinton Administration would “defend” the policy in such a way that it would be struck down.

35. OFFICE OF THE SECRETARY OF DEFENSE, SUMMARY REPORT OF THE MILITARY WORKING GROUP (1993). General Otjen was a supporter of a ban on open homosexual service, Correales, *supra* note 20, at 420–421.

36. Summary Report of the Military Working Group, *supra* note 35, at 10–11.

37. Correales, *supra* note 21, at 421.

38. *Id.* at 420–21.

39. *Id.* at 467.

## 2. *Congress Takes Action—10 U.S.C. 654 and Congress' Rationale*

Congress eventually stepped forward to consider legislation to codify the proposed policy when the House of Representatives took up the issue in September 1993.<sup>40</sup> The House considered three proposals: one granting the President the power to decide on an appropriate policy, one which involved passing into law the existing ban along with pre-induction questioning on sexual orientation, and one which generally codified what would become the modern “Don’t Ask, Don’t Tell” policy.<sup>41</sup> The final evolution of that policy is located at 10 U.S.C. § 654.<sup>42</sup> The statute begins with a series of fifteen findings of fact which lay out the Congressional justification for the policy.<sup>43</sup>

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40. *Id.* at 462.

41. *Id.*

42. 10 U.S.C. § 654 (2006).

43. *Id.* at § 654(a). The section states: “(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

These begin with a recitation of the power of Congress, granted in Section 8 of Article I of the U.S. Constitution, to establish rules for the armed forces.<sup>44</sup> This power of Congress is followed immediately by a finding that “[t]here is no constitutional right to serve in the armed forces.”<sup>45</sup> The findings note that the ultimate purpose of the military is combat and preparation for combat, and further recognize that high sacrifices are asked of servicemembers.<sup>46</sup> The findings then link combat success to “high morale, good order and discipline, and unit cohesion.”<sup>47</sup> Among these, unit cohesion is the most important to combat effectiveness.<sup>48</sup> The military has unique circumstances and rules which make it distinct from civilian life. The unique rules of the military apply to its members twenty-four hours a day regardless of their location and regardless of whether they are on active duty.<sup>49</sup> The military must maintain rules and policies to promote good order and discipline and unit cohesion, and these values are purportedly endangered by the presence of homosexuals in military service.<sup>50</sup>

### 3. *Mechanics of the “Don’t Ask, Don’t Tell” Statute*

The substance of the “Don’t Ask, Don’t Tell” policy begins at subsection (b). This section provides for the separation of a servicemember from the armed services if certain findings are made and provides regulatory powers to the Secretary to carry out this purpose.<sup>51</sup> There are three such findings. The first is a finding of homosexual conduct: “engag[ing] in, attempt[ing] to engage in, or solicit[ing] another to engage in a homosexual act or acts. . . .”<sup>52</sup> This finding will not result in separation if the member can meet a five factor test to demonstrate that such separation is not warranted.<sup>53</sup> These factors are findings that: 1) the conduct is not the normal behavior of the servicemember; 2) the servicemember will not likely repeat the conduct; 3) no force, coercion, or intimidation was involved; 4) the member’s presence in the military will not

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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.”

44. *Id.* at § (a)(1).

45. *Id.* at § (a)(2).

46. *Id.* at § (a)(4)-(5).

47. *Id.* at § (a)(6).

48. *Id.* at § (a)(7).

49. *Id.* at § (a)(8)-(11).

50. *Id.* at § (a)(14)-(15).

51. *Id.* at § (b).

52. *Id.* at § (b)(1).

53. *Id.*

discourage military order and discipline or morale; and 5) the member has no “propensity or intent” to engage in homosexual conduct.<sup>54</sup> Homosexual acts are defined as “any bodily contact . . . between members of the same sex for the purpose of satisfying sexual desires . . . .”<sup>55</sup> This definition also includes bodily contact “which a reasonable person would understand to demonstrate a propensity or intent to engage in . . . [the previously described homosexual acts].”<sup>56</sup>

The second finding which may lead to separation is that the member has made a statement indicating “that he or she is a homosexual or bisexual.”<sup>57</sup> This finding also does not compel separation if certain findings are made, namely that the servicemember does not engage in and does not attempt to engage in homosexual conduct and has no propensity or intent to do so.<sup>58</sup> A “homosexual” is defined as “a person, regardless of sex, who engages in, [or] attempts to engage in . . . homosexual acts . . . .”<sup>59</sup> Like in the definition of homosexual acts, the definition of homosexual also includes the propensity or intent to engage in homosexual acts.<sup>60</sup> The definition of “bisexual” is largely similar to that of “homosexual” except that it references “homosexual and heterosexual acts” rather than merely homosexual ones.<sup>61</sup>

One final finding that may lead to separation is that a servicemember “has married or attempted to marry a person known to be of the same biological sex.”<sup>62</sup> This third ground for separation is notable because, unlike the two previously stated grounds for separation, it does not permit a servicemember to prevent separation by demonstrating that he or she satisfies certain conditions which justify retention (i.e. a lack of an intent or propensity to commit homosexual acts).<sup>63</sup>

These same prohibitions are applied to new entrants to the military and must be announced in the documents used to enlist or appoint new servicemembers.<sup>64</sup> Furthermore, new servicemembers must be briefed on the laws and regulations governing their sexual conduct and must be re-briefed

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54. *Id.* at § (b)(1)(A)-(E).

55. *Id.* at § (f)(3)(a).

56. *Id.* at § (f)(3)(b).

57. *Id.* at § (b)(2).

58. *Id.*

59. *Id.* at § (f)(1).

60. *Id.*

61. *See id.* at § (f)(2).

62. *Id.* at § (f)(3).

63. Compare 10 U.S.C. § 654(f)(3) with 10 U.S.C. § 654(f)(1)-(2) (person shall be discharged for homosexual acts or self identification as a homosexual or bisexual unless certain conditions can be proven to justify retention).

