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SYMPOSIUM

INTRODUCTION

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Ten years ago, the Department of Defense (DoD) began implementation of a policy that Congress developed for the purpose of separating “known” lesbians, bisexuals, and gay men from military service,¹ a policy resulting in regulations known colloquially as “Don’t Ask, Don’t Tell.”² Congress codified its policy following hearings and testimony

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1. Congress codified its policy for separation of lesbians, gay men, and bisexuals in the National Defense and Authorization Act for FY94 on Nov. 30, 1993. Policy Concerning Homosexuality in the Armed Forces, Title V, Subtitle G, § 571 Pub.L. 103-160, 107 Stat. 1670, (1993). The legislation required the DoD to promulgate regulations for implementation of the policy within 90 days. *Id.* at 571(b) (codified as 10 U.S.C. § 654(b))(set forth in Appendix A). The DoD promulgated those regulations in 1994. DoD Directive §§ 1332.1 et seq., “Implementation of DoD Policy on Homosexual Conduct in the Armed Forces,” February 28, 1994.

2. The full moniker for the policy is “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass.” See SERVICEMEMBERS LEGAL DEFENSE NETWORK, SURVIVAL GUIDE: A COMPREHENSIVE GUIDE TO “DON’T ASK, DON’T TELL, DON’T PURSUE, DON’T HARASS” AND RELATED MILITARY POLICIES 4, at www.Sldn.org/templates/get/index.html?section=19 (4th ed. March 2003) [hereinafter SLDN, SURVIVAL GUIDE]. Though Congress codified only the “Don’t Tell” provisions (i.e., rendering a statement of one’s gay or bisexual identity as a grounds for discharge), Congress left to the discretion of the DoD promulgation of complementary regulations, which the DoD did in fact promulgate, prohibiting inquiries of service member sexuality during accession to service, military-initiated investigations of “suspected” homosexuals, and harassment of service members perceived to be gay. *Id.* at 4-7.

from military experts who claimed that sexual minorities threatened the cohesiveness of United States Armed Forces—in essence, maintaining that sexual anxiety and social tension produced by “open homosexuality” would polarize military units, especially combat units, where heterosexual service members would direct the resulting anxiety and tension at lesbians, bisexuals, and gay men.³ The testimony was virtually all second-hand, delivered by military leadership purportedly on behalf of troops allegedly discomfited with the idea of serving openly gay men.⁴ Congress permitted contrary testimony from a small group of gay and lesbian service members, though only at the conclusion of the hearings.⁵ To many, that testimony served as little more than a token gesture to objective inquiry, an afterthought to a foregone Congressional conclusion in favor of restricting service by lesbians, bisexuals, and gay men.⁶

This past fall, Hofstra University convened a conference of scholars and military personnel to examine military policy on service by sexual minorities, to determine whether the policy had been effective or was needed in light of ten years' experience. *Don't Ask, Don't Tell: 10 Years Later* focused both on the practical ramifications of the policy in the United States, but also theoretical evaluations of the policy under law and in light of global developments. To the conference organizers' dismay, representatives from the DoD and the nation's most vociferous defenders of excluding lesbians and gay men from service declined to attend, despite repeated invitations and offers to give them an exclusive platform to air their views.⁷ Fortunately, several provocative and seasoned military scholars came to the conference to explain why military leaders are concerned about change from current policy, particularly any change that would accommodate lesbian, bisexual, and gay service

3. For key excerpts from the hearings as well as analysis of the legislative process, see WILLIAM N. ESKRIDGE JR. & NAN D. HUNTER, *SEXUALITY, GENDER, AND THE LAW* 729–745 (2d ed. 2003).

4. For extensive analysis, see Diane H. Mazur, *Re-making Distinctions on the Basis of Sex: Must Gay Women Be Admitted to the Military Even If Gay Men Are Not?*, 58 OHIO ST. L.J. 953, 983–991 (1997). As Professor Mazur has explained the testimony focused almost exclusively on the subject of male comfort with homosexuality and virtually ignored experiences of women's tolerance for working with known lesbians. *Id.*

5. Grethe Cammermeyer, Remarks at Hofstra University's Don't Ask, Don't Tell Conference, Sept. 18, 2003 (transcript on file with author).

