Honors Thesis Proposal

for

Don't Ask, Don't Tell: A History, Legacy, and Aftermath

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CHAPTER 1: INTRODUCTION

Though prohibited by the Articles of War of 1916, a ban on homosexuality within the United States’ military was not strictly enforced until World War II. During this time of homosexual purging, the Army, Navy and Selective Service System mobilized greatly and developed procedures for spotting and excluding homosexual draftees from service. These tactics were far-reaching: new recruits were “screened for feminine body characteristics, effeminacy in dress and manner and a patulous (expanded) rectum” (Webley, 2010).

These policies continued throughout the 20th century with the Selective Service including “homosexual proclivities” as a disqualifier for the draft in 1941 and Army Regulation 600-443 of 1950 classifying homosexuals into three different types of classes, based on how aggressive their homosexual conduct is deemed to be. Service members deemed to be “aggressive” homosexuals are placed in Class I and are subjected to general court-martial. Homosexual service members considered “active but non-aggressive” are placed in Class II and were allowed to accept a dishonorable discharge or allowed to resign (if they were officers) in order to avoid court martial. Finally under this regulation, personnel admitting to or exhibiting homosexual tendencies, without committing a violation of the sodomy statute, are designated "Class III," and can be removed from service “under general or honorable discharge” (United States Naval Institute, 2010).

This continued with a policy of anti-homosexuality for thirty years. In 1981, more standards were written on dealing with homosexuality in the military, through Defense Directive 1332.14, which explicitly declared that “homosexuality is incompatible with military service”, ordering mandatory discharge for any service member who “engaged in, has attempted to engage in, or has solicited another to engage in a homosexual act” (United States Naval Institute, 2010).
Disagreeing with this policy, the 1992 campaign run of President William Clinton had promised to end discrimination against gay who were serving in the U.S. Armed Forces and end the ban on homosexuality in the military (Evans, 1993). This initiative, however, was met with heavy resistance from Congress who stood mostly against the idea, and a compromise between the two sides was made in the form of the 1993 Defense Directive 1304.26 of the United States Department of Defense, which laid out the guidelines behind what was colloquially known as the “Don’t Ask, Don’t Tell” (also referred to as DADT) Policy of the United States Military (Belkin, 2003). Explicitly, this directive states that people looking to serve the military “shall not be asked or required to reveal whether they are heterosexual, homosexual or bisexual [. . .] or required to reveal whether they have engaged in homosexual conduct” (United States Department of Defense). Considered to be a middle ground at the time, this policy allowed for service members to be gay, though in secret. Under this policy, a service member must not asks another’s sexual orientation, nor tell another their own (Scaglia, 2011). This did not void Defense Directive 1332.14 and make discharges of homosexuality illegal, but it instead made them harder and forced a cease of investigations into a service member’s sexual orientation or private sexual behaviors.

Throughout the course of this legislation’s enactment, several challenges were made to it. Several Federal Court of Appeals of the United States upheld Don’t Ask, Don’t Tell. These challenges came in the form of several cases. These cases included Richenberg v. Perry (8th Cir. 1996), where a United States Air Force member sued for an injunction to stop his discharge from the United States military under DADT, claiming that the policy of DADT violated his due process and free speech rights, but was denied. Specifically, the court claimed that Richenberg had “not made a sufficient showing of irreparable injury” and that he had “not persuaded us [the
Eighth Federal Circuit Court of Appeals] that he has a substantial likelihood of success on the merits of his appeal” (Richenberg v. Perry). Another case was Thomasson v. Perry (4th Cir. 1996), in which a Navy Lieutenant and service member of ten years sued for being discharged after outing himself as a gay man. His motion was denied. Other cases include: Able v. United States (2d Cir. 1998); Cook v. Gates (1st Cir. 2008); Holmes v. California National Guard (9th Cir. 1998), all of which had similar circumstances to the Richenberg and Thomasson cases, and all of which ended with findings against the homosexual service members.