64. 10 U.S.C. § 654 (c)(1)-(2).



periodically throughout their careers.<sup>65</sup> Finally, the statute provides that subsection (b) governing separation must not be construed to require a servicemember's separation when it is determined under DOD regulations that 1) a servicemember has violated any portion of the subsection for the purpose of obtaining a separation or 2) a servicemember's separation is not in the best interest of the military.<sup>66</sup>

The "Don't Ask, Don't Tell" statute is clarified by the regulations promulgated under its authority by the Under Secretary of Defense for Personnel and Readiness. These include the regulations regarding separation, which are divided into separate regulations for officers<sup>67</sup> and enlisted servicemembers.<sup>68</sup> While the statute deals with the conditions for separation, the regulations are where the "Don't Ask, Don't Tell" policy as popularly understood is located. The regulations provide that except for the conduct prohibited in the statute "[a] member's sexual orientation is considered a personal and private matter, and is not a bar to continued military service under [this regulation]."<sup>69</sup> In other words, a homosexual may serve in the military unless he or she commits a homosexual act or makes a statement confessing homosexuality.

### C. Judicial Approaches to Regulation of Homosexual Conduct—A High Standard of Deference

The "Don't Ask, Don't Tell" statute has been subjected to multiple judicial challenges regarding its constitutionality. These decisions are influenced by the traditional deference courts pay to the other two branches of government when military affairs are at issue.<sup>70</sup> While courts maintain that servicemembers are not deprived of the protections of the Bill of Rights, courts also recognize that "servicemembers, as a general matter, do not share the same autonomy as civilians."<sup>71</sup> The Supreme Court has recognized that "the military is, by necessity, a specialized society separate from civilian society . . . [which] has, again by necessity, developed laws and traditions of its own during its long history."<sup>72</sup>

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65. *Id.* at § (d).

66. *Id.* at § (e).

67. Department of Defense Instruction 1332.30 (2008).

68. Department of Defense Instruction 1332.14 (2008).

69. Department of Defense Instruction 1332.30 at 9; Department of Defense Instruction 1332.14 at 18.

70. Burrelli & Dale, *supra* note 20, at 14.

71. *United States v. Marcum*, 60 M.J. 198, 205–06 (C.A.A.F. 2004).

72. *Parker v. Levy*, 417 U.S. 733, 743 (1974).

This deference was demonstrated in *Able v. U.S.*, a case that involved a challenge of the “Don’t Ask, Don’t Tell” statute by multiple officers and enlisted persons.<sup>73</sup> In *Able*, plaintiffs raised multiple constitutional challenges to the statute, including due process, equal protection, and First and Fifth Amendment claims.<sup>74</sup> The District Court held that §654(b)(2) of the statute, which relates to statements of homosexuality or bisexuality, violated the First Amendment as well as the Equal Protection Clause of the Fourteenth Amendment.<sup>75</sup> It further found that the plaintiffs did not have standing to challenge §654(b)(1), which relates to homosexual conduct.<sup>76</sup> The Second Circuit reversed this decision, holding that §654(b)(2) “‘substantially furthers the government’s interest . . . in preventing the occurrence of homosexual acts in the military’” and held that whether the section survived a First Amendment challenge depended on the constitutionality of §654(b)(1).<sup>77</sup> After finding that plaintiffs had standing to challenge the latter section, the court remanded the case to the District Court to determine whether that section violated the Equal Protection Clause.<sup>78</sup> The District Court found that it did and the government appealed, arguing that the court did not give Congress the proper amount of deference on military issues.<sup>79</sup>

When the case returned to the Second Circuit, the court noted that the District Court had suggested that heightened scrutiny was appropriate when a statute discriminates against homosexuals.<sup>80</sup> The Second Circuit declined, however, to address the issue (and in doing so, applied rational basis review) because the plaintiffs asserted at oral argument that they were asking for nothing more stringent than rational basis review.<sup>81</sup> The court went on to emphasize that a level of deference above and beyond that accorded to rational basis review is applied where an issue affecting the military is involved.<sup>82</sup> The court went on to recite a litany of issues which the Supreme Court had held were valid exercises of legislative and executive power, including the male-only military draft, the use of the Uniform Code of Military Justice to regulate military personnel, the presidential exercise of discretion in commissioning

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73. *Able v. U.S.*, 155 F.3d 628 (2d Cir. 1998).

74. *Id.* at 631.

75. *Id.*

76. *Id.*

77. *Id.* (quoting *Able v. U.S.*, 88 F.3d 1280, 1296 (2d Cir. 1996)).

78. *Id.*

79. *Id.*

80. *Id.* at 632.

81. *Id.*

82. *Id.*

Army officers, and the requirement of prior approval for the circulation of petitions at military installations.<sup>83</sup>

Turning to the arguments of the parties, the court noted that the purported government interests at issue were unit cohesion, privacy, and sexual tension among servicemembers.<sup>84</sup> The court then addressed the plaintiffs' contention that these interests were merely proffered to disguise "irrational prejudice against homosexuals."<sup>85</sup> This was an illegitimate government interest under *Romer v. Evans*, *City of Cleburne, Texas v. Cleburne Living Center*, and *Palmore v. Sidoti*.<sup>86</sup> The Second Circuit distinguished these cases on the ground that the cases concerned civilians and thus were not decided under the higher deference accorded to decisions related to the military.<sup>87</sup> The court also noted that the asserted government interests were peculiar to the military and that *Romer* and *City of Cleburne, Texas* did not involve restrictions based on conduct.<sup>88</sup> Those cases were therefore inapplicable to the conduct that is the focus of the "Don't Ask, Don't Tell" statute.<sup>89</sup> The court applied a similar level of deference in finding for the government on the plaintiffs' second argument: that the asserted government interests were not rationally related to the prohibition in the statute.<sup>90</sup>

A similar deference was at issue in *United States v. Marcum*.<sup>91</sup> Plaintiff, a male Air Force technical sergeant, was convicted of non-forcible sodomy with a male subordinate.<sup>92</sup> The plaintiff challenged his conviction under Article 125 by asserting that the statute was unconstitutional under the Supreme Court's decision in *Lawrence v. Texas*.<sup>93</sup> In *Marcum*, the parties disputed the level of scrutiny to be applied.<sup>94</sup> The court decided to apply rational basis review, noting that the Supreme Court did not plainly state that the liberty interest in *Lawrence* was a fundamental right and concluded that the Court would not recognize a fundamental right in the military context which had not been explicitly declared in the civilian context.<sup>95</sup> The Court also

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83. *Id.* at 633.

