

# U.S. Military Policies Concerning Homosexuals: Development, Implementation, and Outcomes

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*Throughout the U.S. military's history, its treatment of sexual minorities has varied both as medical and popular understandings about homosexuality have shifted and as the needs of the armed forces themselves have changed. Military regulations have moved increasingly away from criminal prosecution to the discharge of homosexual servicemembers in response to changing views among medical professionals about the root causes of homosexuality. The U.S. armed forces presently maintain a complete ban on the service of sexual minorities, regardless of conduct or performance.*

*Within an institution that has officially prohibited the service of sexual minorities since the 1940s, however, the actual implementation of the prohibition has fluctuated across time and branch of service, as well as among commanders.*

*Purges and investigations of entire bases have coexisted with the experiences of homosexual servicemembers whose sexual orientation was known to fellow servicemembers and even to commanding officers without incident. Societal attitudes toward homosexuality have become more tolerant; likewise, there has been increasing evidence of acceptance among many heterosexual military personnel as well.*

*Rates of discharge have fluctuated relative to the manpower needs of the service. During periods of sustained conflict, when the need for good unit function and operational effectiveness is at its zenith, the numbers of discharges for homosexuality decrease. Further, the policy is not uniformly implemented even in times of peace; some homosexual servicemembers face a lesser chance of discharge than others because of gender, branch of service, or place of duty. Researchers have catalogued scores of examples from the last fifty years of servicemembers who have served openly and with the support and respect of their colleagues.*

*Department of Defense officials now acknowledge that many homosexual servicemembers have served honorably and well, and have discarded the unsupported belief that gays and lesbians are a threat to national security. They do, however, continue to express concern that removing the ban on homosexuality would lead to declines in morale, unit cohesion, and operational effectiveness.*

*Review of military, governmental, scholarly, and nonprofit research indicates that sexual orientation does not affect service performance and does not impact national security concerns. Evidence from foreign militaries and domestic fire and police departments reveal that sexual minorities can be successfully integrated into military and paramilitary organizations.*

*This study contains additional empirical evidence that supplements the relevant statistics. The report examines the case studies of four servicemembers who publicly challenged the military's ban through court cases or administrative review. The four servicemen were exemplary servicemembers before the initiation of their cases. The group includes a Navy petty officer with twelve years of service who had previously been recognized as "Aircrew Instructor of the Year"; a graduate of a naval academy with twelve years of experience and a commendation medal for her*

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*service during the Gulf War; a decorated nuclear submarine officer with thirteen years of service; and a first lieutenant who served as second-in-command of a company in the Army Reserves.*

*These servicemembers continued to serve pending the outcome of their cases. Because their cases received considerable media attention, their sexual orientation was widely known among colleagues during their challenges. The experiences of these servicemembers, who collectively served openly for more than eighteen years, supplement other research findings that homosexuals can be successfully integrated into military organizations. These servicemembers maintained collegial relationships with co-workers, received outstanding evaluations, won awards, and received promotions during their periods of open service. They also maintained high levels of responsibility by managing personnel, overseeing military budgets, and commanding troops.*

I.	INTRODUCTION .....	115
II.	METHODOLOGY .....	116
III.	A BRIEF HISTORY OF MILITARY POLICIES CONCERNING SEXUAL MINORITIES .....	117
	<i>A. Military Policy Prior to World War II.....</i>	117
	<i>B. World War II Policies.....</i>	119
	<i>C. Policies Concerning Homosexuality After World War II.....</i>	121
	<i>D. The Creation of a New Policy Under President Clinton.....</i>	124
IV.	APPLICATION OF THE MILITARY'S BAN ON HOMOSEXUAL SERVICEMEMBERS .....	126
	<i>A. Variation in Enforcement.....</i>	129
	<i>B. Differential Rates of Discharge over Time Based on         Manpower Needs.....</i>	133
V.	RATIONALES FOR THE EXCLUSION OF SEXUAL MINORITIES FROM U.S. MILITARY SERVICE .....	138
VI.	EVIDENCE RELATED TO RATIONALES FOR THE EXCLUSION OF SEXUAL MINORITIES FROM THE U.S. MILITARY .....	140
VII.	CASES OF HIGHLY VISIBLE GAY AND LESBIAN SERVICEMEMBERS .....	149
	<i>A. The Case of Petty Officer Keith Meinhold.....</i>	151
	1. Background of the Case.....	151
	2. In Their Own Words: The Experience of Meinhold and His Colleagues .....	153
	<i>B. The Case of Lieutenant Zoe Dunning.....</i>	162
	1. Background of the Case.....	162
	2. In Their Own Words: The Experience of Dunning and Her Colleagues.....	164
	<i>C. The Case of Lieutenant Richard Watson .....</i>	173
	1. Background of the Case.....	173
	2. In Their Own Words: The Experience of Watson and His Colleagues .....	176
	<i>D. The Case of Lieutenant Steve May.....</i>	181

2002]	<i>U.S. MILITARY POLICIES</i>	115
	1. Background of the Case.....	181
	2. In Their Own Words: The Experience of May and His Colleagues .....	183
VIII.	CONCLUSION .....	190

I. INTRODUCTION

Throughout the U.S. military’s history, its treatment of sexual minorities has varied both as medical and popular understandings about homosexuality have shifted and as the needs of the armed forces themselves have changed. Military regulations have moved increasingly away from criminal prosecution to the discharge of homosexual servicemembers in response to changing views among medical professionals about the root causes of homosexuality. Within an institution that has officially prohibited the service of sexual minorities since the 1940s, however, the actual implementation of the ban has fluctuated across time and branch of service, as well as among commanders. During periods of war, rates of discharge have declined as manpower needs have increased. There are numerous examples of gay and lesbian military personnel who have served with colleagues and under commanders who were aware of their sexual orientation. Further, not only does a servicemember’s chance of being discharged vary by branch of service, but female servicemembers also comprise a disproportionate number of those separated under the policy. Department of Defense officials have acknowledged in the past decade that the ban on homosexual servicemembers has not resulted in the complete removal of gays and lesbians from the military and that many sexual minorities have served honorably in the U.S. armed forces. However, the officials continue to maintain that a removal of the ban would negatively affect morale, unit cohesion, and operational effectiveness within the U.S. military.

This report examines the development of, and reasoning behind, U.S. military policies restricting the service of homosexual men and women. It further analyzes scholarly, military, and governmental data concerning gay and lesbian servicemembers and their effects on military operations. Studies of homosexual military personnel, foreign militaries, and domestic police and fire departments have consistently indicated that gay and lesbian servicemembers can be successfully integrated into military and paramilitary organizations. This report then examines in detail the case studies of four servicemembers who openly challenged the military’s ban while continuing to serve in the military. Collectively,

the subjects of these case studies have served more than eighteen years as openly homosexual military personnel. While these cases offer additional examples of exemplary service by homosexual servicemembers, they also detail the responses of heterosexual personnel to extended service with openly homosexual military officers. Such case studies are meant to add nuance and detail to the quantitative research that has been established over the last fifty years, which has failed to find any negative effect of the service of sexual minorities on the morale, unit cohesion, or operational effectiveness of military units. The servicemembers in the four case studies maintained collegial relations with their co-workers; received promotions, exemplary evaluations, medals and commendations; and continued high levels of responsibility during their periods of open service.

## II. METHODOLOGY

Information collected for this report was systematically gathered from publicly available primary and secondary sources concerning the historical development of the U.S. military's policy on homosexuality. In addition, this report draws extensively upon military, governmental, and scholarly research relevant to understanding outcomes associated with homosexual military service. Such research includes assessments by the military, the government, and nonprofit organizations on the policy and its implementation. It includes studies on homosexual servicemembers and veterans, foreign militaries, and domestic fire departments that have established nondiscrimination policies for sexual orientation. In addition, the research examines the effect on unit cohesion and inter-group relations, sexual behavior and orientation, issues of privacy and personal modesty, attitudes among military personnel, and military discharge statistics. Independent observations from multiple sources were compared to find commonalities among researchers in different sectors (e.g., military, academic, nongovernmental). The citations and bibliographies from sources were used as additional resources to ensure the broadest possible inclusion of relevant research material.

This report further draws upon legal, military, governmental, scholarly, and journalistic sources relevant for understanding the development of court and administrative cases challenging the military's policy over the last decade. Content analysis was done of Lexis-Nexus search retrievals for news articles and wire service dispatches relating to administrative and court challenges in the past decade (n=137). Present and former sexual minority participants and colleagues were also interviewed (n=7), and these interviews were supplemented with court

transcripts and public comments found in newspaper accounts (n=121).<sup>1</sup> The cases detailed in this report involve servicemembers who continued to serve pending the outcomes of their challenges. Such cases are meant to add qualitative depth and nuance to the findings of quantitative research related to outcomes associated with homosexual military service. The case studies were chosen because they represent cases in which, due to the high levels of media interest, the sexual orientation of the challenger was widely known by colleagues throughout the contestation of their discharges.

### III. A BRIEF HISTORY OF MILITARY POLICIES CONCERNING SEXUAL MINORITIES

#### A. *Military Policy Prior to World War II*

Prior to World War I, the U.S. military did not maintain specific regulations addressing homosexuality among its servicemembers.<sup>2</sup> Instead, individual commanders retained considerable discretion over the control and discipline of soldiers under their command.<sup>3</sup> Evidence exists of both the participation of gay military personnel and of discharges for homosexuality as far back as the revolutionary war.<sup>4</sup> While documents concerning same-sex sexual behavior from this time are scarce, it is believed that not all reported cases were prosecuted.<sup>5</sup> The Articles of War of 1916 codified the issue of homosexual conduct for the first time, although prohibition was limited to assault with the “intent to commit sodomy.”<sup>6</sup> In the 1920 revision of these regulations, consensual sodomy was listed as a specific offense.<sup>7</sup>

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1. Of these sources, 105 are also counted among the LEXIS/NEXIS search.

2. David Burelli, *An Overview of the Debate on Homosexuals in the U.S. Military*, in GAYS AND LESBIANS IN THE MILITARY 17 (Wilbur Scott & Sandra Stanley eds., 1994).

3. *Id.*

4. *Id.* at 135-36. For accounts of military discharge for homosexuality prior to World War II, see JONATHAN NED KATZ, GAY AMERICAN HISTORY: LESBIANS AND GAY MEN IN THE U.S.A. 24 (1992). For accounts of the military service of gay and lesbian personnel during World War II, see ALLAN BÉRUBÉ, COMING OUT UNDER FIRE: THE HISTORY OF GAY MEN AND WOMEN IN WORLD WAR TWO (1990); see also RANDY SHILTS, CONDUCT UNBECOMING (1993).

5. See generally KATZ, *supra* note 4, at 6.

6. NATIONAL DEF. RESEARCH INST. (RAND), SEXUAL ORIENTATION AND U.S. MILITARY PERSONNEL POLICY: OPTIONS AND ASSESSMENT 4 (1993) [hereinafter SEXUAL ORIENTATION AND U.S. MILITARY PERSONNEL POLICY]. The Articles of War of 1916 became effective March 1, 1917. See Burelli, *supra* note 2, at 17.

7. Burelli, *supra* note 2, at 18. The Manuals for Court-Martial from 1917 defined sodomy as anal penetration of either a man or a woman by a man; oral sex did not constitute sodomy. After the 1920 revision, however, the Manuals for Court-Martial redefined sodomy to include oral and anal penetration between two men or between a man and a woman. SEXUAL

Following World War I, psychiatrists favoring personality development models persuaded Army officials that they could identify and screen out men with personality disorders, thereby minimizing the psychological casualties of war.<sup>8</sup> While psychiatrists framed the standards upon personality development theories, the Army embedded in the screening protocols the language of degeneration.<sup>9</sup> Human beings were ranked according to hierarchical categories of characteristics, and the Army excluded those who were deemed inferior.<sup>10</sup> In 1921, the Army issued standards that disqualified men who displayed “the stigmata of degeneration.”<sup>11</sup> Those with a “degenerate physique” included men with female physical characteristics, which were defined to include sloping shoulders, broad hips, an absence of facial and body hair, and a lack of secondary sexual characteristics.<sup>12</sup> A young man with a “scant and downy beard” or a “female figure” was to be closely observed for indications of “internal glandular disturbances.”<sup>13</sup> In addition to classifying physical characteristics, the Army standards established the broad category of “sexual perversion,” which included oral and anal sex among men, as one sign of “functional” degeneracy.<sup>14</sup> Finally, the screening list detailed “sexual psychopathy” as a “constitutional” psychopathic state, which indicated a biological problem of a psychiatric nature that made a person unable to adjust to civilized society.<sup>15</sup>

During the inter-war period, however, a shortage of volunteers and a lack of pressure from psychiatrists meant in practice that the Army’s screening standards were rarely implemented.<sup>16</sup> Although the Articles of War listed sodomy as an offense subject to court martial, servicemembers who were determined to have engaged in sodomy were more frequently subjected to an administrative discharge under a “Section VIII” discharge for unsuitability.<sup>17</sup> Such discharges were generally classified as less-than-honorable, or “blue.”<sup>18</sup> However,

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ORIENTATION AND U.S. MILITARY PERSONNEL POLICY, *supra* note 6, at 3-4 n.2; SHILTS, *supra* note 4, at 15.

8. BÉRUBÉ, *supra* note 4.

9. *Id.*

10. *Id.*

11. BÉRUBÉ, *supra* note 4, at 13.

12. *Id.* at 13-14; SEXUAL ORIENTATION AND U.S. MILITARY PERSONNEL POLICY, *supra* note 6, at 4.

13. BÉRUBÉ, *supra* note 4, at 14.

14. *Id.*

15. *Id.*

16. *Id.*

17. SEXUAL ORIENTATION AND U.S. MILITARY PERSONNEL POLICY, *supra* note 6, at 4.

18. *Id.* “Blue discharges,” so termed because of the blue paper on which they were printed, were characterized as less-than-honorable. Such discharges stripped servicemembers of

imprisonment for homosexual conduct did continue to occur.<sup>19</sup> For example, the Army convicted thirty-four soldiers for sodomy and related offenses from July 1938 to May 1941.<sup>20</sup> While medical developers of World War II screening plans would discard the outdated categories of “anatomical and functional stigmata of degeneration,” this terminology would continue to be used by the Army and Navy through the Second World War.<sup>21</sup> Army and Navy officials would persist in describing homosexuality as a “constitutional psychopathic state” and to diagnose gay and lesbian servicemembers as “sexual psychopaths.”<sup>22</sup>

### B. World War II Policies

During World War II, military leaders engaged in substantial debate about the policies and practices related to homosexuality in the armed forces, and considerable revision of regulations occurred throughout the services.<sup>23</sup> World War II required a mass mobilization unlike any previously seen in U.S. history; the Selective Training and Service Act of 1940 resulted in the immediate registration of more than sixteen million men.<sup>24</sup> Debate concerning homosexual policies stemmed from the widespread variation in the handling of individual cases as well as the U.S. government’s reliance on the psychiatric establishment to assist in weeding out soldiers who were considered unfit to serve.<sup>25</sup> By November 1940, the Selective Service issued a memorandum to volunteer physicians at local draft boards that explained in lay terms five psychiatric “categories of handicap” and concluded with a list of miscellaneous “deviations” that physicians should be alert for.<sup>26</sup> Homosexuality was not included in the first circular, but by mid-1941,

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their honors and denied them access to GI benefits. See MOLLY MCGARRY & FRED WASSERMAN, *BECOMING VISIBLE* 34 (1998); see also *SEXUAL ORIENTATION AND U.S. MILITARY PERSONNEL POLICY*, *supra* note 6, at 4.

19. SHILTS, *supra* note 4, at 15-16; see *BECOMING VISIBLE: A READER IN GAY AND LESBIAN HISTORY FOR HIGH SCHOOL AND COLLEGE STUDENTS* 138-46 (Kevin Jennings ed., 1994).

20. BÉRUBÉ, *supra* note 4, at 147 n.47 (citation omitted).

21. *Id.* at 14.

22. *Id.*

23. *SEXUAL ORIENTATION AND U.S. MILITARY PERSONNEL POLICY*, *supra* note 6, at 5. For example, the Army instituted twenty-four separate revisions of its policy concerning homosexuals between 1941 and 1945. *Id.*

24. JOHN D’EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES, 1940-1970* 24 (1998). Eighteen million men would eventually be registered during the course of the war. *SEXUAL ORIENTATION AND U.S. MILITARY PERSONNEL POLICY*, *supra* note 6, at 5.

25. *SEXUAL ORIENTATION AND U.S. MILITARY PERSONNEL POLICY*, *supra* note 6, at 5; see also *BECOMING VISIBLE*, *supra* note 19, at 136.

26. BÉRUBÉ, *supra* note 4, at 11-12.

however, the Army and Selective Service would include “homosexual proclivities” among the list of disqualifying “deviations.”<sup>27</sup> The Navy by this time had issued its own directive precluding the induction of those “whose sexual behavior is such that it would endanger or disturb the morale of the military unit,” but it did not explicitly mention homosexuality.<sup>28</sup> Psychiatric leaders involved in establishing the guidelines would push for treatment of homosexuality as a mental illness, rather than as a crime requiring imprisonment.<sup>29</sup>

In 1942, Army leaders advanced the first regulations that differentiated between homosexual and “normal” individuals, provided signs of homosexuality, and clarified the procedures for the exclusion of gay servicemembers.<sup>30</sup> Those who “habitually or occasionally engaged in homosexual or other perverse sexual practices” were not to be inducted.<sup>31</sup> The regulations detailed three possible signs for identifying gay men: “feminine bodily characteristics,” “effeminacy in dress and manner,” and a “patulous [expanded] rectum.”<sup>32</sup> The Army, Navy, and Marine Corps did not initially develop screening procedures for women, instead basing their protocol on the standards established for men.<sup>33</sup> In October 1944, after most of the Women’s Army Corps (WAC) recruiting had been completed, the WAC finally established standards for women that explicitly included homosexuality as a reason for disqualification.<sup>34</sup>

In 1943, new Navy regulations focused on “homosexuals” rather than “sodomists.”<sup>35</sup> Criminal penalties for sodomy were not, however, actually eliminated.<sup>36</sup> Those who engaged in same-sex sexual behavior were either to be administratively discharged or allowed to resign, unless their behavior was violent or involved a minor.<sup>37</sup> The Navy directive also noted that the policy applied to the Women’s Reserve as well.<sup>38</sup> Under Army regulations, those who were not “confirmed perverts” and who

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27. *Id.* at 12.

28. *Id.*

29. *See id.* at 12-13.

30. *See id.* at 19.

31. *Id.* at 19; *see also* SHILTS, *supra* note 4, at 16.

32. BÉRUBÉ, *supra* note 4, at 19. Late in the war, Army psychiatrists would also suggest that homosexuals lacked a gag reflex as a result of performing fellatio. *Id.*

33. *Id.* at 29.

34. *Id.* at 32.

35. SEXUAL ORIENTATION AND U.S. MILITARY PERSONNEL POLICY, *supra* note 6, at 5. The Army directive continued to use the term “sodomist” until 1944. *Id.*

36. *Id.*

37. *Id.* The number of men convicted of sodomy by the Army was fifty-two in September 1943 and only eleven by July 1944. BÉRUBÉ, *supra* note 4, at 146. The judge advocate general at the time believed the decline was a result of the new standards. *Id.* (citation omitted).

38. *Id.* at 142.

were considered to possess a “salvage value” were to be returned to duty after appropriate disciplinary action.<sup>39</sup> By 1944, the medicalization of homosexuality was complete.<sup>40</sup> The Army circular broadened the category of offenders who might be reclaimed from those who had gone astray to the “true or confirmed homosexual[s]” whose “cases reasonably indicate the possibility of reclamation.”<sup>41</sup> The Navy’s 1944 circular introduced for the first time in that military branch the concept of those who have homosexual “tendencies” and stated that even if no sexual contact actually occurred, those with homosexual tendencies were to be identified and prohibited from serving in the military or discharged upon discovery.<sup>42</sup>

### C. Policies Concerning Homosexuality After World War II

In 1949, the Department of Defense distributed a memo unifying the military services’ regulations relating to homosexuality.<sup>43</sup> Unlike the wartime policy, there was to be no rehabilitation of gay and lesbian personnel.<sup>44</sup> The memo stated, “[h]omosexual personnel, irrespective of sex, should not be permitted to serve in any branch of the Armed Services in any capacity, and prompt separation of known homosexuals from the Armed Forces is mandatory.”<sup>45</sup>

The memo urged more careful investigations of suspected homosexuals and the establishment of better communication between the military branches to facilitate the exchange of information concerning homosexuals.<sup>46</sup> The Department of Defense also recommended that each branch of the military give lectures about homosexuality modeled on existing venereal disease lectures.<sup>47</sup>

In 1950, Congress replaced previous military judicial statutes with the Uniform Code of Military Justice (UCMJ) to increase civilian control of military disciplinary actions.<sup>48</sup> The UCMJ, which was designed to protect the due process rights of servicemembers, standardized the

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39. *Id.* at 140.

40. *Id.* at 143.

41. *Id.* at 142.

42. *Id.*; SEXUAL ORIENTATION AND U.S. MILITARY PERSONNEL POLICY, *supra* note 6, at 6.

43. SEXUAL ORIENTATION AND U.S. MILITARY PERSONNEL POLICY, *supra* note 6, at 6.

44. *See generally id.*

45. BÉRUBÉ, *supra* note 4, at 261; SEXUAL ORIENTATION AND U.S. MILITARY PERSONNEL POLICY, *supra* note 6, at 6.

46. BÉRUBÉ, *supra* note 4, at 261.

47. *Id.*

48. *Id.* The UCMJ went into effect on May 21, 1951. *Id.* at 262.

criminal statutes, court-martial procedures, and appeals processes across the armed forces.<sup>49</sup>

The UCMJ remains in effect today. Article 125 of the UCMJ prohibits sodomy, which it defines as “unnatural carnal copulation.”<sup>50</sup> Although the article does not explain “unnatural carnal copulation” in greater detail, the Manual for Courts Martial defines the phrase as including anal and oral sex and sex with an animal; Article 125 applies to both same-sex and opposite-sex conduct.<sup>51</sup> While prosecutions of heterosexuals under the sodomy statutes have occurred,<sup>52</sup> military officials continue to view homosexuals categorically as potential sodomites.<sup>53</sup> The illegality of sodomy under the UCMJ has been used as justification for the prohibition on homosexual service.<sup>54</sup> The maximum penalty for consensual sodomy under Article 125 is five years at hard labor, forfeiture of pay, and dishonorable discharge.<sup>55</sup>

Widespread fear of subversive behavior at the height of the Cold War led to crackdowns on sexual minorities throughout the military and government in the 1950s.<sup>56</sup> In 1953, President Eisenhower signed Executive Order 10,450, which made “sexual perversion” grounds for dismissal from federal employment.<sup>57</sup> It is estimated that dismissals from federal jobs increased tenfold in the wake of Eisenhower’s order.<sup>58</sup> The

49. *Id.*

50. 10 U.S.C.A. §§ 801-946 (1988); *see also* Janet Lever & David Kanouse, *Sexual Orientation and Proscribed Sexual Behaviors*, in *OUT IN FORCE: SEXUAL ORIENTATION AND THE MILITARY* 28 (Gregory Herek et al. eds., 1994).

51. *Id.*; *SEXUAL ORIENTATION AND U.S. MILITARY PERSONNEL POLICY*, *supra* note 6, at 10. The text of the Manual on Courts Martial relating to sodomy reads in part:

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

49 Fed. Reg. 17,152 (1984); Theodore Sarbin & Kenneth Karols, *Nonconforming Sexual Orientations and Military Suitability*, in *GAYS IN UNIFORM: THE PENTAGON SECRET REPORTS* 20, 26 (Kate Dyer ed., 1988).

