

## THE HISTORY OF “DON’T ASK, DON’T TELL” IN THE ARMY: HOW WE GOT TO IT AND WHY IT IS WHAT IT IS

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### I. Introduction

While gays, lesbians, bisexuals (and transgendered men and women) have almost certainly served in America’s armed forces since the Revolutionary War, their status—as reflected in policy and regulation—has differed markedly over time. What follows is a historical overview of the Army’s treatment of gays, lesbians, and bisexuals<sup>1</sup>—and homosexual conduct—to provide a context for the contrasting articles on the future of “Don’t Ask Don’t Tell” authored by Major Sherilyn A. Bunn<sup>2</sup> and Major Laura R. Kesler.<sup>3</sup>

While this article does touch on the criminalization of homosexual conduct under the Articles of War (AW) and the Uniform Code of

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<sup>1</sup> While activists, commentators and scholars identify gay, lesbian, bisexual, and transgendered or “GLBT” as one single category, this article focuses chiefly on gay, lesbian and bisexual personnel, and excludes transgendered men and women. This is because Army policies and regulations in the 20th century dealt only with the first three categories, and because information on the presence of, and any official policy toward, transgendered Soldiers is scant.

<sup>2</sup> Major Sherilyn A. Bunn, *Straight Talk: The Implications of Repealing “Don’t Ask, Don’t Tell” and the Rationale for Preserving Aspects of the Current Policy*, 203 MIL. L. REV. 207 (2010).

<sup>3</sup> Major Laura R. Kesler, *Serving With Integrity: The Rationale for the Repeal of “Don’t Ask, Don’t Tell” and its Ban on Acknowledged Homosexuals in the Armed Forces*, 203 MIL. L. REV. 284 (2010).

Military Justice (UCMJ), it does so only as part of its primary focus: explaining the evolution of the twentieth century regulatory framework constructed by the Army to either preclude homosexuals from entering the Army or administratively eliminate them from the service. This article concludes with an examination of the legislation that created DADT in 1993, and a brief look at the most recent congressional hearings on it.

History shows that the Army did not have much official interest in homosexuals and homosexual conduct until the 1920s, when *consensual* sodomy was criminalized for the first time in the AW, and the Army began administratively discharging gay Soldiers regardless of conduct.<sup>4</sup> Although there certainly was a moral component underlying the Army's policy of discharging male homosexuals in the 1920s and 1930s, the official—and stated—rationale for these separations was medical: homosexuality was an illness and sick men should not be in uniform.<sup>5</sup> This medical rationale continued to be at the root of Army policy in World War II, as the Army—relying on the expert opinions of psychiatrists and psychologists—steadfastly insisted that homosexuality was a sexual psychopathy and that this deviancy required the exclusion of homosexual men (and women) from the Army.<sup>6</sup>

After World War II, the Army developed the first comprehensive policy on homosexuals and homosexual conduct when it published an army regulation devoted exclusively to the investigation and separation of homosexuals in 1950.<sup>7</sup> This separate and distinct regulation, however, disappeared in the 1960s, when the Army placed its homosexual discharge provisions in the administrative regulations containing all the bases (and criteria) for discharging of officers and enlisted personnel.<sup>8</sup>

The administrative discharge of officer and enlisted homosexuals under their respective administrative separation regulations continued unchanged until 1981, when the Army, in response to setbacks suffered in litigation in the federal courts, created separate chapters governing homosexuality in both regulations.<sup>9</sup> During this time period, the medical rationale that had originally supported the policy requiring the discharge

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<sup>4</sup> *Infra* Part II.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Infra* Part III.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

of gays, lesbians and bisexuals disappeared completely.<sup>10</sup> It was replaced by an official policy that required the exclusion of homosexuals from the Army because their presence was incompatible with good order and discipline.<sup>11</sup>

For the next twelve years, an administrative regulatory framework continued to control Army policy on gays and lesbians in green uniforms. In 1993, however, in response to proposals by newly elected President William J. Clinton to allow homosexual Soldiers to serve “openly,” the Congress enacted legislation governing the status (and treatment) of gays, lesbians and bisexuals in the military—today commonly known as “Don’t Ask, Don’t Tell” (DADT).<sup>12</sup> Today’s Army regulations reflect—and follow—this statute, which allows gays, lesbians, and bisexuals to serve, provided they do not disclose their sexual identities.

This article concludes with a brief look at the February 2010 congressional hearings on DADT—where the Secretary of Defense and Chairman of the Joint Chiefs of Staff both testified that it was time to end DADT—since the hearings are the latest, but certainly not the last, chapter in the history of homosexual policy in the Army.

## II. Revolutionary War through World War II (1775–1950)

The Old and New Testament’s strict prohibitions on homosexuality<sup>13</sup> meant that American society, consisting mostly of men and women wedded to traditional Judeo-Christian concepts of morality and behavior, has been anti-homosexual and anti-bisexual for most of history.<sup>14</sup> Given its origins as an Army of citizen-Soldiers, it follows that this aversion to anything other than heterosexual conduct has been a part of the Army’s history as well.

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Infra* Part IV.

<sup>13</sup> See, e.g., *Leviticus* 18:22 (King James) (“Thou shalt not lie with mankind, as with womankind; it is abomination”); *1 Corinthians* 6:9 (King James) (“Know ye not that the unrighteous shall not inherit the Kingdom of God? Be not deceived: neither fornicators, nor idolaters, nor adulterers, nor effeminate, nor abusers of themselves with mankind.”).

