

The logo for the New York City Bar, featuring the text "NEW YORK CITY BAR" in a bold, serif font, centered between two horizontal blue bars.

**NEW YORK
CITY BAR**

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**COMMITTEE ON LESBIAN, GAY, BISEXUAL & TRANSGENDER RIGHTS
COMMITTEE ON CIVIL RIGHTS
COMMITTEE ON MILITARY AFFAIRS AND JUSTICE**

**REPORT TO THE UNITED STATES SENATE ARMED SERVICES COMMITTEE
IN SUPPORT OF THE REPEAL OF THE “DON’T ASK, DON’T TELL” POLICY**

The Association of the Bar of the City of New York (the “City Bar”) calls for the immediate repeal of the United States military’s ban on open service by lesbian, gay, or bisexual (“LGB”) individuals, known colloquially as “Don’t Ask, Don’t Tell” (“DADT”). This discriminatory policy has denied numerous LGB individuals the opportunity to serve their country, while denying the military the benefit of their talents and skills. DADT is both legally unsupportable and unsound as a matter of policy.

President Obama’s recent promise to work for the repeal of DADT during his January 27, 2010 State of the Union address and the Senate Armed Services Committee hearing that followed on February 2, 2010, are important first steps to repealing this discriminatory policy. During that hearing, Defense Secretary Robert M. Gates and Admiral Mike Mullen, chairman of the Joint Chiefs of Staff, added their support to the growing mass of proponents calling for DADT’s repeal, and announced the creation of a working group to study the implementation of any repeal. The City Bar urges the Pentagon and Congress to act swiftly to determine an effective implementation plan and include repeal language in the next Defense Authorization bill, and urges President Obama to follow through on his promise to end this discriminatory policy.

A. Introduction

In 1993, as part of the National Defense Authorization Act for 1994, Congress passed into law the “Policy Concerning Homosexuality in the Armed Forces.” The statute provides that a member of the armed forces shall be separated from the military if a finding is made that the member “has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts unless,” *inter alia*, the member can affirmatively demonstrate that “such conduct is a departure from the member’s usual and customary behavior” and “the member does not have a propensity or intent to engage in homosexual acts.”¹

Although touted at the time as a compromise policy that would shield the privacy interests of LGB service members while protecting the military’s interest in unit cohesion, good order, discipline and the morale of the troops, fifteen years of experience under DADT has demonstrated that it did not accomplish its stated objectives. Far from achieving the goal of avoiding the waste of military resources on needless investigations and discharges – a goal that is

¹ 10 U.S.C. § 654(b)(1).

even more critical given the significant demands on today's militaries - DADT has resulted in the discharge of more than 13,000 service men and women since its enactment in 1993.²

Despite the popular name given to the policy, in fact there is nothing in the statute itself that prohibits the military from questioning service members about their sexual orientation.³ Limitations are found in the Department of Defense's implementing regulations, but, in accordance with the statute, those regulations provide for inquiry into what would otherwise be lawful, private conduct allowed for heterosexual service members. DOD Directive 1304.2 provides that applicants shall not be questioned about their sexual orientation at the time of their enlistment or induction – yet this prohibition is suspended where the military has independent evidence that the applicant has engaged in “homosexual conduct.”⁴ Similarly, although DOD Directive 1332.14 prohibits a commander or inquiry official from asking about sexual orientation during a fact-finding inquiry or administrative separation procedure, the investigating official is authorized to ask members whether they engaged in “homosexual conduct” where credible information exists to support such charges.⁵ Indeed, that directive does not “preclude[] questioning a member about any information provided by the member in the course of the fact-finding inquiry or any related proceeding.”⁶ Moreover, to oppose separation from the service in administrative proceedings, it is the service member who bears the burden of proving, by a preponderance of the evidence, that he or she is not a person who engages in, or has a propensity to engage in, or intends to engage in homosexual acts.⁷ Accordingly, although the public may perceive DADT as a policy that permits LGB individuals to serve so long as they are “discreet” as to their sexuality, as a matter of practice, DADT imposes restrictions on the private lives of homosexual service members beyond those imposed on all other service members.⁸