52. Peter Jacobson, *Sexual Orientation in the Military: Some Legal Considerations*, in *OUT IN FORCE*, *supra* note 50, at 44.

53. Gary Lehring, *Constructing the ‘Other’ Soldier: Gay Identity’s Military Threat*, in *GAY RIGHTS, MILITARY WRONGS: POLITICAL PERSPECTIVES ON LESBIANS AND GAYS IN THE MILITARY* 281 (Craig Rimmerman ed., 1996).

54. *See generally* Lever & Kanouse, *supra* note 50, at 28.

55. 10 U.S.C.A. §§ 801-946 (1988); *see also* Francine D’Amico, *Race-ing and Gendering the Military Closet*, in *GAY RIGHTS, MILITARY WRONGS*, *supra* note 53, at 6.

56. *See* JOHN D’EMILIO, *MAKING TROUBLE* 60 (1992).

57. *Id.*; Exec. Order 10,450, 18 Fed. Reg. 2489 (1953), 3 C.F.R. 936 (1949-1953).

58. For a discussion of the treatment of gay men and lesbians during the McCarthy period, *see* LILLIAN FADERMAN, *ODD GIRLS AND TWILIGHT LOVERS: A HISTORY OF LESBIAN LIFE*

rates of discharge as a percentage of total number of military personnel grew ten-fold in the armed forces as well in response to Eisenhower's order.<sup>59</sup> Separations further increased another 50% by the beginning of the 1960s.<sup>60</sup>

The policy of the Department of Defense concerning discharge for homosexuality was further amended in 1959 and 1965.<sup>61</sup> In 1959, Section VII.I of 1332.14 on administrative discharges listed "sexual perversion," including homosexual conduct and sodomy, as indications of "unfitness" meriting discharge.<sup>62</sup> Procedures for discharge under less-than-honorable circumstances were liberalized in 1965 to allow servicemembers to challenge their discharges in front of administrative discharge boards and to have legal counsel present.<sup>63</sup> Continuing inconsistencies in standards, required documentation, and administrative hearings led to a further review of the policy during the Carter administration.<sup>64</sup> The Department of Defense issued Directive 1332.14 on January 16, 1981, in response to court rulings that had questioned inconsistencies in the way the prior policy had been implemented.<sup>65</sup> The purpose of Directive 1332.14 was to make clear that discharge would be mandatory for any servicemember who "engaged in, has attempted to engage in, or has solicited another to engage in a homosexual act."<sup>66</sup> The new policy voided all clauses in military regulations that had permitted the retention of homosexuals;<sup>67</sup> prior to the development of the new directive, final decisions about the separation of servicemembers had been left to the discretion of individual commanders.<sup>68</sup> Directive 1332.14 also stated that, in the absence of aggravating circumstances, a gay or lesbian servicemember was to receive a discharge under honorable

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IN TWENTIETH-CENTURY AMERICA (1991); TRISHA FRANZEN, SPINSTERS AND LESBIANS: INDEPENDENT WOMANHOOD IN THE UNITED STATES (1996); JOHN D'EMILIO, MAKING TROUBLE, *supra* note 56, at 57-63; SHILTS, *supra* note 4, at 17, 107; BÉRUBÉ, *supra* note 4; SEXUAL ORIENTATION AND U.S. MILITARY PERSONNEL POLICY, *supra* note 6, at 6.

59. SEXUAL ORIENTATION AND U.S. MILITARY PERSONNEL POLICY, *supra* note 6, at 6.

60. D'EMILIO, SEXUAL POLITICS, SEXUAL COMMUNITIES, *supra* note 24, at 44-45.

61. SEXUAL ORIENTATION AND U.S. MILITARY PERSONNEL POLICY, *supra* note 6, at 6-7.

62. *Id.* at 7.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* at 7-8.

67. SHILTS, *supra* note 4, at 377.

68. Lawrence Korb, *Evolving Perspectives on the Military's Policy on Homosexuals: A Personal Note*, in GAYS AND LESBIANS IN THE MILITARY, *supra* note 1, at 221.

conditions.<sup>69</sup> The 1981 directive would remain in effect until President Clinton's efforts to remove the ban in 1993.<sup>70</sup>

*D. The Creation of a New Policy Under President Clinton*

During the 1992 presidential campaign, then-candidate Clinton vowed to "lift the ban" on sexual minorities serving in the military.<sup>71</sup> Clinton's vow created a firestorm of opposition among the Joint Chiefs of Staff. Senate Armed Services Committee Chair Sam Nunn, other members of Congress, and other opponents mobilized immediately to block the president's efforts.<sup>72</sup> On January 29, 1993, President Clinton instructed the Secretary of Defense to draft an "[E]xecutive Order ending discrimination on the basis of sexual orientation in determining who may serve in the Armed Forces of the United States."<sup>73</sup> Congress held a series of hearings on the matter in the spring of 1993.<sup>74</sup> While the issue was being debated, the Clinton administration established an interim policy that prevented military officials from asking recruits about their sexual orientation.<sup>75</sup> The policy placed those in the process of discharge on stand-by reserve.<sup>76</sup>

The final policy, termed "Don't Ask, Don't Tell, Don't Pursue," was intended to be a compromise that would ease restrictions against homosexual servicemembers without leading to an outright removal of the ban.<sup>77</sup> The military would be prohibited from asking a servicemember about his or her sexual orientation, but it would still be able to discharge service personnel on the basis of credible investigative

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69. SHILTS, *supra* note 4, at 377-78. In 1975, a review of pending gay discharges from the Navy determined that the Chief of Naval Personnel had downgraded the discharge recommendations of administrative panels in four out of five cases. *Id.* at 216. All of the cases involved servicemembers who had been rated as "excellent" or "outstanding." *Id.* While the percentage of honorable discharges for homosexuality would increase after the implementation of the 1981 regulations, commanders would continue to issue less-than-honorable discharges for homosexual status. *Id.* at 380.

70. *See generally* Burelli, *supra* note 2, at 20.

71. *Id.*

72. *See generally* Tim McFeeley, *Getting It Straight: A Review of the 'Gays in the Military' Debate*, in *CREATING CHANGE* 236-44 (John D'Emilio et al. eds., 2000); *see also* David Rayside, *The Perils of Congressional Politics*, in *GAY RIGHTS, MILITARY WRONGS*, *supra* note 53, at 147-84; Craig Rimmerman, *Promise Unfulfilled: Clinton's Failure to Overturn the Military Ban on Lesbians and Gays*, in *GAY RIGHTS, MILITARY WRONGS*, *supra* note 53, at 113-23; JANET HALLEY, *DON'T: A READER'S GUIDE TO THE MILITARY'S ANTI-GAY POLICY* 19-26 (1999) (describing in detail the behind-the-scenes political battle surrounding efforts to remove the ban).

73. Jacobson, *supra* note 52, at 39.

74. *See* Burelli, *supra* note 2, at 20-21.

75. HALLEY, *supra* note 72, at, at 22-25.

76. *Id.* at 24; Burelli, *supra* note 2, at 20-21.

77. *See* Burelli, *supra* note 2, at 26.

information, or if a servicemember voluntarily admitted his or her orientation.<sup>78</sup> Unlike the old policy, which expressly prohibited both homosexual conduct and homosexual status, the new policy was intended to distinguish between homosexual orientation, which would not be a bar to service, and homosexual conduct, which would be.<sup>79</sup> In February 1994, the Department of Defense issued its directive implementing the new policy.<sup>80</sup> The Department of Defense declared, "A person's sexual orientation is considered a personal and private matter and is not a bar to service unless manifested by homosexual conduct."<sup>81</sup> The directive also stated:

The Department of Defense has long held that, as a general rule, homosexuality is incompatible with military service because it interferes with the factors critical to combat effectiveness, including unit morale, unit cohesion and individual privacy. Nevertheless, the Department of Defense also recognizes that individuals with a homosexual orientation have served with distinction in the armed services of the United States.

Therefore, it is the policy of the Department of Defense to judge the suitability of persons to serve in the armed forces on the basis of their conduct. Homosexual conduct will be grounds for separation from the military services. Sexual orientation is considered a personal and private matter, and homosexual orientation is not a bar to service entry or continued service unless manifested by homosexual conduct.<sup>82</sup>

By the time that the Department of Defense issued its implementing regulations, however, Congress had already passed legislation that weakened the proposed distinction between conduct and status. On November 30, 1993, the new policy was codified by congressional passage of the National Defense Authorization Act.<sup>83</sup> The Act reiterates the earlier view that homosexual servicemembers constitute an "unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion."<sup>84</sup> It lists the grounds of discharge as engaging in, attempting to engage in, or soliciting another to engage in homosexual acts; stating one is homosexual or bisexual; or marrying or

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78. See generally *id.* at 26-27.

79. HALLEY, *supra* note 72, at 27-28.

80. Burelli, *supra* note 2, at 28.

81. *Id.*

82. U.S. DEP'T OF DEFENSE, REP. NO. D-2000-101, EVALUATION REPORT: MILITARY ENVIRONMENT WITH RESPECT TO THE HOMOSEXUAL CONDUCT POLICY (Mar. 16, 2000).

83. Francine D'Amico, *Race-ing and Gendering in the Military Closet*, in GAY RIGHTS, MILITARY WRONGS, *supra* note 53, at 5.

84. National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, 107 Stat. 1670 (1993).

attempting to marry a member of the same sex.<sup>85</sup> The Act forbids homosexual conduct at all times, regardless of whether one is off-duty or off-base.<sup>86</sup> Other legislation also expressly allows for the reinstatement of enlistment questions concerning sexual orientation.<sup>87</sup> Servicemembers may challenge their separation by, among other things, demonstrating that they do “not have a propensity or intent to engage in homosexual acts.”<sup>88</sup> Finally, an amendment to the Nunn legislation omits the Clinton administration’s objective of enforcing sodomy laws equally for heterosexuals and homosexuals.<sup>89</sup>

In 1999, the Defense Department issued two policy memoranda clarifying the application of the policy on sexual minorities.<sup>90</sup> The memoranda emphasized that the report of harassment or of threats because a servicemember is perceived to be homosexual does not itself constitute credible information justifying the initiation of an investigation into the sexual orientation of the member in question.<sup>91</sup>

#### IV. APPLICATION OF THE MILITARY’S BAN ON HOMOSEXUAL SERVICEMEMBERS

Although the U.S. armed forces have maintained an official policy of excluding known homosexuals since World War II, the actual implementation of the ban on sexual minorities has been considerably more varied and complex. Because colleagues may respect the privacy of homosexual servicemembers and individual commanders have had a certain amount of control over the decision to pursue investigations and discharges, the actual execution of the military’s ban on sexual minorities has varied both over time and across the armed forces. Purges and investigations of entire bases have coexisted with the experiences of homosexual servicemembers whose sexual orientation was known to fellow servicemembers and even to commanding officers without incident. Further, rates of discharge have fluctuated relative to the

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85. *Id.*

86. *Id.*

87. See David Rayside, *The Perils of Congressional Politics, in GAY RIGHTS, MILITARY WRONGS*, *supra* note 53, at 163.

88. Nat’l Def. Auth. Act, 10 U.S.C. § 654 (1993). For a detailed look at the specifics of the National Defense Authorization Act as it applies to homosexual servicemembers and the Department of Defense regulations, see generally HALLEY, *supra* note 72.

89. Rayside, *supra* note 87, at 163.

90. OFFICE OF THE UNDER SECRETARY OF DEF., U.S. DEP’T OF DEFENSE, REVIEW OF THE EFFECTIVENESS OF THE APPLICATION AND ENFORCEMENT OF THE DEPARTMENT’S POLICY ON HOMOSEXUAL CONDUCT IN THE MILITARY (Apr. 1999).

91. *Id.*

manpower needs of the service. In times of war, the number of official discharges has consistently declined.

No accurate figures exist to indicate the number of homosexual and bisexual servicemembers who have completed their military service without being discharged. It is widely agreed, however, that the number of soldiers separated for homosexuality is far smaller than the total number of gay, lesbian, and bisexual military personnel that serve. While approximately one in every 2000 soldiers gets dismissed for homosexuality,<sup>92</sup> survey data indicate that two to eight percent of men and one to six percent of women acknowledge engaging in same-sex sexual behavior.<sup>93</sup> Research on sexual behavior suggests that veterans have had a similar number of same-sex experiences as men in the general population.<sup>94</sup> Further, research of homosexual men indicates that they are at least as likely as heterosexual men to serve in the military.<sup>95</sup> In its discussion of the discrepancy between the actual number of separations and the expected number of homosexual servicemembers, the military's Defense Personnel Security Research and Education Center (PERSEREC) report cited Michael Ruse,<sup>96</sup> who reported that

[m]any soldiers, sailors and airmen are homosexual—and actively so. They do not get caught or prosecuted because they are discreet or lucky, or because authorities turn a blind eye. But the rules do exist, and every now and then some unfortunate gets enmeshed in the net.<sup>97</sup>

For the vast majority of homosexual soldiers and sailors in the U.S. military, sexual orientation has been a closely guarded secret within the service that is shared, if at all, only with other gay and lesbian

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92. Since 1990, discharges for homosexuality have ranged from four to seven per 10,000 servicemembers. *Id.*

93. *Id.*; see also LOIS SHAWVER, AND THE FLAG WAS STILL THERE: STRAIGHT PEOPLE, GAY PEOPLE AND SEXUALITY IN THE U.S. MILITARY 89-90 (1995); SEXUAL ORIENTATION AND U.S. MILITARY PERSONNEL POLICY, *supra* note 6, at 44. These studies are, however, all subject to the problem of underreporting. *Id.* More than one researcher has estimated that as many as 40% of all men have had at least one same-sex sexual experience. Kinsey's SEXUAL BEHAVIOR IN THE HUMAN MALE, which was first published in 1948, reported that 37% of men surveyed had had at least one post-adolescent homosexual experience; same-sex eroticism predominated for at least three years for 12.5% of the male sample, and 4% were exclusively homosexual throughout their adulthood. D'EMILIO, SEXUAL POLITICS, SEXUAL COMMUNITIES, *supra* note 24, at 35. For a discussion of the problems associated with evaluating percentages of people who have engaged in homosexual sexual activity generally, and of Kinsey's study in particular, see SEXUAL ORIENTATION AND U.S. MILITARY PERSONNEL POLICY, *supra* note 6, at 44-49.

94. SEXUAL ORIENTATION AND U.S. MILITARY PERSONNEL POLICY, *supra* note 6, at 49-50.

95. SHAWVER, *supra* note 93, at 91.

96. See Sarbin & Karols, *supra* note 51, at 29 (citing MICHAEL RUSE, HOMOSEXUALITY: A PHILOSOPHICAL INQUIRY (1988)).

97. *Id.* at 23.

servicemembers or a few trusted heterosexual military friends. The sanctions against homosexuality, including the potential loss of one's military career, have acted as a powerful deterrent to disclosure. Even with such discretion, however, homosexual servicemembers have been highly vulnerable to interrogation, discharge, and even imprisonment through sweeps of bases and widespread investigations. Servicemembers have been interrogated extensively about the most intimate details of their sex lives, threatened with imprisonment if they did not provide the names of other homosexual personnel, charged as lesbians for rebuffing the sexual advances of male colleagues, subjected to searches of personal letters and diaries, and investigated for not fitting traditional gender norms. Military personnel have been investigated after reporting harassment due to suspected homosexuality and jailed for consensual same-sex sodomy.<sup>98</sup> Intelligence services have posted personnel outside of gay bars to write down license plates and see who exited.<sup>99</sup> Investigations have involved the use of wiretaps, mail surveillance, and confidential counseling sessions with base chaplains, psychiatrists and doctors.<sup>100</sup>

Not only has the 1994 policy not led to a decrease in the number of servicemembers discharged for homosexuality, but the number of separations has actually increased by approximately 70% since the new policy was implemented.<sup>101</sup> The attempted compromise to distinguish between conduct and status has apparently failed; mere indications of a homosexual orientation are presumed to presuppose conduct and are therefore investigated. The Servicemembers Legal Defense Network, which has assisted more than 2900 military personnel facing discharge since 1993, has documented thousands of violations of the policy.<sup>102</sup> Servicemembers are routinely asked about their sexual orientation in direct violation of the policy.<sup>103</sup> They continue to be investigated after asking commanders for assistance in cases of harassment and also as a

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98. See generally SHILTS, *supra* note 4.

99. *Id.*

100. *Id.*; see also Jeffrey Barnett & Timothy Jeffrey, *Issues of Confidentiality: Therapists, Chaplains, and Health Care Providers*, in *OUT IN FORCE*, *supra* note 50, at 247-64.

101. Stacey L. Sobel & Kathi Westcott, *Conduct Unbecoming: The Sixth Annual Report on 'Don't Ask, Don't Tell, Don't Pursue, Don't Harass'*, at <http://www.sldn.org/templates/law/record.html?section=22&record=21> (Mar. 9, 2000). The U.S. military discharged 617 servicemembers in 1994, and 1046 personnel in 1999, for homosexuality. *Id.*

102. Servicemembers Legal Defense Network, Press Release, *Conduct Unbecoming: The Seventh Annual Report on 'Don't Ask, Don't Tell, Don't Pursue, Don't Harass'*, at <http://www.sldn.org/templates/law/record.html?section=22&record=256> (Mar. 15, 2001).

103. *Id.*

result of conversations with health care professionals.<sup>104</sup> They are harassed for suspected homosexuality without intervention or protection from senior military officers.<sup>105</sup>

A. *Variation in Enforcement*

Both statistical data and recorded accounts of homosexual servicemembers indicate that the policy has varied considerably across the armed forces as well as over time.<sup>106</sup> Discharge statistics consistently show that women are disproportionately targeted under the policy.<sup>107</sup> Although women comprised 14% of the active forces in 1999, for example, they represented 31% of those discharged for homosexuality.<sup>108</sup> In addition, while male servicemembers are usually investigated on a case-by-case basis, women are more likely to be scrutinized for homosexuality as a result of a mass investigation.<sup>109</sup> Many have suggested that the gender gap in discharge rates stems in part from continued resistance to female military service more generally.<sup>110</sup>

Studies of the breakdown of discharges by branch of service further suggest that the policy has been implemented differently across the armed forces.<sup>111</sup> Prior to the 1994 policy change, Navy separations for homosexuality consistently comprised a disproportionate amount of the total number of such discharges.<sup>112</sup> Navy servicemembers accounted for approximately 27% of all military personnel from 1980-1990, but Navy discharges accounted for 51% of the total number of separations for

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104. *Id.*

105. *Id.* In its 1998 report on the application of the military's policy, the Office of the Under Secretary of Defense reviewed selected investigations files and records of administrative discharge hearings. OFFICE OF THE UNDER SECRETARY OF DEFENSE, REVIEW OF THE EFFECTIVENESS, *supra* note 90. The report would conclude that the policy has, "for the most part, been properly applied and enforced." *Id.* at 13. The report did, however, recommend that the Department of Defense issue guidance on the initiation of investigations, fully train all those charged with implementing the policy, and make it clear that harassment is unacceptable. *Id.*

106. Servicemembers Legal Defense Network, Press Release, *Seventh Annual Report*, *supra* note 102.

107. *Id.*

108. Sobel & Westcott, *supra* note 101.

109. See generally Michelle M. Benecke & Kirsten S. Dodge, *Military Women: Casualties of the Armed Forces' War on Lesbians and Gay Men*, in GAY RIGHTS, MILITARY WRONGS, *supra* note 53, at 71-108; SHILTS, *supra* note 4, at 5-6.

110. *Id.*

111. See, e.g., Stacey L. Sobel et al., *Conduct Unbecoming: The Seventh Annual Report on 'Don't Ask, Don't Tell, Don't Pursue, Don't Harass'*, (Mar. 15, 2001) available at [http://www.sldn.org/binary-data/SLDN\\_ARTICLES/pdf\\_file/256.pdf](http://www.sldn.org/binary-data/SLDN_ARTICLES/pdf_file/256.pdf).

112. U.S. GENERAL ACCOUNTING OFFICE, REP. NO. GAI.13:NSIAD-92-98, U.S. DEFENSE FORCE MANAGEMENT: DOD'S POLICY ON HOMOSEXUALITY 17 (June 12, 1992) [hereinafter DEFENSE FORCE MANAGEMENT].

homosexuality during the same period.<sup>113</sup> The Air Force, which also represented 27% of total active forces during this time, accounted for only 18% of the discharges for homosexual orientation.<sup>114</sup> Since the implementation of the new policy, the statistical breakdown of homosexual separations has shifted. The Army, the largest branch by troop strength with 37% of the total active forces, has consistently discharged fewer sexual minorities than either the Navy or the Air Force.<sup>115</sup> In 1999, for example, the Army represented only 25% of total discharges for homosexuality.<sup>116</sup> The Navy also reduced its numbers of separations both in absolute terms and as a percentage of total homosexual discharges; it accounted for just 30% of all homosexual discharges by 1999.<sup>117</sup> The Air Force had reported an increasing proportion of gay and lesbian discharge cases, accounting for 33% of all such cases by 1999.<sup>118</sup>

No exact figures exist on the numbers of homosexual men and women who have served in the U.S. armed forces with the knowledge of their commanders, or of at least some of their unit members. Journalists, social historians, and other scholars have, however, documented scores of cases in which sexual minorities served openly or semi-openly. Allan Bérubé's *Coming Out Under Fire*<sup>119</sup> and Randy Shilts' *Conduct Unbecoming*,<sup>120</sup> which together detail gay and lesbian military service from World War II through to the onset of the Persian Gulf War, provide the most thorough accounts of the experiences of homosexual servicemembers.<sup>121</sup> Combined, the two authors interviewed more than 200 former gay and lesbian personnel, as well analyzed letters, diaries, personnel records, and official government documents relating to gay and lesbian service. While such stories provide only a partial picture of the total experience of gay and lesbian service personnel, they do indicate

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113. *Id.*

114. *Id.* The Marines, with 9% of total armed service forces, accounted for 6% of all discharges for homosexuality. *Id.* at 18.

115. *Id.* at 17-18.

116. Sobel et al., *supra* note 111, at Appendix A.

117. *Id.*

118. *Id.*

119. BÉRUBÉ, *supra* note 4, at 14.

120. SHILTS, *supra* note 4.

121. Shilts also provides less detailed information about homosexual service as far back as the Revolutionary War. See SHILTS, *supra* note 4. For additional accounts of lesbian and gay servicemembers, see generally FADERMAN, *supra* note 58; MARGARETHE CAMMERMEYER & CHRIS FISHER, *SERVING IN SILENCE* (1994); W.S. WEBBER, *LESBIANS IN THE MILITARY SPEAK OUT* (1993); SHAWVER, *supra* note 93; and D'EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES*, *supra* note 24.

that some homosexual servicemembers have been able to serve openly and collegially with heterosexual colleagues.

