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Implementing the Repeal of “Don’t Ask, Don’t Tell” in the U.S. Armed Forces

Lawrence J. Korb, Sean E. Duggan, and Laura Conley March 2010



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Introduction and summary

It is long past time to repeal the “Don’t Ask, Don’t Tell” law that bans openly gay men and women from serving in the military. As the Center for American Progress noted in a June 2009 report, the policy is discriminatory, has led to the discharge of thousands of qualified men and women, and has deterred untold others who want to defend their country from serving. Additionally, thousands more men and women in uniform voluntarily leave the service every year because of the law. Repealing it is the right thing to do, can be accomplished quickly, and would require few changes in military regulations and practices.

The highest-ranking civilian and military leaders in the Pentagon agree it’s time to end “Don’t Ask, Don’t Tell”: Last month, Secretary of Defense Robert Gates and Chairman of the Joint Chiefs of Staff Admiral Michael Mullen testified before the Senate Armed Services Committee that they fully support the Obama administration’s decision to work with Congress to repeal the law this year. Admiral Mullen went further, stating it was his personal belief that “allowing gays and lesbians to serve openly would be the right thing to do.”¹

This is the type of leadership needed to once and for all put an end to this policy. Now that these leaders have announced that they do not believe that military effectiveness would suffer if openly gay men and lesbians were allowed to serve, proponents of maintaining this outdated, discriminatory, counterproductive, and most likely illegal policy can no longer base their support for “Don’t Ask, Don’t Tell” on the groundless assertion that open homosexuality undermines unit cohesion and military readiness.² Many of our nation’s closest allies have already repealed their bans on open military service by gays and lesbians. And as their successful experiences demonstrate, effective leadership and consistent execution of policies that create equal standards for all service members can and do ensure that readiness and cohesion are not affected by open service policies.

This month, the Defense Department is reportedly set to announce it will relax the enforcement of “Don’t Ask, Don’t Tell”. Specifically, the department will raise the level of an officer who is authorized to conduct or initiate a “Don’t Ask, Don’t Tell” inquiry; raise the bar on what constitutes credible information to initiate an inquiry; and raise the bar on what constitutes a reliable person in making an accusation.³

Meanwhile, Sen. Joseph Lieberman (I-CT) introduced legislation in the Senate on March 3, 2010, to repeal the 17-year-old law that resembles similar legislation already introduced

in the House of Representatives by Iraq war veteran Rep. Patrick Murphy (D-PA), the Military Readiness Enhancement Act. These developments are encouraging.

But this is not enough. The president and his national security team must begin working directly with Congress to enact legislation decisively overturning the 1993 law. Instead of actually supporting the legislation that has been introduced in both Houses of Congress, the Pentagon has appointed a high-level working group to “ensure that the department is ready should the law be changed.”⁴ This group has three main tasks:

- To reach out to members of the armed services to gauge their views on the issue
- To undertake a thorough examination of all changes to the department’s regulations that will be needed if the policy is repealed
- To examine the potential impact of the repeal on military readiness

Secretary Gates also instructed the RAND Corporation to update its 1993 study on the impact of allowing openly gay men and women to serve in the military in testimony before Congress in February. The secretary noted the review could take up to a year to complete. But this is nonsense. The working group’s first two tasks or objectives have already been completed.

Numerous official government studies dating back to the 1950s confirm that reversing the ban on gays and lesbians in the military will not undermine unit effectiveness or cohesion. According to the Palm Center at the University of California-Santa Barbara, “no reputable or peer-reviewed study has ever shown that allowing service by openly gay personnel will compromise military effectiveness.”⁵ In fact, historian Nathaniel Frank, perhaps the foremost authority on the military’s current policy on gay troops and author of the seminal study on the issue, notes that the ban itself is not “based on sound research because no research has ever shown that openly gay service hurts the military.”⁶

The Clinton administration learned the hard way that studying the impact of the change on military readiness “further would cause waste, delay, and a possible backlash” when it was forced to set up the Military Working Group—many of whose members opposed Clinton’s policy—to study the question of open service.⁷ Congressional proponents of maintaining the ban on homosexual service members—which existed prior to Clinton’s 1993 “Don’t Ask, Don’t Tell” compromise—used the opportunity created by the Working Group’s 1993 review to conduct sensationalist hearings questioning the feasibility of allowing gays and lesbians to serve openly.

The 1993 RAND study demonstrated conclusively that any delay would be counterproductive. RAND went further to state that the “new policy regarding homosexuals in the military... be decided upon and implemented as quickly as possible.” RAND based its recommendation on the prediction that any delay would cause undue anxiety within the

The working group’s first two tasks or objectives have already been completed.

services, allow opponents to work together to undermine the potential policy change, and signal a lack of commitment to the policy. And that's exactly what happened.

Similarly, the views of service members on this issue have already been thoroughly examined. The *Military Times* conducted a poll of the opinions of U.S. service members on the issue earlier this year. The poll demonstrated that opposition to gays serving openly in the military sharply declined among service members in recent years. The poll of 3,000 active duty troops revealed that opposition to gay men and lesbians serving openly in the military fell to about half (51 percent) from nearly two-thirds (65 percent) in 2004. Additionally, a recent poll of recently returned Iraq and Afghanistan veterans found that 73 percent are personally comfortable in the presence of gays and lesbians, including 37 percent who are very comfortable.⁸ This means today's military is much more supportive of allowing gays to serve openly than were service members of the past to other social changes such as integrating African Americans or opening up combat positions to women.

Moreover, anecdotal evidence suggests that the troops themselves have simply moved on. Shortly after Admiral Mullen's dramatic testimony before Congress, he did not receive a single question on the potential change in policy toward gays and lesbians during a trip to visit service members stationed in Jordan. And Air Force Chief Master Sgt. Darryl Robinson, the operations coordinator for the defense attaché office at the U.S. Embassy in Amman, told reporters after the admiral's question-and-answer session that "The U.S. military was always at the forefront of social change... We didn't wait for laws to change."⁹

Most importantly, while consulting our troops must be a component of the process to repeal "Don't Ask, Don't Tell," leaving the decision up to the troops alone would be unprecedented and would undermine the chain of command. What the Department of Defense should do is engage our men and women in uniform in a discussion about the information and resources they believe would be most helpful to them during the implementation of the new policy.

The Pentagon's review should also recognize the overwhelming support of the American people for overturning the ban. Seventy-five percent of Americans in a recent *Washington Post* poll supported openly gay people serving in the U.S. military, up from 62 percent in early 2001 and 44 percent in 1993, when President Clinton tried to overturn the ban.¹⁰ Overturning the policy enjoys broad appeal across partisan lines as well: The same poll found that majorities across party lines favor repeal, "with support among Democrats (82 percent) and independents (77 percent) higher than among Republicans (64 percent)."

The Pentagon's working group should, however, undertake the second objective and begin a review of the rules and regulations that must be updated in order to effectively and seamlessly implement the policy change. But this review must focus on *how* to implement the change rather than *whether or not* to do so.

Those who take the point of view that there must be a long period of transition are simply setting up a straw man to hide their real agenda, which is to maintain the current ban. Given these arguments, it is critical that the repeal of “Don’t Ask, Don’t Tell” not be perceived as a complicated puzzle requiring complex solutions to minor problems. Substantial research finds that transitioning to an inclusive policy would be significantly less difficult than proponents of “Don’t Ask, Don’t Tell” claim.¹¹ Pentagon Press Secretary Geoff Morrell recently overstated the complexity of this transition when he said on March 3, 2010—after Sen. Lieberman introduced his bill to repeal the policy—that “we need to know more than we know about what the potential impact would be.”¹²

But as this study and the experiences of some of our closest allies will demonstrate, once the law is repealed there are a number of fairly limited and manageable administrative, bureaucratic, and legal changes that must be made to the military’s internal regulations dealing with benefits, housing, conduct, and other relevant topics. Most existing regulations are already neutral with respect to sexual orientation and therefore don’t need to be modified. Others will require minor changes in legislation or additional executive guidance.

This report will analyze the eight critical areas where we believe the military must change rules and regulations in order to effectively implement the new policy (see text-box on page 5). For the most part, these are minor changes to existing standards and can be instituted relatively quickly. Before making our specific recommendations for U.S. policy, we will examine the experiences of our allies in Canada, Israel, and the United Kingdom to demonstrate how their militaries successfully integrated openly gay men and women into their armed forces. Analyzing their experiences will make clear that the U.S. military does not need months or years to make this change, and that the transition can be made quickly and easily.

Twenty-five nations allow openly gay men and women to serve in their militaries, including the majority of our NATO allies. But this report relies primarily on the United Kingdom, Canada, and Israel. These countries were chosen for several reasons.

First, their militaries are structured like ours. Their forces deploy globally and are frequently ordered to live in close quarters, such as on submarines. Second, their forces maintain a high level of readiness and engage in combat frequently. Third, the Canadians, Britons, and Israelis share a set of progressive cultural values similar to those of the United States. While the culture of the American military—or any military for that matter—has certain distinct features, the experiences of these militaries, which resemble our own, can provide valuable insight into how the United States should approach the repeal of “Don’t Ask, Don’t Tell.” Finally, these countries dropped the ban on gays serving openly in the military around the same time that the United States decided not to do so.

Ensuring smooth implementation of the repeal of “Don’t Ask, Don’t Tell”

Key recommendations and findings

Training

- Mandate that the Department of Defense make sexual orientation part of existing servicewide nondiscrimination training programs
- Update all training manuals and the Military Equal Opportunity program to include nondiscrimination based on sexual orientation

Legal issues arising from repeal

- After “Don’t Ask, Don’t Tell” is repealed, there will be no federal law prohibiting service members’ same-sex partners from receiving certain benefits afforded to the same-sex partners of civilian DoD employees and employees of other federal agencies, including the State Department. Certain benefits can be provided if the president revises and reissues his June 2009 White House memo on same-sex domestic partners to include the military services. Alternatively, the military can provide these benefits on its own.

Housing and common-use facilities

- Signal clearly that the military will not segregate housing, showering, and other common-use facilities based on sexual orientation
- Moreover, the military should look first to the State Department in order to determine if service members’ same-sex partners, who meet domestic partner criteria established by the State Department in January 2009, can be allowed to reside in on-base housing or receive the augmented basic housing allowance that married military personnel receive.

Benefits

- There is no federal law (beyond “Don’t Ask, Don’t Tell”) that prohibits the president from applying the June 2009 White House memo that establishes a procedure for extending certain benefits to the same-sex partners of federal civil service employees to same-sex partners of service members.
- The White House memo called on the heads of all federal agencies except the Pentagon to “conduct a review of the benefits provided by their respective departments and agencies to determine what authority they have to extend such benefits to same-sex domestic partners of federal employees.” The Department of Defense should be called upon to do the same.

Code of Conduct issues

- Congress should repeal the ban on sodomy in the Uniform Code of Military Justice, which is rarely enforced on heterosexuals, and replace it with a ban on all sexual acts that undermine good order and discipline.
- DoD should implement a broad code of social conduct based on the U.K. model that covers all personal relationships and behavior that undermine good order and discipline.

Discipline and promotion

- A broad code of social conduct should be implemented as discussed in the above section, and the military’s equal opportunity program should be amended to include issues of sexual orientation, as discussed in the training section.
- Beyond these measures, existing regulations are adequate to provide protection for both homosexual and heterosexual service members on issues of discipline and promotion.

Retroactive compensation and reinstatement

- DoD should allow previously discharged service members the opportunity to re-enlist provided that they meet all other age, fitness, moral, and educational standards as all other prior service members must.
- Prior service applicants should follow existing application procedures whenever possible. The services, Congress, and the White House should work together to establish a fair and uniform procedure for considering requests from former officers.
- Congress should permit a one-time temporary exception for service members discharged under “Don’t Ask, Don’t Tell” who wish to re-enlist if the only barrier to their re-enlistment is a restriction on the number of noncommissioned officers or commissioned officers who may be maintained in a particular military rank.

Health concerns

- Existing health regulations are adequate and do not need to be revised, including pre-entry HIV testing and regular testing for active duty service members and troops about to deploy.