84. *Id.* at 634.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* at 635.

89. *Id.* at 634-35.

90. *Id.* at 635-36.

91. *United States v. Marcum*, 60 M.J. 198 (C.A.A.F. 2004).

92. *Id.* at 200-01.

93. *Lawrence v. Texas*, 539 U.S. 558 (2003) (held that Texas statute prohibiting private consensual homosexual acts was unconstitutional under the Due Process Clause).

94. *Marcum*, 60 M.J. at 204.

95. *Id.* at 205.

declined to permit a facial challenge to the statute based upon the unique nature of the military, the Court's past practice of using "as applied" review when national security and constitutional rights are both at issue, and the Court's finding that *Lawrence* is inapplicable to forcible sodomy penalized by Article 125.<sup>96</sup>

### III. ANALYSIS

This section will discuss three possible reforms to the current statutory regime which governs homosexuals in the military. These potential reforms are similar to those discussed by Debra Luker<sup>97</sup> and are informed by the findings of a group of former general officers issued by the Palm Center at the University of California.<sup>98</sup>

#### A. Preliminary Considerations: Desirability of Reform

Before proceeding to discuss the three proposals, a brief examination must be made of the factors Congress will consider in deciding whether it will acquiesce to any proposed change to 10 U.S.C. § 654.

The desirability of repealing the "Don't Ask, Don't Tell" statute has long been evaluated on the basis of the impact of the open service of homosexuals on good order and discipline. As previously noted, a study by DOD's Military Working Group and a DOD-commissioned study by the RAND Corporation came to opposite conclusions on this point. Further, the negative impact of open homosexual service on good order and discipline was one of the key justifications for the policy given by Congress.<sup>99</sup> Given the central position of this justification, it should serve as no surprise that debates continue to emerge over the impact of open homosexual service.

A recent example is a debate between the Palm Center of the University of California and the Center for Military Readiness over the results of a 2009 *Military Times* poll on the attitudes of active duty servicemembers towards homosexuals in the military. The poll in question indicated that "[m]ost active-duty service members continue to oppose President-elect Barack Obama's campaign pledge to end the 'don't ask, don't tell' policy . . . ."<sup>100</sup>

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96. *Id.* at 206.

97. Debra A. Luker, *The Homosexual Law and Policy in the Military: "Don't Ask, Don't Tell, Don't Pursue, Don't Harass"...Don't Be Absurd!*, 3 SCHOLAR 267, 327 (2001).

98. HUGH AITKIN ET AL., REPORT OF THE GENERAL/ FLAG OFFICER'S STUDY GROUP (2008).

99. See 10 U.S.C. § 654(a)(14)-(15) (2006).

100. Brendan McGarry, *Troops Oppose Repeal of 'Don't Ask, Don't Tell'*, MILITARY TIMES, (Dec. 29, 2008), at ¶1, available at [http://www.militarytimes.com/news/2008/12/122908\\_military\\_poll\\_DADT/](http://www.militarytimes.com/news/2008/12/122908_military_poll_DADT/).

The poll also revealed that ten percent of those surveyed reported an intention to leave the military after their current term expires should the ban be lifted, and that an additional fourteen percent said they might do so.<sup>101</sup> Elaine Donnelly, head of the Center for Military Readiness, in a posting on the *National Review's* online military blog, touted the poll as more reliable than civilian polls which are generally more favorable towards repeal of the "Don't Ask, Don't Tell" policy.<sup>102</sup>

This posting was followed by a detailed critique of the *Military Times* poll by Palm Center researcher Nathaniel Frank.<sup>103</sup> Frank began by noting that a person's opinion does not always dictate their conduct. He noted that neither dissent expressed by American officers to the inclusion of women at West Point nor a stated refusal of Canadian servicemembers to share quarters with homosexual colleagues lead to an exodus from either nation's armed forces.<sup>104</sup> The lack of random sampling in the polling process was also noted, which, if accounted for would (so Frank asserts) make results comparable to the fifty percent opposition figure noted in other polls.<sup>105</sup> Frank then proceeded to cite a 2006 Zogby poll which indicated that servicemembers have no strong feelings against homosexuals. It further indicated that many servicemembers know, or suspect that members of their unit are, homosexuals, findings that do not indicate a threat to good order and discipline.<sup>106</sup> Perhaps the most intriguing portion of Frank's critique is his rejection of polling as the solitary basis for policymaking, equating the use of polling to support the "Don't Ask, Don't Tell" policy to a practice of polling the troops on whether they should be sent into combat.<sup>107</sup>

This argument over polling data foreshadows what will likely be a continuing argument over how morale and discipline would be affected by

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101. *Id.*

102. Elaine Donnelly, *Military Times Poll: Troops Oppose Gay Agenda for the Military*, The Tank (Jan. 2, 2009), <http://tank.nationalreview.com/archives> (follow "January 2009" hyperlink; then follow "Military Times Poll: Troops Oppose Gay Agenda for the Military" under "January 02").

103. Nathaniel Frank, *Military Times Poll is Flawed* (Jan. 15, 2009) (unpublished manuscript, on file with The Palm Center), available at <http://www.palmcenter.org/files/active/0/MilitaryTimesPollAnalysis.pdf>.

104. *Id.* at ¶ 2.

105. *Id.* at ¶ 5–6. Frank discusses the opinion of Dr. Gary Gates of UCLA School of Law's Williams Institute that the poll failed to accurately represent the gender and political affiliation of servicemembers: "[A]mong the Times's 1,947 active-duty respondents, only 10 percent were women, compared to 15 percent of the actual military; among enlisted personnel, only 22.6 percent of the Times's respondents were independents, compared to 66 percent of enlisted personnel in the Army." By adjusting the proportions of each gender and political affiliation, Gates arrived at the number discussed above.