B. Lesbian, Gay and Bisexual Service Members Are Subjected to Harsh Penalties Not Faced by Their Heterosexual Counterparts

Because DADT applies at all times, whether on base or off, the estimated 66,000 LGB people serving in the U.S. military⁹ are subject to restrictive limitations in their civilian life, which are not imposed on their heterosexual colleagues. A service member who turns to the civilian police in situations of domestic violence or bias attacks risks discharge if he or she has to admit to legal homosexual conduct to make the report. Entering into same-sex marriage, civil or domestic partnership, or simply obtaining domestic partner benefits under private insurance puts a service member at risk of discharge. Same-sex partners cannot be listed as primary next of kin to be notified if the service member is killed, missing, or wounded in action. Nor will the

² David F. Burrelli, “Don’t Ask, Don’t Tell:” The Law and Military Policy on Same-Sex Behavior (Congressional Research Service 2009) at 10.

³ See 10 U.S.C. § 654

⁴ DOD Directive 1304.26, E2.2.8.1.

⁵ DOD Directive 1332.14, E5.3.c. (Aug. 28, 2008).

⁶ *Id.*

⁷ *Id.* E5.3.f.

⁸ See Don't Ask, Don't Tell: Debating the Gay Ban in the Military 53-60 & 139-50 (Aaron Belkin & Geoffrey Bateman, eds., 2003).

⁹ http://www.law.ucla.edu/williamsinstitute/pdf/GaysintheMilitary2008_PressRelease.pdf.

military provide benefits for same-sex partners. Failure to report the adoption of a child with their same-sex partner can lead to criminal conviction.¹⁰

Discharge under DADT can seriously impact the benefits the service member receives following discharge. The discharge characterization the service member is awarded if discharged under DADT may be improperly lowered, putting at risk certain benefits, including the Montgomery G.I. Bill education benefits, and he or she may no longer be eligible for separation pay.¹¹

C. Arguments Supporting DADT Are Not Supported by the Facts

Defenders of DADT argue that allowing LGB service members to serve openly would wreak havoc on unit cohesion, recruitment and retention, and battle readiness. In other words, the discriminatory effects of DADT are justified by the sexual anxiety, fears and bigotry of heterosexual service members, who would not be able to tolerate serving with identifiable sexual minorities. However, recent studies, as well as the experiences of foreign militaries which allow open service by LGB individuals, demonstrate that these fears are unfounded.¹²

Whatever arguments might have been made in 1993 regarding the necessity for DADT, the sea change in public perceptions and military culture regarding homosexuality that has taken place in the intervening fifteen years has largely negated the perceived basis for a ban on open military service by LGB individuals. In 2008, 104 retired generals and admirals called for the repeal of DADT, including some of those who supported the policy at the time it was initially adopted.¹³ A 2006 survey by Zogby International of current and recent military personnel serving in Afghanistan and Iraq found that the majority of service members know or suspect that there are LGB service members in their units. Two-thirds of service members who were certain that a member of their unit was gay did not believe the presence of an LGB individual adversely impacted the morale of their unit.¹⁴ Moreover, 78% of those polled stated they would join the military regardless of whether gay and lesbian service members could serve openly.¹⁵ Even the military's own studies and reports have found no link between sexual orientation and military performance.¹⁶

The successful experiences of foreign militaries that have lifted bans on open service by LGB individuals also rebut the contention that integration would decrease military effectiveness.

¹⁰ Servicemembers Legal Defense Network, "The Survival Guide: A Comprehensive Guide to 'Don't Ask, Don't Tell' and Related Military Policies," Fifth Ed., 2007, pp. 32-36, available at <http://www.sldn.org/pages/survival-guide>.