In his research on homosexual military service during World War II, Bérubé determined that many psychiatrists, classification officers, and military leaders found ways to manage homosexuality within the military routine and integrate sexual minorities in military life.<sup>122</sup> He includes the accounts of a number of men who were able to be fairly open about their sexual orientation during the war.<sup>123</sup> Many of the gay veterans he interviewed reported that they “‘got more flak’ for being New Yorkers, Southerners, Jews, or blacks than for being gay.”<sup>124</sup> Bérubé cites the Army’s official history of psychiatry in World War II, which reported that commanders in the Thirty-Eighth Division simply transferred those soldiers who made unwelcome passes at other men to other regiments.<sup>125</sup> He also recounts the words of one major, who was a proponent of excluding homosexuals from service before he was stationed in a remote combat area in Alaska.<sup>126</sup> After reflecting on the harsh conditions in which his men lived, he decided that: “it is doubtful if morale is served by evacuating homosexuals. . . . Each man seems to identify himself with the person who is fortunate enough to go back to the United States, regardless of cause.”<sup>127</sup> Bérubé also learned from gay combat service personnel that a “live and let live attitude” and even respect could be forged and strong camaraderie fostered by the common experience of fighting battle after battle together.<sup>128</sup> As one gay veteran of Iwo Jima recalled, “There was a war on. Who in the hell is going to worry about this shit?”<sup>129</sup> Bérubé adds:

Even gay soldiers who looked and acted “queer” could fit well into combat units. Many outfits had at least one flamboyant soldier who did his job especially well, was protected by a superior officer, and, despite the talk

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122. BÉRUBÉ, *supra* note 4, at 14. In a well-publicized story from World War II, General Eisenhower requested that his assistant, WAC Sergeant Johnnie Phelps, identify the lesbians in her battalion for removal. Sergeant Phelps responded that she would be happy to provide him a list of names, but that he should know that her name would be at the top of the list, along with the names of all of the file clerks, the section heads, most of the commanders, and the motor pool. General Eisenhower rescinded the order. FADERMAN, *supra* note 58, at 118.

123. *See generally* BÉRUBÉ, *supra* note 4, at 51-57.

124. *Id.* at 52.

125. *Id.*

126. *Id.* at 181.

127. *Id.*

128. *Id.* at 186.

129. *Id.* at 180.

behind his back and the joking and teasing, won respect from the other men. Gay veterans tell many stories about these men.<sup>130</sup>

Shilts also recounts scores of anecdotes through the late 1980s in which homosexual personnel, including submarine and battleship sailors, Navy SEALs, and Army combat infantry personnel, served with the knowledge of their colleagues and even commanding officers. His book includes multiple accounts of heterosexual co-workers who attempted to protect gay and lesbians under investigation by attesting to their heterosexuality.<sup>131</sup> At the 1976 discharge hearing of his son, Navy Commander Vernon Berg, Jr. testified, "Homosexuals that I have known in the military have done extremely well, getting to extremely high ranks after I first met them."<sup>132</sup> He further stated that he knew homosexual men who had reached the rank of commander, captain, and rear admiral.<sup>133</sup>

Shilts determined that by the late 1970s, large networks of gay communities had grown within the military, mirroring the establishment of a broader gay community in civilian life.<sup>134</sup> Moreover, some military commanders of battleships and bases refused to permit investigations under their authority.<sup>135</sup> Conversations with scores of gay military personnel also yielded numerous stories of gay sailors or soldiers who tried to get out of service by acknowledging to their commanders that they were gay.<sup>136</sup> More often than not, commanders told the malingerers to continue working.<sup>137</sup> The U.S.S. LaSalle was known in the late 1970s to have the largest percentage of gay personnel of any air base, naval installation and Army post; it was estimated that at least 60% of the five-hundred-member crew was homosexual.<sup>138</sup> The intelligence ship, which was the flagship for the Commander of Middle East Forces and was permanently ported in the Emirate of Bahrain, was one of the most continuously decorated vessels in the modern U.S. Navy.<sup>139</sup> By the late 1980s, increasing acceptance of sexual minorities in society at large resulted in greater tolerance among military personnel, as well:

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130. *Id.* at 184.

131. *See generally* SHILTS, *supra* note 4.

132. *Id.* at 258.

133. *Id.*

134. *See generally* SHILTS, *supra* note 4.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* at 310. No one knew why the percentage was so high; one hypothesis was that, because no families were allowed to accompany the servicemen, few married sailors wanted to be assigned to the ship. The crew also drew heavily from highly specialized areas of military intelligence, a job category that has historically had a large gay contingent. *Id.*

139. *Id.*

Although the late 1980s saw a great number of [gay] people expelled from the military, it also saw the beginning of an even more significant countertrend: the acceptance of gay soldiers and sailors by large numbers of military field commands. Much of the gay military subculture was now only slightly under cover, when it was hidden at all.<sup>140</sup>

Shilts would find the trend most pronounced outside the Southern United States, particularly in San Diego, “where local commands seemed to adopt the live-and-let-live California outlook and only enforced gay regulations when it was absolutely necessary.”<sup>141</sup>

Because of the continued official restrictions against homosexual service, however, those gay and lesbian personnel who found acceptance from heterosexual colleagues and commanding officers were still vulnerable. Crackdowns occurred as a result of changes in personnel or by being named in the investigations of servicemembers in other units or on other bases.<sup>142</sup> Shilts discussed the precariousness of accepting environments in the military:

At any time, a change in command could transform an accepting environment into a hostile one. The leniency of some segments of the military reflected the reality that decisions about pursuing gay investigations were generally made at the field command level. Like their civilian counterparts, growing numbers of these commanders were simply not as antagonistic toward gays as their predecessors had been. However, a large share if not a majority of commanders remained opposed to gays in uniform, which meant that one officer’s transfer or promotion could be the harbinger of malicious crackdowns and purges.<sup>143</sup>

#### *B. Differential Rates of Discharge over Time Based on Manpower Needs*

From the time that the prohibition against homosexual orientation in the U.S. armed forces was first implemented, the enforcement of these regulations and the subsequent discharge of gay and lesbian servicemembers have fluctuated according to the manpower needs of the military.<sup>144</sup> During periods of heightened conflict, from World War II to the Persian Gulf, evidence of both military directives and discharge statistics exists that highlights differential enforcement of the prohibition as a result of increased manpower requirements. When service personnel

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140. *Id.* at 532.

141. *Id.*

142. *Id.* at 538-39.

143. *Id.*

144. *Id.* at 70.

are greatly needed and concerns about blocking the avoidance of service increase, the military consistently relaxes its implementation of the ban. The logic behind such action does not lessen the contradiction it creates. Such differential behavior draws into question the military's argument that gay and lesbian servicemembers compromise the morale, cohesiveness, and operational effectiveness of their units, especially because it is during periods of conflict that morale, cohesiveness, and operational effectiveness are most vital.

Shortly after the United States' entry into World War II, the adjutant general ordered the commanding general of the West Coast Air Corps Training Center at Moffett Field to review cases of convicted homosexuals "to determine their respective availability for military service" with "the view of conserving all available manpower for service in the Army."<sup>145</sup> In printed Sex Hygiene lectures, officers in the Women's Army Corps (WAC) were specifically advised that they should be sympathetic to the close friendships that might develop between women under wartime conditions and that such friendships might even "eventually take some form of sexual expression."<sup>146</sup> They were to take action "only in so far as its manifestations undermine the efficiency of the individual concerned and the stability of the group."<sup>147</sup> If the officer believed that a romantic involvement between two women from the same unit was causing disruption, the Sex Hygiene lectures recommended that the two be administratively separated.<sup>148</sup> Discharge was to occur only as a last resort.<sup>149</sup> Sex Hygiene lectures also informed WAC officers that homosexual tendencies, if channeled, could lead a trainee to become an exemplary soldier.<sup>150</sup> An officer could use her influence to "bring out in the woman who had previously exhibited homosexual tendencies a definite type of leadership which can then be guided into normal fields of expression, making her a valued member of the corps."<sup>151</sup>

A January 1943 War Department circular on sodomy stated that "the Army will be serving during the period of the war in many parts of the world where the standards of morality may be at variance with our

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145. BÉRUBÉ, *supra* note 4, at 179.

146. FADERMAN, *supra* note 58, at 123.

147. *Id.*

148. *Id.*

149. *Id.* at 123. In contrast, officers in the Navy WAVE in 1952 were advised in *Instructions for Committee on Indoctrination and Education* that "homosexuality is wrong, it is evil . . . an offense to all decent and law abiding people, and it is not to be condoned on grounds of 'mental illness' any more than any other crime such as theft, homicide or criminal assault." *Id.* at 151.

150. BÉRUBÉ, *supra* note 4, at 50.

151. *Id.*

own,” and therefore that some service personnel “will submit to unnatural practices.”<sup>152</sup> At least one medical officer took the directive to signal that, “particularly for soldiers overseas . . . homosexual relationships should be tolerated” if they did not injure the morale of the unit.<sup>153</sup> In 1945, when the Army faced manpower shortages during the final European offensive, then Secretary of War Harry Stimson ordered a review of all discharges for homosexuality during the previous two years.<sup>154</sup> He encouraged the re-induction of gay soldiers who had not committed in-service homosexual acts.<sup>155</sup> Orders also went out to military commanders to “salvage” homosexual soldiers for service whenever necessary.<sup>156</sup> A study by two psychiatrists during the war would conclude that the military maintained an unofficial policy of permitting nearly all homosexual personnel to remain in the service.<sup>157</sup>

During the peacetime period from 1947 to early 1950, however, the number of discharges per 100,000 troops climbed to three times the number of wartime separations.<sup>158</sup> Prior to the onset of the Korean War, the Navy typically discharged 1100 sailors a year for homosexuality.<sup>159</sup> In 1950, at the height of the Korean War, that number dropped to 483.<sup>160</sup> In 1951, only 533 gay sailors were expelled from the Navy.<sup>161</sup> In 1953, when the Armistice was signed, the number of naval discharges for homosexuality jumped to 1353.<sup>162</sup> The end of the shortages during World War II that provided opportunities for women in the military resulted in particularly substantial purges of lesbians in the post-war years.<sup>163</sup> By the mid-1950s, Navy officials would privately admit that the discharge rate for homosexuality had become “much higher for the female than the male.”<sup>164</sup>

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152. *Id.* at 180.

153. *Id.*

154. SHILTS, *supra* note 4, at 70.

155. *Id.*

156. *Id.*

157. BÉRUBÉ, *supra* note 4, at 172-73.

158. *Id.* at 262. While rates of discharge for homosexuality averaged approximately 1000 per year in the late 1940s, an average of 2000 servicemembers were discharged in the early 1950s, climbing to 3000 per year in the beginning of the next decade. D’EMILIO, MAKING TROUBLE, *supra* note 56, at 61; *see also* BECOMING VISIBLE, *supra* note 19, at 151-54 (discussing the onslaught of the “McCarthy era” shortly after WWII).

159. SHILTS, *supra* note 4, at 70.

160. *Id.*

161. *Id.*

162. *Id.*

163. BÉRUBÉ, *supra* note 4, at 263.

164. *Id.*

During the Vietnam War, changes in discharge levels became apparent as early as 1966.<sup>165</sup> Gay activists reported that the Pentagon issued a directive to local draft boards requiring that draftees claiming to be gay submit evidence of their sexual orientation.<sup>166</sup> The Department of Defense later stated that a search of its files uncovered no evidence of such a letter.<sup>167</sup> Nevertheless, from 1966 on, gay draftees were required to submit either signed affidavits from same-sex sexual partners or a sworn statement of a psychiatrist attesting to the draftee's sexual orientation.<sup>168</sup> Within a month of the Tet Offensive in 1968, the draft standards appeared to fall again.<sup>169</sup> A gay activist working in Los Angeles at the time declared that at least twelve openly gay men were drafted or classified A-1 in the L.A. area alone during a two-month period.<sup>170</sup> The most famous case of a gay man being drafted during the Vietnam War involves Perry Watkins, who acknowledged that he was gay both to a draft board and to a psychiatrist during his induction.<sup>171</sup> The psychiatrist wrote on his evaluation form, "This 19 year old inductee has had homosexual tendencies in the past . . . . Patient can go into Military service—qualified for induction."<sup>172</sup> Watkins, who was inducted into the Army in May of 1968, would go on to serve as an openly gay soldier and re-enlist four times.<sup>173</sup>

Not only did the military relax its restriction on gay draftees during the Vietnam War, but it also appears that it discharged fewer gay and lesbian service personnel as well. In the three years prior to 1966, the Navy discharged between 1600 and 1700 sailors each year for homosexuality.<sup>174</sup> From 1966 to 1967, the numbers dropped from 1708 to 1094.<sup>175</sup> In 1968, gay discharges fell again to 798, and they dipped to 643 at the peak of the military build-up in 1969.<sup>176</sup> In 1970, the Navy discharged only 461 sailors for homosexuality.<sup>177</sup> This decline in the

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165. SHILTS, *supra* note 4, at 65.

166. *Id.*

167. *Id.*

168. *Id.* Shilts points out that obtaining such affidavits from sexual partners was complicated by the fact that same-sex sexual acts constituted a felony in forty-nine states at that time. *Id.*

169. *See id.* at 66.

170. *Id.*

171. *See id.* at 60-64.

172. *Id.* at 63.

173. *Id.*

174. *Id.* The Navy is the only branch for which such statistics are available during the Vietnam War.

175. *Id.*

176. *Id.*

177. *Id.*

number of discharges for homosexuality occurred during a period when the Navy's membership was larger than at any other time after the Second World War.<sup>178</sup> After the cessation of the Vietnam conflict, U.S. armed forces faced new manpower shortages due to the abolition of the draft.<sup>179</sup> The military therefore promoted a policy of minimizing the number of people discharged unnecessarily.<sup>180</sup> During 1974, the armed forces as a whole discharged only 875 servicemembers for homosexuality.<sup>181</sup> Discharge levels began slowly to increase in 1975 and became a definite trend by 1977.<sup>182</sup>

In 1991, the *Wall Street Journal* reported evidence that once again the military had relaxed the implementation of its ban on sexual minorities as a result of the Persian Gulf War.<sup>183</sup> Although the Pentagon insisted at the time that there had been no change in policy, at least fourteen gay and lesbian reservists were cleared by their commanders to serve in the Persian Gulf even after they announced their homosexuality.<sup>184</sup> The reservists, who told their commanders they were homosexual but still wanted to serve in the Persian Gulf, were further informed that discharge proceedings would nevertheless be initiated upon their return from the Gulf.<sup>185</sup> Gay rights attorneys argued that the continued inclusion of these reservists during the war was due to the military's "stop loss" policy, which allowed commanders to delay the discharge of personnel whose services are needed.<sup>186</sup> A Pentagon spokesman interviewed at the time explained that the stop loss policy "has nothing to do with gays being in, or with putting them out of, the military. Manpower needs have nothing to do with retaining gays."<sup>187</sup> He added that the decision to begin processing a soldier for homosexuality lay with the unit commander; the commander could decide to begin proceedings immediately or postpone them to a later date.<sup>188</sup> It was later discovered, however, that the Army had circulated a "Commander's Handbook" prior to deployment in 1990 that declared no discharges for

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178. *Id.*

179. *Id.* at 295.

180. *Id.*

181. *Id.*

182. *Id.*

183. Wade Lambert, *Gay GIs Told, Serve Now, Face Discharge Later*, WALL ST. J., Jan. 24, 1991, at B1.

184. *Id.*

185. *Id.* At the time of the original story, gay veterans groups and other gay rights groups informed reporters that approximately half of the reservists had been deployed. *Id.*

186. *Id.*

187. *Id.*

188. *Id.* at B1, B5.

homosexuality would be authorized once a unit had been placed on “alert notification.”<sup>189</sup> In its section on “personnel actions during the mobilization process,” the handbook stated that in cases of homosexuality, “if discharge isn’t requested prior to the unit’s receipt of alert notification, discharge isn’t authorized. Member will enter AD [active duty] with the unit.”<sup>190</sup>

In *Conduct Unbecoming*, Shilts describes the case of Army reservist Donna Lynn Jackson, who was told that her unit would be deployed to Saudi Arabia by the end of December 1990.<sup>191</sup> While Specialist 4 Jackson was at Fort Ord awaiting deployment with her unit, she told her colonel that she was a lesbian.<sup>192</sup> According to documents later filed in federal court, the colonel replied, “Don’t worry about it—it’s no big deal.”<sup>193</sup> When Jackson explained this response to an Army lawyer, he informed her that she would be allowed to serve in the Persian Gulf but would be discharged when she returned.<sup>194</sup> An assistant to Congressman Gerry Studds looked into Jackson’s case and found that, “Her commander interpreted stop-loss to apply to gay discharges. He said he just didn’t have time to deal with that, and they would take her with them.”<sup>195</sup> After Specialist 4 Jackson went public with the case, she received an honorable discharge without being deployed.<sup>196</sup>

## V. RATIONALES FOR THE EXCLUSION OF SEXUAL MINORITIES FROM U.S. MILITARY SERVICE

As has been touched upon in the section on the historical development of U.S. military policy concerning sexual minorities, the primary rationale for prohibiting the service of homosexual men and women has changed over time as attitudes and beliefs about the causes of same-sex sexual behavior have shifted. Even as new justifications have emerged, however, old views have not been entirely abandoned.<sup>197</sup> Exclusions prior to the 1950s were based largely on unfounded judgments that sexual minorities as a group were inadequate soldiers or

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189. *Id.* A unit may be deployed overseas any time, from ten days to approximately two months after notification. Wade Lambert & Stephanie Simon, *U.S. Military Moves to Discharge Some Gay Veterans of Gulf War*, WALL ST. J., Aug. 30, 1991, at B6.

190. *Id.*

191. SHILTS, *supra* note 4, at 725-26.

192. *Id.*

193. *Id.*

194. Lambert, *supra* note 183, at B1.

195. *Id.* at B5.

196. SHILTS, *supra* note 4, at 73.

197. *See generally* Lehring, *supra* note 53, at 269-93.

sailors. Earlier views of such behavior as a function of physiological criminality, to be lumped together with “habitual and confirmed intemperance, or solitary vice,” gradually gave way to the conception of homosexuality as a sign of psychological illness.<sup>198</sup> Homosexuality was then thought to reveal a mental infirmity that would make one unable to withstand the rigors of military life. In both cases, same sex sexual behavior was viewed as the outward manifestation of an internal problem that would lead to inadequate military service. During the anti-communism of the McCarthy era, concerns about national security were added to worries about psychological health.<sup>199</sup> Military leaders feared that gay and lesbian personnel would be vulnerable to blackmail because of the social stigma attached to their sexual orientation.<sup>200</sup>

More recently, the rationale for the exclusion of homosexual men and women from military service has once again shifted.<sup>201</sup> Military leaders now express concern primarily about the effect of openly gay service personnel on their heterosexual colleagues.<sup>202</sup> The rationale for the exclusion of sexual minorities now focuses less on their ability to do their job capably than on the disruption their presence might cause.<sup>203</sup> The 1981 Department of Defense directive provides the most succinct encapsulation of the rationale for the continued exclusion of sexual minorities from military service.<sup>204</sup> Although the regulation itself has since been supplanted, its language is still used to justify the continued exclusion of homosexual servicemembers:

The presence of [homosexuals] adversely affects the ability of the Military Services to maintain discipline, good order, and morale; to foster mutual trust and confidence among service members; to insure the integrity of the system of rank and command; to facilitate assignment and worldwide

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198. See Burelli, *supra* note 2, at 18. This quote is taken from the 1860s *Manual of Instruction for Military Surgeons* as reasons for rejection of enlistment and discharge. See *id.*

199. Even at the time, however, the Senate, in its report on homosexuality in government, gave as its first reason for excluding homosexual men and women from government service the general proposition that “they are generally unsuitable” because homosexuality “is so contrary to the normal accepted standards of social behavior, that persons who engage in such activity are looked upon as outcasts by society generally.” BECOMING VISIBLE, *supra* note 19, at 155, 156; FADERMAN, *supra* note 58, at 141; SHILTS, *supra* note 4, at 105-12.

200. See generally BECOMING VISIBLE, *supra* note 19, at 156-58.

201. *Id.*

202. For detailed discussions of arguments against the inclusion of gay and lesbian soldiers, see Colonel Ronald Ray, *Lifting the Ban on Homosexuals in the Military: The Subversion of a Moral Principle*, in GAYS AND LESBIANS IN THE MILITARY, *supra* note 1, at 87-101; Laura Miller, *Fighting for a Just Cause: Soldiers’ Views on Gays in the Military*, in GAYS AND LESBIANS IN THE MILITARY, *supra* note 1, at 69-85; see also Korb, *supra* note 68, at 219-29.

203. See Ray, *supra* note 202, at 87-101; Miller, *supra* note 202, at 69-85; Korb, *supra* note 68, 219-29.

204. See discussion *supra* Part III.C.

deployment of service 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 service; and to prevent breaches of security.<sup>205</sup>

Military leaders have expressed concern that the presence of homosexuals will interfere with the bonding of personnel and, therefore, with the formation of cohesive units.<sup>206</sup> They worry that heterosexual soldiers will be uncomfortable serving with openly gay soldiers or sharing facilities with them and that those who disapprove of homosexuality for religious or moral reasons may be unwilling to work with sexual minorities.<sup>207</sup> Underlying such apprehension is a belief that unit cohesion and morale, and thereby operational effectiveness, will subsequently decline.<sup>208</sup> Military officers also express concern that hostility toward gays and lesbians will lead to violence and a breakdown in command.<sup>209</sup>

#### VI. EVIDENCE RELATED TO RATIONALES FOR THE EXCLUSION OF SEXUAL MINORITIES FROM THE U.S. MILITARY

The Department of Defense stated in 1992 that its policy prohibiting the service of homosexuals is based not on scientific or empirical data, but on the reasoned judgment of its military leaders and civilian policymakers.<sup>210</sup> Social scientific evaluations are therefore not considered sufficient to warrant changes in the policy. Both the Department of Defense and Congress have, however, commissioned multiple studies relating to the issue of homosexuality. In addition to providing their own research, several of the studies thoroughly review social science literature relevant to discussions of homosexual service. None of the research has provided any evidence that homosexual

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205. DEFENSE FORCE MANAGEMENT, *supra* note 112, at 11.

206. See SEXUAL ORIENTATION AND U.S. MILITARY PERSONNEL POLICY, *supra* note 6, at 28-29; DEFENSE FORCE MANAGEMENT, *supra* note 112, at 27-28.

207. *Id.*

208. For a review of the social science literature discussing unit cohesion and morale, see generally SEXUAL ORIENTATION AND U.S. MILITARY PERSONNEL POLICY, *supra* note 6; Robert MacCoun, *Sexual Orientation and Military Cohesion: A Critical Review of the Evidence*, in OUT IN FORCE, *supra* note 50, at 3-14; see also Gregory Herek, *Why Tell If You're Not Asked? Self-Disclosure, Intergroup Contact, and Heterosexuals' Attitudes Toward Lesbians and Gay Men*, in OUT IN FORCE, *supra* note 50; SHAWVER, *supra* note 93 (discussing disclosure of sexual orientation and the issue of modesty as both relate to the military debate).

209. SEXUAL ORIENTATION AND U.S. MILITARY PERSONNEL POLICY, *supra* note 6, at 27-31; see also Gregory Herek, *Social Science, Sexual Orientation, and Military Personnel Policy*, in OUT IN FORCE *supra* note 50, at 4.

210. See DEFENSE FORCE MANAGEMENT, *supra* note 112, at 27.

servicemembers are less competent than their heterosexual colleagues. They have shown, however, that sexual minorities do not pose a threat to national security. Multiple studies involving foreign militaries and domestic fire and policy departments have also indicated that homosexual servicemembers can be successfully integrated into military and paramilitary organizations without compromising unit cohesion, morale, or operational effectiveness.