<sup>14</sup> Major Jeffrey S. Davis, *Military Policy Toward Homosexuals: Scientific, Historical, and Legal Perspectives*, 131 MIL. L. REV. 55, 71 (1991).

In General George Washington's Continental Army, homosexuality was not accepted and at least one officer was court-martialed and "dismiss'd with Infamy" after being convicted of sodomy.<sup>15</sup> Interestingly, however, after the establishment of the U.S. Army in the 18th century—and enactment of AW by Congress—criminal prosecutions for homosexual acts apparently could not be conducted at courts-martial. This was because the AW contemplated that Soldiers who committed civil offenses would be tried in civilian courts.

Not until the Civil War did Congress enact legislation giving courts-martial subject-matter jurisdiction over civilian crimes committed by uniformed personnel—but only if these offenses occurred "in time of war" and only if the crimes were "graver civil crimes" like murder, rape and robbery.<sup>16</sup> While it appears that the Army first began court-martialing Soldiers for consensual sodomy during World War I<sup>17</sup>—as a non-capital crime or disorder "to the prejudice of good order and discipline" under Article 62<sup>18</sup>—it was not until 1920 that Congress amended the AW to make *consensual* sodomy a crime.<sup>19</sup>

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<sup>15</sup> RANDY SHILTS, CONDUCT UNBECOMING: LESBIANS AND GAYS IN THE U.S. MILITARY VIETNAM TO THE PERSIAN GULF 12 (1993). Lieutenant Gotthold F. Enslin, a German immigrant then serving in the Continental Army, was court-martialed on 10 March 1778; the president of the court was Lieutenant Colonel Aaron Burr. *Id.* at 11, 12, 17.

<sup>16</sup> W. WINTHROP, MILITARY LAW AND PRECEDENTS 667 (2d ed. 1920). Article 58, first enacted by Congress in 1874, was based on legislation, first passed by Congress in 1863, which provided that,

[I]n time of war, insurrection or rebellion, larceny, robbery, burglary, arson, mayhem, manslaughter, murder, assault and battery with intent to kill, wounding, by shooting or stabbing, with an intent to commit murder, rape or assault and battery with an intent to commit rape, shall be punishable by the sentence of a court-martial when committed by persons in the military service of the United States, and the punishment in any such case shall not be less than the punishment provided, for the like offense, by the laws of the State, Territory, or District in which such offense may have committed.

Articles of War, 1874, art. 58, 18 Stat. 234. According to Winthrop, the crimes listed in Article 58 could not legally be brought to court-martial in time of peace; Article 62 (the general article akin to Article 134, Uniform Code of Military Justice) also could not be used to assimilate these serious civil crimes under the Articles of War. WINTHROP, *supra* at 670–71.

<sup>17</sup> Richard D. Rosen, Homosexuals and the Military 11 (Fall 1985) (unpublished manuscript, on file with TJAGLCS).

<sup>18</sup> Articles of War, 1874, art. 6, 18 Stat. 234.

<sup>19</sup> Articles of War, 1920, art. 93, 41 Stat. 805, ch. 227.

Shortly after the Congress criminalized consensual sodomy in the military, the Army also began using its medical regulations to bar gay men from enlisting.<sup>20</sup> "The idea of excluding people for having a homosexual orientation," wrote journalist Randy Shilts, "as opposed to punishing only those who committed homosexual acts, was born during World War I, and advanced by practitioners in the fledging field of psychiatry."<sup>21</sup> This was a remarkable historical shift in the sense that homosexuality was now viewed—at least by the Army—as an illness rather than a sin or a crime. It follows that while a belief in the immorality of homosexual behavior could have been the basis for the Army's policy on homosexuals, it was not. On the contrary, the presence of gays in the Army could not be tolerated because, as a 1923 Medical Department regulation stated, homosexuality was a "sexual psychopathy" and, as sexual deviants, homosexuals were unfit for military service.<sup>22</sup>

This medical regulation gave commanders the basis to administratively discharge gay men who had already enlisted and were serving on the grounds that they had "habits or traits of character which serve to render their retention in service undesirable."<sup>23</sup> Consequently, while some courts-martial prosecutions for homosexual conduct continued, the 1920s marked the first time that the Army had a regulatory framework for refusing to admit homosexuals and discharging them based solely on status.

During World War II, the Army continued to exclude gays, lesbians, and bisexuals from military service, regardless of conduct, because "homosexuality was an indicator of psychopathology" which made one unfit for military service.<sup>24</sup> Draftees (and volunteers) were turned away if they acknowledged during their induction medical physicals that they were gay.<sup>25</sup> Homosexuals already in uniform could be administratively

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<sup>20</sup> Since women were not permitted to serve in the Army (except as nurses) until Congress established the Women's Army Auxiliary Corps in May 1942 (the forerunner of the Women's Army Corps), it follows that only gay men were prohibited from enlisting.

<sup>21</sup> SHILTS, *supra* note 15, at 15.

<sup>22</sup> U.S. WAR DEP'T, REG. NO. 40-105, MEDICAL DEPARTMENT—STANDARD OF PHYSICAL EXAMINATION FOR ENTRANCE INTO THE REGULAR ARMY, NATIONAL GUARD, AND ORGANIZED RESERVES para. 93p (23 May 1923); Rosen, *supra* note 17, at 13–14.

<sup>23</sup> U.S. WAR DEP'T, REG. 615-360, ENLISTED MEN—DISCHARGE para. 49 (1 Mar. 1926).

<sup>24</sup> LAUREN CASANEDA & SHANNON B. CAMPBELL, NEWS AND SEXUALITY: MEDIA PORTRAITS OF DIVERSITY 192 (2005).