¹¹ *Id.*, pp. 47-52.

¹² Zogby International, "Opinions of Military Personnel on Sexual Minorities in the Military," December 2006, p. 6. Kyle Dropp and Jon Cohen, "Acceptance of Gay People in the Military Grows Dramatically," *The Washington Post*, July 19, 2008, A3, available at www.washingtonpost.com/wp-dyn/content/article/2008/07/18/AR2008071802561.html.

¹³ <http://www.palmcenter.org/press/dadt/releases/104Generals%2526Admirals-GayBanMustEnd>.

¹⁴ Sam Rodgers, "Opinions of Military Personnel on Sexual Minorities in the Military," Zogby International, December 2006.

¹⁵ *Id.*

¹⁶ See, e.g., RAND's National Defense Research Institute Report; U.S. Gen. Accounting Office, *Homosexuals in the Military: Policies and Practices of Foreign Countries* (1993); U.S. Army Research Institute for the Behavioral and Social Sciences Report (Pinch 1994); F.C. Pinch, *Perspectives on Organizational Change in the Canadian Forces* (U.S. Army Research Institute for the Behavioral and Social Sciences, 1994).

In total, twenty-four nations allow LGB individuals to openly serve in the military, including twenty-two allied nations with troops serving alongside American service member in Iraq and Afghanistan. Great Britain, Australia, Canada and Israel, to name a few, have successfully integrated their militaries. Numerous studies examining the impact of integration on these foreign militaries have found that open service by LGB individuals has not undermined military performance, unit cohesion, military readiness, nor has it increased difficulties in recruitment and retention.¹⁷ The successful integration of foreign militaries confirms that the continuation of the United States' official ban is not necessary to fulfill military objectives.

D. DADT Is Incompatible with Constitutional Values

In the area of military affairs more than in other areas of civic life, courts look to Congress to set the standard in granting constitutional rights to the men and women who serve their country.¹⁸ For that reason, Congress is under a particularly heavy obligation to act.

The constitutionality of DADT has been called into question by the seminal Supreme Court case of *Lawrence v. Texas*, in which the Supreme Court recognized a fundamental constitutional right, guaranteed by Due Process Clause of the Fourteenth Amendment, for adults to engage in private, consensual homosexual conduct.¹⁹ DADT's codified discrimination against service members who engage in "homosexual conduct" as defined in 10 U.S.C. § 654 represents a direct abridgement of LGB service members' protected liberty interest in pursuing private, intimate relationships with consenting adults of their choice. While the military setting undoubtedly often dictates a need for less privacy than in civilian life, because DADT operates where there is no similar restriction on private, intimate relationships for non-LGB service members, DADT cannot be justified by military need.

The conflict between DADT and the holding of *Lawrence* has been recognized in recent court decisions.²⁰ In the face of a substantive due process challenge, the Ninth Circuit overruled its prior precedent upholding DADT.²¹ The Ninth Circuit reasoned that DADT's intrusion "upon the personal and private lives of homosexuals" must be subjected to heightened scrutiny. Applying this standard, the Ninth Circuit concluded that DADT's constitutionality must be

¹⁷ See, e.g., Aaron Belkin and Jason McNichol, Effects of the 1992 Lifting of Restrictions on Gay and Lesbian Service in the Canadian Forces: Appraising the Evidence (The Center for the Study of Sexual Minorities in the Military [CSSMM] 2000); Aaron Belkin & Melissa Levitt, The Effects of Including Gay and Lesbian Soldiers in the Israeli Defense Forces: Appraising the Evidence (CSSMM 2000); Aaron Belkin & Jason McNichol, The Effects of Including Gay and Lesbian Soldiers in the Australian Defence Forces: Appraising the Evidence (CSSMM 2000); Aaron Belkin & R. L. Evans, The Effects of Including Gay and Lesbian Soldiers in the British Armed Forces: Appraising the Evidence (CSSMM 2000) (all of these studies are available at <http://www.palmcenter.org/publications/dadt>). See also RAND's National Defense Research Institute Report; U.S. Gen. Accounting Office, Homosexuals in the Military: Policies and Practices of Foreign Countries (1993); U.S. Army Research Institute for the Behavioral and Social Sciences Report (Pinch 1994); F.C. Pinch, Perspectives on Organizational Change in the Canadian Forces (U.S. Army Research Institute for the Behavioral and Social Sciences, 1994); Aaron Belkin, Don't Ask, Don't Tell: Is the Gay Ban Based on Military Necessity? 33 Parameters 111 (2003).