Proponents of maintaining the policy argue that the U.S. military must conclude its exhaustive and in many ways redundant review process before Congress begins drafting and enacting legislation for the law's repeal. We disagree. The Pentagon is fully capable of providing a list of administrative and procedural changes to Congress while both houses take up their respective pieces of legislation.

Nor is there a need for an excessively long implementation period. As noted above, Secretary Gates has indicated that even after Congress repeals the law, the Pentagon could take up to a year to implement the new policy. But the experiences of foreign militaries and RAND's 1993 study indicate that immediate implementation not only can be done but is also the most effective way to make the policy change.

The Palm Center also notes that leadership and consistency will be incredibly important to the repeal: "Senior leaders must send clear signals of support for the new policy, and ensure that commanders discipline those who disobey it. In addition, the military must have a single code of conduct that applies irrespective of sexual orientation, and that holds every service member to the same behavioral standards."¹³

The experiences of the United Kingdom, Canada, and Israel make it clear that integrating openly gay men and women into the armed forces need not be the laborious and contentious process some fear. Several administrative and policy changes can ease the transition, and a wide body of literature and practical experience exists to guide this process.

All reputable military, academic, and popular studies and polls show that the American people are ready for this costly, ineffective, and discriminatory policy to end. The military's top uniformed and civilian leadership has signaled that it is in favor of repeal, too. Now is the time for Congress, the White House, and the Pentagon to improve military readiness by permitting gay and lesbian Americans the opportunity to serve their country without forcing them to live a lie.

The Pentagon is fully capable of providing a list of administrative and procedural changes to Congress while both houses take up their respective pieces of legislation.

Integrating openly gay and lesbian service members

Experiences of foreign militaries

United Kingdom

Of the three countries examined in this paper, the United Kingdom has had the most recent experience establishing a policy of allowing open service. Until the European Court of Human Rights forced the United Kingdom to overturn its ban in 2000, gay and lesbian service members and known homosexuals could be prosecuted under military regulations and discharged.

The ban began to erode in the mid-1990s, when the Ministry of Defense, or MoD, initiated a Homosexual Policy Assessment Team in response to a failed court case challenging U.K. policies on military service and homosexuality. The team did not ultimately advocate overturning the existing policy, but the Palm Center notes that “its report made clear that there was no evidence that gays were unsuited to military service and that the assumption that gays were a threat to security and a predatory menace to young troops were unfounded.”¹⁴

The United Kingdom took steps to modify its policy before repealing it entirely. Gay and lesbian service members could still be discharged under the modified policy, but “military leaders told commanders only to investigate suspect homosexuals if an unavoidable problem arose.”¹⁵

All restrictions were dropped after the Ministry of Defense lost a legal challenge to its policies in the European Court of Human Rights. Four former service members were awarded monetary compensation from the ECHR, and the court ruled in September 1999 that “there had been a violation of Article 8 (right to respect for private and family life) of the European Convention on Human Rights” of which the United Kingdom is a signatory.¹⁶ The United Kingdom announced in December 1999 that it would comply with the court’s decision and would no longer investigate or discharge service members on the basis of their sexual orientation. The new policy became effective in January 2000, a month after the announcement.¹⁷

Thirty months after the United Kingdom changed its policy to permit open service, the Ministry of Defense concluded in a tri-service review of its army, air force, and navy that the change had been accomplished smoothly. The Royal Air Force reported that “the overwhelming view of RAF COs [commanding officers] is that the change in policy was overdue and represented recognition of the diverse culture in which we all live. All COs agreed that there had been no tangible impact on operational effectiveness, team cohesion, or Service life generally.”¹⁸ The implementation sections in the report detail the steps the MoD took to achieve this smooth transition without undermining military readiness.

Timeline: The United Kingdom Overturns Open Service Ban

European Court of Human Rights finds U.K. ban violates convention

Mid-1990s

The U.K. Ministry of Defense Homosexual Policy Assessment Team finds no evidence that gays are unsuited for military service.

1999

The United Kingdom announces that it will comply with the European Court of Human Rights’ decision to allow open service, and it stops investigating and discharging service members on the basis of sexual orientation.

2000

The United Kingdom overturns its ban on open service.

2002

A U.K. Ministry of Defense review finds that the ban has no tangible impact on operational effectiveness, team cohesion, or service life in general.

2004

The U.K. Civil Partnership Act of 2004 passes.

2005

The Civil Partnership Act of 2004 goes into effect giving legal status to same-sex couples.

Integrating openly gay and lesbian service members (continued)

Israel

The Israeli military, the only conscription (drafted) force considered in this report, never operated under a blanket ban on open service. Yet the Israel Defense Forces, or IDF, did maintain some irregularly enforced restrictions on gay and lesbian service members until June 1993. This was similar to the policy that existed in the U.S. military until 1980. A 1983 military order imposed limits on career paths for homosexuals—intelligence positions requiring top secret clearances were officially off limits to gay and lesbian service members—and mandated a psychological evaluation for any known or suspected homosexuals. Members of the IDF were not automatically dismissed based on their sexual orientation under this policy, but such discharges were still legally permitted.¹⁹

A U.S. Government Accountability Office, or GAO, analysis found that pre-1993 restrictions in Israel on the positions open to gay and lesbian service members were “not followed in practice.” During the GAO’s research in Israel in the early 1990s, before the remaining restrictions were removed, staff were told that gays and lesbians were serving in intelligence positions and “were found to be capable of doing their jobs without problems.”²⁰ The dismissal of IDF Colonel Uzi Even under this policy in the 1980s later provided the impetus to repeal all remaining restrictions.

Colonel Even revealed the circumstances of his discharge from the IDF in 1993 testimony to a subcommittee of the Israeli Knesset, the legislative branch of the Israeli government. Even, a former intelligence officer, was dismissed from the IDF and stripped of his security clearance in 1983 after his homosexuality became known.²¹ The Palm Center notes that, “Even conducted highly classified military research for 15 years and was open about his sexual orientation and therefore not at-risk for blackmail when the IDF revoked his security clearance.”²²

The Israeli prime minister convened a military committee to study the issue as a result of Even’s testimony and the subsequent public backlash against the military. The committee subsequently drafted a policy of nondiscrimination based on sexual orientation. A review conducted in 2000, seven years after openly gay men and women were allowed to serve in the IDF, showed no indication that lifting the gay ban compromised military effectiveness.²³ Additional information on the implementation of this policy is contained in the sections that follow.

Timeline: Israel Moves to Open Service

Colonel’s testimony prompts new policy

1983

Israel imposes limits on career paths for gays and lesbians and mandates that they undergo psychological evaluations.

1988

Sodomy is decriminalized in Israel.

February 1993

Former Israeli Defense Forces Colonel Uzi Even testifies before the Israeli Knesset that he was stripped of his security clearance and discharged in 1983 because of his sexual orientation. The testimony prompts a national response and the military chief of staff subsequently forms a committee to review the military’s policy.

June 11, 1993

The IDF officially adopts a policy of nondiscrimination on the basis of sexual orientation.

1997

The Tel Aviv District Court orders the Israeli army to grant Adir Steiner the benefits of his late partner, Colonel Doron Maisel. Following the decision, same-sex partners of federal employees, including the IDF, are extended the same benefits that heterosexual spouses receive.

Integrating openly gay and lesbian service members (continued)

Canada

The Canadian Forces accepted openly gay and lesbian service members beginning in 1992. The move to permit open service resulted from the evolution of Canada's national human rights policies. In 1985 the country implemented a national Charter of Rights and Freedoms, which did not specifically provide for protection on the basis of sexual orientation but did require equal treatment and protection under the law without discrimination based on a number of specified characteristics. These protections built on similar guarantees in Canada's 1977 Human Rights Act.

In the late 1980s and early 1990s, this framework was examined for its relevance to sexual orientation. A GAO study notes that in 1990 the attorney general of Canada acknowledged that sexual orientation was covered by the Charter of Rights and Freedoms, and two years later "the Court of Appeal for Ontario determined that the Canadian Human Rights Act should be interpreted to include sexual orientation as an illegal basis of discrimination."²⁴

Prior to 1988, the Canadian Forces maintained an outright ban on gays and lesbians in the military. Service members found to be homosexual were automatically discharged, just as in the United States. GAO also notes that the regulations governing gays and lesbians in the military "required military personnel to report to their superiors other soldiers whom they suspected or discovered were homosexual."²⁵ These stringent regulations were loosened in 1988 after several years of consideration. Service members were no longer required to report suspected gays and lesbians, and homosexuals were permitted to refuse discharge on the basis of their sexual orientation—though severe discriminatory practices remained for those who continued to serve.

The Canadian Forces' policy was finally revoked in 1992 when five former service members challenged the policy in court, claiming that it violated the Charter of Rights and Freedoms.²⁶ The Canadian Forces settled in court later that same year and replaced the 1988 policy with one of nondiscrimination on the basis of sexual orientation. It did so despite opposition from within the military, including predictions that large numbers of service members would refuse to shower or bunk with homosexuals and would refuse to re-enlist.

Research by the Palm Center at the University of California-Santa Barbara reveals that just the opposite occurred. Palm researchers noted that "after the ban was lifted... follow-up studies found no increase in disciplinary, performance, recruitment, sexual misconduct, or resignation problems."²⁷ Detailed information on Canada's experience repealing its ban without undermining unit cohesion or military readiness is included in the implementation sections of this report.

Timeline: Canada Repeals Ban on Open Service

Service members challenge ban and win

1985

Canada implements a national Charter of Rights and Freedoms that does not specifically provide protection on the basis of sexual orientation.

1988

Prior to 1988, the Canadian Forces maintained an outright ban on openly gay men and women in the military.

1990

The attorney general of Canada acknowledges that sexual orientation is covered by the national Charter of Rights and Freedoms.

1992

Canada repeals its ban on open service.

1992

A Canadian federal human rights tribunal orders all branches of the Canadian government, including the military, to provide the same medical, dental, and other benefits to gay and lesbian couples as heterosexual common-law couples.

2005

Canada legalizes gay marriage.

Training issues

After the law banning gay men and women from serving openly in the military is overturned, the U.S. military services will immediately need to implement training programs to ensure that the new rules and regulations are effectively and uniformly communicated, understood, and executed. Countries whose militaries have successfully integrated openly gay men and women into the armed forces have done just that.

Careful review of these nations' training programs reveals that the most important characteristic is incorporating gender and sexual-orientation-neutral training into all military service training programs. U.S. Air Force Colonel Om Prakash supports this point. In *Joint Force Quarterly*—the journal published by the U.S. military's National Defense University for the Chairman of the Joint Chiefs of Staff—Colonel Prakash argued that after repealing the military's "Don't Ask, Don't Tell" policy "sexual harassment regulations and sensitivity training would need to be updated, and guidance from leadership would be necessary. These would not be insurmountable obstacles."²⁸

As the Department of Defense sets up programs for training their forces after the repeal, it would learn a great deal by reviewing the experiences of our allies, especially the British and Canadians, both of whom set up training programs for their forces after their repeals.

The British experience

An early and effective training program was an important element of the successful integration of gay and lesbian service members into the British Armed Forces in 2000. Just as crucial, the British created a new Armed Forces Code of Social Conduct that applied equally to heterosexuals and homosexuals. The code served as the basis for effective training programs for all three British military services.

The new code makes clear that behavior that undermines trust and cohesion such as "unwelcome sexual attention in the form of physical or verbal conduct ... displays of affection which might cause offence to others ... and taking sexual advantage of subordinates" is not permitted in the British Armed Services regardless of sexual orientation. The conduct section of this report discusses the code further.

Then-British Secretary of State for Defense Geoffrey Hoon announced the policy change on January 12, 2000, a few weeks after the government announced it would comply with the decision of the European Court of Human Rights. He noted that there would be “zero tolerance” for harassment, discrimination, and bullying on the basis of any of the conditions outlined in the Code of Social Conduct.