<sup>25</sup> Rosen, *supra* note 17, at 15.

discharged and, in 1943 alone, the Army discharged 1625 Soldiers for homosexuality.<sup>26</sup>

However, because homosexuality was categorized as an illness, and because military psychiatrists apparently opined that some gay and lesbian Soldiers could be cured of their sexual deviancy, a commander did have the option to seek treatment for those “deemed reclaimable.”<sup>27</sup> This explains why War Department Circular No. 3, dated January 1944, advised commanders that “the interests of the Military Establishment” often were best served “by prompt elimination” of homosexuals by administrative means, and that these “true or confirmed” homosexuals were to be discharged unless they could be cured.<sup>28</sup> Absent an attempt to cure or “reclaim” an offender, however, discharge was the only option: gay officers were to be “offered the opportunity and permitted to resign for the good of the service;” enlisted men were to be administratively eliminated and given a discharge “without honor.”<sup>29</sup>

At the end of 1945, the Army revised and reprinted Circular No. 3 as Circular No. 385.<sup>30</sup> The War Department published additional guidance the following year in Circular No. 85. This last Army directive permitted commanders to issue an honorable discharge to gay and lesbian Soldiers being administratively eliminated, as long as they had not committed any homosexual acts.<sup>31</sup> Additionally, because the basis for the Army’s anti-homosexual policy was medical—Circular 85 stated that homosexuality was a “psychological maladjustment” or “psychoneurosis”<sup>32</sup>—a commander retained the option to hospitalize those individuals who might be cured of their sexual affliction, i.e., “whose cases reasonably

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<sup>26</sup> *Id.* at 18 (citing WILLIAM C. MENNINGER, *PSYCHIATRY IN A TROUBLED WORLD: YESTERDAY’S WAR AND TODAY’S CHALLENGES* 225 (1948)).

<sup>27</sup> U.S. WAR DEP’T, CIR. NO. 3, *HOMOSEXUALS* (3 Jan. 1944).

<sup>28</sup> *Id.* para. 2; Rosen, *supra* note 17, at 18.

<sup>29</sup> A “without honor” discharge was printed on blue colored paper and consequently earned the moniker “Blue Discharge.” Note, *Homosexuals in the Military*, 37 *FORDHAM L. REV.* 465, 466 (1969).

<sup>30</sup> U.S. WAR DEP’T, CIR. NO. 385, *HOMOSEXUALS* (28 Dec. 1945).

<sup>31</sup> U.S. WAR DEP’T, CIR. NO. 85, *HOMOSEXUALS* (23 Mar. 1946) [hereinafter *CIRCULAR NO. 85*]. In 1947, the Army’s administrative elimination regulations were modified again: a homosexual Soldier who had not committed any homosexual acts, but who had served honestly and faithfully, could be discharged with a general discharge; only a gay Soldier whose military record was “especially meritorious” was allowed to receive an honorable discharge. U.S. WAR DEP’T, REG. NOS. 615–368, *ENLISTED MEN—DISCHARGES—UNFITNESS* para. 2b(3)(a) (14 May 1947); Rosen, *supra* note 17, at 19–20.

<sup>32</sup> *CIRCULAR NO. 85, supra* note 31, para. I.5.

indicate the possibility of reclamation.”<sup>33</sup> As several authors have noted, these 1945 and 1946 circulars ultimately became the foundation of the Army’s post-World War II regulatory framework on homosexuality.<sup>34</sup>

### III. An Evolving Regulatory Framework (1950–1993)

In 1950, Congress swept away the old Articles of War and adopted a uniform criminal code applicable to the Army, Navy, and the newly created Air Force. This new UCMJ retained consensual sodomy as a court-martial offense under Article 125, thus continuing to give commanders an option to deal with a Soldier’s homosexual acts at courts-martial.<sup>35</sup>

At the same time, the Army published new regulatory guidance on homosexuals and homosexual conduct. Army Regulation 600-443, *Personnel—Separation of Homosexuals*, appeared on 12 January 1950. That regulation and its progeny,<sup>36</sup> which set out a comprehensive scheme that classified homosexuals and then established mandatory guidance on administratively separating homosexuals, are worth examining in some detail. At least three points are evident.

First, the Army acknowledged, apparently for the first time, that there were lesbians in uniform and insisted that their presence—like the presence of gay Soldiers—was intolerable. This is why AR 600-443 states at the outset that “true, confirmed, or habitual homosexual personnel, *irrespective of sex*, will not be permitted to serve in the Army in any capacity and prompt separation of *known* homosexuals from the Army is *mandatory*.”<sup>37</sup> Second (also apparently for the first time), the Army stated as official policy that every Soldier had a duty “to report to

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<sup>33</sup> *Id.* para. I.b.

<sup>34</sup> Rosen, *supra* note 17, at 19; Note, *supra* note 29, at 466–67.

<sup>35</sup> See MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 51 (2008). Some commentators argue that the constitutional validity of the UCMJ’s criminalization of consensual sodomy is uncertain after *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding unconstitutional Texas statute that made it a crime for two persons of the same sex to engage in consensual sexual contact). See, e.g., Major Bailey W. Brown, *Don’t Ask, Don’t Tell: The Implications of 2008 Circuit Court Decisions for the Standard of Constitutional Review Applicable to the Homosexual Conduct Policy*, 201 MIL. L. REV. 184 (2009).