106. *Id.* at ¶ 8.

107. *Id.* at ¶ 9.

open homosexual service. Frank's criticism of the statistical soundness of the *Military Times* poll illustrates the problems of relying upon statistics to determine the direction that policy will take. Current polls on the opinions of servicemembers are not based on random samples, due to the Pentagon's refusal to allow outside groups to conduct a study using random sampling.<sup>108</sup> This lack of random sampling leaves such polls open to precisely the type of criticism raised by Frank. Paradoxically, any random sampling performed by the military itself may be met with criticism by those opposed to whatever finding the military's study arrives at. Any truly random sample of servicemembers' opinions conducted according to generally accepted statistical methods would nevertheless go a long way towards showing what the likely impact of any change to open homosexual service would be.

Statistical analysis is not, however, the only tool available in the debate over "Don't Ask, Don't Tell." Frank's attempt to move beyond the polls, coupled with his insistence that expressed opinion does not equate to conduct, suggests that proponents of repealing the ban on homosexual service may make a sort of "Field of Dreams" argument: if you lift the ban, the troops will come around. This position is supported by the evolution of treatment of African-Americans in the decades following their full integration into the armed services by order of President Truman, to the point where no significant interracial conflict was reported during the First Gulf War.<sup>109</sup> One commentator has even cited the military's experience of racial integration as evidence that forcing those of different races and genders to associate with one another may lead to significant progress towards a more voluntarily integrated society.<sup>110</sup> While this is not likely a position on which proponents of changing "Don't Ask, Don't Tell" will base their arguments, it suggests that servicemembers may simply adapt to open homosexual service over time, gradually arriving at a point where openly homosexual servicemembers are just as accepted in the military as African-Americans are today.

The integration of African-Americans into the military also suggests a further compelling argument regarding good order and discipline: the impact of open homosexual service will be unknown until a policy permitting it is already in place. Frank suggests this argument through his discussion of the disconnect between opinion and action. It is bolstered by the positive

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108. Jeane Scheper et. al., "The Importance of Objective Analysis" on *Gays in the Military: A Response to Elaine Donnelly's Constructing the Co-Ed Military*, 15 DUKE J. GENDER L. & POL'Y 419, 434 (2008).

109. Mario L. Barnes, "But Some of [Them] Are Brave": *Identity Performance, the Military, and the Dangers of an Integration Success Story*, 14 DUKE J. GENDER L. & POL'Y 693, 701-702 (2007).

110. Note, *Lessons in Transcendence: Forced Associations and the Military*, 117 HARV. L. REV. 1981 (2004).

experiences of some militaries which have already instituted integrated service, including the British and Australian armed forces.<sup>111</sup> Not all foreign integrations into service have gone smoothly, however, and there are many differences between America and these nations, making such comparisons somewhat problematic.<sup>112</sup> For example, three integrated nations are in many ways culturally similar to the United States: Australia, Canada, and the United Kingdom. However, reliance on the integration successes of these nations as a predictor of successful integration in the United States is qualified by public attitudes towards homosexuality in each nation. According to the Spring 2007 Pew Global Attitudes Survey, Americans surveyed were closely divided as to whether or not homosexuality was an acceptable lifestyle.<sup>113</sup> By contrast, a clear majority of Canadians surveyed believed that homosexuality was an acceptable lifestyle.<sup>114</sup> Britains surveyed were equally favorable in approximately the same proportions as Canadians.<sup>115</sup> A recent survey of Australians revealed that a majority of those surveyed favored allowing homosexuals to marry.<sup>116</sup> These results indicate that general attitudes towards homosexuals are at least somewhat more tolerant in these three nations than attitudes in the United States. This point was made in a recent newsletter issued by the Center for Military Readiness, which also noted that Canada and Australia primarily focus on peacekeeping and support operations.<sup>117</sup>

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111. Burelli & Dale, *supra* note 20, at 34.

112. See Burrelli & Dale, *supra* note 20, at 34–35. Difficulties in making a comparison include differences in how terms such as “orientation” are defined, whether servicemembers are unionized, the specific missions of the services in question (including whether they are deployed abroad), and whether servicemembers are conscripted. A notable problem in drawing comparisons is the extent to which official policy often differs from the experiences of individual servicemembers. *Id.*

113. PEW RESEARCH CENTER, PEW GLOBAL ATTITUDES PROJECT: SPRING 2007 SURVEY Q.46, p.44 (2007), available at <http://pewglobal.org/reports/pdf/258topline.pdf>. Results cited are those from Spring 2007 unless otherwise noted. Forty-nine percent of American respondents responded that “Homosexuality is a way of life that should be accepted by society,” forty-one percent responded that “Homosexuality is a way of life that should not be accepted by society,” and ten percent did not know or refused to answer. *Id.*

114. *Id.* Seventy percent of Canadian respondents surveyed stated that society should accept homosexuality, twenty percent stated that it should not, and nine percent did not know or refused to answer. *Id.*

115. *Id.* Seventy-one percent of British respondents stated that society should accept homosexuality, twenty one percent said it should not, and eight percent did not know or refused to answer. *Id.*

116. Galaxy Research, Same Sex Marriage Report, Table 3, p. 16 (June 2009) (unpublished survey, on file with Australian Marriage Equality), available at <http://www.australianmarriageequality.com/Galaxy200906.pdf>. Of 1,100 respondents, sixty percent either agreed or strongly agreed that “same-sex couples should be able to marry,” thirty-six percent either disagreed or strongly disagreed with the statement, and four percent responded that they did not know. *Id.*

117. CTR. FOR MILITARY READINESS, FOREIGN NATIONS THAT ACCOMMODATE HOMOSEXUALS IN THEIR MILITARIES ARE NOT AN EXAMPLE FOR AMERICA’S MILITARY, pgs. 1–2 (September 2009), available at <http://cmrlink.org/CMRdocuments/CMRPolicyAnalysis-September2009.pdf>.