In February 2000, the British Royal Air Force became the first service to encourage tolerance toward homosexuality in its officer training corps. The Royal Navy and the Army quickly followed suit. The new training regimen “discusse[d] the issue during the ‘beliefs and values’ session, which [was] conducted by chaplains and staff. Officer candidates [were] informed that homosexuality is compatible with service and does not damage team morale. They [were] also taught that overt displays of affection, whether heterosexual or homosexual, threaten team discipline.”²⁹

Since the law’s repeal, trainings and discussion sessions on the code of social conduct and the importance of equal treatment within the British Armed Forces for both heterosexuals and homosexuals have been integrated successfully into training at the Tri-Service Equal Opportunities Training Center, the training site for the Services’ Equal Opportunity Advisors.³⁰ The Ministry of Defense’s Service Personnel Board undertook an extensive review of the impact of all three services’ policy on homosexuality and the code of social conduct two years after the ban’s repeal. Their report found that, “The overwhelming majority of attendees now see homosexuality within the Armed Forces as a non-issue and are content with the policy and the management implications.”

More importantly, the review found that there had been, “very few management or disciplinary problems highlighted by attendees, and it is evident that in the vast majority of units across the services, sexual orientation is viewed as irrelevant.”³¹

The study found that the new training scheme and code of conduct had been so thoroughly accepted and carried out that merely two years after the ban’s repeal no further review of the armed forces policy on homosexuality was judged to be necessary.

The British even hired Stonewall—a lesbian, gay, and bisexual lobbying and aid group—to conduct training courses for their troops. The organization promotes best practices and gives private and public organizations guidance on how to create workplace equality. “The Royal Navy and Royal Air Force are ... members, alongside companies such as Barclays and IBM and many public sector bodies,” according to a recent article on the group’s involvement with the British armed services. “The Army [began] working with Stonewall [in 2008] to promote good working conditions for all existing and potential employees and to ensure equal treatment for those who are lesbian, gay and bisexual.”³²

The Canadian experience

Unlike the British, the Canadian Department of National Defense, or DND, did not institute a separate program “to handle same-sex sexual harassment or personal harassment based on sexual orientation” immediately following the overturn of the ban in 1992. Four years after the repeal, however, the DND did implement the Standards for Harassment and Racism Prevention program, or SHARP, to “increase general awareness about abuse, including harassment based on sexual orientation. The mandatory program provided information designed to help service members recognize and prevent harassment and racist conduct.”³³

The SHARP workbook listed sexual orientation as one of the grounds on which harassment was prohibited and provided “examples of prohibited dialogue... The materials use[d] gender-and orientation-neutral terms to describe specific misconduct such as leering, requests for sexual favours, derogatory name-calling, and sexually suggestive gestures that constitute harassment regardless of the gender or orientation of the harasser or the target.”³⁴

In 2000, the DND then created the Cadet Harassment and Abuse Prevention, or CHAP program, to support the prevention of harassment and abuse in future generations of the Canadian Armed Forces. CHAP provides members of the armed services “with an awareness of their rights and responsibilities with regards to harassment and abuse.” Members of the Canadian Cadet program are trained to recognize “inappropriate kinds of behavior and what action should be taken in the event of an incident.”

CHAP consists of two levels: a sensitization module for all members of the Cadet Movement and a leadership module for senior cadets in a position of authority as well as officers of the Cadet Instructors Cadre, civilian instructors, and volunteers.

The CHAP program is mandatory, and all CHAP instructors at the lieutenant or sublieutenant level must complete the Canadian Forces SHARP program and a two-day “train the trainer” course specifically designed to prepare them to deliver the CHAP program. CHAP trainings are small, group-oriented meetings meant to ensure maximum effectiveness.³⁵

Recommendations for U.S. policy

The Department of Defense should follow the example of the British and Canadian armed forces and integrate sexual orientation into its existing nondiscrimination training programs and training manuals to coincide with the policy change. The basis for the sessions should be gender- and sexual-orientation-neutral training based on revised criteria for the Military Equal Opportunity program, or MEO, “a program that formulates, directs, and sustains a comprehensive effort to maximize human potential to ensure fair treatment for military personnel.”

The American experience with personnel-related training

The American military also has significant experience conducting servicewide training in response to previous social policy changes. To cite one example, in July 1992 Acting Navy Secretary J. Daniel Howard ordered an entire-day service stand down for training on the Navy's sexual harassment rules following the revelation that 83 women and 7 men were sexually assaulted in September 1991 during the annual Las Vegas symposium of the Tailhook Association.

As a result of this incident, then-Secretary of Defense Dick Cheney fired the secretary of the Navy and terminated the Navy's involvement with Tailhook, a nonprofit fraternal organization supporting sea-based aviation that hosted the annual convention of thousands of active duty, reserve, retired, and civilian Navy and Marine Corps personnel in Las Vegas.

Acting Secretary Howard ordered "every command, every unit in the Navy and Marine Corps, to suspend operations for a single full day to conduct" the training on sexual harassment policies and standards of conduct over the course of 60 days in mid-1992. Howard said he hoped to eliminate "'fuzzy' definitions of sexual harassment by amending military law to specifically describe the behavior."³⁶

While sexual harassment and assaults in the United States military have not been completely eliminated, it is clear that the services have wide experience designing and conducting servicewide training programs that would prove useful in implementing the new policy once "Don't Ask, Don't Tell" is repealed.

DoD's policies currently stipulate that "programs or activities conducted by, or that receive financial assistance from, the Department of Defense shall not unlawfully discriminate against individuals on the basis of race, color, national origin, sex, religion, age, or disability in accordance with guidance issued by DOJ, DHHS, the Department of Labor, and the Small Business Administration."³⁷ DoD's future directives can easily be expanded to include prevention of discrimination on the basis of sexual orientation as our British and Canadian colleagues have done.

Moreover, there are many opportunities for these trainings to take place. DoD's February 2009 directive on diversity management and equal opportunity programs declared that the MEO program must include "periodic, mandatory education and training in human relations and MEO at installation and operational unit commands, during pre-commissioning programs and initial entry training, and throughout professional military education systems."³⁸

All service members should be required to participate in gender- and sexual-orientation-neutral training immediately following the repeal of "Don't Ask, Don't Tell," and these training sessions can be modeled on the servicewide stand down that followed the infamous Tailhook incident in the early 1990s. A clear policy of nondiscrimination based on sexual orientation should be a topic in all future training programs across the services.

Military housing and cohabitation issues

Military service often requires the men and women of our armed forces to live, sleep, and eat in close quarters with one another on a daily basis. The relationships that are developed in basic training or boot camp and through cohabitation with fellow service members can foster strong bonds of friendship and camaraderie that can last a lifetime and enhance military effectiveness. At times, however, forced cohabitation can also create tension, cause animosity, and inhibit performance.

In today's American armed forces, men and women of all races, religions, and socioeconomic backgrounds volunteer to live and work together toward a common goal. It is inevitable in this environment that certain individuals will take issue with working and living alongside fellow service members who they perceive to have values, views, or ways of life with which they do not agree or are unfamiliar.

Opponents of repealing "Don't Ask, Don't Tell" cite a small but vocal number of service members who strongly oppose serving alongside openly gay and lesbian service members as a reason for leaving the current policy in place. These service members and their supporters contend that allowing openly gay service members into the armed services would significantly disrupt unit cohesion and lead to increased instances of harassment.

Similar complaints were raised when Americans of color were integrated into the military beginning in the late 1940s. More recently, many service members and senior officers complained that the introduction of women into significant combat roles would be a hindrance to military readiness. Indeed, Former Marine Commandant General Robert Barrow said in the early 1990s that putting women in combat units would destroy the Marine Corps—something no foreign army could ever do. And General Merrill McPeak, Air Force Chief of Staff from 1990 to 1994, went so far as to say he would prefer having an unqualified man flying a combat aircraft than allow a woman to pilot the aircraft.³⁹

But none of these nightmare scenarios came to pass. Nor did they occur in any of the 25 nations that have dropped the ban. On the contrary, military leaders and military analysts alike laud the benefits that a diverse talent pool brings to the armed forces. And our military leadership is now moving to permit female sailors to serve as submariners and modify the ban on women serving in ground-combat units, steps that many of their predecessors opposed vehemently.

Americans of color and American women have proven their indispensable value to the armed forces both in the skills they bring to the services and through their leadership in times of war and peace. Some special living provisions were made for female service members—including separate showers and restroom facilities—but by in large men and women of all races, religions, and values train together, sleep in extremely close quarters, and eat in the same mess halls without detriment to unit cohesion or military effectiveness.

These realities notwithstanding, proponents of the law banning openly gay men and women from military service rehash old doomsday scenarios to keep this counterproductive and discriminatory law in place. This despite the fact that today tens of thousands of gay men and women whose sexual orientation is already known to many of their fellow servicemen and women are already serving with no negative effect on military readiness. As Admiral Michael Mullen, chairman of the Joint Chiefs of Staff, noted during his testimony before the Senate Armed Services committee in February, “I have served with homosexuals since 1968 ... everybody in the military has.”

The militaries of Great Britain, Canada, and Israel amply demonstrate that lifting the ban on openly gay service will not require the U.S. military to provide separate housing, shower, or other common-use facilities for gay and lesbian service members. In fact, the notion of segregating gay and straight service members, as some have proposed, would be counterproductive.

Even General Carl Mundy, commandant of the Marine Corps from 1991 to 1995 and a fierce opponent of repealing “Don’t Ask, Don’t Tell,” recently argued that “The last thing you even want to think about is creating separate facilities or separate groups or separate meeting places or having four kinds of showers—one of straight women, lesbians, straight men and gay men. That would be absolutely disastrous in the armed forces ... It would destroy any sense of cohesion or teamwork or good order and discipline.”⁴⁰

This is not to say that lifting the ban will not require the U.S. military to undertake certain administrative changes for housing and cohabitation. Among other things, the military will need to decide whether and under what circumstances it will allow the partners of gay and lesbian service members to share on-base housing. The military will also have to decide whether gay service members with a domestic partner will receive the augmented basic housing allowance that married heterosexuals do. Finally, the military will have to decide whether service members in small living quarters (three or less, for example) will be able to request to change their housing situation if they are uncomfortable living with an openly gay service member.

Tens of thousands of gay men and women whose sexual orientation is already known to many of their fellow servicemen and women are already serving with no negative effect on military readiness.

The British experience

Cohabitation issues were one of British military leaders' foremost concerns in the leadup to the reversal of that country's ban on gay men and women in the armed forces. Interviews conducted with military leaders and an official Ministry of Defense review of the policy's implementation, however, reveal that cohabitation is, in the words of numerous British officials, "not now nor ever was an issue."

Before Britain was forced to lift its ban, many British military leaders, like current proponents of maintaining "Don't Ask, Don't Tell," argued that "the intimacy of living together in same-sex barracks, showering together, and sharing toilet and washing facilities made homosexual service impractical." They further contended that "heterosexual service members would feel uncomfortable showering or sleeping next to a homosexual soldier."⁴¹ British naval personnel's primary concern was "the lack of privacy on board a ship or submarine, particularly in the confined living conditions in single sex messes."⁴² Such apprehensions about sharing living quarters and other facilities were widespread among British military officials of all services before dropping the ban.

But such concerns turned out to be much ado about nothing and abruptly disappeared once openly gay men and women were integrated into the military and began living and sleeping in the same quarters as straight service members. The key to a smooth transition was the introduction of the new British Code of Social Conduct. Commander S.N. Cooper, LLB and barrister for Naval Personnel and Service Conditions, who worked on the new Code of Social Conduct, explained that:

The prime concern, and really the only one raised by people in the run-up to the publication of this policy... was sharing accommodations. ... straight chaps and straight girls might not necessarily like having to share living, changing and washing facilities with people of another sexual orientation. ... We've taken the view that we will not separate out homosexuals and give them separate living accommodations. Now I would characterize the reaction to that as being very short-term complaints, very loud but short-lived. And as far as I know, the Armed Forces of the United Kingdom has only lost three people who have resigned over this issue.

Military officials interviewed for a Palm Center report in 2000—the year of the law's repeal—were also not aware that the housing policy had "negatively affected recruit training completion rates or that there had been any training problems related to the lifting of the ban."

British armed forces' housing provisions are currently guided by the Tri-Service Accommodation Regulations, which provide the policy for the provision of living quarters such as Service Family Accommodations for service personnel. Since the Civil Partnership Act of 2004 went into effect in 2005 giving legal status to same-sex partnerships in Britain, the armed services have treated personnel who are registered in a civil

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partnership the same way as married personnel. (Previously, SFA was referred to as “married quarters,” but the terminology has been changed to SFA to take into account the introduction of civil partnerships.)