<sup>36</sup> U.S. DEP’T OF ARMY, REG. 600-443, PERSONNEL—SEPARATION OF HOMOSEXUALS (10 Apr. 1953).

<sup>37</sup> *Id.* para. 2 (emphasis added).

his commanding officer any facts which may come to his attention concerning overt acts of homosexuality.”<sup>38</sup>

Third, the Army established, again for the first time, a three-tier classification system that governed how homosexuals would be discharged from the service. Gays and lesbians falling into “Class I” had committed homosexual acts involving coercion, fraud or intimidation.<sup>39</sup> Under AR 600-443, all Class I individuals were required to be prosecuted at general courts-martial. “Class II” homosexuals covered “true” or “confirmed” gays or lesbians who committed homosexual acts that, because of the lack of aggravating factors listed in Class I, did not fall into that first category.<sup>40</sup> Those men and women in Class II had the option of accepting an undesirable discharge or facing general court-martial. Finally, “Class III” homosexuals covered those “rare cases wherein personnel only exhibit, profess or admit homosexual tendencies but wherein there are no specific, provable acts or offenses.”<sup>41</sup> Personnel in this classification also had options: voluntarily separate with either an honorable or general discharge, or face involuntary administrative elimination.<sup>42</sup>

In 1955, the Army published a new regulation governing homosexuals in uniform. Under AR 635-89, official policy continued to be predicated on the belief that gay Soldiers were “reclaimable” even if they had engaged in homosexual acts; these men could remain in the Army if a psychiatrist determined that they were not “confirmed homosexuals.”<sup>43</sup> The 1955 regulation also continued to classify homosexuals in three categories.<sup>44</sup> Courts-martial of Class I homosexuals was required, but a commander did have the option to treat Class I gays and lesbians as Class II homosexuals if criminal prosecution was not possible.<sup>45</sup> In the case of Class II homosexuals, AR 635-89 required a commander to prefer criminal charges against an offender, and

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<sup>38</sup> *Id.* para. 5. Presumably, it was a dereliction of duty in violation of UCMJ Article 92, to fail to report “overt acts of homosexuality.” UCMJ art. 92 (2008).

<sup>39</sup> AR 600-443, *supra* note 36, para. 3.a. Acts with a child under the age of sixteen, even if consensual, fell into this category. *Id.*

<sup>40</sup> *Id.* para. 3.b.

<sup>41</sup> *Id.* para. 3.c.

<sup>42</sup> *Id.* para. 3.a–c.

<sup>43</sup> U.S. DEPT. OF ARMY, REG. 635-89, PERSONNEL SEPARATIONS—HOMOSEXUALS (21 Jan. 1955).

<sup>44</sup> *Id.* para. 5.

<sup>45</sup> *Id.*



then force the accused to choose between a court-martial or a voluntary undesirable discharge.

As for Class III homosexuals, the 1955 regulation defined them as either “overt, confirmed homosexuals,” who had not engaged in any homosexual acts while in the Army, or as men and women “who possess homosexual tendencies to such a degree as to render them unsuitable for military service.”<sup>46</sup> Class III gays and lesbians were required to be administratively discharged (assuming they were not reclaimable) with a general or an undesirable discharge.<sup>47</sup> In exceptional cases, an honorable discharge might be given.<sup>48</sup>

Three years later, on 8 September 1958, the Army again modified its policy on homosexuals in uniform when it re-published AR 635-89.<sup>49</sup> For the first time, the regulation stated that medical reasons were not the sole basis for excluding gays and lesbians: “Homosexuals are unfit for military service because their presence impairs the morale and discipline of the Army, and homosexuality is a manifestation of a severe personality defect which appreciably limits the ability of such individuals to function effectively in society.”<sup>50</sup> This was a significant departure from the Army’s earlier regulatory scheme, which was predicated—at least in writing—on homosexuality as a psychopathy and the need to keep the Army free of mentally ill men and women. Now, however, the Army acknowledged that gays and lesbians in uniform undermined the Army’s cohesiveness as an organization.

For the first time, the Army also defined the term “homosexual” and the term “homosexual act.” The former was an “individual, regardless of sex, who demonstrates by behavior a preference for sexual activity with persons of the same sex.”<sup>51</sup> The latter was “bodily contact between persons of the same sex actively undertaken or passively permitted with the intent of obtaining sexual gratification, or any proposal, solicitation, or attempt to perform such an act.”<sup>52</sup>

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<sup>46</sup> *Id.* para. 2.c.

<sup>47</sup> *Id.* para 7.b.(1).

<sup>48</sup> *Id.*

<sup>49</sup> U.S. DEP’T OF ARMY, REG. 635-89, PERSONNEL SEPARATIONS—HOMOSEXUALS (8 Sept. 1958).

<sup>50</sup> *Id.* para. 2.a.

<sup>51</sup> *Id.* para. 3.a.

<sup>52</sup> *Id.* para. 3.b.

In 1966, the Army re-published AR 635-89, but the only change was that the new version provided a Soldier being discharged for homosexuality the right to consult with counsel and be represented by such counsel before a board of officers.<sup>53</sup>

In January 1970, the Army scrapped its separate and distinct homosexual regulation and merged its contents into its regulations governing officer<sup>54</sup> and enlisted<sup>55</sup> separations. The more stringent three-tier classification system was abolished and the Army announced that its new policy was simply that Soldiers who had “homosexual tendencies” or who committed “homosexual acts” were to be discharged. Officers would be separated for moral or professional dereliction or on national security grounds.<sup>56</sup> Enlisted personnel would be discharged for “unfitness” if they committed homosexual acts;<sup>57</sup> those Soldiers who had homosexual tendencies were eliminated for “unsuitability.”<sup>58</sup>

In November 1972, the Army republished AR 635-212 as AR 635-200, *Personnel Separations—Enlisted Personnel*, and placed enlisted separations for homosexual acts and tendencies in a new Chapter 13. Paragraph 13-5 of that chapter provided that:

Applicability. An individual is subject to separation under the provision of this chapter when one or more of the following conditions exist:

a. Unfitness.