Considerable evidence of the accomplished and honorable service of a number of homosexual military personnel has been established since World War II. For example, the Army's official history of psychiatry in World War II concluded: "The problem of homosexuality was not conspicuous in most combat divisions. There were undoubtedly a great many homosexuals throughout the military services, but, for the most part, they carried out their assignments conscientiously and exercised sexual restraint."<sup>211</sup>

Brigadier General William Menninger declared after the war that some of the "most efficient and admirable women" in the WAC were lesbians.<sup>212</sup> Throughout World War II, psychiatrists privately acknowledged that gay men had become vital members of the armed forces.<sup>213</sup> A 1945 National Academy of Sciences study of gay servicemen found that they served throughout the military.<sup>214</sup> Jobs varied a good deal, covering many phases of wartime activity from that of gunnery officer aboard a destroyer, to air combat intelligence work, to labor relations work in factories making munitions.<sup>215</sup> Some individuals served in the most active part of the fighting fronts, and several did their whole service in the United States.<sup>216</sup>

There is evidence that the exemplary conduct of some gay servicemembers was not without recognition. In a leaked memo from 1990, Vice Admiral Joseph Donnell, Commander of the Navy Surface Atlantic Fleet, admitted that lesbians are usually "among the command's top professionals."<sup>217</sup>

A 1992 U.S. General Accounting Office (GAO) report also discusses seven federal court cases in which gay and lesbian

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211. BÉRUBÉ, *supra* note 4, at 180-81.

212. *Id.* at 34.

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.* at 58.

217. SHILTS, *supra* note 4, at 720. See generally Barry Adam, *Anatomy of a Panic: State Voyeurism, Gender Politics, and the Gulf of Americanism*, in GAYS AND LESBIANS IN THE MILITARY, *supra* note 1, at 106.

servicemembers contested their discharges and more generally challenged the constitutionality of the U.S. military's prohibition on gay service.<sup>218</sup> The GAO report uses the seven cases as examples of discharges in which performance clearly was not an issue. The cases include a twelve-year Air Force veteran who received a Bronze Star for his service in Vietnam, a sixteen-year veteran and recipient of the Air Force Commendation medal and the National Defense medal, a nine-year Navy linguist and cryptographer with a top security clearance, and an Army reserve officer with a fifteen-year outstanding record whose promotion to major was suspended at the discovery of her homosexuality.<sup>219</sup>

In 1957, the U.S. Navy commissioned a report on the Navy's policies and directives related to homosexuality, including security risk implications.<sup>220</sup> The study, entitled the *Report of the Board Appointed to Prepare and Submit Recommendations to the Secretary of the Navy for the Revision of Policies, Procedures and Directive Dealing with Homosexuality*, found no indication that homosexuals pose a greater risk to national security than heterosexuals.<sup>221</sup> The report concluded:

The concept that homosexuals pose a security risk is unsupported by any factual data. . . . The number of cases of blackmail as a result of past investigations of homosexuals is negligible. No factual data exist to support the contention that homosexuals are a greater risk than heterosexuals.<sup>222</sup>

The Crittenden Report, as it became popularly known, challenged the underlying rationale of the U.S. military's exclusionary policy.<sup>223</sup> In fact, the report stated that "[o]ne concept which persists without visible supporting data . . . is the idea that homosexual individuals and those who have indulged in homosexual behavior cannot acceptably serve in the military."<sup>224</sup> The report further highlighted the fact that many homosexual service personnel have served honorably, and argued that the screening process was ineffectual and "usually serve[d] to eliminate only the more flagrant and exhibitionistic of the confirmed homosexuals."<sup>225</sup>

In a memorandum from the Chief of Naval Personnel to the Judge Advocate General in 1976, the Chief defined the rationale for exclusion

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218. DEFENSE FORCE MANAGEMENT, *supra* note 112.

219. *Id.*

220. Lehring, *supra* note 53, at 272-73.

221. *Id.*

222. *Id.*

223. See DEFENSE FORCE MANAGEMENT, *supra* note 112.

224. SHILTS, *supra* note 4, at 282.

225. *Id.* The Navy suppressed the publication of the study for twenty years. *Id.* at 283.

as follows: (1) emotional relationships among service personnel could interfere with proper command relationship; (2) gay servicemembers could be liable for court martial or civil punishment; (3) homosexual servicemembers could perpetrate sexual assaults; and (4) homosexual officers or senior personnel would not be able to maintain respect or trust from subordinates.<sup>226</sup> The memo went on to pose a rhetorical question: "Does the Navy have any empirical proof that homosexuality among its members has an adverse effect upon the completion of its mission?"<sup>227</sup> The Chief then replied, "No such empirical proof is known at this time."<sup>228</sup>

In 1988, the Department of Defense commissioned a second study on the possible risks of homosexuals to national security.<sup>229</sup> Undertaken by the Defense Personnel Security Research and Education Center (PERSEREC), this report determined that "[i]n the 30 years since the Crittenden report was submitted, no new data have been presented that would refute its conclusion that homosexuals are not greater security risks than heterosexuals."<sup>230</sup> The study then looked beyond the issue of national security and addressed the likelihood of suitability for service more generally.<sup>231</sup>

PERSEREC was informed that its report exceeded its authorized scope, and was therefore asked to submit a revised report limiting its focus to the issue of personnel security.<sup>232</sup> In the second report, PERSEREC more narrowly tailored the study to determine whether sexual minorities differ from heterosexual men and women in characteristics relevant to security concerns; the answer was no. The report concluded that homosexuals also showed better pre-service adjustment than heterosexuals.<sup>233</sup>

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226. *Id.*

227. *Id.*

228. SHILTS, *supra* note 4, at 280-81. The memo was later obtained and made available to the public pursuant to the Freedom of Information Act. *Id.*

229. *See generally* Sarbin & Karols, *supra* note 51.

230. *Id.* at 29. Sarbin & Karols explain that "[s]tudies of homosexual veterans make clear that having a same-gender or an opposite-gender orientation is unrelated to job performance in the same way as is being left- or right-handed."

231. *Id.* at 33.

232. *Id.* In 1992, Department of Defense officials argued that the PERSEREC draft did not address issues of morale, discipline, and other factors, and that therefore its analysis was flawed. *See* DEFENSE FORCE MANAGEMENT, *supra* note 112, at 7; *see also* Lehring, *supra* note 53, at 272.

233. Lehring, *supra* note 53, at 272. The PERSEREC report would not be made public until Congressman Gerry Studds and Congresswoman Patricia Schroeder received anonymous copies of the first report and released it to the press in October 1989. *Id.* at 273; *see also* Michael

In 1992, the GAO conducted a general review of the Department of Defense's policy of excluding homosexual persons from military service.<sup>234</sup> The GAO was careful to make no explicit recommendations concerning the policy; suggesting, however, that the report could be of assistance in evaluating a legislative initiative to prohibit discrimination by the armed forces on the basis of sexual orientation.<sup>235</sup> The report analyzed discharge figures and costs, studies on homosexuality in the U.S. military, social science research on homosexuality, the policies of foreign militaries, and the experiences of domestic police and fire departments that had adopted nondiscrimination policies.<sup>236</sup> It restated earlier military findings that evidence did not substantiate the preconception that national security would be compromised by homosexual service.<sup>237</sup> The GAO researchers also reported that

[m]ajor psychiatric and psychological organizations in the United States disagree with DOD's policy and believe it to be factually unsupported, unfair, and counterproductive. . . . [and that] many experts believe that the military's policy . . . has no validity according to current scientific research and opinions; and appears to be based on the same type of prejudicial suppositions that were used to discriminate against blacks and women before these policies were changed.<sup>238</sup>

The GAO noted that thirteen Western allied countries allow homosexual men and women to serve in the military without restrictions and that officials from the domestic departments that had prohibited discrimination of sexual minorities reported that "they had not experienced any degradation of mission associated with these policies."<sup>239</sup>

In 1993, then Secretary of Defense Les Aspin commissioned a study from RAND to provide analysis useful for the implementation of President Clinton's order removing the ban on sexual minorities in the military.<sup>240</sup> The RAND study, which ran more than 500 pages, found "[t]here is no scientific evidence, and no compelling reason to believe, that homosexuals are inherently less capable of performing military tasks

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McDaniel, *Preservice Adjustment of Homosexual and Heterosexual Military Accessions: Implications for Security Clearance Suitability*, in *GAYS IN UNIFORM*, *supra* note 51, at 111.

234. DEFENSE FORCE MANAGEMENT, *supra* note 112, at 2.

235. *Id.* at 7.

236. *Id.* at 4-6.

237. *Id.* at 7.

238. DEFENSE FORCE MANAGEMENT, *supra* note 112, at 3, 37.

239. *See id.* at 6. The 1992 report did not, however, assess the effects of such military policies allowing homosexuals to serve.

240. *See* SEXUAL ORIENTATION AND U.S. MILITARY PERSONNEL POLICY, *supra* note 6. RAND's National Defense Research Institute, which completed the report, is funded by the Department of Defense.

than are heterosexuals.”<sup>241</sup> The study acknowledged that hostile opinions concerning homosexuality were prevalent within the American military, but they concluded that evidence suggested “[h]omosexuals can be successfully integrated into military and public security organizations.”<sup>242</sup> In reviewing research related to the issues of unit cohesion and operational effectiveness, RAND found that “[h]omosexuals who serve in the military are committed to the military’s core values, which [include] fighting skill, professional teamwork, physical stamina, self-discipline, duty (selfless service) and loyalty to unit.”<sup>243</sup>

The study included an analysis of the sizable literature on unit cohesion more generally to extrapolate the likely effects of open homosexuality on unit cohesion and operational effectiveness, concluding that potential problems could be overcome with effective leadership because “[t]here is ample reason to believe that heterosexual and homosexual military personnel can work together effectively.”<sup>244</sup> The RAND study also reviewed the experiences of foreign militaries, as well as domestic fire and police departments, that had instituted nondiscrimination policies.<sup>245</sup> For those foreign militaries that had liberalized their policies on homosexual service, the study reported no problems for conscription, recruitment, or retention.<sup>246</sup> Military personnel, members of advocacy groups, and social scientists informed the RAND researchers that “[t]here was no significant threat to unit cohesion or organizational performance created by the presence of homosexuals in their militaries.”<sup>247</sup> With respect to domestic fire and police departments, the study found that there was a “shared consensus” among leaders of domestic departments “that a policy of non-discrimination had in no way compromised their ability to perform their mission.”<sup>248</sup> Accordingly, the RAND report recommended the implementation of a conduct-based policy that would establish clear standards of behavior for all service personnel, regardless of sexual orientation, and would not consider sexual orientation, by itself, as germane.<sup>249</sup>

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241. *Id.* at 284.

242. *Id.* at 32.

243. *Id.* at 312.

244. *Id.* at 329-30.

245. *See generally* SEXUAL ORIENTATION AND U.S. MILITARY PERSONNEL POLICY, *supra* note 6.

246. *Id.* at 104. The militaries that had liberalized their policies were France, the Netherlands, and Norway. *Id.*

247. *Id.*

248. *Id.* at 141.

249. *Id.*

As a result of the congressional debate over President Clinton's intention to remove the military's ban on homosexuals, Senator John Warner, in 1993, also requested a GAO review of the military policies concerning homosexuality in twenty-five countries.<sup>250</sup> During this same period, the Army Research Institute commissioned studies of the practices of eight European countries.<sup>251</sup> The GAO report briefly reviewed military regulations for each country, but focused on the experiences of the armed forces in Canada, Israel, Sweden, and Germany.<sup>252</sup> The GAO concluded that for those countries studied in-depth, "[t]he presence of homosexuals in the military is not an issue and has not created problems in the functioning of military units."<sup>253</sup> The study also found that for military leaders "the inclusion of homosexuals in the military is not a problem and has not adversely affected unit readiness, effectiveness, cohesion, or morale."<sup>254</sup> A more recent and general review of the available literature on foreign militaries, including the Army Research Institute's reports, illustrates that the trend among Western nations in the early 1990s was toward removing restrictions on service based on sexual orientation.<sup>255</sup> The study found no evidence of "problems with cohesion, morale, recruiting, and retention" for those countries that had eliminated bans to service, even in nations where disruption had been predicted prior to the removal of such prohibitions.<sup>256</sup>

Since the RAND and GAO studies were published in 1993, several other studies have been conducted of foreign militaries that have removed all restrictions on homosexual service. In the cases of Canada and Israel, such studies provided long-term assessments adding to the RAND and GAO analyses of what, at that time, were short-term

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250. See U.S. GENERAL ACCOUNTING OFFICE, REP. NO. GAO/NSIAD-93-215, *HOMOSEXUALS IN THE MILITARY* (1993) [hereinafter *HOMOSEXUALS IN THE MILITARY*]. The countries whose policies were reviewed in the report include: Australia, Belgium, Brazil, Canada, Chile, Colombia, France, Germany, Greece, Hungary, Israel, Italy, Japan, Peru, Poland, Portugal, Republic of Korea, Romania, South Africa, Spain, Sweden, the Netherlands, Turkey, the United Kingdom, and Venezuela.

251. The studies covered Belgium, Canada, Denmark, France, Germany, Italy, the Netherlands, and the United Kingdom. See Paul Gade et al., *The Experience of Foreign Militaries*, in *OUT IN FORCE* *supra* note 50, at 109.

252. At the time, Israel, Sweden, and Canada had no restrictions against homosexual service, while Germany did impose restrictions on homosexual volunteers; Canada and Israel had only recently lifted all of their restrictions on the service of homosexuals. See *HOMOSEXUALS IN THE MILITARY*, *supra* note 250.

253. *Id.* at 3.

254. *Id.* at 4.

255. See generally CHARLES MOSKOS, *THE POSTMODERN MILITARY: ARMED FORCES AFTER THE COLD WAR* (Charles Moskos et al. eds., 2000) (detailing the developments of individual countries by chapter).

256. *Id.* at 126.

changes.<sup>257</sup> Researchers have also analyzed the outcome of Australia's 1992 removal of its ban, as well as the more recent policy change in the U.K.<sup>258</sup> In the case of Canada, the study found that the eradication of prohibitions against homosexual service "had no impact on military performance, readiness, cohesion, or morale."<sup>259</sup> While the removal of the ban was not universally popular with heterosexual soldiers, it was universally accepted and successfully implemented.<sup>260</sup> Despite concerns of resignations, violence, and refusals to work with homosexual service-members prior to the policy change, officials saw no such actions once the policy went into effect.<sup>261</sup> The study reported that

[o]fficials, military scholars, nongovernmental and political leaders, and gay soldiers all concur that the removal of the ban had had, to their knowledge, no perceptible negative effect on the military. The issue of gay and lesbian soldiers in the Canadian Forces has all but disappeared from public and internal military debates.<sup>262</sup>

Prior to Australia's removal of restrictions against homosexual service in 1992, military officials there worried that the policy change would jeopardize recruitment, unit cohesion, and combat effectiveness while encouraging the spread of AIDS and predatory sexual behavior.<sup>263</sup> In a study conducted in 2000, however, the policy change was later described by an Australian Defense Forces (ADF) official as a "non-event" in terms of its effect on recruitment and retention.<sup>264</sup> The study found that the removal of restrictions has led to no perceptible decrease in military performance, operational effectiveness, or unit cohesion for

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257. See Aaron Belkin & Jason McNichol, *Homosexual Personnel Policy in the Canadian Forces: Did Lifting the Gay Ban Undermine Military Performance?*, 56 INT'L J. 73-88 (2001); Aaron Belkin & Melissa Levitt, *The Effects of Lifting of Restrictions on Gay and Lesbian Service in the Israeli Forces: Appraising the Evidence* (June 2000), available at CENTER FOR THE STUDY OF SEXUAL MINORITIES IN THE MILITARY, <http://www.gaymilitary.ucsb.edu/Publications/IsraelPub1.htm>.

258. See Aaron Belkin & Jason McNichol, *The Effects of Including Gay and Lesbian Soldiers in the Australian Defence Forces: Appraising the Evidence* (Sept. 19, 2000), available at CENTER FOR THE STUDY OF SEXUAL MINORITIES IN THE MILITARY, <http://www.gaymilitary.ucsb.edu/Publications/AustraliaPub1.htm>; Aaron Belkin & R.L. Evans, *The Effects of Including Gay and Lesbian Soldiers in the British Armed Forces: Appraising the Evidence* (Nov. 2000), available at, CENTER FOR THE STUDY OF SEXUAL MINORITIES IN THE MILITARY, [http://www.gaymilitary.ucsb.edu/Publications/british\\_pub1.htm](http://www.gaymilitary.ucsb.edu/Publications/british_pub1.htm).

259. Belkin & McNichol, *Homosexual Personnel Policy in the Canadian Forces*, *supra* note 257, at 74.

260. *Id.*

261. *Id.*

262. *Id.* at 73-88.

263. Belkin & McNichol, *Gay and Lesbian Soldiers in the Australian Defence Forces*, *supra* note 258.

264. *Id.*

the ADF.<sup>265</sup> The study further noted that “[s]enior officials, commanders, and military scholars within the ADF consistently appraise the lifting of the ban as a successful policy change that has contributed to greater equity and effective working relationships within the ranks.”<sup>266</sup>

While Israel has never officially barred sexual minorities from serving in the military, it retained restrictions on their service in intelligence positions until 1993.<sup>267</sup> Restrictions against gay and lesbian servicemembers stemmed from concerns about blackmail; homosexuality, however, was not viewed by military leaders as a threat to either the success of military operations or the cohesiveness of military units.<sup>268</sup> In a study of the long-term effect of the official removal of all restrictions against homosexual service in intelligence positions, it was reported that there was no evidence that the policy change had in any way harmed operational effectiveness, combat readiness, unit cohesion, or morale in the Israeli Defense Forces (IDF):

[T]he scholars, former and present military personnel, and representatives of gay and lesbian organizations interviewed for this report indicated that they had not heard any intimations that IDF performance had been compromised by the inclusion of openly gay and lesbian soldiers. In this security-conscious country, where the military is considered to be essential to the continued existence of the nation, there has been no public debate or expressions of concern about possible harm to IDF rates of success by sexual minorities.<sup>269</sup>

Finally, another report found that Britain’s removal of its ban in January 2000 was “hailed as a solid achievement” in the British Ministry of Defense’s classified study undertaken six months after the policy change was implemented.<sup>270</sup> While it was too early to determine the long-term effects of the eradication of the prohibition on homosexual service, the short-term response to the policy change was characterized by a “marked lack of reaction” among servicemembers, according to the Ministry of Defense’s report.<sup>271</sup> Despite initial fears of potential damage, the report found no indication of any initial effect of the ban’s elimination

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265. *Id.* Problems within individual units were successfully handled through normal management procedures. *Id.*

266. *Id.*

267. See Belkin & Levitt, *Gay and Lesbian Service in the Israeli Forces*, *supra* note 257.

268. *Id.*

269. *Id.*

270. Belkin & Evans, *Gay and Lesbian Soldiers in the British Armed Forces*, *supra* note 258.

271. *Id.*

on recruitment, retention, harassment, morale, or the operational success of the British Defense Forces.<sup>272</sup>

In the past decade, U.S. military leaders have generally come to accept the fact that sexual minorities can perform military duties just as well as their heterosexual colleagues, and that many gay and lesbian military personnel have served honorably under the current ban.<sup>273</sup> Senior military commanders now acknowledge that tens of thousands of homosexuals serve ably, albeit privately, in the 1.4 million-member military.<sup>274</sup> In his 1992 congressional testimony, General Colin Powell, then Chairman of the Joint Chiefs of Staff, made it clear that the motivation behind the ban “is not an argument of performance on the part of homosexuals who might be in uniform, and it is not saying they are not good enough.”<sup>275</sup> Senator Strom Thurmond, a leading supporter of the ban on homosexual servicemembers, acknowledged the “dedicated and heroic service by many gays in the ranks of our armed services,” in his testimony before the Armed Services Committee in 1993.<sup>276</sup> The issue of national security has also fallen by the wayside. In 1991, then Secretary of Defense Dick Cheney stated in his congressional testimony that, with respect to homosexual servicemembers, the national security issue was “a bit of an old chestnut.”<sup>277</sup> Notwithstanding the numerous studies of foreign military and domestic paramilitary organizations, U.S. officials today argue that the problem is not that homosexual servicemembers do exist, but that they would undermine morale and discipline if allowed to serve openly; seventy-six percent of senior military officers continue to oppose sexual minorities openly participating in the U.S. military.<sup>278</sup>

## VII. CASES OF HIGHLY VISIBLE GAY AND LESBIAN SERVICEMEMBERS

Beginning with Technical Sergeant Matlovich in 1975, a number of gay and lesbian servicemembers have challenged their discharges and the military’s policy concerning sexual minorities, in both federal and

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272. *Id.*

273. See DEFENSE FORCE MANAGEMENT, *supra* note 112.

274. See Eric Schmitt, *Gay Rights Advocates Plan to Press Clinton to Undo Policy of ‘Don’t Ask, Don’t Tell’*, N.Y. TIMES, Dec. 25, 1999, at A20.

275. Herek, *Social Science, Sexual Orientation, and Military Personnel Policy*, *supra* note 209, at 3.

276. Adam, *supra* note 217, at 106.

277. Lehring, *supra* note 53, at 273; see also DEFENSE FORCE MANAGEMENT, *supra* note 114, at 35.

278. See Schmitt, *supra* note 274.

administrative courts.<sup>279</sup> While several have prevailed in their individual causes of action, the constitutionality of the military's ban on sexual minorities has ultimately been upheld.<sup>280</sup> Federal courts continue to provide the armed forces with considerable latitude and deference on matters relating to military service, organization, and personnel. As the Supreme Court declared in *Rostker v. Goldberg*, "judicial deference . . . is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged."<sup>281</sup> Correspondingly, courts have accorded the armed forces great latitude, but more so because of a presumption that military life inevitably involves fewer privacy expectations and, thereby, the relinquishment of some constitutional rights.<sup>282</sup>

Nevertheless, cases involving challenges of discharges for homosexuality are worth studying for purposes other than mere legal precedent. As was indicated by GAO researchers in 1992, the various suits have brought records of exemplary conduct by gay and lesbian military personnel to public attention. In addition, many of these cases also provide examples of open service by homosexuals. Even among those who had not previously made their sexual orientation known to military colleagues, their participation in high-profile challenges has effectively meant that military co-workers were made aware of their homosexuality. Because of injunctions against discharge pending case outcomes, a number of those who fought their discharge board recommendations continued to serve in the military while their cases made their way through the federal court system or through the military's appeals process. In 1995, seventeen military personnel served openly despite efforts to discharge them for homosexuality.<sup>283</sup>

The following section examines four recent cases in which military personnel continued to serve in the U.S. armed forces while they fought their pending discharges. The segments draw from newspaper accounts, court records, interviews with the servicemembers themselves, and statements by their co-workers and superior officers. The cases were

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279. Shilts extensively details various federal court cases related to the military's ban on homosexual servicemembers through the 1980s. See generally SHILTS, *supra* note 4. For additional information on the case of Leonard Matlovich, the first servicemember to challenge the regulation in court, see generally *Matlovich v. Sec'y of the Air Force*, 591 F.2d 852 (D.C. Cir. 1978); MARTIN B. DUBERMAN, *ABOUT TIME: EXPLORING THE GAY PAST* (1991).

280. See generally SHILTS, *supra* note 4.

281. 453 U.S. 57, 70 (1981).

282. See SEXUAL ORIENTATION AND U.S. MILITARY PERSONNEL POLICY, *supra* note 6, at 339-40 (discussing the Supreme Court's decision in *Rostker*).