Currently all military personnel are placed into a Personnel Status Category. Those in the British military’s so-called Personnel Category 1 must meet one of the following qualifying criteria:

- A legally married member of the armed forces, who lives with his or her spouse, or who would do so but for the exigencies of the armed forces.
- A member of the armed forces, who is registered in a civil partnership in accordance with the Civil Partnership Act of 2004, or is in a civil partnership under an overseas scheme recognized under that act, and who lives with his or her registered civil partner, or who would do so but for the exigencies of the armed forces.

All service members who fall under Personnel Status Category 1 (regardless of whether they meet either of the descriptions above) are eligible to receive SFA accommodation. British military officials interviewed for this report were not aware that the housing policy had had any significantly adverse effect in the 10 years since the ban was lifted.

The Canadian experience

The Canadian military settled a court case in October 1992 challenging the treatment of homosexuals within the military, which effectively ended the Canadian military’s discrimination practice.⁴³ Immediately after the ban was repealed, Canadian military leaders made several decisions regarding the treatment of homosexuals in the military. For instance, they decided that there would be equal standards of conduct regardless of sexual orientation, that homosexuals and heterosexuals could share living quarters, and that no exceptions would be made for heterosexuals or homosexuals with regard to accommodation.⁴⁴

The military relied upon its updated code of conduct and new harassment and rape program to increase general awareness about issues that would arise with openly gay men and women in the ranks and to ensure that service members who lived together in shared housing adhered to conduct guidelines regardless of their sexuality orientation. The Canadian national forces have three main criteria for housing: suitability, availability, and affordability.⁴⁵ As such, Canadian service members are assigned to housing units on a first-come, first-serve basis without regard to rank, position, or marital status.⁴⁶

Service members with the lowest ranks live in a shared room with a shared bathroom and, as their rank increases, they are afforded single rooms with shared bathrooms.⁴⁷ Service members’ partners can choose to live in the same unit because of Canada’s policy on gay marriage, and service members in common-law relationships can also seek a housing unit together.

The Israeli experience

The Israeli Defense Forces introduced a policy of total equality toward gay and lesbian soldiers after formally abolishing the ban on openly gay men and women serving in some positions in the IDF in 1993. But while the IDF maintains an inclusive policy regardless of sexual orientation, the Israeli military has not codified the rules and regulations that govern that policy as the Canadian and British forces have done. Rather, the IDF deals with issues that arise with openly gay service on a case-by-case common-sense basis.⁴⁸

All IDF service members generally live together in shared housing regardless of their sexual orientation. When interviewed, an anonymous female Israeli officer remarked that “there are no laws that refer to gay people’s service; they live in the same rooms and serve in the same units [as heterosexual soldiers].”⁴⁹

But there are some—though relatively few—soldiers who remain uncomfortable with homosexual soldiers despite the IDF’s nondiscriminatory policy. As one soldier explained, “The truth is [serving under a gay commander] would be a bit strange for me... I would try to get used to the idea and if I did not succeed I would request a transfer.” A study by Melissa Levitt and Aaron Belkin reports that some heterosexual Israeli soldiers are allowed to live off base or change units if they are having trouble with their unit.⁵⁰

Despite this, most IDF soldiers and officers are relatively comfortable with the idea of having openly gay and lesbian soldiers serving in their units. Similar to the concerns of some in the U.S. military, the shared use of shower facilities was the most commonly expressed concern with open homosexual service in the IDF. For example, Second Lieutenant Gal, a human resources officer, told Belkin and Levitt that he believes gay and lesbian soldiers have an equal right to serve in the IDF, but he “wouldn’t shower with [them]. There are cubicles here at [the officer’s training base].”⁵¹

The IDF overcame this common apprehension, however, with common-sense solutions. Some commanders allow their heterosexual soldiers to shower privately.⁵² Of those surveyed, Belkin and Levitt found that only 12 brought up the issue of showering with gay soldiers, and 3 objected to it entirely.⁵³

The IDF has no official policy regarding housing and sexual orientation. Soldiers are only required to travel short distances within Israel to reach their bases, so many soldiers live on “open bases” that allow those stationed there to return to their families on weekends. The IDF also has no official rules regarding same-sex couples living together in military housing, but this is not forbidden. As mentioned above, when problems arise between soldiers they are effectively handled by commanders on a case-by-case basis.

Current U.S. military housing policy

Housing can greatly influence military readiness and retention. The Defense Department states that, “the quality of military housing—as part of the military quality of life—is a key component of military readiness.” Quality housing helps DoD retain the best personnel for its all-volunteer military force. And according to the DoD, troops who are satisfied with their living conditions are more likely to remain in the service.

Once service members complete basic training or boot camp—where recruits are required to live together in a barracks—service members increasingly have the option of living in either on-base housing or living in private-sector housing located off base.

DoD established the Military Housing Privatization Initiative in 1996 in order to address the relatively poor condition of DoD-owned housing and the shortage of quality affordable private housing. The initiative aims to “attract private sector financing, expertise and innovation to provide necessary housing faster and more efficiently than traditional Military Construction processes would allow.” DoD’s policy since the 1996 initiative is to rely on the private sector first for its

housing needs. A service member receives a basic housing allowance if the member and his or her family choose to live in off-base housing or if that is the only option available to them. Housing allowances vary depending on a number of factors including geographic location, pay grade, and dependency status.

DoD owns and operates about 134,000 on-base housing units worldwide.⁵⁴ The basis for on-base housing assignments is determined by rank and family size.⁵⁵ As of fiscal year 2007, roughly 63 percent of military families lived in off-base private-sector housing while 10 percent of military families live in on-base military housing.

The remaining 24 percent of service members live in on-base privatized housing and this number is increasing. DoD provides military housing in areas where “private-sector housing falls short, considering cost, commuting area, and other established criteria. In these cases, it operates barracks for unaccompanied personnel, military family housing for members with dependents, and temporary lodging for Service members changing station or on temporary duty.”

Recommendations for U. S. policy

A review of the 25 foreign militaries that have adopted an inclusive policy for military service including the British, Canadians, and Israelis reveals that “none of the countries studied installed separate facilities for gay troops.”⁵⁶ The United States can easily follow their example, which in the nearly two decades since many of these countries changed their policies has caused no impact on unit effectiveness or morale. In doing so, our military leadership should clearly signal from the policy’s inception that the military will not segregate housing, showering, and other common-use facilities based on sexual orientation.

Moreover, the military should look first to the State Department in order to determine if service members’ same-sex partners, who meet domestic partner criteria established by the State Department in January 2009, can be allowed to reside in on-base housing or receive the augmented basic housing allowance that married military personnel receive.

Benefits issues

Overturing the ban on openly gay men and women in the military will mark another major achievement in the advancement of civil rights for all Americans. But simply overturning the ban and leaving in place the current laws governing which service members' families are entitled to military benefits will not accomplish the legitimate goal of ensuring that gay and lesbian service members have the same rights and benefits as their heterosexual colleagues. Ensuring that all service members' families and dependents, regardless of sexual orientation, receive the benefits they deserve is another important component (and probably the most difficult part) of ending "Don't Ask, Don't Tell" and in fact may require changes in federal law.

Soldiers, sailors, Marines, airmen and women, and coastguardsmen and women receive significant health care, housing, education, retirement, and other benefits in addition to their base pay. Many of these same benefits are extended to heterosexual spouses and dependents for life after a defined period of service. For example, the military's retirement package becomes effective after only 20 years of service. This means that a service member who enlisted at 18 can retire at 38 and begin drawing a pension while still pursuing a second career. The package includes relatively inexpensive health care coverage for themselves and their dependents for life.

These benefits augment service members' annual salaries by tens of thousands of dollars. The average single enlisted member of the United States Army (age 22 with four years of service and no dependents) earned about \$33,000 in base pay in 2006. But that modest figure does not take into account that the same corporal or specialist receives generous allowances for his or her housing and other living expenses. Moreover, none of these allowances are subject to federal income tax.

That same corporal or specialist receives benefits in the form of noncontributory "military pensions, health care (for military personnel, dependents and retirees) and a variety of installation-based benefits" (financial counseling, commissaries, and exchanges) in addition to base pay and other allowances noted above, known as regular military compensation. This means that that average service member earned the equivalent of over \$70,000 in 2006 dollars with all of these cash and in-kind benefits, along with deferred compensation (retirement and Veterans Administration benefits), particularly the GI Bill.

But if that same service member with four years of experience happened to be married with two dependents, this total would increase by \$16,000, or 23 percent, to nearly \$86,000.⁵⁷ Indeed, DoD's total compensation costs averaged nearly \$80,000 per service member in 2006 dollars.⁵⁸

Currently, the partners of gay service members are not entitled to marital benefits that spouses of heterosexual troops routinely enjoy, such as joint accommodations, job training, and medical benefits. This is despite the fact that nearly 60 percent of all servicemen and women regardless of their sexual orientation have some form of family responsibility.⁵⁹ Several other countries that allow openly gay men and women to serve in the military do not restrict benefits as the United States does. In Great Britain, for example, partners of gay service members have been afforded full benefits for the past five years.

Given the significant cost of extending the same benefits afforded to spouses of heterosexual service members, this issue has become a bureaucratic hurdle often cited by proponents of maintaining the status quo. It is true that benefit programs cost the military, and by extension the federal government, hundreds of billions of dollars every year. Over a decade ago in 2000, for example, the Defense Department was spending \$76 billion annually on military personnel. The military spent \$154 billion in FY 2010 on military personnel even though the size of the total force remained essentially the same.⁶⁰

Admittedly, extending benefits to all service members, their families, and their dependents regardless of sexual orientation will increase personnel costs. But these costs will be more than offset by the price the military is currently paying to replace and train new recruits when qualified people are thrown out or choose not to re-enlist because of their sexual orientation.

A review of the Canadian, British, and Israeli experiences in providing government benefits to partners of same-sex service members demonstrates that the surest way to go about extending federal benefits to the family members of all service members is to ensure that the right to those benefits is mandated by legislation or executive order. Analysis of the experience of all three governments in extending benefits to service members' same-sex partners reveals that none of the governments experienced significant difficulties or large additional costs in extending benefits, and in fact found the process to be routine and perfunctory.

Moreover, there is no reason why many of the same benefits afforded to the same-sex partners of our nation's State Department employees since June 2009—when President Obama asked federal agencies to review their policies—cannot be extended to the same-sex partners of service members provided the president reissues his June 2009 White House memo to include the military.

The British experience

Openly gay men and women were able to serve in the British military five years before benefits were extended to their partners. Openly gay and lesbian service members began serving in the British armed forces beginning in 2000, but at that time the United Kingdom did not recognize civil partnerships. As such, if a service member was in a relationship with someone of the same sex, the partner was not entitled to the same benefits as the spouse of a heterosexual service member.

This all changed with the passage of Great Britain's Civil Partnership Act in 2004. The act mandated that same-sex partners be entitled to the same legal status as married heterosexual couples of the opposite sex. The British government defined a civil partnership as a legal relationship, which can only be formed by two people of the same sex. The law gave same-sex couples the ability to obtain legal recognition for their relationship. Couples who form a civil partnership were entitled to a new legal status—that of “civil partner.” The civil partnership law went into effect in December 2005.

The law stated that civil partners would be able to accrue survivor pensions in public service schemes and contracted-out pension schemes in respect of service since April 1988. The act also ruled that civil partnerships should be treated in the same way as married couples for tax purposes. Moreover, civil union partners were entitled to the same status category as married personnel and are entitled to the same range of allowances and benefits as married personnel.⁶¹

The Canadian experience

In mid-June 1996, four years after the Canadian military allowed openly gay men and women to serve, a federal human rights tribunal ordered all branches of the Canadian federal government, including the Canadian Armed Services, to provide the same medical, dental, and other benefits to gay and lesbian couples as heterosexual common-law couples. The tribunal ruled that “same-sex partner benefits were to include compassionate leave and leave without pay for spousal accompaniment, military service regulations, isolated post regulations, and relocation. Same-sex partners would also be entitled to dental care and health care plans as dependents.”