¹⁸ While "[t]he military has not been exempted from constitutional provisions that protect the rights of individuals," *Emory v. Secretary of Navy*, 819 F.2d 291, 294 (D.C. Cir. 1987), courts hesitate to disturb Congressional judgments. See *Cook v. Gates*, 528 F.3d 42, 57 (1st Cir. 2008) (upholding DADT against due process and equal protection challenge because of the "unique context" of the strong deference due when "reviewing an exercise of Congressional judgment in the area of military affairs.").

¹⁹ 539 U.S. 558 (2003).

²⁰ See, e.g., *United States v. Marcum*, 60 M.J. 198 (C.A.A.F. 2004).

²¹ *Witt v. Department of Air Force*, 527 F.3d 806, 819 (9th Cir. 2008).

analyzed on a case-by-case basis, and that its application to any particular service member must be specifically shown to further an important government interest in the least intrusive way possible.²² As the factual underpinnings of DADT have not withstood scrutiny, it is highly doubtful that the military could ever meet this standard.

Moreover, while lower courts upheld the constitutionality of DADT against Equal Protection challenges pre-*Lawrence*,²³ DADT is not compatible with our constitutional guarantee of equal protection under the law.²⁴ DADT singles out one group – LGB service members – for statutory strictures not imposed on any other group. The Supreme Court has explained that laws singling out LGB individuals for stricter legal treatment "raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected."²⁵ As discussed above, there is no factual basis for any interest other than such animosity, an interest that, of course, is not a legitimate governmental interest.²⁶

E. Conclusion

DADT has resulted in the discharge of thousands of qualified individuals who identify as LGB. Since its inception, over 13,000 men and women have been discharged from the armed services, including over 300 language experts, more than 50 of whom were fluent in Arabic.²⁷ Discharging highly qualified individuals with specialized skills – particularly those skills needed by a military engaged in wars on multiple fronts – based on nothing more than their sexual orientation runs counter to military effectiveness and to the principles of liberty and equality that the military is sworn to uphold.

The City Bar urges that the Pentagon, Congress and President Obama heed the call of Members of Congress, military leaders, active and discharged service members, and a growing chorus of the public, to repeal DADT and to replace it with a policy of non-discrimination. This is not only critical to the lives and dignity of LGB individuals in the Armed Forces and their families, but also, imperative to returning our Armed Forces to their fullest and most able capacity.

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²² *Id.*

²³ See, e.g., *Richenberg v. Perry*, 97 F.3d 256 (8th Cir. 1996) (split panel defers to Congressional judgment on necessity of DADT to maintain unit cohesion).

²⁴ See *Lawrence*, 539 U.S. at 579-585 (Justice O'Connor concurring in the judgment on Equal Protection grounds).

²⁵ *Romer v. Evans*, 517 U.S. 620, 634 (1996).

²⁶ *Id.* See also *United States v. Virginia*, 518 U.S. 515, 532 (1996) (sex classifications may not be used "for denigration of the members of either sex or for artificial constraints on an individual's opportunity"); *Loving v. Virginia*, 388 U.S. 1, 8 (1967) (rejecting "equal application" defense to prohibited classification).

²⁷ David F. Burrelli, "Don't Ask, Don't Tell:" The Law and Military Policy on Same-Sex Behavior (Congressional Research Service 2009) at 10.