283. Kay Mills, *National Lawyers Network Advises Gays in Uniform*, ST. LOUIS POST-DISPATCH, Jan. 1, 1995, at 6B.

chosen precisely because of their high-profile nature and the length of time the servicemembers served openly. Collectively, the subjects served more than eighteen years as openly homosexual servicemembers. During that time, they received outstanding evaluations, awards, promotions, and expanded responsibilities, as well as established collegial relationships with co-workers. The minor problems they encountered were effectively resolved through normal military procedures. Such cases add further qualitative nuance and depth to the quantitative information about the actual implementation of the ban and the experiences of foreign militaries and domestic paramilitary organizations.

A. *The Case of Petty Officer Keith Meinhold*

1. Background of the Case

Petty Officer Keith Meinhold, a sonar operator and trainer on P-3 Orion aircraft,<sup>284</sup> served with the Navy for twelve years when he disclosed that he was gay on ABC Nightly News in May 1992. Meinhold, who flew missions throughout the Pacific and Indian Oceans and the Persian Gulf,<sup>285</sup> was an exemplary sailor who had received high performance evaluations throughout his career. He consistently graduated at the top of his classes and had been certified as a Master Training Specialist, an honor bestowed upon the top 10% of instructors. Meinhold supervised a team of thirty-two Navy instructors and had previously been recognized as "Aircrew Instructor of the Year."<sup>286</sup> He was prompted to come forward after hearing about an alleged witch hunt for gay sailors in Japan, in which more than fifty servicemembers were investigated.<sup>287</sup> As a result of his public statement, Meinhold's commanding officer initiated discharge proceedings. The administrative board unanimously agreed that Meinhold should be discharged under honorable conditions on June 30, and he was separated from the Navy in August 1992.<sup>288</sup>

Meinhold challenged the discharge in federal district court in Los Angeles, arguing that the hearings were improperly and unfairly

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284. The P-3 Orion is an anti-submarine warfare plane. Petty Officer Meinhold was based at Moffett Field in California at the time of his statement.

285. See <http://www.members.aol.com/kmeinhold/bio.htm>. Petty Officer Meinhold had at this time accumulated over 3500 flight hours. *Id.*

286. *Id.*

287. Dan Turner, *Moffett Gay Sailor Hopes for Exception to Policy*, S.F. CHRON., May 23, 1992, at A18.

288. Dan Turner, *Navy Board Recommends Discharge for Gay Sailor*, S.F. CHRON., July 1, 1992, at A3; Edward Lempinen, *Gay Sailor Ordered Reinstated by Navy*, S.F. CHRON., Nov. 7, 1992, at A18.

conducted and that the ban on homosexual servicemembers was unconstitutional.<sup>289</sup> In November 1992, Meinhold moved for and was granted an injunction reinstating him pending the outcome of the case. Meinhold's first efforts to return to work were rebuffed; officials told him that they needed direct approval from the Pentagon to reinstate him. Meinhold subsequently returned to work with his squadron after the court issued a second order. United States District Judge Hatter ruled in Meinhold's favor in January 1993, stating that the Navy had "no justification" for discharging Meinhold.<sup>290</sup> Judge Hatter further ruled that the military's ban on sexual minorities was unconstitutional and, therefore, permanently enjoined the military from "discharging or denying enlistment to any person based on sexual orientation in the absence of sexual conduct which interferes with the military mission of the armed forces of the United States."<sup>291</sup> The Department of Justice under the Clinton administration, which at the time was in the process of completing its review of the military's policy on sexual minorities, appealed Judge Hatter's decision to the Ninth Circuit Court of Appeals.<sup>292</sup> While the Administration opposed the ruling out of a fear that it would impede the long-term efforts to lift the ban, President Clinton praised Judge Hatter's decision, stating, "It makes the practical point I have been making all along."<sup>293</sup>

The Ninth Circuit upheld Meinhold's reinstatement and ruled that the armed forces could not discharge sexual minorities based solely on their own statements that they are gay.<sup>294</sup> The court did, however, overturn the district court's military-wide prohibition against barring homosexual men and women from serving.<sup>295</sup> Because Meinhold only sued on his own behalf and not as part of a class-action suit, the court ruled that the decision would affect Meinhold alone.<sup>296</sup> The U.S. government decided

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289. Lempinen, *supra* note 288.

290. Ruth Marcus & Helen Dewar, *Pact on Gay Ban Remains Elusive*, WASH. POST, Jan. 29, 1993, at A1; *see also* Meinhold v. U.S. Dep't of Def., 808 F. Supp. 1455 (C.D. Cal. 1993).

291. *Meinhold*, 808 F. Supp. at 1458.

292. Eric Schmitt, *U.S. Opposes Court Interference in Gay Troop Ban*, N.Y. TIMES, Mar. 5, 1993, at A14.

293. *Id.*

294. David Johnson, *Gay Sailor Claims Victory as Court Deadline Passes*, N.Y. TIMES, Oct. 17, 1994, at A12; *see also* Meinhold v. U.S. Dep't of Def., 34 F.3d 1469, 1477-80 (9th Cir. 1994).

295. *Meinhold*, 34 F.3d at 1480.

296. *See generally id.* For general discussions of the legal challenges to the U.S. military's ban on sexual minorities, *see* Jon Sawyer, *Homosexuals in Military Protest Ban So That Others Can 'Stop Living a Lie'*, ST. LOUIS POST-DISPATCH, Apr. 27, 1993, at 7A; Marc Sandalow, *Gay Soldiers Regret Trusting Clinton For 3 Who Went Public, Failure to End Military Ban Has Been Tragic*, SAN FRAN. CHRON., Sept. 20, 1993, at A2; Bettina Boxall, *Video Presents Case for Gays*

not to appeal the decision to the Supreme Court.<sup>297</sup> Meinhold was told by military personnel, however, that he would be discharged under the new policy if he repeated that he was gay.<sup>298</sup> He re-enlisted in the Navy on December 16, 1993.

In his final Navy tour with Patrol Squadron 46, Meinhold was recognized for photographic intelligence quality with two Lens Master and one Golden Lens awards. His crew won the 1995 ASW rodeo and was honored as the most combat effective P-3 crew in the Pacific Fleet as both the “Crew of the Quarter” and “Crew of the Year.” Meinhold continued to serve until he retired from the Navy in March 1996, after sixteen years of service. He retired with full military honors and was awarded the Navy Achievement Medal for his service with Patrol Squadron 46.<sup>299</sup>

## 2. In Their Own Words: The Experience of Meinhold and His Colleagues

During an interview with ABC News, Meinhold explained his decision to publicly announce his sexual orientation as follows: “Primarily, the reason was my own personal integrity. I am an honest person, and not saying anything didn’t make me feel good.”<sup>300</sup> Like other service personnel publicly challenging the military’s ban on homosexuality, Meinhold had to cope both with the issue of sexual orientation within an institution that was officially hostile and with the fact that he was publicly criticizing the Navy. He made a conscious decision to include the media in his case, in part to ensure his own safety as well as to ensure that the military handled his case in a manner that was above-board.<sup>301</sup> “I knew that as long as the media was paying attention to my case, the Navy would never try to do anything unseemly,”

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*in the Military*, WASH. POST, Apr. 21, 1993, at B3. For greater detail of Meinhold’s legal case, see Joan Biskupic, *High Court Lifts Bar to Gay Ban; Action Clears Way for Clinton Policy of ‘Don’t Ask, Don’t Tell,’* WASH. POST, Oct. 30, 1993, at A01; *Gay Sailor’s Reinstatement Upheld*, CHI. SUN-TIMES, Aug. 31, 1994, at 3; David Johnston, *Gay Sailor Claims a Victory As Court Case Deadline Passes*, N.Y. TIMES, Oct. 17, 1994, at A12.

297. Stephen Labaton, *U.S. Drops Effort to Oust a Gay Sailor*, N.Y. TIMES, Nov. 29, 1994, at A20. Meinhold would later win payment of his legal bills from the government; the court ordered the government to pay \$440,000 in court costs. *U.S. Told to Pay Legal Bills of Gay Sailor*, N.Y. TIMES, July 20, 1995, at A17.

298. Labaton, *supra* note 297.

299. Keith Meinhold, *Navyboy@aolcom: Keith Meinhold*, 2001 at <http://www.members.aol.com/kmeinhold/career.htm>.

300. Turner, *supra* note 287.

301. See generally SHILTS, *supra* note 4 (providing a detailed account of the military’s investigative procedures concerning homosexual personnel).

Meinhold stated.<sup>302</sup> It was still difficult for him, however, to witness the Navy's tactics during the discharge process. After twelve years of receiving 4.0 evaluations, Meinhold's commanders dramatically dropped his performance rating.<sup>303</sup> Commanders interviewed the induction doctor from twelve years earlier in an unsuccessful effort to show that Meinhold had been deceitful about his sexual orientation during his induction.<sup>304</sup> Finally, they attempted to portray Meinhold's Thanksgiving dinner invitation to a student as inappropriate behavior.<sup>305</sup> Meinhold explained, "It's interesting; there's a lot of character assassination. And this was not done by the people I worked with. That's done by the legal team."<sup>306</sup>

During his discharge hearing, four colleagues testified that Meinhold was an "outstanding sailor" and expressed their wish to continue working with him. One would state that many of his co-workers knew he was gay before his public announcement and shielded Meinhold from exposure.<sup>307</sup> Two subordinates also testified that his sexual orientation was not a problem for them.<sup>308</sup> When he was asked if the retention of Meinhold would "frustrate the performance of the command," superior officer Senior Chief Yates replied, "No I think ah, if he were retained, and put back in instructor duty, we would benefit from his instructor ability."<sup>309</sup> Another officer apologized for any inadvertent prejudice and said he had changed his opinion about homosexuals after working with Meinhold.<sup>310</sup> The Navy's attorney would state that Meinhold's conduct was irrelevant; regulations mandated the separation of all homosexual servicemembers.<sup>311</sup>

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302. Telephone Interview with Keith Meinhold, Chief Petty Officer, U.S. Navy (Retired) (June 4, 2001).

303. *Id.*

304. *Id.*

305. *Id.* In recommending that Meinhold be discharged, the Navy's convening authority stated to the Chief of Naval Personnel that Meinhold's sexual orientation had "adversely affected his performance of duty and adversely affected good order and discipline," even though the administrative panel had made no such finding. [Proposed] Separate Statement of Undisputed Facts in Support of Plaintiff's Motion for Summary Judgment or, in the Alternative, for Summary Adjudication of Claims at 4, *Meinhold v. U.S. Dep't of Def.*, 123 F.3d 1275 (9th Cir. 1997) (No. 96-56094) (on file with author).

306. Interview with Keith Meinhold, *supra* note 302.

307. It was determined during Meinhold's federal court case that he had been open about his sexual orientation to superior officers, including one base commander. [Proposed] Separate Statement of Undisputed Facts, *supra* note 305, at 5.

308. *Id.*

309. Defendant's Statement of Unccontroverted [sic] Facts and Conclusion of Law at 4, *Meinhold v. U.S. Dep't of Def.*, 123 F.3d 1275 (9th Cir. 1997) (No. 96-56074) (on file with author).

310. Jane Gross, *Gay Sailor Blazing Path for Others, Returns to Base After Court Order*, N.Y. TIMES, Nov. 13, 1992, at A12.

311. [Proposed] Separate Statement of Undisputed Facts, *supra* note 305, at 5.

An acoustic operator student at the time of Meinhold's statement later reflected:

I was actually assigned Keith as my tac phase instructor. This was during the time he "came out." I never got to have a single event with Keith as the instructor; since the day after his TV appearance they assigned my partner and I a new instructor. It wasn't until later, after I had served with Keith in another command that I realized how inferior the replacement instructor was.<sup>312</sup>

When Meinhold returned to work after the court mandated his reinstatement, he was informed by a base official that everyone had been instructed to show him no disrespect.<sup>313</sup> One aviation electronics technician who had previously worked with Meinhold predicted at the time that "the people that he works with will be receptive" and added admiringly that "he turned out to be a real strong-willed individual."<sup>314</sup> Nevertheless, he did receive an icy stare from one base official who refused to shake his hand, and some people kept their distance, but those were the worst reactions he received.<sup>315</sup> Meinhold would later add, "What happened when I actually started walking on the hanger deck, instead of people giving me dirty looks, saying things or whatever, people actually came to shake my hand and congratulated me."<sup>316</sup> Meinhold was assigned a bodyguard by the military. When the bodyguard went to the commanding officer to inform him that there did not seem to be any danger, the bodyguard was immediately reassigned.<sup>317</sup>

Meinhold was reinstated as an instructor for acoustic sonar training for anti-submarine aircraft. While naval officials knew they had to comply with the federal order, they were unsure how to handle the situation. Meinhold explained:

They came up with a scheme that if I was going to be teaching students in-flight, that the commanding officer or the executive officer would, the day before, bring the entire crew in to ask them if they felt comfortable flying with an avowed homosexual and they would also ask my students before I went to teach or lecture a class. Every day, the chief in charge of the shop would enter the classroom and ask if everybody felt comfortable flying with a known homosexual.<sup>318</sup>

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312. Interview with Keith Meinhold, *supra* note 302.

313. Gross, *supra* note 310.

314. *Id.*

315. *Id.*

316. Interview with Keith Meinhold, *supra* note 302.

317. *Id.*

318. *Id.*

After being asked the same question each day for more than a month and responding that they did not have a problem, the students finally went to the commanding officer and requested that the questions stop. According to Meinhold, the students told him:

They learn more from me in a day than from other instructors in a month. Now that's what the students said. Whether it's true, I don't know. But clearly they wanted me as the instructor because they learned something from me. And that's rather, I think—the surprising part to me and to the chief was that these were young military people. They were not, had not been there for a long time. They were not seniors, they were, you know, 18-23 years old, to have the balls to go to the chief and say, "We wanted him to teach our class." I thought that was pretty interesting.<sup>319</sup>

While Meinhold did not receive negative feedback from his co-workers during his transition back, he would later hear from colleagues that some people had been upset about his stand and his return.<sup>320</sup> Meinhold felt that some resented him for taking on the military policy, believing that he had disparaged the image and reputation of the military by publicly challenging it.<sup>321</sup> In the military, Meinhold explained, "a rule is a rule, and you just follow it."<sup>322</sup> Despite this resentment, he had no problems with his colleagues in terms of professional relationships, harassment, or capacity to work together.<sup>323</sup>

Any problems he had during the period when his case was still pending came from the Navy brass:

I think one of the things that we can look at, at least from my perspective that was somewhat poignant, the difference between official military response and the personal response of military personnel. I found that, I can't say necessarily dramatic, but it was interesting to see the official military response was one of caution but also tactically they were trying to do everything they could, of course, to get rid of me. What that did, that caught my commanding officer and my supervisors sort of between me and the court, well saying there was a gay person staying in the military and the officials at the Pentagon putting pressure on the commanding officer to sort of get rid of me or do something to me.<sup>324</sup>

Those who testified on his behalf at his hearing declined further public comment during the remainder of the court case. One Moffett Field aircrew instructor admitted that "[t]here's a lot of pressure (to keep

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319. *Id.*

320. *Id.*

321. *Id.*

322. *Id.*

323. *Id.*

324. *Id.*

silent), both overt and some very subtle.”<sup>325</sup> A student in the squadron later recalled:

It was rough at the squadron then, as all the students were basically locked down and instructed to follow some strict rules. One of them was that if any of us were approached by the press we were to make no comments. It was made clear by the squadron’s commanding officer (CO) that anything other than “no comment” would result in us not passing training and not continuing on to our fleet squadrons.<sup>326</sup>

After the questions to his students stopped, things settled down to normal. Other than continued media exposure, which could be a disruption, everyone settled back into a routine. Meinhold explained,

[f]or the most part, I would say it was pretty much forgotten after the first couple of months and people not having to be asked at all. For the most part, people don’t think about it. They didn’t go, Oh, that’s a gay guy. Exactly.

I think one of the things I had trouble with the media is that they never reported that, everything went okay. There’s no controversy after that, basically other than the court case. There’s no controversy. I didn’t have confrontations. I went to work. I did my job, and I went home.<sup>327</sup>

Meinhold’s sexual orientation receded into the background as he went about his job. He did find, however, that heterosexual sailors wanted to ask him questions about sexual orientation issues and homosexuality in general. A couple of people tried to set him up on dates, including one colleague who had a gay brother. He was also approached by other gay sailors offering support:

There’re some folks who sort of came up to me later on separately where, you know, out of sight and said, “Hey, look, I realize you’re doing this for me.” I remember one time the duty office that the unit that I was working in was staffed by four people: the driver, the duty officer, the messenger, and myself as the assistant duty officer. At one time, all four people staffing the front office were gay.<sup>328</sup>

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325. In court documents filed in the case, Moffett Field Captain Gregory Markwell argued that Meinhold’s presence “has reduced morale, efficiency and mission focus” and “struck a discordant note with the troops.” David Tuller, *Moffett Contends Gay Sailor is Causing Morale Problems*, S.F. CHRON., Jan. 28, 1993, at A3. Markwell further argued that officers spent “in excess of 100 man-hours dealing with issues related to” his return. *Id.* Meinhold’s attorney countered, “There was an implied effort to encourage people to express some dissatisfaction to his presence.” *Id.*; see also Dan Turner, *Gay Sailor Says He Feels Bitter Problems Caused by Commanders, Meinhold Says*, S.F. CHRON., Apr. 9, 1993, at B5.

326. Telephone Interview with William Whitmire, Petty Officer, U.S. Navy (Sept. 6, 2001).

327. Interview with Keith Meinhold, *supra* note 302.

328. *Id.*

Meinhold always knew there were other gay sailors in the Navy, including the colleague in whom he first confided his sexual orientation, although he did not realize it at the time.<sup>329</sup> But once he became a public figure, he became aware of many more. Flipping through his old naval yearbook, he said, “[Y]ou can go right through the book—1, 2, 3, 4, 5, 6, 7, 8, 9, gay.”<sup>330</sup>

Because Patrol Squadron 31 was decommissioned in 1993 as a result of the closing of the Moffett Field Naval Air Station, Meinhold was temporarily transferred to a job doing database financial work for the comptroller overseeing the budgetary issues related to the shut-down.<sup>331</sup> The comptroller had lost his assistants due to the impending closure, and Meinhold worked directly for him on the budget.<sup>332</sup> Although he had no training in finance, Meinhold was recommended for a commendation medal by the comptroller for the outstanding work he performed on the budget.<sup>333</sup> Meinhold was also given perfect scores on his yearly evaluation in November 1993.<sup>334</sup> He was recommended for advancement to chief petty officer and was described by superiors as “a skillful administrator, an accomplished instructor . . . [who] performed his duties demonstrating competence and superb technical expertise.”<sup>335</sup> Soon after his yearly evaluation, Meinhold wrote in an op-ed piece for *The New York Times*:

Since my reinstatement as an openly gay man, the only discrimination I have encountered is that of the Navy’s policy. I have not been the target of discrimination by individuals. The Joint Chiefs, Senator Sam Nunn and others have greatly underestimated American service people. In my experience, the troops are not consumed with hatred and prejudice, but are just interested in doing a good job.<sup>336</sup>

After his tour of duty was completed in 1994, Meinhold was transferred to Patrol Squadron 46 (VP-46) for work once again as an acoustic station operator and instructor. It was around this time that his case was also successfully resolved. When Meinhold was transferred to unit VP-46, the news of his impending arrival preceded him. The Navy command implemented anti-discrimination training, and a number of those who did not already know Meinhold expressed concern and anger about his

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329. Gross, *supra* note 310.

330. *Id.*

331. Interview with Keith Meinhold, *supra* note 302.

332. *Id.*

333. *Id.*

334. Keith Meinhold, *The Navy vs. Me*, N.Y. TIMES, Dec. 16, 1993, at A29.

335. *Id.*

336. *Id.*

arrival. Petty Officer William Whitmire, an E-5 Senior Acoustics Operator in Patrol Squadron 46 who had already worked with Meinhold, found that differences in attitude split, in part, between those who knew Meinhold personally and those who did not.<sup>337</sup> For those who already knew the Petty Officer, his arrival was “something of a homecoming.”<sup>338</sup> Whitmire explained what the mood was like before Meinhold’s arrival:

It was late 1993 when we got news that Keith had orders to VP-46. At that time the popular response by those who did not know Keith was to proclaim his being in the squadron, much less the Navy, as wrong. Most don’t [sic] want to see him come and made it clear that they would make his life miserable and be as uncooperative with him as possible. . . .

It was a tense moment when he finally did check in. The senior folks were walking on eggshells. Those in different job ratings from mine and Keith’s were skiddish [sic], almost like Keith was a celebrity. For the AW’s, there was a variety of reactions. All of the AW’s that were around my rank and higher had very little concern over it. I guess we were more interested in the reactions of the others. The junior AW’s had been assured by us that it would be fine. They were probably a little stand-offish at first, but after they got to know him they realized there was little to be concerned with.

I can’t really recall any threats to Keith even after all the boastful comments made prior to his checking in. As time went on it became apparent to all that Keith was a normal person and while I’m sure there had to be those who were uncomfortable around him most treated Keith as just another person.<sup>339</sup>

Whitmire felt that the commanding officers were overly worried about how the men would respond to Meinhold’s presence. He described an operational meeting that occurred before Meinhold’s arrival:

Usually this meeting was devoted to the operational abilities of the crewmembers in order for a balanced group of crews to be formed throughout the squadron. To this day it still amazes me the lengths the Training Department folks went through to ensure the crew Keith was on “could handle it.” This meeting normal[ly] takes about half a day but we spent nearly a week in there trying to organize a crew list that would work. Finally the crew list came out and Keith’s crew was loaded with mainly senior, married guys on it. He was also put on the Skipper’s crew, I guess to keep a better eye on him. . . .

Later on, like everything else, these restrictions or worries were lost as folks began to realize that Keith was just a normal human being. As a

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337. Interview with William Whitmire, *supra* note 326.