Despite these problems, proponents argue that the United States should give open service a try, and quit wasting time arguing about statistics. Opponents would likely argue that it is not right to use servicemembers as “guinea pigs” in any integration plan not premised on observed results among troops. Nevertheless, compelled integration of African-Americans into the armed services provides a precedent for such a program.

While the integration of African-Americans into the military provides a valuable perspective on what any future integration of homosexuals into full service might look like, there is another group of servicemembers who must be examined because of unique experiences integrating with the military. Women were first formally allowed into the military in the aftermath of World War II by the Women’s Armed Services Integration Act of 1948, at approximately the same time that African-Americans were integrated.<sup>118</sup> This initial integration program was, however, of a limited nature. Women commissioned in the newly established Women’s Army Corps. could hope to reach only the rank of lieutenant colonel (with the lone exception of the Director of the Corps., who was a temporary colonel during her service as Director).<sup>119</sup> Some limitations on the service of women continue today, including rules prohibiting women from serving in units “whose primary mission is to engage in direct combat on the ground.”<sup>120</sup> The common rationale for this continued limitation on women’s service roles, the promotion of unit cohesion, is similar to the rationale for preserving the “Don’t Ask, Don’t Tell” statute (the preservation of good order and discipline) in that in both instances the addition of a group of people sharing a common sex or gender characteristic is said to endanger the ability of the military (or an individual unit within it) to function effectively.<sup>121</sup> This suggests that it may be too optimistic to presume that integration of open homosexuals into the armed services will be “smooth sailing,” given that women have not been permitted into every aspect of military service even after almost half a century of male-female integration.<sup>122</sup>

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118. Martha McSally, *Women in Combat: Is the Current Policy Obsolete?*, 14 *DUKE J. GENDER L. & POL’Y* 1011, 1022 (2007).

119. Women’s Army Integration Act, Pub. L. No. 80-625, 62 Stat. 356, 357–358.

120. Memorandum from Secretary of Defense Les Aspin to the Secretaries of the Army, Navy, and Air Force et al., Direct Ground Combat Definition and Assignment Rule (Jan. 13, 1994), available at <http://cmrlink.org/CMRNotes/LesAspin%20DGC%20DefAssign%20Rule%20011394.pdf>.

121. On unit cohesion and the role of women in combat, see generally McSally, *supra* note 118, at 1034–35.

122. Interestingly, the unit cohesion-based justification for limiting the combat role of women may slowly be eroded by combat realities. The Second Gulf War has challenged the military’s limitations on placing women into combat both by calling the definition of “combat” into question (due to the elimination of a definable forward area where “combat” occurs) and by causing male-female



The history of women's integration into military service also suggests another possible obstacle to open homosexual service. Numerous sexual harassment scandals have plagued the military, including the infamous "Tailhook" incident.<sup>123</sup> A more recent example is the scandal at the Air Force Academy where rape allegations made by many female cadets were ignored by Academy officials.<sup>124</sup> Harassment of homosexual servicemembers is by no means unheard of today. One of the most severe occurrences was the murder of Pfc. Barry Winchell, who was bludgeoned to death at Fort Campbell in 1999 by a fellow soldier.<sup>125</sup> This incident prompted a review of the "Don't Ask, Don't Tell" policy by the Defense Department Inspector General's office in the waning days of the Clinton Administration.<sup>126</sup> In that report, which included survey data collected from servicemembers, thirty-seven percent of respondents stated that they had observed harassment of fellow servicemembers who were perceived to be homosexuals within the previous twelve months.<sup>127</sup> Among other harassment witnessed, approximately twenty-five percent of all respondents reported having witnessed the infrequent use of offensive harassing speech (with approximately eight percent reporting frequent use) while approximately four percent reported witnessing infrequent physical assaults on perceived homosexual servicemembers (with approximately one percent reporting frequently observing such assaults).<sup>128</sup> These statistics, coupled with that fact that the harassment of women in the military spawned major scandals even after decades of integrated service, may

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integrated "non-combat" units to be placed in combat situations. Diane H. Mazur, *Military Values in Law*, 14 DUKE J. GENDER L. & POL'Y 977, 987-88 (2007).

123. See J. Richard Chema, *Arresting "Tailhook": The Prosecution of Sexual Harrassment in the Military*, 140 MIL. L. REV. 1, 16-18 (1993). "Tailhook" refers to a high-profile sexual harassment scandal that occurred at the 1991 convention of the Tailhook Association (a private group for naval aviators). Several women were molested by male aviators when they were pushed down a "gauntlet" formed in a hotel hallway. Coupled with the inaction of officials with knowledge of the incident, "Tailhook" served to suggest that the Navy maintained "a hostile environment for females." *Id.* at 18.
124. See Diane H. Mazur, *Military Values in Law*, 14 DUKE J. GENDER L. & POL'Y 977, 1000-1001 (2007).
125. Elaine Sciolino, *Army Exonerates Officers in Slaying of Gay Private*, N. Y. TIMES, July 19, 2000, available at <http://www.nytimes.com/2000/07/19/us/army-exonerates-officers-in-slaying-of-gay-private.html>.
126. *Pentagon to Review "Don't Ask, Don't Tell" Policy*, CNN.com, Dec. 13, 1999, available at <http://archives.cnn.com/1999/US/12/13/pentagon.gays/index.html>.
127. Office of the Inspector General, Department of Defense, *Military Environment with Respect to the Homosexual Conduct Policy*, Report. No. D-2000-101, 8 (2000), available at <http://dont.stanford.edu/commentary/evaluation101.pdf>.
128. *Id.* at 38. The utility of these figures is hampered by the absence of data on the incidence of similar conduct in the civilian world. It does not appear that a comparable study has been conducted outside the military.

mean that homosexuals openly serving in the military may also face harassment for decades to come.