Gay and lesbian couples would be entitled to benefits if “for a continuous period of at least one year, a member has lived with a person of the same sex in a homosexual or lesbian relationship, publicly represented that person as his/her life partner and continues to live with that person as his/her life partner.”⁶²

Follow-up studies conducted by the University of California-Santa Barbara concluded that the steady expansion of benefits to gay and lesbian personnel in Canada has “helped create

a relatively safe working environment where social anxieties and tensions have eased.” Gay and lesbian personnel, as well as their colleagues, have also reported higher work performance with access to the full array of benefits such as bereavement leave and counseling.⁶³ Indeed, without the need to constantly fear that they might be “discovered” gay and lesbian personnel have found that they can more effectively concentrate on their jobs.

The Israeli experience

The Israeli Defense Forces have allowed openly gay men and women to serve in all branches of the military since 1993, but the partners of gay service members were not entitled to their partner’s benefits until the late 1990s. In 1997 the Tel Aviv District Court, acting as an IDF appeals committee, ordered the Israeli army to grant Adir Steiner the benefits of his late partner, Colonel Doron Maisel. As a result of the case, the Israeli Civil Service Commission currently extends spousal benefits and pensions to the partners of gay and lesbian employees.

Mr. Steiner had lived with Colonel Maisel for more than seven years at the time of Colonel Maisel’s death due to cancer in 1991. The couple also shared finances and their relationship was public knowledge. At the time of Maisel’s death, Steiner requested the compensation the IDF regularly pays to bereaved spouses as well as legal recognition as Maisel’s spouse for burial purposes. The army refused to grant Steiner’s request, arguing that only heterosexual couples qualified for those benefits. Steiner then sued the government for Maisel’s benefits as an IDF widower.

Steiner’s attorney argued that the IDF’s position was discriminatory because the law at the time did not rule out common-law spouses of the same sex. The couple qualified as a common-law couple given their living situation at the time of Colonel Maisel’s death. “The committee ruled that a woman in Steiner’s position would be eligible for the benefits—as the law applies to both married and common-law spouses—and that he was being denied them merely because he [was] male. The committee accepted the appellant’s claim that the law applies equally to relations between members of the same sex. The IDF appealed unsuccessfully to Jerusalem District Court, claiming that the language of the law governing IDF pensions cannot be interpreted to entitle same-sex partners.”⁶⁴

Steiner’s suit had implications across the entire public sector, including the armed forces. After 1997 the same benefits that heterosexual spouses of all Israeli federal employees received, including members of the Israeli Defense Forces, were extended to same-sex partners as well. Israel currently grants unregistered cohabitation rights to partners of the same sex.

Recommendations for U. S. policy

The United States does not have a federal civil partnership act or a federal law allowing for the marriages of gay men and lesbians—as was the case with Canada and Great Britain when those countries repealed their ban. In fact, the Defense of Marriage Act, or DOMA, passed in 1996, explicitly prohibits the federal government from legalizing gay marriage. Moreover, the Obama administration has stated that it does not have the legal right under existing federal law to extend all federal benefits (including full medical, dental, and other benefits) to the same-sex partners of federal employees—whether serving in uniform or in a civilian capacity. Statutory changes will therefore be necessary before the government can offer its gay and lesbian employees some of the most important benefits noted above.⁶⁵

Simply overturning the ban on openly gay men and women serving in the military will not ensure that the partners of gay service members receive the full array of benefits enjoyed by the spouses of heterosexual service members as is the case with Britain, Canada, and Israel, as well as most of the other 22 militaries that allow openly gay men and women to serve. This is especially critical for military people since, as discussed above, benefits comprise such a large part of total military compensation.

But there remains a viable alternative short of allowing civil partnerships and same-sex marriage that will provide for the extension of significant benefits to partners of service members regardless of sexual orientation.

President Obama issued a White House memo in June 2009 that established a procedure for granting a number of benefits to same-sex partners of civilian federal employees. The memo called on the heads of all federal agencies to “conduct a review of the benefits provided by their respective departments and agencies to determine what authority they have to extend such benefits to same-sex domestic partners of Federal employees.”

The president’s order identified areas in which statutory authority already exists to extend benefits currently available to heterosexual couples to same-sex domestic partners of federal government workers. These benefits include hospital visitation rights, relocation expenses, and in some agencies such as the State Department, the spouse’s inclusion in family size calculations for housing allocations overseas.

While many of the benefits outlined by the president and the Office of Personnel Management were already available to federal employees, they often needed authorization from an individual supervisor. The president’s order required all federal agencies to review what benefits they could extend to same-sex partners and then make a recommendation to the president for implementation.

There remains a viable alternative short of allowing civil partnerships and same-sex marriage that will provide for the extension of significant benefits to partners of service members regardless of sexual orientation.

State Department domestic partner definitions

An individual must meet the following criteria, obtained from the State Department's Foreign Affairs Manual, to be considered a domestic partner of a State Department employee:

a. To obtain benefits and assume obligations of a domestic partner under the Foreign Affairs Manual (FAM) and Department of State Standardized Regulations (DSSR), an employee must file...[an affidavit]...identifying his or her domestic partner and certifying that she or he and the domestic partner:

(1) Are each other's sole domestic partner and intend to remain committed to one another indefinitely;

(2) With regard to a common residence:

(a) Have a common residence and intend to continue the arrangement; *or*

(b) Have had a common residence and intend to resume having a U.S. Department of State Foreign Affairs Manual Volume 3—Personnel 3 FAM 1610 Page 2 of 3 common residence after an assignment abroad for which the domestic partner did not accompany the employee; *or*

(c) Would have a common residence, but are prevented from having one for reasons described by the employee, and the Under Secretary for Management or his or her designee determines that the circumstances described are

sufficient to justify the waiver of the common residence requirement. Unless and until such a determination is made, the domestic partner relationship does not qualify for benefits and obligations under the FAM and DSSR;

(3) Are at least 18 years of age and mentally competent to consent to contract;

(4) Share responsibility for a significant measure of each other's common welfare and financial obligations;

(5) Are not married to, joined in civil union with, or domestic partners with anyone else;

(6) Are same-sex domestic partners, and are not related in a way that would prohibit legal marriage in the State in which they reside;

(7) Agree to inform the Department of State of any dissolution of the partnership in accordance with 3 FAM 1613;

(8) Understand that the domestic partner will be held to standards of conduct in the FAM that apply to family members; and

(9) Understand that falsification of information within the affidavit may constitute a criminal violation under 18 U.S.C. 1001 and may lead to disciplinary action.

No federal law prohibits the president from issuing another White House memo similar to the one in June 2009 for the purpose of extending certain benefits to same-sex partners of service members once "Don't Ask, Don't Tell" is repealed. The military should be called upon to determine what benefits it can extend legally and expeditiously implement those benefits as soon as "Don't Ask, Don't Tell" is repealed. Alternatively, there is nothing prohibiting DoD from extending these same benefits on its own.

When the Defense Department establishes a procedure to carry this out, the DoD should look first to the State Department as a model for several reasons. First, Foreign Service officers and by extension their partners are required to deploy overseas for

extended periods of time, just like military service members. Second, Foreign Service personnel are commissioned officers of the U.S. civil service and are entrusted with a similar degree of responsibility as commissioned military personnel. Finally, the State Department has been the most proactive of all federal agencies at extending a wide array of benefits to the same-sex partners of its employees. (See text box for State Department definition of domestic partners on page 27.)

These benefits include:

- Inclusion in family-size calculations for housing allocations
- Use of medical facilities at posts abroad
- Inclusion on employee travel orders to and from posts abroad
- Shipment of household effects
- Medical evacuation from posts abroad
- Family member preference for employment at posts abroad
- Diplomatic passports
- Emergency travel for partners to visit gravely ill or injured employees and relatives
- Inclusion as family members for emergency evacuation from posts abroad
- Subsistence payments related to emergency evacuation from posts abroad
- Inclusion in calculations of overseas allowances (payment for quarters, cost of living, and other allowances)
- Representation expenses
- Training at the Foreign Service Institute

The Department of Justice, the U.S. Agency for International Development, and the Peace Corps largely adopted the States Department’s position for all overseas employees in the summer of 2009.

During the Bush administration, the Defense Department used a broad interpretation of DOMA, a 1996 law that defined marriage as a union between one man and one woman and allowed states—or other political subdivisions within the United States—not to treat a relationship between civilian employees of the same sex as a marriage even if the relationship is considered a marriage in another state.

This broad interpretation continued until February 25, 2010. Until that time, the Defense Department used DOMA provisions to reject an attempt by the department’s Education Activity, or DODEA—which oversees all overseas schools on military bases—to recognize same-sex relationships when transferring overseas teachers, which the State Department, USAID, the Peace Corps, and the Department of Justice do when deploying people overseas. DoD decided not to give same-sex teaching couples the same joint transfer consideration as married heterosexual teaching couples on the grounds that it conflicted with DOMA.⁶⁷

DoD's rationale for this position was shaky considering DODEA's decision to grant same-sex partner transfer benefits to civilian DoD employees would not cost the DoD any additional money and partners of State Department employees serving in the same countries are afforded this benefit. On March 10, 2010 the department announced that as of February 25, 2010, same-sex teaching couples would be eligible for joint job transfers. To receive this benefit, couples must sign an affidavit saying that are in an "exclusive and committed relationship."⁶⁸

Conduct issues

Proper behavior among U.S. service members is defined and enforced by the Uniform Code of Military Justice and personnel orders and directives issued by the Department of Defense and the individual armed services. These documents collectively prohibit improper fraternization or relationships between officers or warrant officers and enlisted personnel that have “compromised the chain of command, resulted in the appearance of partiality, or otherwise undermined good order, discipline, authority, or morale.”⁶⁹

These documents also forbid rape, sodomy, sexual assault, and sexual harassment, and they regulate unprofessional relationships between service members—including two enlisted members, two officers, and between officers and enlisted personnel—which may not meet the standards for fraternization proscribed by the UCMJ.

After the repeal of “Don’t Ask, Don’t Tell,” the introduction of openly gay men and lesbians into the armed forces should lead to a review of these policies to determine whether there are adequate conduct standards for homosexual and heterosexual soldiers, sailors, airmen and women, Marines, and coastguardsmen and women. The ban on sodomy in the UCMJ, § 925, Article 125, which is rarely if ever enforced for heterosexuals, should be the first to go.⁷⁰ But repeal may also raise some broader questions about day-to-day conduct between service members.

For example, do regulations on improper fraternization apply equally to homosexual and heterosexual service members? Do existing regulations provide protection from harassment between members of the same sex? And what restrictions, if any, should be placed on a service member’s right to be open about his or her sexuality in the workplace? It is important for the military to address these questions, and doing so should be fairly simple since existing conduct regulations are already neutral in regard to sexual orientation.

The experiences of other militaries that have repealed their bans on open service demonstrate that with some minor administrative modifications, the same policies that have ably served the diverse U.S. military for decades can also enforce good conduct when all service members are allowed to openly acknowledge their sexual orientations.

The British experience

When the United Kingdom repealed its ban on homosexuals serving in the armed forces, conduct issues were addressed immediately and decisively through a new Code of Social Conduct. This code, modeled on the Australian approach to open service, equally applies to homosexual and heterosexual service members and regulates potentially disruptive relationships and behavior.⁷¹

It acknowledges the impossibility of listing every instance of inappropriate behavior, but it notes that personal relationships must not disrupt unit cohesion or operational effectiveness, and that possible violations include “unwelcome sexual attention” as well as “displays of affection which might cause offense to others.” Each case is to be judged on its own merits, but the code specifies a general, common-sense test for determining whether behavior is inappropriate:

*Have the actions or behaviour of an individual adversely impacted or are they likely to impact on the efficiency or operational effectiveness of the Service?*⁷²

In short, the British policy provides equal protection for all service members by focusing on an individual’s behavior rather than the individual’s specific characteristics. It steers clear of the potentially rancorous process of establishing explicit, separate regulations on conduct for gay and straight soldiers, a process that at least in the United States would likely allow political factors other than military expediency to dictate policy.

Britain’s experience implementing its revised code of conduct has been largely positive. The United Kingdom’s Ministry of Defense, or MoD, reported on the armed services’ experience introducing and enforcing the code in a 2002 study. Naval officers noted that the code was “seen as a good guide and regulator for all relationships, and brought maturity to personal behaviour across the board. It ... created a climate within which harassment, exploitation and sexism [could] be challenged and dealt with.”