...

(7) Homosexual acts. Homosexual acts are bodily contact between persons of the same sex, actively undertaken or passively permitted by either or both, with the intent of obtaining or giving sexual gratification, or

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<sup>53</sup> U.S. DEP'T OF ARMY, REG. 635-89, PERSONNEL SEPARATIONS—HOMOSEXUALITY paras. 16.a, 18.a, 20, 22.b (15 July 1966).

<sup>54</sup> U.S. DEP'T OF ARMY, REG. 635-100, PERSONNEL SEPARATIONS—OFFICER PERSONNEL (21 Jan. 1970) [hereinafter AR 635-100].

<sup>55</sup> U.S. DEP'T OF ARMY, REG. 635-212, PERSONNEL SEPARATIONS—DISCHARGE—UNFITNESS AND UNSUITABILITY (21 Jan. 1970) [hereinafter AR 635-212].

<sup>56</sup> AR 635-100, *supra* note 54, para. 5-12.a.(7).

<sup>57</sup> AR 635-212, *supra* note 55, para. 6.a.(7).

<sup>58</sup> *Id.* para. 6.b.(6).

any proposal, solicitation, or attempt to perform such an act. Individuals who have been involved in homosexual acts in an apparently isolated episode, stemming solely from immaturity, curiosity, or intoxication normally will not be processed for discharge because of homosexual acts. If other conduct is involved, individuals may be considered for discharge for other reasons set forth in this chapter.

...

b. Unsuitability.

...

(5) Homosexuality (homosexual tendencies, desires, or interest but without overt homosexual acts). Applicable to personnel who have not engaged in a homosexual act during military service, but who have a verified record of preservice homosexual acts. It is also applicable to other cases which do not fall within the purview of a(7) above.

During this time period, any remaining medical support for the view that homosexuality was a mental disorder or illness disappeared. Empirical research by psychologists and psychiatrists, changing societal views on the morality of sexual behavior, and the rise of a politically active GLBT community caused the American Psychiatric Association to declassify homosexuality as a mental disorder and removed it from the *Diagnostic and Statistical Manual of Mental Disorders* (DSM) II (2nd edition) in 1973.<sup>59</sup> Some psychiatrists and psychoanalysts opposed to the declassification of homosexuality as a mental illness forced the Association’s membership to vote on the issue the following year, but their view was rejected.<sup>60</sup> As a result, by the late-1970s the prevailing

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<sup>59</sup> Am. Psychiatric Ass’n, Homosexuality and Sexual Orientation Disturbance: Proposed Change to DSM-II, 6th Printing, 44, APA Document Reference No. 730008 (1973), available at [http://www.psychiatryonline.com/DSMPDF/DSM-II\\_Homosexuality\\_Revision.pdf](http://www.psychiatryonline.com/DSMPDF/DSM-II_Homosexuality_Revision.pdf).

<sup>60</sup> Facts About Homosexuality and Mental Health, available at [http://psychology.uc.davis/rainbow/HTML/facts\\_mental\\_health.HTML](http://psychology.uc.davis/rainbow/HTML/facts_mental_health.HTML) (last visited Apr. 8, 2010). While the third edition of the DSM, published in 1980, did contain a new diagnosis for “ergo-dystonic homosexuality,” this mental disorder focused on men and women who wanted a

view in the medical community was that gays and lesbians were not sexual deviants and that there was no medical basis to exclude them from the Army.<sup>61</sup> While the Army had long abandoned any claim that it was excluding gays and lesbians from its ranks for medical reasons, the lack of any credible medical support for discrimination against homosexuals in uniform meant that the Army now relied completely on good order and discipline as a rationale.<sup>62</sup>

In the 1970s, while the Army continued to discharge homosexuals under AR 635-200 and AR 635-100, those gays and lesbians facing these administrative eliminations began challenging their separations in U.S. District Court—and winning.<sup>63</sup> In *Watkins v. United States Army*, for example, Sergeant Perry J. Watkins sued after being discharged for being gay. The facts in the Watkins case were not favorable to the Army, since Watkins had admitted that he was a homosexual and admitted that he had engaged in same sex conduct at the time he had been drafted into the Army in August 1967.<sup>64</sup> Additionally, he had not hidden his sexual identity during the sixteen years of honorable service that followed his

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heterosexual relationship but who suffered from a “sustained pattern of *unwanted* homosexual arousal.” (emphasis supplied). *Id.*; see also AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (3d ed. 1980). This new diagnostic classification was deleted in 1986, and the fourth edition of the DSM, published in 1994 (revised 2000), contains no classification of homosexuality as a mental disorder. *Id.*; see also AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (text rev., 4th ed. 2000).

<sup>61</sup> At the same time that psychiatrists and psychologists were altering their views of homosexuality, biologists began investigating whether “same-sex sexuality” in human beings was unique, and whether there was a biological basis for it. While the scientific consensus is that “individuals, populations or species are considered to be entirely heterosexual until proven otherwise,” biologists have recorded same-sex sexual activity in more than 450 different species of animals. This suggests, at least to some scientists, that there is a biological basis for homosexuality. For a recent discussion of scientific research on the issue, see Jon Mooallem, *They Gay? There is a Science to Same-Sex Animal Behavior*, N.Y. TIMES MAG., Apr. 4, 2010, at 26–35, 44–46.