As has been noted above, the true impact of any eventual repeal of the current “Don’t Ask, Don’t Tell” regime will be unknown until such a repeal is actually carried out and homosexuals are allowed to serve openly. Current opinion polls used to determine what potential impact a repeal may have are vulnerable to attack on statistical grounds and have sparked bitter debate between proponents and opponents of policy change. As a preliminary to any future debate on the “Don’t Ask, Don’t Tell” regime, Congress should request (presumably via either the House or Senate Armed Services Committee) that the Department of Defense furnish it with a random sample survey of current servicemembers in order to determine what current opinions regarding open homosexual service are. As suggested in Frank’s critique of polling discussed above, such polls should not be the sole basis for policymaking.<sup>129</sup> A more statistically sound poll would, however, provide a firmer basis for any congressional consideration. Using this poll in the light of the experiences of other nations and the military’s past integration efforts, Congress would be able to consider the merits of “Don’t Ask, Don’t Tell” and decide whether it is time to change the policy.

The experiences of other nations provide some evidence that integration may be workable even when the many differences between these nations and the United States are accounted for. If American society continues its trend of increasing acceptance of homosexuality, these militaries provide evidence that integration in the U.S. military could be successful.<sup>130</sup> Furthermore, the military’s efforts to integrate African-Americans and women into the military show that, while integration of any formerly excluded group is not likely to be easy or swift, progress is nevertheless possible. Finally, there is a good argument that servicemembers opposed to open homosexual service will come to accept it in time. While these factors do not indicate that ending the current “Don’t Ask, Don’t Tell” regime will be painless, they do give enough hope that open homosexual service will succeed to justify at least a limited program to see if it does.

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129. See Frank, *supra* note 103.

130. Poll results from 1972 to 2006 indicate a long term shift in public opinion from the idea that homosexual conduct is always wrong to the position that it never is. Karolyn Bowman and Adam Foster, Attitudes about Homosexuality and Gay Marriage, 2 (June 2008) available at <http://www.aei.org/docLib/20080603-Homosexuality.pdf>.

## B. Possibilities for Change: Three Proposals

This section of the comment presents three proposals to alter the current statutory framework applicable to homosexual servicemembers. While each proposal carries its own advantages and disadvantages, a common theme is the repeal of the current “Don’t Ask, Don’t Tell” statute. This step would permit homosexuals to serve openly and is thus a necessary component of any proposed change in current law.

### *1. Congress May Repeal 10 U.S.C. 654 And Permit The Defense Department To Regulate*

Many have called for the abrogation of §654 by either legislative or judicial means.<sup>131</sup> A simple congressional repeal of this section would return control over military retention of homosexuals to the Department of Defense (“DOD”).<sup>132</sup> Thus the issue would ultimately be decided by President Obama in his role as Commander-in-Chief. Each administration would, however, be free to change the policy as they see fit. While the policy in place at the time the “Don’t Ask, Don’t Tell” statute was adopted had been in place since 1981,<sup>133</sup> there is no guarantee that the policy would remain so consistent in the modern political climate. The intense passions stirred by the Clinton Administration’s attempt to revise the policy could lead this issue to become a perennial hot potato as successive presidents change the policy to suit their own ideological proclivities. Any likelihood of such frequent change is tempered by the military’s need for consistent personnel policy. Such considerations would likely prevent frequent policy changes, but the issue would nevertheless be potentially subject to revision with each incoming administration.

Mere repeal of §654 would have no impact on Article 125, meaning that penalization of homosexual conduct (along with all forms of consensual

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131. For just a few examples, *see* Corealles, *supra* note 21 (argues that “Don’t Ask, Don’t Tell” should be overturned under a “searching rational basis” review), Luker, *supra* note 97 (discusses multiple legislative options for repeal of “Don’t Ask, Don’t Tell”), and Shannon Gilreath, *Sexually Speaking: “Don’t Ask, Don’t Tell” and the First Amendment After Lawrence v. Texas*, 14 DUKE J. GENDER L. AND POL’Y 953 (2007) (argues that “Don’t Ask, Don’t Tell” facially violates the First Amendment free speech guarantee).

132. *See Statement of Elaine Donnelly, President, Center for Military Readiness, to the House Armed Services Committee Subcommittee on Personnel, in Support of Section 654, Title 10, the 1993 Law Stating that Homosexuals are not Eligible to Serve in the Military*, 110th Cong. 2–3 (2008), available at [http://armedservices.house.gov/pdfs/MilPers072308/Donnelly\\_Testimony072308.pdf](http://armedservices.house.gov/pdfs/MilPers072308/Donnelly_Testimony072308.pdf).

133. *Id.* at 2 n.4.

sodomy) would continue under that section.<sup>134</sup> While the President could alter applicable regulations as well as the provisions relating to sodomy in the Manual for Courts Martial<sup>135</sup>, the statutory sodomy penalty would remain as currently codified.

This option would provide maximum flexibility in allowing the DOD to conduct a transition to open homosexual service, and would provide the opportunity to abandon plans which prove ineffective and allow for a chance to try new alternatives. It is therefore unsurprising that this is the course of action recommended by the Palm Center group of general officers.<sup>136</sup> The trade off for this option is that there is, again, no guarantee that the DOD will refrain from restoring a ban on homosexual service at some future time. Opponents of “Don’t Ask, Don’t Tell” may feel that this option does not provide enough security for openly homosexual servicemembers. It is unlikely, however, that such a policy would be overturned unless some problem arises with integrating open homosexuals into the military. Despite continued battles over race in America, there was never any attempt to re-segregate the military once it was integrated by President Truman. This suggests that if initial integration efforts succeed, open homosexual service is likely to endure even through an adverse political climate.