The report also included some negative feedback—specifically that the code was not enforced effectively in all cases and was so broad that it opened the door for inconsistent application across services and situations.⁷³

Excerpts of the British Code of Social Conduct

1. This Code of Social Conduct explains the Armed Forces' revised policy on personal relationships involving Service personnel. It applies to all members of the Armed Forces regardless of their gender, sexual orientation, rank or status. The provisions apply equally to members of the Regular and the Reserve Forces...
2. In the area of personal relationships, the overriding operational imperative to sustain team cohesion and to maintain trust and loyalty between commanders and those they command imposes a need for standards of social behaviour which are more demanding than those required by society at large. Such demands are equally necessary during peacetime and on operations. Examples of behaviour which can undermine such trust and cohesion, and therefore damage the morale or discipline of a unit (and hence its operational effectiveness) include:
 - Unwelcome sexual attention in the form of physical or verbal conduct
 - Overfamiliarity with the spouses or partners of other Service personnel
 - Displays of affection which might cause offence to others
 - Behaviour which damages or puts at risk the marriage, civil partnership or personal relationships of Service personnel or civilian colleagues within the wider defence community
 - Misuse of rank and taking sexual advantage of subordinates
 - Probing into a person's private life and relationships
 - It is important to acknowledge in the tightly knit military community a need for mutual respect and a requirement to avoid conduct which offends others. Each case will be judged on an individual basis.
3. It is not practicable to list every type of conduct that may constitute social misbehaviour. The seriousness with which misconduct will be regarded will depend on the individual circumstances and the potential for adversely affecting operational effectiveness. Nevertheless, misconduct involving abuse of position, trust or rank, or taking advantage of an individual's separation, will be viewed as being particularly serious.

4. Unacceptable social conduct requires prompt and positive action to prevent damage. Timely advice and informal action can often prevent a situation developing to the point where it could:

- Impact adversely on third parties; and/or
- Impair the effectiveness of a Service individual or unit
- Result in damage to corporate image or reputation

However, on occasion it may be appropriate to proceed directly to formal administrative or disciplinary action. Such action is always to be proportionate to the seriousness of the misconduct. It may constitute a formal warning, official censure, the re-assignment of one or more of the parties involved or disciplinary action. In particularly serious cases, or where an individual persists with, or has a history of acts of social misconduct, formal disciplinary or administrative action may be taken, which might lead to termination of service.

The service test

5. When considering possible cases of social misconduct, and in determining whether the Service has a duty to intervene in the personal lives of its personnel, Commanding Officers at every level must consider each case against the following Service Test:

"Have the actions or behaviour of an individual adversely impacted or are they likely to impact on the efficiency or operational effectiveness of the Service?"

This Service Test lies at the heart of the Armed Forces' Code of Social Conduct; it is equally applicable to all forms of conduct, including behaviour while not on duty. In assessing whether to take action, Commanding Officers will consider a series of key criteria. This will establish the seriousness of the misconduct and its impact on operational effectiveness and thus the appropriate and proportionate level of sanction. Each of the Services has its own statement on values and standards.⁷⁴

Available at <http://www.mod.uk/DefenceInternet/AboutDefence/WhatWeDo/Personnel/EqualityAndDiversity/ArmedForcesCodeOfSocialConductPolicyStatement.htm>.

The Israeli experience

Israel faced fewer issues than Britain in changing conduct regulations after 1993 because the IDF never had a formal ban on homosexuals serving openly in the military. Sodomy was decriminalized in the country in 1988, and general codes of conduct prohibited all sexual activity on military bases as well as fraternization between officers and enlisted personnel (although RAND Corporation researchers noted in 1993 that fraternization rules only applied to persons in the same chain of command).⁷⁵

Once all positions within the services were officially opened to homosexuals, the IDF “banned any restrictions or differential treatment based on sexual orientation.”⁷⁶ In practice, commanders have reportedly made some allowances to accommodate homosexual and heterosexual troops separately, such as permitting some heterosexual service members to shower separately. But these exceptions have never been extended to conduct issues.⁷⁷

The Canadian experience

Canada also underwent a relatively smooth transition in revising its conduct regulations and standards. Sodomy was decriminalized in 1969, and in early 1992 the Canadian Court of Appeals for Ontario ruled that discrimination on the basis of sexual orientation was not permitted under the Canadian Human Rights Act. GAO noted that after Canada’s 1992 move to allow openly gay and lesbian service members, civilian antidiscrimination laws held sway over the military and officials began “revising related policies, including those concerning inappropriate sexual conduct, personal relationships, and harassment.”⁷⁸

The Canadian Forces ultimately opted to introduce some new administrative orders covering sexual misconduct and personal harassment, but these did not distinguish between homosexual and heterosexual members and provided equal standards and protection for all service members.⁷⁹

Recommendations for U.S. policy

None of the three countries reviewed above instituted separate rules of conduct for heterosexual and homosexual service members after they overturned their bans. And none have encountered significant issues in enforcing good conduct in the aftermath of their decisions. The United States should adopt a similarly undifferentiated policy once “Don’t Ask, Don’t Tell” is repealed to transition to a force where conduct issues are treated equitably regardless of the sexual orientation of the service members involved.

As a first step, the outdated prohibition on sodomy in the Uniform Code of Military Justice must be repealed. The Palm Center recommends that this provision be replaced by “a ban in the Manual for Courts-Martial on all sexual acts that are prejudicial to good order and discipline.”⁸⁰ Congress should amend the uniform code at the same time that it repeals “Don’t Ask, Don’t Tell.”

The U.S. military’s existing prohibitions against sexual harassment, sexual assault, rape, and fraternization are already largely gender neutral. For example, “The Manual for Courts Martial,” in describing the elements of a charge of rape by force, requires only “That the accused caused another person, who is of any age, to engage in a sexual act by using force against that other person.”⁸¹ If properly enforced such standards already provide sufficient protection between and among homosexual and heterosexual service members and do not need to be changed.

The Defense Department should also adopt a broader code of social conduct just like the British in the wake of their repeal. Setting fair expectations for behavior with the singular goal of maintaining an effective fighting force is the best answer to general concerns about conduct in a post-“Don’t Ask, Don’t Tell” military. This path will provide a fair standard to identify serious situations of improper conduct that may not be specifically covered by existing regulations and dismiss ungrounded accusations, no matter the gender or sexual orientation of the parties.

In other words, it will allow the military to remain focused on its primary mission as the guardian of U.S. national security without forcing it to repeatedly rehash debates about the moral or ethical implications of repealing “Don’t Ask, Don’t Tell.” (For more on the British Code of Social Conduct, see the training section.)

Discipline and promotion issues

One of the core building blocks of military effectiveness is the chain of command, which demands each service member's commitment to obey superiors and treat subordinates fairly in accordance with military rules and regulations. For a few service members, the move to permit openly homosexual men and women to serve in the armed forces could call into question the integrity of that system, particularly regarding issues of equal treatment for all parties involved in questions of discipline and promotion.

For instance, once "Don't Ask, Don't Tell" is repealed, what options would be available for a man or woman who is disciplined or denied promotion unfairly on the basis of his or her sexual orientation? Moreover, how could a commander respond to false accusations that he or she has discriminated against a subordinate on the basis of that person's sexual orientation? And finally, how could the military ensure that service members will obey their commanders without consideration of their sexual orientation?

Once "Don't Ask, Don't Tell" is repealed, it will be imperative to ensure that clear guidance is in place to deal with these issues and that members of the military understand their legal options if issues regarding sexual orientation and good order and discipline should arise. The experiences of our allies, as well as the strong legal protections already available to U.S. service members, make it clear that this transition will be relatively easy to achieve. Minimal changes to existing regulations along with a general emphasis on leadership and comprehensive training will ease the transition.

Clear guidance and effective leadership are key to successful repeal.

The British experience

Issues of good order and discipline as they relate to sexual orientation are largely addressed through the military justice system in Britain, though the civilian criminal code can also apply to members of the military. The Ministry of Defense's Armed Forces Overarching Personnel Strategy notes that the forces seek to create an environment in which all service members "have equal opportunity and encouragement to realise their full potential," regardless of, among other factors, sexual orientation.⁸² This commitment to equal treatment is enforced through a variety of regulations.

At the time that the United Kingdom changed its policy to permit open service, each of the three services—the Royal Air Force, Royal Navy, and British Army—operated under service-specific disciplinary acts. These acts targeted specific behaviors that undermine good order and discipline. The Army Act of 1955,⁸³ the basis of the Royal Army’s military justice system when the ban on openly gay service members was overturned, specifically prohibits, among other acts, insubordination, disobedience to standing orders and lawful commands, and ill treatment of officers or men of inferior rank.⁸⁴ These protections create a system in which subordinates and superiors receive equal treatment regardless of factors like sexual orientation.

The United Kingdom provides opportunities for service members to seek redress if they believe that they have been treated unfairly by other members of the armed forces. These protections do not specify or depend on the sexual orientation of the involved parties. The 2006 Armed Forces Act, for example, which unified the disciplinary codes for these services, provides for the redress of individual grievances against other members of the armed forces. Joint Services Protocol 831, Redress of Individual Grievances, notes that the 2006 Armed Forces Act “gives a person subject to Service law who thinks they have been wronged in any matter relating to their Service, a statutory right to make a Service complaint.”

The same document notes that the subject of a complaint will be given a “reasonable opportunity to respond,” thus providing a means for service members both to take action against discrimination and to rebut false accusations.⁸⁵

Finally, the United Kingdom provides additional protection for individuals through the office of the service complaints commissioner, an official who—like our inspector general—can be approached outside the chain of command by individuals who wish to complain of discrimination (explicitly including discrimination based on sexual orientation), harassment, or bullying.⁸⁶ This kind of office provides an option the United States could consider to ensure good order and discipline throughout the force.

The Israeli experience

The Israeli military has long been more accepting of homosexual service members than the United Kingdom. Yet the shift to unrestricted service did demand some adjustments regarding good order and discipline issues. Israel allowed discrimination in the assignment of homosexual service members to intelligence positions requiring top secret clearances prior to 1993, which was a de facto form of promotion discrimination. Scholarly research has noted, however, that these restrictions were not uniformly enforced for homosexuals seeking these posts.⁸⁷

According to GAO, after the change in policy, Israel guaranteed that no restrictions would limit the promotion of openly gay men and lesbians because of their sexual orientation. The agency noted that during its research in Israel, researchers spoke with openly homosexual military retirees and reservists who reported no issues with their promotion in the IDF, and Israeli nongovernmental organizations told GAO staff that “being homosexual has no bearing on an individual’s military career and that homosexual soldiers are judged on their merits like any other soldier.”

The Canadian experience

Before Canada completely removed its ban on open service by homosexuals in 1992, a Ministry of Defense Charter Task Force was convened to inform the Canadian Forces’ response to recent developments in Canada’s human rights and equal protection laws, including advances in protection based on sexual orientation. The task force examined a number of issues related to sexual orientation in the military, including issues of discipline and promotion.⁸⁸ The report noted fears among some service members that “homosexual supervisors would use their power for sexual ends,” as well as suggestions that subordinates would not react well to serving under a homosexual commander.⁸⁹ Once the ban was lifted, however, these fears turned out to be unfounded.

In 1988, the Canadian military put in place an interim policy loosening regulations on homosexuals, but still prohibited openly gay men and lesbians in the armed forces from receiving further promotion.⁹⁰ These promotion restrictions were finally removed when the Canadian Forces formally ended their ban on open service. This development led to changes in several Canadian Forces Administrative Orders, including a new CFAO 19-36, Sexual Misconduct, and updates to CFAOs on harassment and mixed gender relationships.⁹¹

The updated CFAO 19-39, Personal Harassment, specifically prohibited “improper behavior by an individual that is directed at or is offensive to another individual; that is based on personal characteristics including ... sexual orientation ...; and that a reasonable person ought to have known would be unwelcome.”⁹² The policy notes that abuse of authority may be one element involved in personal harassment, and it provides provisions for reporting harassment to one’s supervisor or a higher commander if the supervisor is involved in the alleged harassment.