<sup>62</sup> In the 1980s, the emergence of Human Immunodeficiency Virus (HIV) and Acquired Immune Deficiency Syndrome in the United States—primarily among gay men—caused Army leaders to become concerned about the health of male Soldiers. John Lancaster, *Why the Military Supports the Ban on Gays*, WASH. POST, Jan. 28, 1993, at A8. But, while the Army initiated testing to determine whether soldiers were HIV-positive, and some might have argued that the prevalence of HIV among gay men was a reason to exclude homosexuals from the Army, this view was never adopted as official policy.

<sup>63</sup> According to one author, there were six reported court cases “that reached substantive challenges to the homosexual exclusion policy.” MELISSA WELLS-PETRY, EXCLUSION 192 n.1 (1993).

<sup>64</sup> SHILTS, *supra* note 15, at 62.

induction. After being discharged for homosexuality in 1983, Watkins sued and, after years of litigation, a panel of the Ninth Circuit ruled for Watkins—holding that homosexuals were a “suspect class” and that the Army’s regulatory anti-homosexual provisions of AR 635-200 failed to serve any “compelling government interest.”<sup>65</sup> The circuit court, sitting en banc, then ordered the Army to reenlist Watkins, since it determined that, as the Army had known that Watkins was gay, it was “equitably stopped” from discharging him.<sup>66</sup>

While the Army’s loss in *Watkins* was clearly based on the non-constitutional question of whether it was fair to separate Watkins when he had been honest about being gay, the Army was dealt a significant constitutional setback in the litigation involving Army Reserve Sergeant Miriam Ben-Shalom. In 1976, as she was about to graduate from Reserve drill sergeant school in Milwaukee, Wisconsin, Ben-Shalom announced to a local newspaper that she was a lesbian.<sup>67</sup> After her commander subsequently discharged her for homosexuality under Chapter 13, AR 635-200, Ben-Shalom sued in U.S. District Court in 1978. She argued that her discharge had resulted only from her statement that she was a lesbian, and not from any evidence that she had committed any homosexual acts. In *Ben-Shalom v. Secretary of the Army*, Judge Terrance Evans agreed with Ben-Shalom, and ruled that the term “homosexual tendencies” in Chapter 13 violated the First, Fifth, and Ninth Amendments. “Constitutional privacy principles,” wrote Evans, “clearly protect one’s sexual preference in and of themselves from governmental regulation.”<sup>68</sup> Additionally, wrote Evans, even if the Army had proved that Ben-Shalom had committed homosexual acts, it would still be required to prove that this conduct made her unsuitable for military service. Absent any such evidence, Evans ordered the Army Reserve to reenlist her.<sup>69</sup>

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<sup>65</sup> 847 F.2d 1329 (9th Cir. 1989). For more on *Watkins*, see MARY ANN HUMPHREY, *MY COUNTRY, MY RIGHT TO SERVE* 248–57 (1990).

<sup>66</sup> 875 F.2d. 699, 711 (9th Cir. 1989) (en banc).

<sup>67</sup> HUMPHREY, *supra* note 65, at 188.

<sup>68</sup> 489 F. Supp. 964 (E.D. Wis. 1980); SHILTS, *supra* note 15, at 264–65. See also HUMPHREY, *supra* note 65, at 187–93.

<sup>69</sup> *Id.* In August 1989, the Seventh Circuit Court of Appeals reversed the lower court’s decision. *Ben-Shalom v. Marsh*, 881 F.2d 454 (7th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990). Ben-Shalom then appealed to the U.S. Supreme Court, which denied her writ of certiorari on 26 February 1990.

At this point, Army judge advocates working at the Office of The Judge Advocate General's (OTJAG) Litigation Division, joined by OTJAG's Administrative Law Division, recommended amending AR 635-100 and 635-200 by stating, for the first time, that an admission of homosexuality amounted to a propensity to commit acts. According to retired Colonel Richard D. Rosen, who served in OTJAG's Litigation Division at the time, this change "might be more easily defended in litigation, since it was linked to conduct." Remembers Rosen: "We also wanted to shore up grounds for discharge for commission of acts by bringing greater specificity to the provision."<sup>70</sup>

At the same time that judge advocates were examining ways to make the Army's homosexual policy more legally defensible, lawyers at the Department of Defense (DoD) also looked for ways to ensure that the services—Army, Navy, and Air Force—had a uniform policy on gays and lesbians. In January 1981, the DoD issued a directive governing the administrative separation of homosexuals in the armed forces. That directive stated, in part, that:

Homosexuality is incompatible with military service. The presence of such members adversely affects the ability of the Armed Forces to maintain discipline, good order, and morale; to foster mutual trust and confidence among the members; to ensure the integrity of the system of rank and command; to facilitate assignment and worldwide deployment of members who frequently must live and work under close conditions affording minimal privacy; to recruit and retain members of the military services; to maintain the public acceptability of military services; and, in certain circumstances, to prevent breaches of security.<sup>71</sup>

In accordance with the DoD Directive, the Army implemented its new homosexual policy provisions in a completely new and separate regulatory chapters—Chapter 5 for officers and Chapter 15 for enlisted personnel—which was published in March 1981.<sup>72</sup>

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<sup>70</sup> Telephone Interview with Richard D. Rosen, Vice Dean and Professor of Law, Texas Tech University School of Law (Mar. 19, 2010).