338. *Id.*

339. *Id.*

result, by the time we deployed, Keith had an unqualified Nugget Airmand [sic] like the rest of us.<sup>340</sup>

Meinhold was on guard for situations that might be problematic, but people treated the situation with humor. He said, “There was a lot of banter around my being gay. And there’s banter around anything in the military. And I don’t know, the people I worked with just loved ribbing me – that’s always been the case, it just doesn’t have to be around gay issues.”<sup>341</sup> Meinhold’s crew created joke patches for themselves that read “All the Queen’s Men.”<sup>342</sup> He added, “Somebody would say, ‘So, Keith, what do you think about that Jess Smith’—take a name out of the hat—there’s no Jess Smith. And then there seemed like a pretty good silence to me and then everyone would go, ‘Ho, ho, ho!’” A colleague remembers an incident soon after Keith arrived and the response of the commanding officer:

One of the guys who had been in several other commands with Keith and had known him for quite some time held the door open for us. As Keith walked through the door he thanked Brian (the other guy) and Brian simply replied, “Ladies first.” We all laughed about this. Keith has a great sense of humor and this was the perfect ice-breaker for some who didn’t know Keith all that well. The Skipper, still hidden and taking everthing [sic] in, was not amused at all and later spoke to Brian and I about the incident although I doubt he ever said anything to Keith about it. That’s how scared the senior folks were of Keith at that time. Not so much scared of him as they were scared of making a mistake in the way they handled “the situation.”<sup>343</sup>

During his service with Patrol Squadron 46, Meinhold worked as Leading Petty Officer for the Tactics Department and for the squadron Operations Department. During his two years with the unit, he supervised a staff of twelve and managed 140 flight personnel for more than 6000 hours of flight operations annually.<sup>344</sup> As an airborne sensor systems operator with VP-46, Meinhold was deployed both overseas and stateside with the squadron. Working on crews of ten to twelve people on eight- or nine-hour missions, he was responsible for searching for and analyzing acoustic signatures of ships and submarines, and determining tactical information from them. Because of his sensor operation skill,

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340. *Id.*

341. *Id.*

342. Kevin Simpson, *Landmark Crusader Begins Next Tour of Duty*, DENV. POST, May 6, 1996, at B-1.

343. Interview with William Whitmire, *supra* note 326.

344. Keith Meinhold, *Navyboy@aolcom: Keith Meinhold*, 2001, at <http://www.members.aol.com/kmeinhold/career.htm>.

Meinhold was one of three sailors Navy-wide picked to be a “Special Project” operator, a job that involved the operation of specialized signature collection equipment installed on an aircraft deployed to the Persian Gulf. The average missions lasted eight to nine hours and also involved three-hour preflight and two-hour post-flight routines. Because the work is so technical and crews always include junior personnel who need to be qualified, training remains a significant component of the squadron’s duties. Meinhold explained:

What happens is once you go on deployment, you come back after six months, a lot of people leave the unit at that time. You got to start rebuilding your squadron. . . . When we were home, the home stay is generally nine months, maybe a year long, depending on how the cycle—sometimes as short as six months—depending on how the cycle worked. And so we spent a lot of time in simulators, a lot of time flying, doing emergency drills, taking lectures, classes, getting up to speed on new tactics or intelligence or whatever it is. And also actually flying missions on the West Coast, because part of maritime patrol requires keeping an eye on what’s happening household not just worldwide.<sup>345</sup>

While attrition and illness inevitably lead to crew changes, the Navy tries as much as possible to keep crews together, since, as Meinhold stated, “They believe that keeping the crew together helps people to work together better.”<sup>346</sup> Particularly when units are deployed overseas, sailors spend most of their time with members of their own crew. Meinhold remembered his crew as being tight-knit and popular for replacements when spots opened up:

So you would eat and sleep together for six months, especially when you are deployed overseas. You are pretty much stuck with the same people for six months. Saw them everyday. And we became very close as a result. We had a great crew. Some crews click and some don’t—a lot has to do with leadership on the crew itself, in the makeup of the individuals. There are a lot of reasons why people do not get along on crews; some of it has to do with competence. In other words, there were a lot of people who wanted to get on our crew, on crew 1, because we were one of the best.<sup>347</sup>

During this time, Meinhold also continued work as a technician on research and development projects for the Department of Defense. Among other projects, Meinhold was hand-picked to work with researchers at Johns Hopkins University on a new sonar system being developed by the Navy. They operated the sonar sweep electronics and

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345. Interview with Keith Meinhold, *supra* note 302.

346. *Id.*

347. *Id.*

tactics to determine its effectiveness and deployment potential. While such projects had to be done in addition to his regular duties, Meinhold was happy to take on research projects, stating, "My own reason for doing a special project is the dedication to the Navy."<sup>348</sup>

One colleague described Meinhold as "easily in the top ten" operators he has worked with and characterized him as "professional at all times."<sup>349</sup> He declared that Meinhold's sexual orientation "never affected our ability to perform as a squadron" and added:

Keith was an asset. Every year there is an Anti-Submarine Warfare (ASW) contest held in Hawaii. This contest's participants consist of all the U.S. Pacific Fleet squadrons and units from Australia, Japan, and Canada. Our squadron was represented by Keith's crew, and they won it easily and in no small part due to Keith's ability as an ASW operator.<sup>350</sup>

Meinhold decided to retire from the military in 1996. He declared at the time, "If I'd left it up to my heart, I don't know if I'd ever leave the Navy. But I'm 33 years old, and it's the perfect time in my life to start a new career."<sup>351</sup> His retirement included naval band music, a sixty-foot American flag and the Navy honor guard.<sup>352</sup> He summed up his experiences as an openly gay petty officer: "I think a lot of people underestimated the professionalism of sailors in the Navy. The majority are much more tolerant than they're given credit for."<sup>353</sup>

### *B. The Case of Lieutenant Zoe Dunning*

#### 1. Background of the Case

On January 16, 1993, at a rally outside of Moffett Field Air Base organized by Keith Meinhold, Lieutenant Maria Zoe Dunning publicly announced that she was a lesbian. She and two other servicemembers declared their homosexuality at the rally in an effort to maintain pressure on the incoming Clinton administration to keep the President's campaign pledge to eliminate the ban.<sup>354</sup> Dunning, a graduate of the U.S. Naval Academy with twelve years of service as a supply officer, was on active

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348. *Id.*

349. Interview with William Whitmire, *supra* note 326.

350. *Id.*

351. David Tuller, *Gay Sailor Decides It's Time to Move on, Petty Officer Who Successfully Fought Navy Will Retire*, S.F. CHRON., Mar. 29, 1996, at A2.

352. Simpson, *supra* note 342.

353. Tuller, *supra* note 351.

354. See Joyce Murdoch, *Sailor Who Disclosed Homosexuality Now Finds Himself in Legal Limbo; At Least 100 in Military Are Affected by Clinton Compromise*, WASH. POST., Feb. 8, 1993, at A6; *Discharged Lesbian Plans to Challenge Gay Policy*, ARIZ. REPUBLIC, June 11, 1993, at A4.

duty for six years and received a Navy Commendation Medal for her service during the Gulf War. She resigned from active duty in 1991 to attend business school at Stanford University,<sup>355</sup> but she continued her military service as a reserve officer. At her next drill with her unit, Dunning was informed that the Navy had initiated discharge proceedings. She was placed on unpaid reserve status, which she successfully fought.<sup>356</sup> Dunning was then returned to reserve duty with her unit, pending discharge, after three months of unpaid leave.<sup>357</sup>

Dunning received an administrative hearing in June 1993. It was the first discharge proceeding in California since the *Meinhold* court ruled the ban unconstitutional and enjoined the military from enforcing it. Former Assistant Secretary of Defense Lawrence Korb testified at Dunning's hearing that given the recent ruling in *Meinhold*, it would be illegal for the Navy to separate her.<sup>358</sup> The administrative board did, however, rule unanimously that Dunning should be discharged under honorable conditions.<sup>359</sup> The board also issued a statement saying they were "bound to follow" military policy because "the final act" of discharge, rather than the intermediate decision of the administrative panel, "is the only action that is clearly proscribed by *Meinhold*."<sup>360</sup>

Dunning continued to serve with her unit, and her discharge was delayed, pending review due to the possibility of improper influence of the administrative panel by Navy authorities.<sup>361</sup> In July 1993, then-President Clinton announced a new military policy concerning homosexuality and declared that those presently in pending status would receive new discharge hearings under the "Don't Ask, Don't Tell" regulations.<sup>362</sup> Dunning was one of only a handful of military personnel

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355. Peter Fimrite, *Navy Returns Lesbian Officer to Active Duty in Alameda*, S.F. CHRON., May 6, 1993, at A21; *Discharged Lesbian Plans to Challenge Gay Policy*, ARIZ. REPUBLIC, June 11, 1993, at A4.

356. Sawyer, *supra* note 296; *see also* Boxall, *supra* note 296.

357. Sawyer, *supra* note 296.

358. David Tuller, *Discharge of Gay Officer Called Illegal Ex-Pentagon Official Cites Meinhold Ruling That Ban Is U[sic]*, S.F. CHRON., June 10, 1993, at A11.

359. David Tuller, *Lesbian in Navy Reserve Recommended for Ouster*, S.F. CHRON., June 11, 1993, at A3.

360. *Id.*

361. At the time, the interim policy was already in effect and Dunning's discharge had to be approved by the Chief of Naval Operations and the U.S. Attorney General. *See Discharged Lesbian Plans to Challenge Gay Policy*, *supra* note 355; *see also* David Tuller, *Lesbian Sailor's Lawyers Charge 'Jury Tampering'*, S.F. CHRON., June 19, 1993, at A9.

362. Melissa Healy & John M. Broder, *Clinton Eases Ban on Gays in Military but Restricts Conduct Armed Forces*, L.A. TIMES, July 20, 1993, at A1.

to receive a second administrative hearing.<sup>363</sup> While waiting for the administrative panel to meet, Dunning was selected for promotion to lieutenant commander in November 1994.<sup>364</sup> At the end of that same month, the second administrative board met. Dunning argued that her statement—"I am a lesbian"—related to status rather than conduct and acknowledged her sexual orientation and not her intent to engage in same-sex sexual conduct.<sup>365</sup> In an unprecedented ruling, the administrative panel found that Dunning's statement did not prove she would engage in homosexual acts and therefore did not violate the conduct component of the new policy.<sup>366</sup> The Navy ceased all further efforts to discharge Dunning and did not appeal the decision in federal court.<sup>367</sup> The ruling was limited in its effect, however, because federal appellate courts were ruling on similar cases during the same period.<sup>368</sup> Almost seven years after her hearing victory, Dunning continues to serve. Moreover, since winning her case, Dunning has been promoted to commander and has received a Navy Achievement Medal.<sup>369</sup>

## 2. In Their Own Words: The Experience of Dunning and Her Colleagues

While she was fighting to return to reserve duty pending the outcome of her case, Dunning commented:

If they really took into account the lesbians who are in the service right now, how successful they are, I think a lot of the arguments would just fall apart. I know personally for my ship, of the lesbians I knew on board, if you took all of us off, that ship would not have been able to get under way.<sup>370</sup>

At the time of her reinstatement, Dunning declared, "I'm one of thousands who want to serve our country with pride and without shame.

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363. Elaine Herscher, *Rehearing for Lesbian Officer, Navy Board to Decide if 'Don't Tell' Policy Applies*, S.F. CHRON., Nov. 30, 1994, at A19.

364. *Id.*

365. *Id.*

366. Elaine Herscher, *Navy Panel Sides with Lesbian; Landmark Recommendation for Officer to Stay in Reserve*, S.F. CHRON., Dec. 2, 1994, at A1; *Navy Board Backs Lesbian*, WASH. POST, Dec. 2, 1994, at A14.

367. Reynolds Holding, *Navy Quits Trying to Boot Lesbian Officer, Case May Be First Where Any Service Relented on Its Own*, S.F. CHRON., June 16, 1995, at A16.

368. Two appellate courts had recently rendered contradictory decisions as to the constitutionality of the ban. See Reynolds Holding, *Debate on Gays in Military Is Headed for Supreme Court*, S.F. CHRON., Dec. 3, 1994, at A6.

369. Suzanne Herel, *Clinton Blames GOP for Gay Policy; 'Don't Ask' Discussed in Rolling Stone Interview*, S.F. CHRON., Dec. 8, 2000, at A3.

370. Boxall, *supra* note 296.

This shows there is hope.”<sup>371</sup> An officer who later worked with Dunning commented on the general feeling among his Navy colleagues at the time:

The gauge<sup>372</sup> was, is that, this supply corps officer, female, that was having to go on trial for all this, was getting kind of a raw deal because apparently, she was a good officer. And everybody said that. And it was like, that’s just too bad that they’re having to worry about this, because this is a good officer.<sup>373</sup>

During Dunning’s first discharge hearing, her executive officer testified on her behalf and characterized her performance with the unit as “outstanding.”<sup>374</sup> When asked how he would feel if Dunning were discharged from his unit, Commander Petro replied:

I think we’ve already suffered a loss in the unit because everybody worked very well with Zoe. Everybody liked her. And we’ve already basically noticed the loss . . . she’s a part of the group, and it’s a small—it’s about 17 people, and we work very closely together, so it’ll be a loss to the unit, both from a personal and a profession standpoint.<sup>375</sup>

Commander Petro was also asked in considerable detail about his reaction and the reaction of other personnel in his unit to Dunning’s public statement that she is a homosexual.<sup>376</sup> He stated that he and other members were surprised that she was a lesbian, but he heard no negative comments, no requests for reassignment, and no complaints about having to work with Dunning.<sup>377</sup> He said that there had been no change in the performance or the interpersonal relations of the unit in the immediate aftermath of her statement.<sup>378</sup> When asked how he would feel about working with her again if given the opportunity, Commander Petro replied, “We’d welcome her back.”<sup>379</sup>

Another co-worker testified on Dunning’s behalf, and other members of her unit and people who had worked with her previously submitted written comments. Dunning was praised by all in the highest professional and public terms. She was described as a top performer,

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371. Fimrite, *supra* note 355.

372. “Gauge” is military slang for the inside story or scoop. Telephone Interview with Nick Alaga, Commander, U.S. Navy (Aug. 24, 2001).

373. *Id.*

374. Proceedings of Board of Inquiry, (*In re* Lt. Maria Z. Dunning), June 9, 1993, at 48 (on file with author).

375. *Id.* at 50.

376. *Id.*

377. *Id.*

378. *Id.*

379. *Id.*

“clearly one of the best junior officers” on her old ship, and a person of the highest integrity.<sup>380</sup> Her attorney specifically asked the witnesses about the issue of Dunning’s effect on unit cohesion and morale and summarized their statements concerning the potential effect as follows:

And in terms of unit cohesion, you heard what Lieutenant Jones said. She feels there would be no detrimental effect in retaining Lieutenant Dunning. Commander Robberson, also formerly from the unit, said that he would welcome her as a part of his team anytime. Lieutenant Krasnow from the unit said that he does not feel that the knowledge of Lieutenant Dunning’s status affected anyone’s job in the unit. Commander Erhardt said that if it were up to him, he would retain her. And Commander Tredennick commented about working with gays and lesbians in the past and that it caused no problems in his opinion and that he would also retain Lieutenant Dunning if he could make the decision. And then Lieutenant Coetzee, who was one of—who roomed actually with Lieutenant Dunning at the Naval Academy submitted a declaration on her behalf saying that in her opinion she does not think that someone’s status affects performance or unit cohesion.<sup>381</sup>

When asked if there had been any negative comments made in the unit, Lieutenant Jones described the reaction of its members to the news about Dunning’s statement:

No, not really. Everybody was a little surprised. Some were shocked. Basically, they just wondered how this would affect her being in the Navy, whether she would be able to remain in the unit, what was going to happen to her. Everybody’s kind of, I’d say, worried that she might not be with us.<sup>382</sup>

Lieutenant Jones also declared that she had shared a room in the past with Lieutenant Dunning without incident and would have no concerns about sharing a room with her again in the future.<sup>383</sup> She added, “As a matter of fact, I sent a message to her through another member of the unit for a trip that we’re going on this coming weekend to Washington, D.C., in hopes that we could share a room again.”<sup>384</sup>

The prosecutor called Dunning a “fine officer,” but stated that her qualifications were irrelevant as military regulations required that she be separated from the Navy.<sup>385</sup> The administrative panel voted unanimously

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380. *Id.* at 79.

381. *Id.* at 80.

382. *Id.* at 77.

383. *Id.* Another female also testified that she would have no problem rooming with Lt. Dunning. *Id.* at 80.

384. *Id.* at 78.

385. Tuller, *supra* note 358.

that she be honorably discharged. Dunning stated soon after her first discharge hearing, “What struck me at the board was I didn’t want to be kicked out; my unit didn’t want me to be kicked out, and the board didn’t want it. They were compelled to do this by a regulation, and it’s forcing what no one wants.”<sup>386</sup>

While she was awaiting her second discharge hearing, Dunning was informed that she had been selected for promotion to lieutenant commander. She was quoted at the time as saying, “On the one hand, they’re promoting me and saying, ‘You’re doing a wonderful job,’ and on the other, they’re trying to get rid of me. This reflects how this is really an insane policy.”<sup>387</sup>

At the second hearing, Dunning testified as to the response of her colleagues to her initial public statement. While the situation was an unusual one in the Navy, her unit adapted well. Dunning declared that the experience had actually brought them closer together as a unit:

This is not something we deal with or encounter every day in the Navy. I think that as I communicated to them that I was approachable, that it was not something to be afraid of, that I was willing to discuss it with them, that it would not affect my performance, they realized that that was true; and they have grown to be very confident, as you have seen today, of my performance and very supportive and if anything, I think the unit has rallied around me and my case, and I have not seen any adverse effect. In fact, I would say that my opinion is that it has had a positive impact on the unit cohesiveness and morale.<sup>388</sup>

Dunning explained, however, that her actions had angered the commanding officer of the Naval Air Reserve of Alameda, who ordered her commanding officer to downgrade her fitness report. During the period her case was under review, Dunning explained:

Definitely the commanding officer of the Naval Air Reserve for Alameda, who was my commanding officer’s boss, was very, very upset. Actually he ordered my commanding officer just to give me a bad fitness report. And he tried to, and I kind of came back and challenged him a little bit, kind of asked him why he downgraded me. I can tell my commanding officer’s heart was not into the grade, it was the pressure from above and so, like for instance, he gave me a D in judgment. And after I had conversation with

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386. Debbie Howlett, *Lesbians in Line of Fire: Women See a Double Bias in Military’s Stand on Gays*, USA TODAY, July 15, 1993, at 7A.

387. Herscher, *Rehearing for Lesbian Officer*, *supra* note 364, at A19.

388. Proceedings of Board of Inquiry, (*In re* Lt. Maria Z. Dunning), Nov. 29 & 30, Dec. 1, 1994, at 234 (on file with author).

him, he actually initiated and sent a letter to the record people to change the grade to an A.<sup>389</sup>

In his final evaluation covering the period from October 1992 to October 1993, during which time Dunning made her public statement, Captain Kraft, her commanding officer, wrote, "Lieutenant Dunning's performance has been outstanding, far exceeding expectations." He added: "Lieutenant Dunning is an exceptional officer. Extremely intelligent with superb technical and interpersonal skills. She exhibits unlimited potential for increased responsibilities and growth. Lieutenant Dunning has my highest recommendation for early promotion to lieutenant commander."<sup>390</sup>

Captain Kraft subsequently testified at Dunning's second hearing that he would rank her as the top lieutenant in her unit.<sup>391</sup> He stated that he had seen no changes in her performance, no complaints from unit members, and no problems relating to her sexual orientation since her public statement.<sup>392</sup> When asked how he would feel if she were discharged, Captain Kraft replied, "I feel that the Navy would be losing a superb officer. I think it would be a mistake."<sup>393</sup>

At her second hearing, several additional colleagues testified or submitted affidavits. Commander Graves stated that Dunning was "an outstanding naval officer" who "always performed excellently."<sup>394</sup> When asked how he would feel if Dunning were discharged, Commander Graves replied:

Well I would feel bad that the Navy would lose an excellent officer. I think Zoe has proven herself with outstanding performance. She has been fully integrated into both reserve and active duty forces and has left a positive impact on unit cohesiveness, morale, and readiness. I think the Navy needs men and women like Zoe who have honor, integrity, dedication, and courage and who want to serve their country. I am proud t [sic] serve with her now and I would be proud to serve with her in the future and I hope I get that opportunity.<sup>395</sup>

Lieutenant Wolfley, who was a subordinate to Dunning, was asked what the feeling within the unit was regarding her possible discharge. She replied:

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389. Telephone Interview with Zoe Dunning, Commander, U.S. Navy, (Aug. 2, 2001).

390. Proceedings of Board of Inquiry, (*In re* Lt. Maria Z. Dunning), *supra* note 388, at 46.

391. *Id.*

392. *Id.*

393. *Id.* at 164.

394. *Id.*

395. *Id.* at 165.

I personally would feel that wold [sic] be a loss to our unit. We have a lot of turnover and movement, and if you get somebody that's good and stable and does a good job, it makes the unit more cohesive, and losing Zoe would do that for us, would hurt our unit that way, I believe.<sup>396</sup>

Lieutenant Commander Olsen also stated that knowledge of Dunning's orientation had no effect on others' willingness to work with her.<sup>397</sup> He further declared that her sexual orientation "has no relevance to her performance and what she does at the unit."<sup>398</sup> When asked specifically about the issue of unit cohesion, he replied that there had been no detrimental effect at all.<sup>399</sup>

The board subsequently ruled in Dunning's favor in an unprecedented decision. Although the case was a great personal victory, legal scholars acknowledged that the case would likely have little impact on the policy more generally as a couple of circuits were already split on the issue.<sup>400</sup> In the wake of her victory, Dunning proclaimed:

My case is obviously an aberration. It is the only case in which the military has kept someone (who is homosexual), but this does not mean that the military is any more lenient. I was just very fortunate to have an outstanding attorney, a spotless record, and an open-minded board.<sup>401</sup>

After the ruling, Dunning reported that the Department of Defense issued a statement instructing that taking the stand and stating that a previous declaration was one of status only and not of conduct was insufficient to overcome the presumption that status implies conduct:

So [the Department of Defense] sent out a memorandum that basically said, look, I know we haven't given you a whole lot of guidance on what or what doesn't rebut the presumption, but we will tell you this much, tell you that taking the stand and saying that your statement was one of status only is not sufficient to rebut the presumption. So, what they practically did was close the avenue to anyone else to subsequently use that strategy. I opened up the barn door. I've already heard the barn door close behind me.<sup>402</sup>

After the hearing, Dunning's life returned to normal. She continued her work with her unit, handling the supply needs for the Naval Aviation Depot in Alameda and supporting those who handled aviation maintenance. She received congratulations from her unit members and from other sailors dealing with their own discharge cases. While there

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396. *Id.* at 153.

397. *Id.* at 157.

398. *Id.*

399. *Id.*

400. *See* Reynolds Holding, *Navy Quits Trying to Boot Lesbian Officer*, *supra* note 367.

401. *Id.*

402. Interview with Zoe Dunning, *supra* note 389, (Aug. 2, 2001).

was considerable media interest in the outcome of her case, she prevented the media from coming into her unit's workspace and tried to minimize the impact on their work. She remembered that it quickly became "business as usual," but one incident in particular stood out in her memory:

I remember one radio interview<sup>403</sup>—it's on the parking lot in front of the legal office on Treasure Island. And this car kind of like pulled up and stopped—I think about 15 yard from me. Out jumped a sailor in full uniform. He kind of comes running up to me and he just salutes me. I saluted him back, and he just sort of turned and went back to his car and drove off. I still don't know who that guy was. I was really touched by that.<sup>404</sup>

Since the Alameda air base was slated for closure, Dunning's unit assisted with inventory and the transition for the shut down. She would later be transferred to another unit as a supply officer. In October 1995, Lieutenant Commander Dunning joined a unit handling global insurgency work as a supply corps leader. The Mobile Inshore Undersea Warfare Unit, which provided surveillance of inter-coastal waterways, was quite unusual for the Navy Reserves. The unit had no active duty equivalent, was ready to deploy within forty-eight hours, and conducted most of its annual trainings overseas. Once or twice a quarter, the sailors camped out, went through drills and training. The job requirements were also less administrative and more combat-oriented than those in many reserve units. Dunning supervised six people and oversaw the budget. She appreciated the opportunity to do interesting work and make a real contribution.