Broader protections are also provided in the Queen’s Regulations and Orders, or QR&Os, for the Canadian Forces. Provisions in the QR&Os provide strong protection against disruptions of good order and discipline for any reason. The orders cover disobedience to lawful commands and insubordinate behavior, which would provide a basis to deal with any complaints of service members unwilling to follow gay or lesbian commanders.

Moreover, the QR&Os prohibit service members from knowingly making false accusations against officers or noncommissioned members, a provision that bears on the question of how commanders should deal with accusations that discipline or promotion decisions are influenced by sexual orientation.⁹³ Additionally, Canada’s National Defense Act provides, with some exceptions, the right for “an officer or non-commissioned member who has been aggrieved by any decision, act or omission in the administration of the affairs of the Canadian Forces for which no other process for redress is provided under this Act” to submit a formal grievance claim.⁹⁴

Recommendations for U.S. policy

The fear that allowing openly homosexual men and women to serve in the U.S. military will undermine good order and discipline is without any rational basis. Existing rules and regulations are largely adequate to address these issues with minor revisions needed at most.

The UCMJ already provides a framework to make sure service members faithfully follow their superiors’ orders regardless of personal factors such as sexual orientation. The code requires that service members treat colleagues of higher rank with appropriate respect and obey lawful orders by those same colleagues. Service members may be punished as a court martial directs for disrespect toward a superior commissioned officer (§ 889. Art. 89); assaulting or willfully disobeying a superior commissioned officer (§ 890. Art. 90); insubordinate conduct toward a warrant officer, noncommissioned officer, or petty officer (§ 891. Art. 91.); and failure to obey a lawful general order (§ 892. Art. 92.).⁹⁵

The military’s promotion system—the fairest promotion system within our society—can be applied without prejudice to sexual orientation. Basic criteria for promotion include time in service and time in the rank from which the service member is to be promoted.⁹⁶ The services prescribe clear additional requirements for promotion, such as physical fitness and education, and candidates for promotion in the officer ranks are examined by promotion boards comprised of senior officers.

The potential for this process to be disrupted by issues related to sexual orientation comes primarily at the beginning of the process, when a service member’s commander makes the decision to recommend or not recommend that man or woman for promotion, or at the point where a commander recommends a service member be subject to judicial or nonjudicial punishment, which could result in a demotion.

The fear that sexual orientation would irretrievably bias promotion and reduction decisions is also baseless. Service members who feel that they have been unfairly denied the opportunity for promotion have opportunities to contest the decision.

For example, Army regulations explicitly spell out this right for enlisted soldiers. Army regulation 600-8-19, Enlisted Promotions and Reductions, states that once a commander has recommended a soldier be denied consideration, “Soldiers may rebut their CDRs’ recommendations and submit statements that directly affect the circumstances. These actions will take place in time to allow the Soldier one month to prepare comments and consult with a judge advocate [a military lawyer], if desired...”⁹⁷

Enlisted soldiers also have the right to appeal a reduction in rank in some cases—unless the reduction was instituted “for failure to complete training.” Army regulations offer clear guidelines on appeals based on erroneous reductions.⁹⁸ The other services also offer similar regulations for enlisted members.

The promotion system for noncommissioned officers and commissioned officers is a much more competitive promotion system that is colloquially known as “up or out.” Service members who twice fail to gain promotion to the next highest rank are in most cases discharged from active duty or forced to retire. When a promotion board is convened to consider promotions within these ranks, officers who meet the standards of time in grade and service, as well as training, education, and other service-dictated conditions, will be considered for promotion (with limited exceptions based on a determination by the service secretary).

There are options, however, for officers who feel that they are passed over for promotion unfairly. 10 USC §628 prescribes options for special selection boards, in which service members who were unfairly denied promotion may be reconsidered.⁹⁹ Specifically, the law states that if there was “material unfairness with respect” to a person passed over by promotion, a service secretary may call for a special selection board to determine whether to recommend that person for promotion.¹⁰⁰

Other potentially serious situations may arise when a service member feels that he or she has been unfairly disciplined based on issues of sexual orientation, or a commanding officer feels that he or she has been unfairly accused of discriminating against or disciplining a subordinate based on issues of sexual orientation.

Good order and discipline in the military depend on the willingness of subordinates to obey their commanding officers. But in situations of unfair treatment, the military provides a plethora of opportunities to seek redress. Article 138 of the UCMJ offers an explicit opportunity to challenge unfair treatment by a commanding officer. It notes that, “Any member of the armed forces who believes himself wronged by his commanding officer, and who, upon due application to that commanding officer, is refused redress, may complain to any superior commissioned officer, who shall forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom it is made.”¹⁰¹

Moreover, the services also offer opportunities to seek redress against superior officers. For example, Navy Regulation 1150 gives any sailor the power to seek redress against any superior—even one outside a service member’s command—who has wronged them by “act, omission, decision, or order.”¹⁰²

While service members must have the opportunity to challenge unfair decisions, whether based on sexual orientation, race, gender, or any other criteria, the military must balance this right with the need to protect service members from erroneous complaints of discrimination or mistreatment. The same laws and regulations that offer a chance for service members to challenge unfair circumstances also offer protection for the accused, who are given the opportunity to challenge unfair investigations or decisions.

This right already exists in the case of accusations of sexual harassment. SECNAV Instruction 5300.26D, the Navy’s regulation dealing with sexual harassment issues, provides that “Both the complainant and the subject(s) of a complaint may appeal administrative findings.” The same instruction also states that no member of the Navy shall “knowingly make a false accusation of sexual harassment,” a directive that will provide commanders adequate legal options to rebut the rash of accusations of sexual harassment that some proponents of keeping “Don’t Ask, Don’t Tell” argue will arise if the policy is appealed.¹⁰³

The above mentioned laws and military regulations are already adequate to address a wide spectrum of discipline and promotion issues that may come up with the repeal of “Don’t Ask, Don’t Tell.” But some minor modifications to existing regulations would be helpful along with a general emphasis on training and leadership.

The experiences of U.S. allies are instructive in this regard. The United States should adopt an overall personnel policy that is explicitly neutral on sexual orientation, like the British. This could be done through modifying DoD’s existing directives on the Military Equal Opportunity program to specifically prohibit discrimination based on sexual orientation (for more on the military’s equal opportunity program see the training section of this report).

The effectiveness of these changes, however, will depend on leadership and training. Members of the armed services must be given adequate information to understand their rights and responsibilities in a post-“Don’t Ask, Don’t Tell” military. And individual commanders must be responsible for enforcing existing regulations fairly and demonstrating appropriate behavior through their own words and actions.

The military maintains strict regulations forbidding sexual harassment as well as procedures for any service members to report such incidents, but the military’s own studies have demonstrated that such incidents often go unreported despite the training that already exists.¹⁰⁴ With the introduction of openly gay and lesbian service members, our military must strive harder than ever to ensure that all regulations regarding good discipline and promotion are implemented at every level of the chain of command.

Reinstatement and compensation issues

Since the implementation of the “Don’t Ask, Don’t Tell” policy in 1993, nearly 14,000 gay and lesbian service members have been discharged from the military solely on the basis of their sexual orientation. Many of these people have long since moved on to new lives and careers. But the repeal of “Don’t Ask, Don’t Tell” will raise questions about how to deal with service members discharged under the policy who seek reinstatement or compensation for the loss of their jobs, benefits, and pensions.

These will not be easy questions to answer, either. Certainly the armed forces should be open to all Americans who meet the military’s standards for age, physical fitness, ethical behavior, and mental acuity. But what steps need to be taken to allow service members discharged under “Don’t Ask, Don’t Tell” to re-enlist if they wish to rejoin the armed forces? Should these men and women be asked to re-enter the service at a lower rank than they held upon their discharge—as military regulations may sometimes require—even when they did not leave the service voluntarily? Conversely, should former service members whose experience and understanding of the military may be substantially outdated be offered the opportunity to rejoin the force in positions where they must mentor and supervise other service members?

Another issue is whether former service members discharged under “Don’t Ask, Don’t Tell” should be given the opportunity to regain the level or growth in salary and pension that they would have obtained if they were able to remain in their positions. Lieutenant Colonel Victor Fehrenbach, a decorated Air Force F-15 weapons officer with 19 years of military service, is being discharged under “Don’t Ask, Don’t Tell” because of accusations made by someone outside the military. If Col. Fehrenbach were forced to leave the Air Force before completing 20 years of active service he would not qualify for retirement benefits. If he later sought to rejoin the Air Force should he be reinstated at the cusp of retirement and offered the opportunity to earn a full pension, even though he was legally discharged?

DoD must be prepared to apply a clear and fair standard governing reinstatement, rank, specialization, pension, and benefits after the repeal of “Don’t Ask, Don’t Tell”—just as the services currently do for any prior service member who applies to re-enlist.

Additionally, DoD and the federal government should be prepared for the possibility that service members discharged under “Don’t Ask, Don’t Tell” will attempt to seek legal

redress for the loss of their jobs, pay, pension, or benefits whether or not they are concurrently seeking to be reinstated in the armed forces, as former Army Sergeant Perry Watkins, who was discharged on the basis of his sexual orientation in 1981 after more than a decade of service, did successfully in 1985.

The British experience

After the United Kingdom removed its ban on open service, the armed forces offered former service members who had been discharged under the policy the opportunity to rejoin the force. Geoffrey Hoon, the secretary of state for defense, noted in announcing the change in policy that applications from these men and women would be viewed “very sympathetically.”¹⁰⁵ Some service members accepted the offer and applied to rejoin the force, though not in substantial numbers.

Thirty months after the United Kingdom instituted its new Code of Social Conduct the Ministry of Defense conducted a tri-service review of the new policy. Among the issues the review encompassed was the United Kingdom’s experience reintegrating former service members. It noted that three personnel had rejoined the Royal Navy and applications were pending in the British Army. Additionally, at least two former service members had rejoined the Royal Air Force, but that service had not kept careful records to identify the efforts of previously discharged members to rejoin. Instead, it treated those applicants the same as all other former service members.¹⁰⁶

Some service members discharged under the old policy brought legal action against the government. The United Kingdom’s decision to alter its policy on gays and lesbians was brought about by a law suit to the European Court of Human Rights, and the initiators of that suit were given payouts between £59,000 and £114,000 in current 2000 British pounds.¹⁰⁷ These payments included emotional and psychological damages as well as funds to cover the loss of earnings. The Ministry of Defense subsequently set aside funds to cover future legal actions based on the policy. Additional suits followed, and by the end of 2008 more than £4 million had been paid out to 65 individuals who brought claims after being discharged under the old policy. At that point the Ministry of Defense said that it did not expect further claims.¹⁰⁸

The Canadian experience

The key case in Canada overturning its ban was that brought by Michelle Douglas, a former Air Force lieutenant in the Canadian Forces, who was discharged after the military determined she had been involved in a lesbian relationship. An independent Security Intelligence Review Committee previously recommended that Douglas be reinstated in the armed forces “with all seniority, benefits, privileges, promotions and financial com-

pensation she would have been granted had she not been dismissed.”¹⁰⁹ But the military refused to reinstate her and Douglas took her case to court.

The government eventually settled with Douglas in 1992. It offered her \$100,000 (or approximately \$80,000 in U.S. dollars) and compensation for her legal costs and the same day announced that it would end the policy of discrimination in the Canadian Forces.¹¹⁰ The government reached settlements with at least two other former service members in 1993, and more cases were pending at that time. *The Toronto Star* reported regarding the 1993 cases that “although a confidentiality clause in the agreements prohibits revealing the terms of the settlement, [Justice Department lawyer Barb] McIsaac said there were ‘financial elements.’”¹¹¹

It is unclear whether Douglas and the other defendants were offered the opportunity to return to their old positions, but by the time of the 1993 suits the Canadian Forces no longer discriminated against applicants on the basis of their sexual orientation.

Recommendations for U.S. policy

Once “Don’t Ask, Don’t Tell” is repealed, Congress and the Defense Department should follow the example of the United Kingdom and make a public offer for service members discharged under the policy to re-enlist provided those men and women currently meet the military’s standards for age, physical fitness, education, and moral behavior. These standards are already prescribed for prior service applicants.