<sup>71</sup> U.S. DEP'T OF DEF., DIR. 1332.14, ENLISTED ADMINISTRATIVE SEPARATIONS (15 Jan. 1981).

<sup>72</sup> *Id.*; U.S. DEP'T OF DEF. DIR. 1332.30, SEPARATION OF REGULAR COMMISSIONED OFFICERS FOR CAUSE (15 Jan. 1981); Rosen, *supra* note 17, at 31.

Under all versions of Chapter 5, AR 635-100, and Chapter 15, AR 635-200, published in the 1980s and early 1990s, gay, lesbian, and bisexual officers and enlisted personnel were required to be separated because homosexuality was “incompatible with military service.”<sup>73</sup> Consequently, any male or female soldier who engaged in, attempted to engage in, or solicited another to commit a homosexual act was required to be discharged.<sup>74</sup> They also had to be separated if they admitted that they were homosexuals or bisexuals, because such statements “demonstrate a tendency to engage in homosexual conduct.”<sup>75</sup> Finally, discharge was mandatory if they married or attempted to marry someone of the “same biological sex.”<sup>76</sup>

This Chapter 15—and discharges under this provision—continued throughout the 1980s and early 1990s during which time there also continued to be impassioned debate on the wisdom of the policy.<sup>77</sup> But the entire regulatory framework was thrown into disarray after the election of William J. Clinton to the White House in November 1992.

#### IV. Don’t Ask, Don’t Tell (1993–present)

The regulations that had governed the status of gay and lesbian Soldiers for more than fifty years ended abruptly in 1993, when Congress enacted legislation creating what is now commonly called

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<sup>73</sup> U.S. DEP’T OF ARMY, REG. 635-200, PERSONNEL SEPARATIONS—ENLISTED PERSONNEL para. 15-1.a. (17 Oct. 1990).

<sup>74</sup> *Id.* para. 15-3.c.

<sup>75</sup> *Id.* paras. 15-1.a, 15-3.b.

<sup>76</sup> *Id.* para. 15-3.c. Interestingly, this new provision also retained some of the old “reclaimable” language of the 1950s, since it allowed a Soldier’s retention if the homosexual act was a “departure from the member’s usual and customary behavior,” the conduct was “unlikely to occur,” the Soldier’s continued service was in the interests of good order and discipline and, the Soldier does not desire to commit additional homosexual acts. In short, a non-homosexual Soldier might be retained, even if he committed a homosexual act, provided there were extenuating circumstances. *See id.* para. 15-3.a.(1)–(5).

<sup>77</sup> *See, e.g.,* WELLS-PETRY, *supra* note 63 (favoring homosexual exclusion policy); Richard H. Kohn, *Women in Combat, Homosexuals in Uniform: The Challenge of Military Leadership*, PARAMETERS, Spring 1993, at 2, 2–4 (suggesting that allowing gays and lesbians to serve openly will not hurt military effectiveness); R. D. Adair & Joseph C. Myers, *Admission of Gays to the Military: A Singularly Intolerant Act*, PARAMETERS, Spring 1993, at 10, 10–19 (suggesting that the “integrati[on of] “avowed homosexuals” into the Armed Forces will undermine unit cohesion and “institutional morality”).

“Don’t Ask, Don’t Tell.”<sup>78</sup> The legislation came in response to newly elected President William J. Clinton’s pledge—“a staple of his rhetoric” as a presidential candidate—to end the ban on homosexuals in the military.<sup>79</sup> While GLBT rights group applauded, Clinton’s promise allow gays and lesbians to openly serve unleashed a firestorm of criticism. *Newsweek* columnist David Hackworth, a retired Army officer and one of the most decorated combat veterans in history,<sup>80</sup> insisted that “putting homosexuals in foxholes” would “destroy fighting spirit and gut U.S. combat effectiveness.”<sup>81</sup> Wrote Hackworth: “Gays are not wanted by straight men or women in their showers, toilets, foxholes or fighting units.”<sup>82</sup> Retired Marine Lieutenant General Bernard E. Trainor insisted that permitting gays and lesbians to serve openly would be a “nightmare as far as the military is concerned” and would “threaten the strong, conservative, moralistic tradition of the troops.”<sup>83</sup> General Colin Powell, then Chairman of the Joint Chiefs of Staff, reportedly told Clinton that lifting the ban “would be prejudicial to good order and discipline.”<sup>84</sup> Senator Sam Nunn (D-Ga.), then the Chairman of the Senate Armed Services Committee, also voiced opposition.<sup>85</sup>

But Clinton was undeterred and, within days of taking office in late January 1993, his aides announced that he was planning to direct Defense Secretary Les Aspin “to prepare an executive order that would lift the ban on homosexuals in the military sometime in the next few months.”<sup>86</sup> The backlash against Clinton now grew greater and greater, if for no other reason than the President’s approach in dealing with the military was not to ask whether lifting the ban was wise, but rather “to

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<sup>78</sup> National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 571, 107 Stat. 1547 (1993).

<sup>79</sup> Dan Belz, *A Promise that Held Inevitable Collision*, WASH. POST, Jan. 28, 1993, at A6.

<sup>80</sup> Although not the most decorated Soldier in history, Hackworth did receive an unprecedented two Distinguished Service Crosses, ten Silver Stars, and eight Purple Hearts in his twenty years as an infantryman.

<sup>81</sup> David Hackworth, *Gays in Combat: Discrimination is Necessary*, WASH. POST, June 28, 1992.