As has been the case each time Dunning switched units, she wondered how aware her new colleagues were of her case and her sexual orientation. Dunning has assumed widespread knowledge and has therefore focused on doing her work well:

Through the next seven years, it's kind of weird. When I go into a unit, I am not quite sure who knows and who doesn't know. But you go in and assume everyone knows. It's a weird, awkward scenario every time when I walk into a unit. Who knows? Who doesn't know? What do they think about it? I just try to go in there, put my nose down and do my job as best as I know how.<sup>405</sup>

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403. Telephone Interview with Zoe Dunning, Commander, U.S. Navy (Nov. 3, 2001). The interview, which was live, occurred immediately following her second administrative hearing. *Id.*

404. Interview with Zoe Dunning, *supra* note 389 (Aug. 2, 2001).

405. *Id.*

One of her fellow officers, Commander Quast, knew of Dunning's circumstance through *Navy Times* articles before she entered the global insurgency unit. He, too, sensed that not everyone in her unit knew about the case or her sexual orientation, explaining:

[D]id people talk and ask behind her back or anything like that? Not that I'm aware of, and I certainly didn't participate in that . . . you know, the general man or person in the unit, I would say probably less than half of the unit actually knew that she was a lesbian.<sup>406</sup>

Dunning was involved in two major assignments in the Middle East—an amphibious assault exercise in the United Arab Emirates and security detail for a Middle East Economic Conference in Qatar. She was the only woman involved in both trainings. She described the experiences:

We were in the Middle East, forming security for Middle East Economic Conference where Madeline Albright was at. The conference had ended and we were sort of doing our last watch—you know, in our radar sonar surveillance trailer. I was the officer in charge of the group who had the last watch. We had to break down the van and put it on a fleet tug and actually ride the ship from Qatar back up to Bahrain. I was the only woman in the group and I was the officer in charge. So, it's me and like 20 guys . . . I slept in this open bay, bunk area with 20 guys . . . So, it's kind of cool, being able to do that.<sup>407</sup>

In the United Arab Emirates, foreign personnel repeatedly mistook her for a female translator. She had the honor of participating in a traditional lunch at the officer's club, only to discover that she was the first woman who had ever dined there. Dunning explained:

Again, they had a post-exercise sort of briefing and then a big traditional Arabic lunch, and I was invited to come along cause I was the third-ranking officer of the unit. I got there, and I was the only woman . . . They've got officers from all of the different Middle Eastern countries that participated in this joint exercise. Again, most of them think I was a translator . . . . And it's a traditional meal and you eat it with your right hand. Afterward, I wanted to go and wash my hand; there's no female bathroom—we're at the officers' club at the army base. Never had a woman dined there before. Basically they had to clear all the men out of the men's room . . . . In my experience as an officer, I had broken barriers on the sexual orientation front. But probably I had far more experiences trying to break barriers as just a woman.<sup>408</sup>

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406. Telephone Interview with John Quast, Commander, U.S. Navy (Aug. 24, 2001).

407. Interview with Zoe Dunning, *supra* note 389, (Aug. 2, 2001).

408. *Id.*

One commander from this unit agreed, “I thought she blended in really well, as she’s had to do throughout her career in a male-dominated organization. And, you know, we’re all the better for having her with us.”<sup>409</sup>

Another colleague from the unit was impressed by Dunning’s professionalism, and by the fact that she encouraged other people to treat her as any other member of the team:

[She] never brought [her sexual orientation] up. And, you know, because she never did, we all kind of respected her more for it. She was always—accept me for what I am, a naval officer, don’t give me any special breaks for this, don’t worry about this, or anything like that; we’re all in the navy together, we’re all a bunch of sailors, let’s treat each other the same way. And it always, it was just always that way.<sup>410</sup>

He added, however, that working with Dunning made him more sensitive to reflexive homophobia. For example, she commented on his use of the term “fag” to jokingly denigrate someone, “And I thought ‘woah.’ I had no idea. Gee, you know, I’m sorry. And after that, I became a little more sensitive to it and didn’t do it.”<sup>411</sup>

After Dunning moved to another unit, she attended a dining-out night with the members of her old unit. Dining-outs are very formal military dinners with guests, spouses, and boyfriends or girlfriends in attendance. Dunning was invited, and she decided to bring a guest, Erin. One of Dunning’s former colleagues described his response to Dunning and her guest’s attendance:

And, you know, it was absolute pure class. Erin was perfect, just really dressed up very nice, and they were just, they don’t put on an air like—oh, we’re gay, so you have to treat us differently. . . . And, you know, you get around them, and you’re just comfortable, absolutely comfortable around them. And it’s great.<sup>412</sup>

Another colleague in attendance concurred:

And I’m just really glad that they made the decision they did, but I just think that’s one of those examples of the kind of courage it takes to sort of not completely, I don’t know, not ask or not tell, or whatever. Kind of maybe help the rest of us in some way or another kind of move along, move beyond this sort of process, or sort of thumb your nose at it. You know. I just think of it as the exact, the absolute right move.<sup>413</sup>

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409. Interview with John Quast, *supra* note 406.

410. Interview with Nick Alaga, *supra* note 372.

411. *Id.*

412. *Id.*

413. Interview with John Quast, *supra* note 406.

For Dunning's next assignment, she worked for two years with a unit that specialized in contract administration. The unit was responsible for the oversight of civilian contractors involved in supplying to forward deployed areas during periods of conflict, such as Bosnia or Kosovo. Her business degree and contracting work made her well-suited for the job, much of which involved making the military purchasing system more professional. When Dunning was promoted to commander, she was required to transfer units. She transferred to a unit that assists the Commander-in-Chief of the Pacific Fleet, where she presently serves. The unit operated as a think-tank comprised of officers with high-tech and consulting experience, providing analysis and recommendations for the improvement of organization and processes. Dunning has worked with the unit for the past year and recently requested command of her own unit.

Commander Dunning feels some regret that most people do not know about the successful resolution of her case. Many who know of her initial struggle assume that she was discharged. She has tried to balance her privacy and her career concerns with a desire to inform people that, while her case was unique, her continued success in the Navy belies the arguments proffered by the government to justify the ban:

And I think you know with the Congress and everyone else basically justifying the policy on the basis that the presence of open homosexuality ruins unit cohesion and morale. I mean that's all hypothetical. They have no proof of that and, in fact, we have proof to the contrary—me.<sup>414</sup>

Commander John Quast, who served with Dunning for two years, recognized the rare opportunity he had in getting to work with an openly homosexual servicemember. For him, it was a learning experience, and he feels privileged to have been able to get to know Dunning and to work with her.<sup>415</sup>

### C. *The Case of Lieutenant Richard Watson*

#### 1. Background of the Case

Watson enlisted in the Navy in 1981 and was selected to participate in the Enlisted Commissioning Program, through which highly qualified enlisted servicemembers may become officers.<sup>416</sup> He obtained a bachelor's degree in mathematics through this program in 1986, earning

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414. Interview with Zoe Dunning, *supra* note 389 (Aug. 2, 2001).

415. Interview with John Quast, *supra* note 406.

416. *Watson v. Perry*, 918 F. Supp. 1403, 1407 (W.D. Wash. 1996).

his commission as a Navy Ensign in the process.<sup>417</sup> He subsequently completed officer candidate school, naval nuclear power school, and the submarine officer basic course, which provided advanced training in nuclear engineering.<sup>418</sup> Watson then joined the crew of the U.S.S. HENRY M. JACKSON (JACKSON) in 1988, a trident nuclear submarine based in Bangor, Washington.<sup>419</sup> Watson began his career on the JACKSON as an engineer officer in charge of reactor controls.<sup>420</sup> He would serve on seven strategic deterrent patrols, working in engineering, missile, and tactical systems capacities.<sup>421</sup> Lieutenant Watson received many honors during this period, including a Letter of Commendation from the Commanding Officer of his submarine, the National Defense Service Medal for Service on Active Duty, the Navy Achievement Medal for “Professional Achievement in the Superior Performance of His Duties,” and a Gold Star in lieu of a second Navy Achievement Medal.<sup>422</sup>

In October 1994, while Watson was working as an ROTC professor at Oregon State University, he received orders to become a department head aboard a nuclear submarine.<sup>423</sup> To prevent possible blackmail, Watson submitted a letter to his commanding officer stating that he was gay.<sup>424</sup> His commanding officer began discharge proceedings, and Watson’s ordered transfer and promotion were suspended.<sup>425</sup> The administrative hearing board was convened in March 1995, and it voted unanimously that Watson should be discharged honorably.<sup>426</sup> Watson then filed his cause of action in federal district court for the Western District of Washington.<sup>427</sup>

The district court enjoined the Navy from discharging Watson until the court issued a final ruling in the case; the court also agreed to hear arguments about the constitutionality of the policy.<sup>428</sup> In issuing the preliminary injunction, Judge Zilly declared that the “Don’t Ask, Don’t

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417. *Id.*

418. *Id.*

419. *Id.*

420. Thomas Haines, *Gay Officer Heads to Court—Navy’s ‘Don’t Ask, Don’t Tell’ Rule Faces Judicial Showdown*, SEATTLE TIMES, Jan. 18, 1996, at B1; Telephone Interview with Richard Watson, Lieutenant, U.S. Navy (Retired) (Aug. 24, 2001).

421. Interview with Richard Watson, *supra* note 420.

422. *Watson*, 918 F. Supp. at 1407.

423. *Id.* at 1407-08. The department head position in military hierarchy aboard a submarine is among the third echelon of command.

424. *Id.*

425. Haines, *Gay Officer Heads to Court*, *supra* note 420.

426. *See Watson*, 918 F. Supp. at 1408.

427. *Id.*

428. *Id.*

Tell” policy was “based on prejudice.”<sup>429</sup> At oral argument, Judge Zilly asked the attorney for the Navy how the new policy differed from previous military rules, which Judge Zilly, himself, had ruled unconstitutional in 1994 when reinstating Colonel Margarethe Cammermeyer to the Washington National Guard.<sup>430</sup> The attorney replied that the new rules allowed sexual minorities to rebut the presumption that they would engage in homosexual conduct.<sup>431</sup>

Watson issued a signed affidavit stating that he had never had sex while on military duty, on any military installation, or with any servicemember or military student.<sup>432</sup> He also denied that he had any “intent or propensity to engage in” sex while on military duty, on any military installation, or with any servicemember or military student.<sup>433</sup> Because he refused to promise never to engage in any sexual conduct with men during his off-duty time away from base, however, the court found that it was reasonable for the Navy to assume gay conduct, and therefore ruled against Watson.<sup>434</sup> In his ruling, Judge Zilly wrote:

The Court’s decision to grant the Government’s motion for summary judgment should not be interpreted as an endorsement of the military’s “Don’t Ask, Don’t Tell” policy or the way it has been applied in general. Regrettably, enforcement of the existing policy has resulted in the expulsion from the armed forces of many outstanding men and women who served their country with honor and dignity. This court may not, however, question the wisdom of the policy.<sup>435</sup>

At the same time that Watson’s case was decided, another federal district court ruled in favor of a gay lieutenant of the California Army National Guard.<sup>436</sup> The government appealed the guardsman’s case, and Watson appealed his case.<sup>437</sup> The two cases were consolidated by the

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429. Thomas Haines, *Gay Officer Heads to Court*, *supra* note 420.

430. Thoms Haines, *Final Statements Heard in Effort to Discharge Gay Navy Lieutenant*, SEATTLE TIMES, Jan. 20, 1996, at A7.

431. *Id.*

432. *Watson*, 918 F. Supp. at 1408.

433. *Id.*; *see also Day in Court Arrives for Homosexual Sailor: ‘Don’t Ask’ Policy on Trial*, PHOENIX GAZETTE, Jan. 19, 1996, at A29.

434. *Watson*, 918 F. Supp. at 1415; *see also* Thomas Haines, *Ruling: Navy Can Discharge Gay Man – Lieutenant’s Lawyers Say They’ll Appeal*, SEATTLE TIMES, Mar. 8, 1996, at B3; *Court Upholds Dismissal of Homosexual Sub Officer but Judge Doesn’t Want Ruling to Be Interpreted as Policy Endorsement*, ROCKY MTN. NEWS, Mar. 8, 1996, at 53A.

435. *Watson*, 918 F. Supp. at 1407.

436. *See Holmes v. California Army Nat’l Guard*, 920 F. Supp. 1510 (N.D. Cal. 1996), *rev’d*, 124 F.3d 1126 (9th Cir. 1997), *cert. denied*, 525 U.S. 1067 (1999); *see also Military’s ‘Don’t Ask, Don’t Tell’ Policy Upheld*, WASH. POST, Sept. 6, 1997, at A4 (reporting the Ninth Circuit’s reversal of the *Holmes* decision and affirmation of the *Watson* decision).

437. *Military’s ‘Don’t Ask, Don’t Tell’ Policy Upheld*, *supra* note 436.

Ninth Circuit Court of Appeals, which split two to one in ruling that the military was within its right to discharge the officers.<sup>438</sup> The Ninth Circuit explained that the two officers failed to prove that they did not engage, or intend to engage, in homosexual acts.<sup>439</sup> Lieutenant Watson was honorably discharged from the Navy on September 1, 1998. The case was then appealed to the Supreme Court, which denied certiorari. This marked the fifth time since 1996 that the high court refused to take a case relating to the military's policy concerning homosexual servicemembers.<sup>440</sup>

## 2. In Their Own Words: The Experience of Watson and His Colleagues

Prior to making his sexual orientation known to his commanding officer, Watson kept his sexual orientation "closely held" on the job.<sup>441</sup> He knew that an admission could cost him his job, and he prepared for that possibility by contacting the Servicemembers Legal Defense Network (SLDN) and a lawyer before submitting his statement. He wanted to understand the process and his rights before triggering an investigation. While he realized that he was putting his career on the line, however, Watson continued to hope that somehow discharge could be averted:

I'm a pragmatist. I knew what the eventual outcome would be, but I had hopes. Grethe Cammermeyer was doing it.<sup>442</sup> Keith Meinhold was doing it. I had a relationship that didn't go well, and I was threatened with outing. I was going to beat him to the punch. I thought, "Hey, I'm an exemplary officer, there's an outside chance." There was no inkling of homosexuality. If they'd based their review on my record and fitness report and professionalism, there'd be no problem.<sup>443</sup>

When Watson spoke with his commanding officer about the matter in October 1994, his superior officer initially tried to prevent Watson from submitting his statement:

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438. *Id.*

439. *Id.*

440. For more information on the Ninth Circuit decision, see *Holmes*, 124 F.3d 1126 (9th Cir. 1997); see also *Military's 'Don't Ask, Don't Tell' Policy Upheld*, WASH. POST, Sept. 6, 1997, at A4; Harriet Chiang, *Supreme Court Rejects Don't Ask [sic] Challenge; S.F. Panel Had Upheld Policy on Gays in Military*, S.F. CHRON., Jan. 12, 1999, at A2; Lily Eng, *Two Appeal Military's Gay Policy—Servicemen Cite High-Court Ruling*, SEATTLE TIMES, July 9, 1997, at B1.

441. Zsa Zsa Gershick, *A Sub Officer with a 'Can Do' Attitude* (2001) (unpublished manuscript, on file with author).

442. For a full account of Cammermeyer's case, see MARGARETHE CAMMERMEYER & CHRIS FISHER, *SERVING IN SILENCE* (1994).

443. Gershick, *A Sub Officer with a 'Can Do' Attitude*, *supra* note 441.

So I gave the folder to my executive officer, he opened it up and then read the subject line—all military memos have a capitalized top line—that said statement of orientation in the case of Lieutenant Richard J. Watson. He closed the envelope and threw it back at me, and he said “Rich, you don’t want me to read this.” And I said, “Well, XO, I think you do.” He says, “Rich, this is going to change your career.” And I said, “You need to read it XO.”<sup>444</sup>

Watson’s commanding officer initiated discharge proceedings the following week. Because he had already learned about the process through SLDN, Watson guided his superior officers through the process. While Watson waited for the administrative hearing, he continued to work as a professor of naval science and training at Oregon State University, where he had been nominated for an excellence in counseling award. He taught naval engineering and management classes, as well as managed a team of fifteen to twenty students in training to become nuclear power officers. His transfer to his new tour of duty was put on hold, as was his promotion to Lieutenant Commander. Watson and his superior officers tried to keep the issue low-profile, although his replacement, who arrived before the discharge process had been initiated, soon learned the reasons for the delay.<sup>445</sup>

Watson’s discharge hearing occurred in March 1995. Lieutenant Commander Scott Wolfe, who roomed with Watson aboard a nuclear submarine, said in an affidavit, “He is precisely the type of officer you want standing next to you in the heat of wartime battle.”<sup>446</sup> Watson recalled the attitude of the naval lawyers:

Even during my first Board of Inquiry back in March of 1995, when the government’s attorneys were getting ready to process me, they came up to me and said, “You know lieutenant, I wish I had the record that you had. And, I’m sorry, but this is my job—I’ve gotta do this.”<sup>447</sup>

Watson was recommended for honorable discharge. He was prepared to accept a discharge under honorable circumstances until he learned that he would only receive 50% of his severance pay. It was then that he decided to fight his discharge in federal court. Watson won an initial ruling barring the Navy from discharging him until the court could decide the merits of the case, and Watson’s odyssey as an openly gay servicemember in the media spotlight began.

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444. Interview with Richard Watson, *supra* note 420.

445. *Id.*

446. *Day in Court Arrives for Homosexual Sailor: ‘Don’t Ask’ Policy on Trial*, PHOENIX GAZETTE, Jan. 19, 1996, at B1.

447. Interview with Richard Watson, *supra* note 420.

Because Watson was being discharged under the new policy and was therefore unaffected by the *Meinhold* decision, the naval injunction against dismissing him did not mandate that he be maintained in his present capacity. Watson's lawyer argued unsuccessfully that he should be allowed to continue to his next posting aboard a submarine while the case was pending, and Watson was instead transferred to a job as Assistant Family Service Manager at Bangor Submarine Base. He taught computer classes to the spouses of Navy servicemembers and performed a wide variety of administrative functions. Although the job was not one for which he had trained, he aspired to do the best that he could. Watson explained:

Grethe Cammermeyer, my mentor, she pretty much told me how it has to be. No matter what job they gave you, whether it be, you know, mop boy, or copy boy, or sit-in-the-office-and-don't-do-anything boy, which they tried to do, and I was able to get better jobs, but each time they gave you that job, you just needed to do the best you can do, and prove to them they're wasting talent and money. And that's what I did.<sup>448</sup>

At Bangor, Watson served as base auditor for a major safety inspection that the base had previously failed. Under his administration, the base passed the inspection with "zero discrepancies."<sup>449</sup> He also helped the Family Service Center pass its tri-annual accreditation with the highest rating.<sup>450</sup>

One incident that occurred while he worked at the Family Service Center particularly stood out. A female colleague was regularly picked up after work by her husband, who was, in the words of Watson "an old salty bosun's mate." As was often the case, the husband wondered what a nuclear submarine officer was doing working there, and he asked his wife about it. Knowing that her husband did not approve of homosexuals serving in the military, she told him that he did not want to know the answer. He continued to observe Watson over time, however, and he recognized that Watson was obviously a competent servicemember. Finally, after continuing to question his wife about the matter, she told him the reason and received no reply. She heard nothing more on the subject for the next few months:

And about three or four months later, he told his wife, "You know, he's a pretty sharp guy—maybe it's not such a bad thing after all." And she told me that when I departed, and she just said, "Hey, changing attitudes one person at a time is probably no great achievement in the larger scheme, but

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448. *Id.*

449. Gershick, A Sub Officer with a 'Can Do' Attitude, *supra* note 441.

450. *Id.*

it's probably significant in slowly changing the policy for the better." I took that, and that was pretty important.<sup>451</sup>

After working at the Family Service Center for several months, Watson sent a letter to the admiral of the Pacific Northwest Fleet stating that his skills could be put to better use in another capacity. Watson was then transferred to Everett, Washington in November 1995, where he became the construction project manager for a twenty million dollar recreation complex. He managed the main contractor and twenty-seven subcontractors, in addition to overseeing a procurement budget. Watson supervised the construction from start to finish over the course of nine months; the project was completed on time and under budget. He described the contradiction between the trust the military placed in him while it was fighting to discharge him: "[As the project manager for the recreation complex], the Navy sent me to a trade show to purchase over \$850,000 in equipment, giving me sole signing authority. It was an incredible amount of responsibility they gave me, an officer who's being discharged for being 'unfit.'"<sup>452</sup>

Just as he had found at the Family Service Center, his sexual orientation for the most part was rarely an issue during the daily rhythm of work life. Watson generally deflected questions about why he was there, explaining:

My life was pretty much routine. I took care of my business, was always professional. My private life was my private life, my professional life was my professional life, and the men and women that I led and the officers that supervised me knew that they could count on Rich Watson to get the job done. And after a while, it became a non-issue. For the sailors, the men and women in the fleet that do the job, they don't care as long as you come to work and do your job and do it well, and even, hey, if you do it really well, take the load off of them. If you can do that, then the bottom line is that orientation is not really an issue.<sup>453</sup>

Watson also added, however, "There was not a day that didn't go by that someone quietly would say 'way to go, good luck'."<sup>454</sup>

While Watson was working as the construction project manager, he did experience one troubling incident related to his sexual orientation. A chief bosun's mate, who at the time was not aware that Lieutenant Watson was gay, asked him if he would re-enlist a sailor that worked for Watson. When he found out about Watson's status, the chief petty officer

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451. Interview with Richard Watson, *supra* note 420.

452. Gershick, A Sub Officer with a 'Can Do' Attitude, *supra* note 441.

453. Interview with Richard Watson, *supra* note 420.

454. *Id.*

complained vociferously to the commanding officer about being assigned a gay officer to his staff. His commanding officer told the chief petty officer Watson's orientation was not his concern, and that he needed to address any professional problem with Watson directly. Watson explained his subsequent interaction with the man:

So, and we did chat, him and I about that, and I said, "Listen chief," he said, "I don't know if you should re-enlist the sailor." I said, "Well, let's ask the sailor that. Because you've worked with me now for a while—you know what I do, and I'm pretty professional." The sailor chose to have me enlist him.

And towards the end of that tour of duty, he came up to me, the chief petty officer, and said, "You know, probably one of the biggest mistakes in my career was challenging your professionalism based on something that's not my business. And you know, I'm sorry, and if there's anything I can do to make that up, let me know." I said, "Well, you know, there's nothing really you can do, just continue to perform and make our division look good."<sup>455</sup>

When the recreation complex was completed, the chief petty officer recommended Watson for an end of tour award.

After the completion of the construction project in October 1996, Watson became the administrative and personnel officer for a large naval station in Puget Sound. He handled personnel issues for approximately 350 Navy staff members.<sup>456</sup> The staff included a large number of individuals who were in transition—those who were no longer posted to their ships due to injury, pregnancy, or transfer. Watson saw his job as taking "this motley crew and creat[ing] some type of strong admin[istrative] support program for the commanding officer."<sup>457</sup>

When Watson first arrived, the commanding officer made it abundantly clear that he did not approve of Watson's challenge of the policy or his continued service in the Navy. The commander told Watson that he was there only because there was a definite need and given Watson's reputation, the commander would give him a chance to fill that need. Watson was therefore particularly surprised when, months later, the Navy quickly moved to discharge him after he lost his appeal. As he and his lawyer struggled to obtain an injunction before he was discharged, Watson informed the commanding officer that he might be gone within twenty-four hours. Watson described his commanding officer's response:

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455. *Id.*

456. Gershick, A Sub Officer with a 'Can Do' Attitude, *supra* note 441.

457. Interview with Richard Watson, *supra* note 420.

The commanding officer of the naval station at that time said, “Rich, you have nothing to worry about. We’ll hire you as a civilian on the spot the next day.” So, you know, and this was a staunch supporter of the policy. Because he saw how I worked and what I did for the station, you know, there’s a total turnaround—a senior naval officer, a captain, a surface warfare officer, who’s willing to hire back a civilian, oh by the way, who has protections, because the civil service has protections against anti-discrimination. So, it’s pretty ironic.<sup>458</sup>

Even though he obtained an injunction, Lieutenant Watson eventually lost his case and was discharged.<sup>459</sup> The captain and the admiral of the Pacific Northwest held a retirement party for Watson. Watson described the party as “probably the most poignant event in my career” and went on to explain:

I can remember the ceremony pretty clearly. The staff, who I supervised for those two years, read a special poem and it had something to do with, you know, taking care of people that no one else wanted, and how you made this a home for us. And if anything was going to choke me up, it was that. It was pretty clear that they had cared a lot, cause I had cared a lot back. It made my time there really special.<sup>460</sup>

Watson was honorably separated from the Navy on September 1, 1998. He was awarded a Navy Commendation Medal by the Admiral for the Pacific Northwest Command upon his discharge.<sup>461</sup> He continued his court battle until January 1999, when the Supreme Court refused to hear his case. Watson was awarded full VA benefits but only 50% of his separation pay; he is now suing for full separation pay.<sup>462</sup>

#### *D. The Case of Lieutenant Steve May*

##### 1. Background of the Case

Steve May was a Republican member of the Arizona Legislature and a lieutenant in the Army on inactive reserve when he made statements on the floor of the Arizona State Legislature alluding to his homosexuality.<sup>463</sup> While May had always been open about his sexual

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458. *Id.*

459. *See supra* notes 430-432 and accompanying text.