6. *Id.*

7. Eric Lane, *Director's Message to DON'T ASK, DON'T TELL: 10 YEARS LATER*, at 4 (Sept. 2003) (Hofstra Cultural Center and Hofstra University School of Law conference program) (“In each case our invitations were not accepted . . . About this . . . Professor Aaron Belkin, another conference participant, speculated that ‘perhaps it is because opponents literally have run out of rational arguments.’”).

members at a time when the United States is still not a gay-friendly place. One of the most experienced scholars in the field, conference participant Eugene Milhizer, a Professor of the Ave Maria School of Law, has provided a thoughtful summary of that view for this journal.⁸

Perhaps not surprisingly, the absence of numerous policy defenders at the conference caused the balance of the conference testimony to question the policy's justifications and effectiveness—a result enhanced by the overwhelming attendance by renowned military and legal scholars who have studied military policy in remarkable detail.⁹ The highlights of their conclusions were daunting, notably among them that all of the United States' leading allies but Turkey had lifted their restrictions on service by lesbians and gay men who are open about their sexuality, without any of the problems claimed by American military leadership.¹⁰ Meanwhile, thousands of lesbian, bisexual, and gay service members have been needlessly discharged in the United States,¹¹ including many who have essential skills to fight the war on terror,¹² many who have given years of their lives to service, only to have that service dismissed for the sake of those in service who allegedly cannot accept homosexuality.¹³ Conference attendees also reported that the policy has resulted in deep intrusions on the private lives of all service members who must de-

8. See pages 349–402, *infra*.

9. On this front, conference attendees included: Sharon Alexander of the Servicemembers Legal Defense Network (SLDN); Professor Aaron Belkin of the Center for the Study of Sexual Minorities in the Military; John Brittain of the Thurgood Marshall School of Law; Melissa Embser-Herbert of Hamline University; Sharra Greer of SLDN; Nan Hunter of Brooklyn Law School; Sylvia Law of New York University Law School; Jonathan Lurie of Rutgers University, Diane Mazur of the University of Florida Levin College of Law; Ruthann Robson of CUNY's Queens College of Law; and Tobias Wolff of University of California Davis Law School.

10. See Appendix B.

11. SERVICEMEMBERS LEGAL DEFENSE NETWORK, CONDUCT UNBECOMING: THE TENTH ANNUAL REPORT ON “DON’T ASK, DON’T TELL, DON’T PURSUE, DON’T HARASS” 2, at http://www.sldn.org/binary-data/SLDN_ARTICLES/pdf_file/1411.pdf (2004)[hereinafter “CONDUCT UNBECOMING 2004”] (showing DoD reports that nearly 10,000 service members have been discharged in the last decade). For a listing of discharges by year, see ESKRIDGE & HUNTER, *supra* note 3, at 745.

12. As SLDN notes, the number of discharges is one-third of the total number of “new” recruits the DoD claims it needs to fight the war on terror, see CONDUCT UNBECOMING 2004, *supra* note 11, at 2, and the loss has been dramatized by discharges of linguists with strong skills in interpreting enemy communications. See SERVICEMEMBERS LEGAL DEFENSE NETWORK, CONDUCT UNBECOMING: THE NINTH ANNUAL REPORT ON “DON’T ASK, DON’T TELL, DON’T PURSUE, DON’T HARASS,” 7 (2003) (hereinafter “CONDUCT UNBECOMING 2003”).

13. For dramatic, renowned stories of such losses, see CONDUCT UNBECOMING 2004, *supra* note 11, at 17–20. SLDN has recently publicized several stories of lesser known gays and lesbians who were called to serve during the current war, some of whom who could not continue because of the climate created by the policy. See *id.* at 9–12. As SLDN notes, these losses have caused increasing numbers of military leaders to denounce the policy as a waste of human resources. *Id.* at 1.

fend against perceptions and accusations of homosexuality,¹⁴ and that the impact of the policy has spread beyond the military, most notably to American colleges and universities, where campuses are required to accommodate discrimination in violation of anti-discrimination prohibitions, and where distribution of materials critical of military policy risks punishment by loss of federal funding.¹⁵

Despite all of this testimony, personal accounts of service members stood out dramatically at the *Don't Ask, Don't Tell* conference—stories told of service members, both straight and gay, who have suffered under the policy—an effort commendably continued by this edition of the *Hofstra Labor & Employment Law Journal*. In this volume, heterosexual service members Sharon Alexander and Keith Taylor document extraordinary losses of colleagues under past and present military policy targeting homosexuality.¹⁶ Gay service members Alastair Gamble and former Green Beret Jay Hatheway tell equally compelling personal stories of their exclusion from service, despite their contributions to national defense.¹⁷ The Documenting Courage Project—an effort by civil rights organizations to collect stories of lesbian, gay and bisexual veterans—has also generously donated select essays for inclusion here.¹⁸

It is important to note that the perspectives and experiences of service members are the focus of this publication not merely because they are the experiences upon which military policy is purportedly based, but because they also reflect the lives of those individuals most deeply affected by military policy. Service members constitute the only labor force in the United States whose private, sexual lives are directly regulated by federal law,¹⁹ and whose firing for being discovered as gay, lesbian, or bisexual is directly *required* by law.²⁰ They comprise the only

14. See DON'T ASK, DON'T TELL: DEBATING THE GAY BAN IN THE MILITARY 53–60 & 139–50 (Aaron Belkin & Geoffrey Bateman, eds., 2003).