## *2. Repeal 10 U.S.C. 654 And Enact A Replacement Statute Guaranteeing Open Homosexual Service*

The repeal of 10 U.S.C. 654 and enactment of a replacement statute governing open homosexual service would fill the statutory void created by a repeal of §654 with some form of protection for homosexuals who chose to reveal their sexual orientation. A current example of this approach can be found in legislation recently introduced by Rep. Ellen Tauscher.<sup>137</sup> This bill would repeal §654 in its entirety and replace it with a new provision which would bar discrimination on the basis of sexual orientation and would call for personnel policies and other rules to be applied without regard to sexual orientation.<sup>138</sup> The bill would also permit servicemembers discharged solely for their sexual orientation to be re-admitted to service.<sup>139</sup> The bill does not address Article 125, an omission that is particularly significant since the bill’s

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134. Luker, *supra* note 97, at 331.

135. The President may alter the Manual for Courts Martial by executive order. *See* MANUAL FOR COURTS MARTIAL, *supra* note 15, at app. 4.

136. Aitkin *et al.*, *supra* note 98, at 12.

137. H.R. 1283, 110th Cong. (2009).

138. *Id.* at § (4)(a)(a-d).

139. *Id.* at § (4)(a)(e).

re-admittance provision permits a return to service for those who committed “homosexual conduct in accordance with laws and regulations in effect before . . . enactment of this section, if otherwise qualified for [re-admittance].”<sup>140</sup> It is unclear whether a conviction under Article 125 which was solely based upon consensual homosexual conduct with another adult would allow a servicemember to be re-admitted, although the prescribed maximum penalty of dishonorable discharge for violating the Article<sup>141</sup> makes it doubtful that such a construction of the statute would be well received by the courts.

The bill shows a reversal of the policy considerations at issue in the first proposal. The DOD is given only very narrow discretion in implementing the policy through the bill’s rulemaking provisions.<sup>142</sup> Thus, implementation must proceed within the bounds laid out by the statute, regardless of any problems which may occur that may be better addressed by a policy change at the DOD level. The rights of homosexuals would, however, be protected in a written statute which could be modified only through the legislative process. This would likely be seen by civil rights advocates as a much larger step in the right direction and would be more likely to garner their support.

### *3. Adopt One of the Prior Two Proposals in Conjunction with An Amendment of Article 125 to Permit Consensual Sexual Acts Not Prejudicial to Good Order and Discipline*

A third option for modifying current policy is to repeal the “Don’t Ask, Don’t Tell” statute (and possibly replace it with new statutory provisions) while simultaneously amending Article 125 to permit consensual sodomy. An example of a plan that could implement this change can be found in a proposal to amend the Article presented to Congress by the DOD, based upon the findings of the Joint Service Committee on Military Justice.<sup>143</sup> The recommended changes would amend the Article to penalize only two forms of sodomy: forcible sodomy and sodomy of a child.<sup>144</sup> Forcible sodomy is defined as “unnatural carnal copulation by force with another person” while

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140. *Id.*

141. See MANUAL FOR COURTS MARTIAL, *supra* note 15, at part IV, ¶ 51.

142. H.R. 1283, 110th Cong. § 7 (2009).

143. DEPARTMENT OF DEFENSE, PROPOSED AMENDMENTS TO THE UNIFORM CODE OF MILITARY JUSTICE WITH INITIAL DOD DRAFT OF COMPLEMENTARY PROPOSED CHANGES TO THE MANUAL FOR COURTS MARTIAL: PART IV, “PUNITIVE ARTICLES” AND PART II, “RULES FOR COURTS-MARTIAL” AND PART III, “MILITARY RULES OF EVIDENCE”, tab A p.1–2 (2005) *available at* <http://www.dod.mil/dodgc/php/docs/HASCMeeting42105.pdf>.

144. *Id.* at tab E p. 1.

sodomy of a child is “unnatural carnal copulation with a person . . . who is not [the perpetrator’s] spouse; and . . . who has not obtained the age of sixteen years.”<sup>145</sup> The recommendations also modify the current statute to clarify that any penetration is sufficient to complete either offense.<sup>146</sup>

The recommendations also propose modification of the Manual for Courts Martial provisions for Article 134. That Article, commonly referred to as the “General Article,” penalizes all non-capital “disorders and neglects to the prejudice of good order and discipline in the armed forces . . . [and] all conduct of a nature to bring discredit upon the armed forces.”<sup>147</sup> The recommendations would call for the penalization of “unnatural carnal copulation” whenever it prejudiced the good order and discipline of the military or brought discredit on it.<sup>148</sup> Lesser included offenses within sodomy would consist of adultery, prostitution, patronizing a prostitute, pandering by procuring or arranging a sex act, and public sexual offenses.<sup>149</sup>

Adopting this proposed change to the statutory and regulatory regime supporting Article 125 would have an impact on heterosexual as well as homosexual servicemembers. As has been argued above, the statute as currently written penalizes “unnatural carnal copulation” without qualification, meaning that it applies equally to homosexual and heterosexual servicemembers. This can theoretically lead to the penalization of conduct that many civilians would be surprised to find is illegal for those in the armed services: “[it] is irrelevant whether the sodomy is committed in public or in the privacy of a service member’s off-post bedroom . . . married service members commit criminal offenses if they engage in consensual oral or anal sodomy in the privacy of their own bedroom with their own spouse.”<sup>150</sup>

Just because private consensual sodomy between adults is penalized, however, doesn’t mean that the penalty is enforced. This is demonstrated by an expansive review by Major Joel Cummings of the state of Article 125 in the light of *Lawrence v. Texas* and *United States v. Marcum*.<sup>151</sup> Cummings notes the three part analysis used by the *Marcum* court to determine if Article 125 was constitutional as applied:

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145. *Id.*

146. *Id.*

147. 10 U.S.C. § 934 (2006).

148. PROPOSED AMENDMENTS, *supra* note 143, at tab F p. 8–9.

149. *Id.*

150. Eugene E. Baime, *Private Consensual Sodomy Should Be Constitutionally Protected In The Military By The Right To Privacy*, 171 MIL.L.REV. 91, 91 (2002).

151. Joel P. Cummings, *Is Article 125, Sodomy A Dead Letter In Light of Lawrence v. Texas and The New Article 120?*, 2009-JAN ARMY LAW. 1 (Jan. 2009).