<sup>82</sup> *Id.*

<sup>83</sup> Catherine S. Manegold, *The Odd Place of Homosexuality in the Military*, N.Y. TIMES, Apr. 18, 1993, at 1.

<sup>84</sup> *Id.*

<sup>85</sup> Lancaster, *supra* note 62.

<sup>86</sup> Eric Schmitt, *Clinton Set to End Ban on Gay Troops*, N.Y. TIMES, Jan. 20, 1993, at 1.



ask how it could be done and minimize the effect on combat effectiveness.”<sup>87</sup>

The end result was that Congress stepped into the fray and enacted legislation that codified the pre-Clinton policy on homosexuals in the Department of Defense—thereby preempting Clinton’s authority as Commander-in-Chief to lift the ban on homosexuals in uniform.<sup>88</sup> The future of this 1993 DADT legislation—now embodied in both AR 635-100 and AR 635-200—is the subject of the two articles that follow this introductory history piece.

## V. The Latest Chapter

After the enactment of DADT, arguments on the wisdom of excluding homosexuals from the Armed Forces continued.<sup>89</sup> While newly elected President Barack Obama indicated his dissatisfaction with the policy—and voiced a desire to repeal the law<sup>90</sup>—the first official statements on DADT occurred on 3 February 2010, when Secretary of Defense Robert M. Gates and Chairman of the Joint Chiefs of Staff, Admiral Mike Mullen, testified before the Senate Armed Services Committee. As the *New York Times* reported it, both men “called for an end to the sixteen-year-old ‘don’t ask, don’t tell law,’ a major step toward allowing openly gay men and women to serve in the U.S. military for the first time.”<sup>91</sup>

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<sup>87</sup> Dan Balz, *A Promise That Held Inevitable Collision*, WASH. POST, Jan. 28, 1993, at A6.

<sup>88</sup> For a detailed legislative history of DADT, see Elaine Donnelly, *Constructing the Co-Ed Military*, DUKE U. J. GENDER L. & POL. 904 (2007). See also William A. Woodruff, *Homosexuality and Military Service*, 64 UMKC L. REV. 121 (1995).

<sup>89</sup> C. Dixon Osburn, *A Policy in Desperate Search of a Rationale: The Military’s Policy on Lesbians, Gays and Bisexuals*, 64 UMKC L. REV. 199 (1995) (arguing that the military’s policy on homosexuals “cannot stand equal protection review, even under the most deferential standard of review courts sometime accord to military decisions”). See also Colonel Om Prakash, *The Efficacy of “Don’t Ask, Don’t Tell,”* 55 JOINT FORCES Q. 88, 88–94 (2009) (arguing that a repeal of DADT will have no impact on military performance).

<sup>90</sup> Rowan Scarborough, *Obama to Delay “Don’t Ask, Don’t Tell” Repeal*, WASH. POST, Nov. 21, 2009, <http://www.washingtontimes.com/news/2008/nov/21/obama-to-delay-repeal-of-dont-ask-dont-tell/>.

<sup>91</sup> Elisabeth Bumiller, *Top Defense Officials Seek to End “Don’t Ask, Don’t Tell,”* N.Y. TIMES, Feb. 3, 2010, at A1.

Shortly after his appearance before Congress, Secretary Gates announced that the Pentagon would “ease enforcement” of DADT by restricting the authority to open a homosexual-related investigation to officers in the grade of brigadier general or rear admiral (lower half) or higher.<sup>92</sup> Additionally, only officers holding that rank or higher will now be permitted to decide whether a discharge is warranted for a gay, lesbian, or bisexual servicemember.<sup>93</sup> Finally, investigators “will generally ignore anonymous complaints and makes those who file them give statements under oath.”<sup>94</sup> Gates also directed the Defense Department “to study how the military would accommodate gay service members” if Congress were to repeal DADT. The study is to be completed by 1 December 2010 and is supposed to include “a ‘systematic’ assessment of the rank and file’s views on the subject.”<sup>95</sup>

Meanwhile, supporters of DADT also have been heard. Lieutenant General Benjamin Mixon, Commander, U.S. Army Pacific, wrote a letter to the *Stars and Stripes*, in which he suggested that Soldiers who supported DADT should tell their elected officials.<sup>96</sup> Secretary Gates called Mixon’s comments “inappropriate.”<sup>97</sup> Admiral Mullen concurred, and added that if commanders disagreed with policy changes, “they should not resort to political advocacy, but rather ‘vote with your feet’ by resigning.”<sup>98</sup>

What will happen to DADT? Will gays, lesbians and bisexuals soon serve openly in the Army and the other services? If so, how will the armed forces implement what is arguably going to have more impact than President Harry S. Truman’s 1948 order to desegregate the military? The answer to these questions must wait for another day—and for history to unfold.

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<sup>92</sup> Editorial, *Don’t Pursue: The Impact of New Rules on Gays in the Military*, WASH. POST, Mar. 27, 2010, at A12.

<sup>93</sup> *Id.*

<sup>94</sup> Craig Whitlock, *Pentagon Restricts Evidence That Can Be Used Against Gays*, WASH. POST, Mar. 26, 2010, at A3.

<sup>95</sup> Craig Whitlock, *A Bit of Catch-22 for Gays in the Military*, WASH. POST, Apr. 1, 2010, at A13.

<sup>96</sup> William McMichael, *Wrong Way to Tell: Lt. Gen. Overstepped His Bounds on “Don’t Ask,” Senior Leaders Say*, ARMY TIMES, Apr. 19, 2010, at 10.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*