15. For a summary of the controversy, see ESKRIDGE & HUNTER, *supra* note 3, at 941–943. For an up-to-date summary of the current litigation over this issue, see www.solomonresponse.org.

16. See pages 403–436 and 455–459, *infra*.

17. See pages 437–442 and 443–453, *infra*.

18. See pages 461–482, *infra*.

19. For a summary of the law, see SLDN SURVIVAL GUIDE, *supra* note 2, at 8; ESKRIDGE & HUNTER, *supra* note 3, at 707–714.

20. CONDUCT UNBECOMING 2003, *supra* note 12, at 9. To assist in the implementation of the Don't Ask, Don't Tell policy, the Assistant Secretary of Defense, Edwin Dorn, issued a training plan to the Assistant Secretary of the Army, Assistant Secretary of the Navy and Assistant Secretary of the Air Force to provide an approach for educating the members of the Armed Forces on the new policy. According to the Assistant Secretary, the training plan was designed to making each Service aware of their responsibilities under the new policy. A copy of the training plan appears in Appendix C.

labor force forbidden by Congress from identifying as lesbian, gay, or bisexual, even though Congress and the DoD have both known for more than a decade that the prohibition increases the risk of violence perpetrated by service members against sexual minorities,²¹ and equally imposes severe political and personal costs on lesbian, gay, and bisexual service members as well.²²

The need for attention to service members' perspectives on the policy has never been more pressing. With the war in Iraq in progress for the last two years and the need for service members high, discharges of lesbians and gay men are at new lows,²³ proving as civil rights activists have claimed for years that claims that service by lesbian and gay men threaten combat units are entirely false. With the DoD now claiming that heterosexual service members must refrain from harassing anyone *perceived* to be gay—including service members²⁴—the danger purportedly feared because of “known homosexuality” in service is phenomenally difficult to explain and corroborate. In these terms, understanding the stories of those lesbian, gay, and bisexual service members who have both hidden their sexuality in service and whose sexuality has become known may be more relevant to understanding current military policy than ever before. We hope that this edition of the *Hofstra Labor and Employment Law Journal* is a significant contribution to that effort.

21. As I have documented extensively before, the government's own documents show the link between discrimination and anti-gay violence in service, particularly flowing from the silencing of lesbians, bisexuals, and gay men regarding their identities. See James Allon Garland, *The Low Road to Violence: Governmental Discrimination as a Catalyst for Pandemic Hate Crime*, 10 *LAW & SEXUALITY* 57–73 (2001). SLDN continues to report military leadership encouraging gay violence with the knowledge that its victims cannot come forward to complain about it. See CONDUCT UNBECOMING 2004, *supra* note 11, at 27 (reporting how a Non-Commissioned Officer (NCO) announced to service members “If I ever found out someone on my crew was gay, I would kill him.”); CONDUCT UNBECOMING 2003, *supra* note 12, at 16 (noting how anti-gay officer told subordinates if “anyone who is gay . . . felt offended” by anti-gay epithets to raise their hand and self-identify in violation of the policy); *Id.* at 14 (reporting NCO telling soldiers “the only thing a good fag needs is a good fag-bashing.”). For extensive additional reports of violence, see SERVICEMEMBERS LEGAL DEFENSE NETWORK, CONDUCT UNBECOMING: THE SEVENTH ANNUAL REPORT ON “DON'T ASK, DON'T TELL, DON'T PURSUE, DON'T HARASS” 72–102, at http://www.sldn.org/binary-data/SLDN_ARTICLES/pdf_file/256.pdf (2001).

22. For an extensive discussion, see Tobias Barrington Wolff, *Political Representation and Accountability Under Don't Ask, Don't Tell*, 89 *IOWA L. REV.* (forthcoming May 2004); see also Tobias Barrington Wolff, *Compelled Affirmations, Free Speech, and the U.S. Military's Don't Ask, Don't Tell Policy*, 63 *BROOK. L. REV.* 1141 (1997).

23. See CONDUCT UNBECOMING 2004, *supra* note 11, at 1; see CONDUCT UNBECOMING 2003, *supra* note 12, at 1.

24. See Garland, *supra* note 21, at 68 & n.334; see also SLDN Survival Guide, *supra* note 2, at 6.