First, was the conduct that the accused was found guilty of committing of a nature to bring it within the liberty interest identified by the Supreme Court [in *Lawrence*]? Second, did the conduct encompass any behavior or factors identified by the Supreme Court as outside the analysis in *Lawrence*? . . . Third, are there additional factors relevant solely in the military environment that affect the nature and reach of the *Lawrence* liberty interest?<sup>152</sup>

The court elaborated on the second factor by listing relevant considerations noted by the *Lawrence* court: whether the conduct in question involved minors, public conduct, prostitution, potential injury or coercion, or a relationship between the parties such that “consent might not easily be refused.”<sup>153</sup>

Cummings focuses on the third part of the test, which he asserts grafts the “prejudicial to good order and discipline” language of Article 134 (the aforementioned “General Article”) onto Article 125.<sup>154</sup> He then analyzes both published and unpublished decisions applying the *Marcum* analysis to conclude that “the key to sustaining a consensual sodomy conviction is establishing prejudice to good order and discipline.”<sup>155</sup> Cummings then analyzes recent cases (from 2004) overturned under *Marcum* and cases decided pre-*Marcum* to determine whether *Marcum* affected charging decisions by prosecutors.<sup>156</sup> He found that, in cases involving consensual sodomy convictions overturned under *Marcum*, consensual sodomy had been charged in conjunction with more serious offences.<sup>157</sup> This led him to conclude that consensual sodomy not prejudicial to good order and discipline is mostly used as an added charge where more serious conduct was the main issue.<sup>158</sup> His survey of cases prior to *Marcum* led to similar findings.<sup>159</sup> Cummings concluded that “the military rarely prosecutes non-prejudicial, consensual sodomy as the gravamen of the case.”<sup>160</sup>

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152. United States v. *Marcum*, 60 M.J. 198, 206–07 (C.A.A.F. 2004) (citations omitted), *see also* Cummings, *supra* note 151, at 5.

153. *Marcum*, 60 M.J. at 207. Note that in *Marcum* the court held the appellant’s subordinate, with whom he committed sodomy, could be subject to coercion or may have had difficulty refusing consent given appellant’s authority over him, thus bringing the case under the second part of the three part test. *Id.* at 208.

154. Cummings, *supra* note 151, at 6.

155. *Id.* at 9.

156. *Id.* at 10–12.

157. *Id.* at 11. Cummings’ survey does not distinguish between homosexual and heterosexual sodomy.

158. *Id.* at 11–12.

159. *Id.* at 12.

160. *Id.* at 11.

Cummings' analysis indicates that when consensual sodomy is prosecuted successfully, it is in cases where the sodomy was found to be prejudicial to good order and discipline. His findings thus support the recommended changes to Article 125 because they show that many acts that fall within its scope are rarely charged and, when charged, rarely result in convictions appellate courts are willing to uphold. Unnatural carnal copulation that is prejudicial to good order and discipline would be penalized under Article 134 except in two specialized cases, forcible sodomy and sodomy of a child. These two types of conduct would both fall within the factors held by the Supreme Court to be beyond the scope of the protected sodomy in *Lawrence* and thus not protected under *Marcum*. In other cases where prosecutors would ordinarily include a charge for sodomy prejudicial to good order and discipline, Article 134 would provide ample grounds to charge offenders without the need for a separate Article.

The proposed amendments to Article 125 discussed above would carry out a rational evolution in military law by decriminalizing conduct that is rarely charged and, when charged, rarely upheld. Simultaneously, it would largely decriminalize consensual sodomy between consenting adults, whether heterosexual or homosexual. This would promote the liberty interest implicated in *Lawrence* by ending what appears from Cummings' research to be a restriction on servicemembers' rights that is unnecessary to promote good order and discipline.

It can be argued that adoption of these amendments has little to do with the promotion of open homosexual service, given the rarity of prosecution under Article 125 where there is no prejudice to good order and discipline present. If the Article is so rarely invoked (goes the argument), why should members of Congress who favor open homosexual service waste valuable political capital on something that appears to only tangentially affect the everyday lives of homosexual servicemembers in the first place? One reason is that amending Article 125 could be joined with an effort to reform the "Don't Ask, Don't Tell" statute as part of an overall "servicemembers rights" package of legislation. This would allow proponents to portray themselves as promoting the sexual privacy of all servicemembers regardless of sexual orientation. Even though amending Article 125 would have little impact on day-to-day military prosecutions, it could have a major symbolic impact by removing an unnecessary limitation on the private lives of servicemembers. A second reason to act is to remove a statute which could be read as a legacy of prohibiting homosexual conduct. Even if never enforced, having a prohibition of consensual sodomy codified into law could be looked upon as a sign that consensual sexual acts between homosexuals still are not approved of by Congress.



#### IV. CONCLUSION

The “Don’t Ask, Don’t Tell” policy, as codified in 10 U.S.C. § 654, and the sodomy prohibition in Article 125 of the Uniform Code of Military Justice both serve to prohibit conduct that has long been seen as offensive to the good order and discipline of servicemembers. However, as this comment has shown, the actual impact of open service of homosexuals will never be known until it is permitted. A simple repeal of the “Don’t Ask, Don’t Tell” statute, coupled with an amendment of Article 125 to permit consensual homosexual conduct between consenting adults, would permit the military to test the impact of open service while granting it the flexibility it needs to ensure continued military effectiveness. A repeal of the current policy would also remove a rarely invoked but highly symbolic restriction on the personal lives of servicemembers. Congress should therefore permit the Department of Defense to set retention policy, at least for the foreseeable future. Should the military prove delinquent in properly ensuring the rights of homosexual servicemembers, or should the presence of open homosexuals prevent the military from properly discharging its mission, Congress is free to enact further statutes to rectify the problem. While there are risks involved in this approach, it is the best balance available between the needs of the military and the equality of homosexual servicemembers with their heterosexual counterparts. President Truman took the first step towards full equality of African-American servicemembers. It is time for Congress to clear the way for President Obama to do the same for homosexuals who serve in the armed forces.