460. Interview with Richard Watson, *supra* note 420.

461. Gershick, A Sub Officer with a ‘Can Do’ Attitude, *supra* note 441.

462. *Id.*

463. James Sterngold, *An Unlikely ‘Don’t Tell’ Target: Lawmaker May Face Discharge*, N.Y. TIMES, Aug. 26, 1999, at A1; *see also* Howard Fischer, *Still in the Army? May Case Could Go to High Court*, ARIZ. BUS. GAZETTE, Sept. 28, 2000, at P1. The attention-getting remarks were in response to proposed legislation that would prohibit the use of public funding for domestic partner health benefits.

orientation and was a member of the Log Cabin Republicans, the remarks received considerable press attention.<sup>464</sup> Nearly a month after making his statements on the floor, May was called back into active duty as a result of the growing conflict in Kosovo. Lieutenant May, who as an active duty officer had been trained in nuclear, chemical, and biological warfare defense and had also qualified as a paratrooper, would become second-in-command of the 348th Transportation Company.<sup>465</sup>

One month after May returned to active service in the Army Reserves, a front-page story was published about him in a free Phoenix paper. One of the soldiers in his unit who read the article discussing May's sexual orientation reported the matter to the commanding officer. An investigation into Lieutenant May's homosexuality was initiated in July 1999, and May subsequently faced an administrative panel in September 2000.<sup>466</sup> While the military requested that May receive a general discharge, the panel ultimately ruled that he be discharged under honorable conditions.<sup>467</sup> May appealed his discharge to the commanding general of his unit and attached a letter signed by 108 members of Congress urging then President Clinton to overrule the discharge; the letter emphasized May's "exemplary record of service in the military."<sup>468</sup> The general upheld the honorable discharge, which May then appealed to the Secretary of the Army. Throughout the appeals process, May continued to serve with his company. A final decision in the case came when President Clinton's Chief of Staff, John Podesta, brokered an agreement in January 2001 between Army command representatives and

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464. Sterngold, *An Unlikely 'Don't Tell' Target*, *supra* note 463.

465. Chris Moeser, *Army Moves to Discharge Rep. May; Says He Violated 'Don't Ask' Rule*, ARIZ. REPUBLIC, Dec. 12, 1999, at A1; Chris Moeser, *Inquiry Targets Lawmaker; Reservist Steve May Focus of Gay-Policy Rule*, ARIZ. REPUBLIC, Aug. 13, 1999, at SD1.

466. Sterngold, *An Unlikely 'Don't Tell' Target*, *supra* note 463; Chris Moeser, *Inquiry Targets Lawmaker*, *supra* note 465; Robbie Sherwood, *May Loses Army-Gay Case Military Says He Should Get the Boot Honorably*, ARIZ. REPUBLIC, Sept. 18, 2000, at A1.

467. Telephone Interview with Steve May, Lieutenant, U.S. Army (Retired) (Aug. 13, 2001 & Nov. 20, 2001). The Army asked that May be discharged under less-than-honorable conditions. The Army argued that May lacked the integrity of an officer because he had been untruthful in an episode of *Larry King Live* about the circumstances of his recall, stating that he was called back to serve in Kosovo. The Army also alleged that May had been disloyal to the Army and was intentionally embarrassing the Army for political gain. The *Larry King Live* episode was replayed at the discharge hearing, and it was shown instead that he actually said he was called up at the time of the Kosovo conflict. The board unanimously ruled that May be discharged under honorable conditions. See *Honorable Discharge Proposed for Gay Legislator in Reserves*, N.Y. TIMES, Sept. 18, 2000, at A14; Christopher Wolf, *Army's Witch Hunt Should End Policy on Gays*, ARIZ. REPUBLIC, Oct. 9, 2000, at B7.

468. Chip Scutari, *Steve May Appeals Army's Decision*, ARIZ. REPUBLIC, Nov. 15, 2000, at B5; John Bacon, *Gay Lawmaker's Appeal of Army Discharge Is Rejected*, USA TODAY, Nov. 16, 2000, at 10A.

May's attorney: the Army agreed not to discharge May in exchange for May's pledge not to re-enlist when his term expired.<sup>469</sup> Lieutenant May completed the remainder of his service with his company and retired from the Army on April 11, 2001.<sup>470</sup>

## 2. In Their Own Words: The Experience of May and His Colleagues

When Lieutenant May was on active duty, he trained troops to protect themselves from nuclear, biological, and chemical weapons.<sup>471</sup> He also won the Silver Dolphin award after spending sixty-three days underwater in a Trident submarine.<sup>472</sup> According to May, his friends in the service were aware all along that he was gay, "and they always treated me very well."<sup>473</sup> While he enjoyed being an active duty soldier (he was an officer in a mechanized infantry battalion by the end of his term of service), May originally left the service as a result of the military's policy against sexual minorities. He explained:

Many people just leave quietly, rather than put up with the hypocrisy and live deceitful lives. On the one hand, you are supposed to be honest in everything you do as a soldier; on the other, you are required to lie. On Monday morning, the guys would share their weekend exploits with their girlfriends but you either can't talk about it or have to change pronouns.<sup>474</sup>

May was surprised when he was called back to active duty in the Reserves, since his high profile as an openly gay legislator seemed to preclude his return to service. When the Kosovo conflict heated up, however, he received notice to report to the 348th Transportation Company. May recalled his confusion at the time:

What am I supposed to do? Am I supposed to send the Army a letter that says 'Hey, haven't you read the newspapers. I'm homosexual?' Or, at a time when I thought we were going to war, am I supposed to take my

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469. Robbie Sherwood & Chip Scutari, *Army Ends Effort to Boot May; Gay Reservist Celebrates Win*, ARIZ. REPUBLIC, Jan. 16, 2001, at A1; Robbie Sherwood, *Rep. May Leaving Army His Way*, ARIZ. REPUBLIC., Apr. 11, 2001, at A1; *Discharged Lesbian Plans to Challenge Gay Policy*, ARIZ. REPUBLIC, June 11, 1993, at A4.

470. Robbie Sherwood, *Rep. May Leaving Army His Way*, *supra* note 469.

471. Mark Shaffer, *Reluctant May Forced to Stand in the Limelight; Lawmaker Tired of Emphasis on His Private Life*, ARIZ. REPUBLIC, Dec. 19, 1999, at A1. May was stationed at Fort Riley, Kansas from 1993 to 1995 where he was a nuclear, biological, and chemical defense officer. *Id.*

472. Derooy Murdock, *'Don't Ask, Don't Tell' Bad Policy*, MILWAUKEE J. SENTINEL, Oct. 1, 2000, at 4J.

473. Interview with Steve May, *supra* note 467 (Aug. 13, 2001).

474. Nicholas Kralev, *Perspectives: A Soldier Fighting on All Fronts: Breakfast with the FT: Steve May Is a Republican Politician Facing Discharge from the Army Because He Is Gay: He Tells Nicholas Kralev About His Battles*, FIN. TIMES (London), July 22, 2000, at 3.

uniform out of the closet so to speak and report for duty? Well, I think the only honorable thing to do is when . . . your country calls, you respond. And so I did.<sup>475</sup>

May was appointed executive officer of a transportation company comprised of two hundred soldiers. Because he was a public figure and an openly gay legislator in the district in which his company was based, some of the soldiers in his unit were already aware of his sexual orientation when he first reported for duty. His primary responsibility was to plan training sessions and oversee their execution. During trainings, he was responsible for getting troops into the field and manning the company command post. Lieutenant May also supervised junior officers and supported the commander, including assuming the commander's functions in his absence. He worked to strengthen the physical training regimen of his company and maintain basic soldier combat skills, including weapons qualification. May described one aspect of his reserve work:

What my soldiers loved doing the most was just driving their vehicles—their big rigs. If you've ever seen a big fuel rig out on the road, that's what these guys drive. And they love doing that. So, what I tried to do was get them what we call "stick time"—I'd try to appropriate the maximum amount of time for them to take their vehicles out on the road. And that means making sure that the vehicles are running, making sure that we have the time allotted for them to do this. Making sure that we have the fuel and the money to get them out on the road. You get them on the road, you put them with mentors, or driver trainers, and get them trained.<sup>476</sup>

When Lieutenant May made the cover story in a Phoenix newspaper, the article was widely circulated and discussed among the members of his unit:

So I go to drill, and my soldiers are all passing this around, talking about it, and coming up to me asking me about it. But it was really interesting in that no one would mention the gay thing. They would talk about everything else in the article, but no one would say anything about the gay part. It was almost surreal.<sup>477</sup>

Once Major Norton was contacted by a soldier in May's platoon about the article, she stated that she had no choice but to initiate action to higher officials.<sup>478</sup>

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475. Interview with Steve May, *supra* note 467 (Aug. 13, 2001).

476. *Id.*

477. *Id.*

478. *Id.*

In his August 1999 evaluation, written after the investigation was initiated, his commanding officer wrote, “Lt. May is an intelligent and effective officer. Put in company command as soon as possible.”<sup>479</sup> In a sworn deposition for the investigation, Captain Stephen Sherbondy wrote, “May’s performance as an officer under my command has been nothing less than outstanding since he joined the unit.”<sup>480</sup> Lieutenant Jeffrey Clark added, “I do not believe that this knowledge [of his homosexuality] has in any way been detrimental to the morale of my troops or the morale of the troops directly under Lt. May’s command.”<sup>481</sup> In the investigative report to the commanding officer, the investigating officer concluded: “It is my recommendation that each commander in Lt. May’s chain of command . . . take into consideration Lt. May’s outstanding military performance . . . and his unlimited potential to be an outstanding asset as a future officer and leader in the Army Reserves.”<sup>482</sup>

As Lieutenant May publicly fought the policy, the discharge proceedings began, and the soldiers in the unit began discussing the process with him. As was the case with Meinhold and Dunning, May’s soldiers struggled with how to handle the issue of going against a military directive and making the military look bad:

I think they were struggling to understand, because they had to reconcile this internal conflict. Soldiers all want to follow the rules; we’re trained to follow the rules. We believe we just do what we’re told, and so there was this rule they knew about—“don’t ask, don’t tell”—but there’s also a guy that they liked and knew individually as a person. And so they were trying to reconcile these two issues.<sup>483</sup>

According to May, everyone was supportive of him personally, although he heard from others that some said things behind his back.<sup>484</sup> He was approached by heterosexual soldiers who offered their encouragement:

And soldier after soldier came up to me privately to say, “I support you,” or, “the guys are all talking about it, and we support you, and we like you, and you’re a great leader,” or they’d say things like “even though homosexuality is a sin, we support you”—stuff like that. So at that time, everything I heard was unanimous support.<sup>485</sup>

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479. Murdock, *‘Don’t Ask, Don’t Tell’ Bad Policy*, *supra* note 472.

480. *Probe Advises Discharge of Gay Reservist*, WASH. POST, Dec. 12, 1999, at A26.

481. Moeser, *Army Moves to Discharge Rep. May*, *supra* note 465.

482. *Id.* The ARIZONA REPUBLIC misattributes this quote to Major Norton, Lieutenant May’s commanding officer; the quote actually comes from an investigative officer in a report to Major Norton. Interview with Steve May, *supra* note 467 (Nov. 20, 2001).

483. Interview with Steve May, *supra* note 467 (Aug. 13, 2001).

484. *Id.*

485. *Id.*

May also had a number of soldiers who were gay visit him privately to get his advice. They worried that they would end up going through a discharge procedure as well, and would lose their college benefits, or family members who did not know would find out about their sexual orientation.<sup>486</sup> Because May's case received major press coverage, he was also contacted by gay and lesbian servicemembers from around the country:

I get letters or e-mails from gay servicemembers who are scared and don't know what to do. And I'm sure a number of them have gotten out. I don't think the military knows how much this policy damages them because there may be 1,200 people who get kicked out, but there are tens of thousands who leave and never say a word.<sup>487</sup>

While Lieutenant May's sexual orientation made him an obvious source of support for gay soldiers, it did not interfere with his relationship with heterosexual colleagues. May felt that his relationship with his fellow officers was quite good; they included him in their banter and joking, and they all socialized together as well:

I did have all my fellow officers over at my house all the time; we'd go out drinking; we were pretty close . . . . We'd go out drinking, and they'd talk about looking for chicks, and then, "We've got to find someone for Steve," and they all made jokes. We went out one night—all the officers—we went out to an Irish pub, and then they all wanted to go to a gay bar with me. So we all went to a gay bar. And a bunch of my gay friends came up to me and said, "don't bring your Army friends here anymore—they're too cute."<sup>488</sup>

One of the frustrations that May faced related not to the issue of sexual orientation, but to his discharge case itself. For over a year, May and his fellow officers were unsure about whether he would be able to continue to serve with the unit.<sup>489</sup> Not only did the case create disruptions for his superior officers, but it also made it more difficult for them to coordinate plans for the unit:

From month to month, we never knew if I was going to be there. And so here I am, the executive officer trying to plan training, and we didn't know if I'd be there. We're planning three months out, and we would never assign me to be the trainer, because we didn't know if I'd be there.<sup>490</sup>

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486. *Id.*

487. *Id.*

488. *Id.*

489. *Id.*

490. *Id.*

May also experienced one troubling incident related directly to the case. After his discharge hearing, during which the board recommended that he be discharged, one particularly insubordinate sergeant, who had a long history of causing trouble, told May that he would not talk to him without his lawyer present. May described his response:

I made him stand at attention, and I said, “I want you to look at your collar and I want you to look at my collar.” I said, “I might be gay, but I outrank you. And you’re going to do what you’re told to do, or you’re going to leave the Army.” He stood there for a minute, and he said, “Yes, sir.” It was awful! I’ve never in my life had to like pull rank like that . . . I wasn’t going to stand for it, and I fixed the problem, and that was it. And from that point until the end, which came for me in April, he was compliant.<sup>491</sup>

A year after the discharge process was initiated, May was made acting commander of his unit during the annual two-week training in the absence of the commanding officer. May commented, “So here they are trying to kick me out, but they make me acting commander. That’s just the Army.”<sup>492</sup> The contradictions between the military’s official policy and the reality of a unit functioning with an openly gay officer also made for some other odd juxtapositions. In the early months of 2000, the Army mandated retraining on the military’s policy on homosexuality. Each unit was given briefing slides and a lecture to read. The officers decided that the first sergeant, rather than May, should be the one to give the briefing. May, however, had to stand at the front of the drill hall with the other officers. He described the discomfiting experience:

I was standing up in front, which is where I’m supposed to be . . . and I’m looking, and soldiers are rolling their eyes . . . . “The Congress has found that homosexuality . . .” or that “Homosexuality is incompatible with military service—it undermines good order” and blah, blah, blah. And people are looking at me. And I’m just standing there, trying to look really professional and not make any facial gestures or anything, but people are making faces at me.

And one guy from another company at the end of this got up—we’d never met this guy before—he stood up, and he said, “Homosexuals shouldn’t be in the Army, there are none in the Army, they’re just not here!” And everybody from our company kind of looked around, and they didn’t know what to say. It was pretty strange, and it made me really uncomfortable. Everybody from our company came up to me afterwards and said, “Who was that guy?”<sup>493</sup>

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491. *Id.*

492. *Id.*

493. *Id.*

In the wake of the Winchell murder,<sup>494</sup> all units were also required to conduct “Consideration of Others” trainings once a quarter. May’s company received word from the battalion commander that they were to complete their training by a specific date, and May’s commanding officer chose him to lead the trainings for his unit. The commanding officer attended May’s classes, which addressed gender, race, and sexual orientation issues. May described the process and his students’ responses to the training:

[P]eople talked about [gender issues, race and homosexuality]. All very supportive that you don’t have to like someone—it’s that you don’t have to like them to get along with them, or be professional. And we all wear the same uniform, all in the same Army—we all have the same mission. And we have to treat people with respect. And I asked people—say to a black sergeant—“Have you ever been discriminated against?” “Yes.” . . . “Has a soldier been insubordinate to you because of your race?” “Yes.” “Well, what happened?” We’d talk about it. “Well, how do you handle that situation?” You know, and then we’d say, and I had to say—“Do you know anyone who’s gay?” People would also say, “Oh, my brother, my sister.” “I know gay people.” “I work with gay people.” The other thing that’s different about these reservists from active duty members—most of them work with gay people in their regular jobs. So it’s just not that big of a deal.<sup>495</sup>

While May’s case was being appealed to the Secretary of the Army, Army officials delayed making a final decision about how to handle such a high-profile case. May learned that Army leadership was unsure how to proceed:

The Army was flat out embarrassed by this. And I know this because I talked to the General Counsel to the Secretary of the Army, and he told me what the four-star generals at the Pentagon were telling him. They were embarrassed about it; they were upset about it. They felt I was being disloyal to the Army by making it a public issue. But the reality is I love the Army; I’m trying to help them. I’m trying to make it better in the long-term.<sup>496</sup>

May’s attorney met with John Podesta, President Clinton’s Chief of Staff, and discussed the possibility of working together on a solution.<sup>497</sup>

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494. On July 5, 1999, Army Private First Class Barry Winchell was brutally beaten and killed with a baseball bat, in part because he was perceived to be gay, by a fellow Army infantryman at Fort Campbell, Tennessee. See *Army Private Admitted Role in Fatal Beating, Guard Testifies*, L.A. TIMES, Aug. 10, 1999, at A17.

495. Interview with Steve May, *supra* note 467 (Aug. 13, 2001).

496. *Id.*

497. *Id.* For greater detail on political maneuvering concerning the military’s ban at the time, see Schmitt, *Gay Rights Advocates Plan*, *supra* note 274.

Podesta organized a meeting at the White House between May's attorney and Army officials, and they devised a compromise which would allow May to complete his tour of duty. Once the offer was on the table, May had to decide whether to accept the compromise as a partial victory or continue to fight the bigger battle in court. May worried that a legal suit might set bad precedent or be narrowly decided on the basis of Arizona law that protects the speech of legislators in public debates. He explained, "So the problem was, even if I won in court, which we didn't think we would, it would be such a narrow victory—it would be for state legislators in the Reserves. How many are there?"<sup>498</sup> May decided that it was best to consider the offer a success, because the Army had never previously allowed an openly gay soldier to complete his term. He continued to serve with his company until April 11, 2001.

Lieutenant May's experience fighting the military's policy on homosexuality has a postscript. Several months ago, he and his partner attended the wedding of an Army friend and were joined by a few other Army colleagues. One officer presented May with a unit coin from his old colonel, who knew the officer would see May at the wedding. May described his Army friends as being "very supportive" and accepting of his partner.<sup>499</sup> One conversation, with an infantry commander, was particularly striking to him. The commander had previously been fully in favor of the ban on homosexual service, but he modified his opinion after learning that May was gay:

He said "I talk to my guys about you all the time, because whenever there's a story in *The Army Times* about you, they ask me, because they all know that I know you, and we worked together." . . . And he said, "I always tell people that if I had to go to war, I'd want to go to war with you."<sup>500</sup>

While the infantry commander changed his mind about working with gay soldiers, however, he still believed that openly gay servicemembers should not live on base with other servicemembers' families. May describes his own reaction to the commander's comments:

I thought, now that's interesting. He's come to the point where he says you can fight with me, but what he said exactly was, "but I don't want to have to explain to my daughter what your relationship is with your partner." I thought, well that's really interesting. A guy who I think really is one of those guys in the middle that we have to influence, and he told me that he used to be a big supporter of the gay policy and all that kind of stuff, but he

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498. Interview with Steve May, *supra* note 467 (Aug. 13, 2001).

499. *Id.*

500. *Id.*

came around after he saw me. Because he had known me—he never knew that I was gay—he knew me just as an officer.<sup>501</sup>

### VIII. CONCLUSION

The prohibition against the service of sexual minorities since the 1940s has not led to their elimination from the U.S. military. Many servicemembers do not know they are homosexual when they enlist and others do not consider themselves to be homosexual, despite the fact that their behavior comports with the military's strict definition. Those who do identify with sexual minorities join the military regardless of the prohibition, because they want to serve their country or because of the job opportunities the military offers. Most serve in relative silence, telling only other gay and lesbian servicemembers or a few trusted heterosexual colleagues, if anyone at all. While military investigations have led to the discharge of roughly 100,000 servicemembers since the 1940s,<sup>502</sup> experts agree that many more have served without being separated. As societal attitudes toward homosexuality have become more tolerant, there has been increasing evidence of acceptance among many heterosexual military personnel as well. Nevertheless, the official policy mandates removal of all known homosexual servicemembers, regardless of conduct and regardless of their record. Even those servicemembers who experience acceptance from their colleagues remain in danger that a change in command, an unreciprocated advance, or the hostility of one individual could result in the end of their military careers.

Department of Defense officials now acknowledge that many homosexual servicemembers have served honorably and well, and they have since discarded the unsubstantiated argument that gays and lesbians pose a threat to national security. They do, however, continue to express concern that removing the ban on homosexuality would lead to a decline in morale, unit cohesion, and operational effectiveness.

Despite considerable evidence to the contrary from the experiences of foreign militaries and domestic fire and police departments, and notwithstanding the opinions of social scientists that study group cohesion and interpersonal relations, U.S. military officials continue to deem sexual minorities as inherently threatening to the working order of the military. The most compelling evidence against such fears comes from what scholars and researchers have learned about the actual service of sexual minorities in the U.S. military. During periods of sustained

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501. *Id.*

502. BÉRUBÉ, *supra* note 4, at 276.

conflict, when the need for optimal unit function and operational effectiveness is at its zenith, the number of discharges for homosexuality decreases. Further, the policy is not uniformly implemented even in times of peace; some homosexual servicemembers face a lesser chance of discharge than others because of gender, branch of service, or place of duty. Researchers have catalogued scores of examples from the past fifty years of servicemembers who have served openly and with the support and respect of their colleagues.

The cases of individuals who continued to serve while publicly challenging the military's policy provide additional qualitative detail to the empirical studies conducted by military, governmental, academic, and nonprofit researchers. The experiences of the servicemembers discussed in this Article, who collectively served openly for more than 18 years, underscore the RAND report conclusion that "homosexuals can be successfully integrated into military and public security organizations."<sup>503</sup> These servicemembers maintained collegial relationships with co-workers, received outstanding evaluations, won awards, and were promoted during their periods of open service. They also maintained high levels of responsibility, managing personnel, overseeing military budgets, and commanding troops. Further, they did so serving within an institution that officially fought to discharge them. Their conduct, records of service, and professional accomplishments reflect what they struggled so hard to obtain—the right to be recognized as exemplary servicemembers, first and foremost.

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503. SEXUAL ORIENTATION AND U.S. MILITARY PERSONNEL POLICY, *supra* note 6, at 32.