Military discharge forms identify a service member’s reason for leaving the force—including separations based on homosexuality—and are reviewed if that man or woman seeks to re-enlist.¹¹² Members of the military, who are administratively separated from the force under “Don’t Ask, Don’t Tell,” are not currently eligible to re-enlist. When Congress repeals “Don’t Ask, Don’t Tell,” the Pentagon should simultaneously announce that any restrictions to re-entry based solely on “Don’t Ask, Don’t Tell” will be waived for service members wishing to re-enlist. The individual services should adjust their personnel policies accordingly.

Once prior service members are declared eligible for re-enlistment, they should be treated fairly under the procedures already in place for prior service applications whenever possible. The military services maintain individual standards to determine when and at what rank prior service applicants may re-enlist. Applicants discharged before completing basic training or job specialization training generally must start over at the beginning of the process. For example, prior service applicants to the Army must have completed at least 180 days of active duty service if they do not wish to go through basic training as E-1s, the lowest enlisted rank.¹¹³

For enlisted prior service members with significant time in the service and a higher rank re-enlistment normally depends on the services' availability to accept men and women of the particular rank and specialization that the applicant possesses. For officers with prior service this process is more complex. Congress limits the number of officers the services may retain and higher ranked positions may be very competitive in the "up or out" system. But the current shortage of midlevel officers, especially in the Army, and Army majors in particular, may ease this process somewhat for some prior service applicants.¹¹⁴

Just as the United Kingdom promised to view prior service applicants sympathetically, the Pentagon should do the same when "Don't Ask, Don't Tell" is repealed. This may entail changes to service personnel policies to ensure that officers who were discharged under "Don't Ask, Don't Tell" are able to re-enlist for officer appointments, provided they meet all age, education, and fitness standards. The services should work together with Congress and the White House to establish a fair, common standard for reappointment of officers discharged under the policy, taking into account prior service and time out of service.¹¹⁵

Moreover, if otherwise qualified men and women who were previously discharged under "Don't Ask, Don't Tell" are denied the opportunity to re-enlist solely because of congressional limitations on the number officers permitted in specific grades, Congress should provide a one-time, temporary exemption for the armed forces to readmit these members in their proper pay grade. The armed services should also designate human resources professionals in each service to serve as a point of contact and facilitator for applications from those discharged under "Don't Ask, Don't Tell."

Service members discharged under "Don't Ask, Don't Tell" must be accepted for re-enlistment, and like other prior service applications they must also complete re-entry training to obtain the appropriate rank. Appropriate re-entry training is proscribed by individual services and is based on the rank and service of the applicant. There should be no variation from these guidelines for men and women previously discharged under "Don't Ask, Don't Tell." Moreover, these service members should also be asked to follow existing service guidelines for attaining appropriate re-entry ranks. In some cases this may mean being accepted at a lower rank than they had attained before being discharged.¹¹⁶

The issue of retroactive compensation is less straightforward. In the United Kingdom service members were able to bring claims against the government after the European Court of Human Rights declared the military's policy to be in violation of its obligations under the European Convention on Human Rights. In Canada the military admitted that its ban on gays and lesbians violated the country's Charter of Rights and Freedoms. But in the United States an act of Congress to repeal "Don't Ask, Don't Tell" is not likely to bear on the legality of discharges previously carried out under the policy.

Thus, while Congress does not have to resolve this issue in order to repeal "Don't Ask, Don't Tell," it should eventually consider whether DoD and the country have an obligation to make some compensation available for former service members who were involuntarily discharged solely on the basis of their sexual orientation.

Health issues

When the Defense Department repeals “Don’t Ask, Don’t Tell,” it must be prepared to confront the full range of stereotypes about homosexuality that unfortunately still exist among some Americans. One issue is whether openly gay and lesbian service members will increase the risk of Human Immunodeficiency Virus, or HIV, transmission in the military. In fact, after the publication of CAP’s first report on ending “Don’t Ask, Don’t Tell,” we received some mail on this subject.

The military already tracks HIV infection rates among applicants and members of the armed services—including active duty, guard, and reserve personnel—through positive serologic tests for HIV-1 antibodies.¹¹⁷ The current prevalence of HIV differs by service and gender. The Armed Forces Health Surveillance Center, or AFHSC, reported that from January 2008 through June 2009 tests of active-duty Army personnel showed positive antibodies in .23 of every 1,000 persons tested. Army measurements of HIV antibodies had been relatively stable throughout the early 2000s, yet “in 2008, there were more incident diagnoses of HIV-1 infection and a higher prevalence of HIV-1 antibody seropositivity than in any year since 1994—the increases in the number and prevalence of seropositive individuals overall were entirely attributable to increases among men.”¹¹⁸

In contrast, positive results did not spike in the active duty Air Force over the same period. And as of August 2009, the AFHSC noted that “there has not been an incident diagnosis of HIV-1 infection among a female active component Air Force member since 2006.”¹¹⁹

These numbers will likely be watched carefully by opponents of repealing “Don’t Ask, Don’t Tell,” who have repeatedly argued that allowing open service will lead to increased transmission of HIV.¹²⁰ It is true that in the United States men who have sex with other men represent the group with the highest rate of HIV infection,¹²¹ but a study presented at the 2004 International Conference on AIDS showed that the “Don’t Ask, Don’t Tell” policy has seriously affected all service members. Because “there is currently no physician-patient privilege for communications of any kind between service members and their military doctors,” under the “Don’t Ask, Don’t Tell” policy service members are not able to provide critical personal information to their doctors that could have an impact on their medical care and treatment.

As a result, the researchers discovered that service members seek care from doctors outside the military's medical system, which limits the military's knowledge of their complete medical history. In fact, several service members studied "reported that they had subversively refused their mandatory HIV testing because they thought they might be positive, and they did not want the military to find out."¹²²

In this sense, the current "Don't Ask, Don't Tell" policy actually poses more of a risk to our service members than allowing gays to serve openly, as the Canadian and British have found (since the Israelis had never banned openly gay members from serving, the risk of HIV transmission after all restrictions were abolished was never an issue). A policy that does not discriminate on the basis of sexual orientation provides the best means of protection for current and future homosexual and heterosexual service members.

The British experience

The United Kingdom maintains a slightly less restrictive approach to HIV infections than the United States. The current application to join the armed forces lists a number of medical conditions that "make a person permanently unsuitable, except where specifically time limited, for entry into the Armed Forces." Both HIV and AIDS are among the conditions specified, and the applicant is asked to certify their confidence that they meet these standards on the application.¹²³ At this time it does not appear that the British armed forces have a policy of mandatory testing for all recruits.¹²⁴

Current service members found to be HIV positive are not automatically discharged, but they may face duty restrictions. The Royal Air Force, for example, does not have a policy of discharging HIV-positive service members, but any person found to be positive is ineligible for duty as a pilot.¹²⁵ Further, the United Kingdom's armed forces take seriously their responsibility to prevent and identify accidental transmission of the virus. Eighteen British soldiers serving abroad in early 2008 were given life-saving but unscreened blood transfusions by U.S. medical personnel. The Ministry of Defense subsequently followed up with the affected personnel, who were given HIV tests that were negative. In addition, U.S. tests subsequently found no evidence of HIV in the donors.¹²⁶

The Canadian experience

The specter of increased HIV infections was raised in Canada before the military transitioned to a policy of open service. The Ministry of Defense's Charter Task Force concluded in the mid-1980s that allowing homosexuals to serve was likely to increase the prevalence of sexually transmitted diseases, including HIV, in the armed forces, and that "problems would be encountered with blood transfusions on the battlefield." The task force went on to speculate that "screening costs for detection of diseases and ensuring uncon-

taminated blood would be extremely high, as would be the cost of treatment and care with the expected increase of STDs.¹²⁷ The issue of blood transfusions on the battlefield has also been raised by proponents of maintaining the U.S. policy.

Despite these fears, after Canada repealed its ban it did not move to exclude all service members or recruits with HIV. The task force report noted in 1994, after Canada had repealed its ban to allow open service, that members of the Canadian Forces were not obligated to submit to regular HIV tests and could not be tested for the virus without permission.¹²⁸ A background paper for UNAIDS in 2001 pointed out that Canada maintained restrictions on the ability to determine the HIV status of service members. Recruits were not required to undergo an HIV test, and though some limits on career paths were imposed—such as selection for pilot positions—service members found to be HIV positive were eligible to be “immunized and posted overseas if they [passed][a medical evaluation and [were] judged to be asymptomatic.”¹²⁹ Nonetheless, there is no evidence that HIV increased in the Canadian Forces after the ban was dropped.

Recommendations for U.S. policy

The RAND Corporation study group examined the issue of HIV transmission and AIDS for its 1993 study and found that “DoD’s testing program for Human Immunodeficiency Virus (HIV) almost entirely prevents the entry of HIV-infected individuals into the military.”¹³⁰ This is still true today. DoD already possesses sufficient regulations to identify and control the spread of HIV in our armed forces. These regulations do not single out service members for testing or restricted duty on the basis of their race or gender—both factors that contribute to different risks for HIV infection—and would not require modifications in order to accommodate openly gay and lesbian soldiers, sailors, airmen or women, Marines, or coastguardsmen or women.

DoD uses a general policy to address service members with HIV or AIDS. DoD Instruction 6485.01, Human Immunodeficiency Virus, makes clear that persons who are HIV positive or suffer from AIDS are not eligible to enlist or be appointed for military service. Current active duty service members must be screened every two years, and reserve personnel “shall be screened when called to a period of active duty greater than 30 days if they have not received an HIV test within the last 2 years.”¹³¹ Those service members found to be HIV positive receive training to reduce the risk of transmitting the disease.

The individual military services maintain their own policies for service members with HIV and AIDS. For example, Army policy states that service members found to be HIV positive will be restricted to positions within the United States, with limited exceptions. The Army and other services also maintain specific instructions on testing for HIV prior to deployment and regulations regarding separation from the service on the grounds of physical disability brought about by the disease. Army Regulation 600-110 notes that

“HIV-infected soldiers who do not demonstrate progressive clinical illness or immunological deficiency during periodic evaluations will not be involuntarily separated solely because they are HIV-infected.”¹³² The Navy and Air Force have similar regulations.¹³³

DoD and the services may review their existing regulations on HIV as needed to maintain the health of the force—as with any military policy. Indeed, the International Conference on AIDS paper suggests that the “Don’t Ask, Don’t Tell” policy probably increases the risk of HIV transmission due to the inherent limitations the policy imposes on patient-doctor relations.

On the whole, however, the restrictions preventing HIV-positive personnel from joining the U.S. armed forces, as well as regular mandatory testing requirements, should be more than adequate to dismiss suggestions that repealing “Don’t Ask, Don’t Tell” will result in a substantial spike in military HIV infections.

Conclusion

Clearly, allowing openly gay men and women to serve immediately and effectively in our armed forces will require only minimal changes to existing regulations and policies. We base this assertion on the experiences of our closest allies as well as close analysis of existing U.S. law, Defense Department directives, service-specific regulations, and the policies of other federal agencies.

In many ways, opponents of repealing “Don’t Ask, Don’t Tell” have the same mindset as those who opposed opening opportunities to women in the military in the 1970s. Rather than confronting the issue directly, they attempted to discourage women from remaining in the military by denying housing and medical benefits to their husbands—a policy that was outlawed by the Supreme Court in 1973. Similarly, by leaving in place a discriminatory law, proponents of “Don’t Ask, Don’t Tell” hope to keep homosexuals from serving their country.

Over the last 17 years, the U.S. military has undermined its effectiveness and trampled on the civil rights of thousands of brave Americans in order to enforce the “Don’t Ask, Don’t Tell” policy. Our British, Canadian, and Israeli colleagues have fought and died to protect their security and ours while allowing gays to serve openly and without making major changes to their existing regulations. The United States can and should take the same path and quickly overturn this discriminatory and unnecessary law and not allow a lengthy and unnecessary review to delay the process.

Congress, the White House, and the Pentagon should begin working together now to make this happen. Eventually, the Department of Defense might find it necessary to seek some statutory changes to existing laws to provide full benefits to same-sex couples. But that situation does not need to hold up the quick repeal of “Don’t Ask, Don’t Tell.”

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