DADT challenges are more famous for two cases that helped homosexual service members, however, these being: Witt v. Department of the Air Force (9th Cir. 2008) and Log Cabin Republicans v. United States of America (9th Cir. 2011). In Witt v. Department of the Air Force (9th Cir. 2008), a “highly decorated 18-year career in the Air Force, Major Margaret Witt was discharged based on an allegation that she had engaged in sexual conduct with another woman: a civilian with whom she was in a committed relationship, in their home, miles from any military base” (Witt v. Department of the Air Force: Lambda Legal). Considering these circumstances, the ACLU of Washington sued with Lambda Legal working alongside, showing that because of a victory in Lawrence v. Texas, the government “cannot demand that individuals completely sacrifice their constitutional right to sexual intimacy with a same-sex partner in order to serve in the armed forces” (Witt v. Department of the Air Force: Lambda Legal). The other notable case for favoring homosexual service members was Log Cabin Republicans v. United States of America (9th Cir. 2011). This case challenged the legality of DADT and is notable for having been decided after the Don’t Ask, Don’t Tell Repeal Act had already been passed by the Obama administration in 2010. In its unanimous decision, however, it forced the end of “the worldwide enforcement of Don’t Ask, Don’t Tell” (Geidner, 2011). This is worth note because,
Despite the passage of the DADT Repeal Act the year before, the DADT Repeal Act was not scheduled to go into effect until September of 2011, which was after *Log Cabin Republicans v. United States of America* (9th Cir. 2011) was decided.

The issue of gays serving openly in the military is not a problem wholly unique to the United States, however. Around the world, policies similar to DADT had been in effect at one time or another. In fact, Britain, Canada, Australia, South Africa, and Israel have all at one time had policies similar to DADT in place, all which have all since been lifted (Frank, 2010).

**Purpose of this Research**

The purpose of this research is to examine the origins of the Don’t Ask, Don’t Tell policy, looking at the ban on homosexual activities within the United States military throughout American history, addressing legal challenges that occurred while the DADT policy reigned. This research will look at both the constitutionality of the policy when it was in effect, as well as the arguments presented in the cases that challenged DADT. This research will also examine how changing public opinion shaped the ways by which this policy was enforced, and how changing public opinion influenced the repeal to the act. Finally, this research will look at DADT on a comparative scale, analyzing anti-gay policies that were once in place in the militaries of other developed nations, looking at how the United States’ military has adjusted in comparison to the others’. From that comparative study, this paper will recommend a route for the United States to take in order to better adjust perception within the military to openly homosexual and bisexual troops.
Problems to be Examined

Enacted in 1993, the Don’t Ask, Don’t Tell policy was in place for seventeen years, until 2010. With this policy in place for so long, acceptance for homosexuality within the United States military has leveled off. Views are slowly changing towards that of neutrality towards homosexual troops, instead of that of hate (Standifer, 2012). The issue lies in the inability for troops to accept the notion of the repeal and to embrace change, with less troops responding positively to the idea of the Don’t Ask, Don’t Tell repeal than initially projected by *The Military Times*, a popular independent magazine that services most military branches. This survey on reactions to the end of DADT, conducted by *The Military Times*, revealed military attitude towards gays coming out within ranks to be four times more likely to be perceived by fellow troops negatively than positively (Standifer, 2012). Because of this lack of an acceptance for homosexuality within troops, especially compared to the predicted outcome, this area has been identified as a problem that this research will address.

Another problem that will be addressed is the disparity of Federal Court of Appeal cases during the reign of Don’t Ask, Don’t Tell. Several different Federal Courts of Appeal affirmed the legitimacy of DADT, while two Federal Courts of Appeal cases struck down parts of DADT to extend rights to gays in the military. Several constitutionality issues within the United States towards the Don’t Ask, Don’t Tell policy will be discussed as well, through looking at the language of the repeal and the original military code. This language will be compared with the rights of homosexuals in the military during DADT to what is now standard and what was standard for heterosexual troops.
Once the policy was finally repealed, public opinion data becomes more difficult to find, especially in relation to how DADT was altered with changing public perception. This is something that will be addressed graphically.

Other countries around the world have had similar policies to DADT in place at one time. Many of these countries have since overturned legislation, oftentimes before the United States. The fallout from these repeals will be examined and compared to the fallout from the repeal of the United States' own exclusionary policy. According to Dr. Nathaniel Frank, the fallout from these repeals in other countries has been limited and has improved over time (Frank, 2010). With the United States repeal still being fairly new and with acceptance within the United States military for homosexuality not being as commonplace (Standifer, 2012), this research will look at how the United States military might better approach the topic and the policies that might be adopted, using other nations’ militaries as models.

Research Questions

Several previous studies on public perception involving the Don’t Ask, Don’t Tell policy have been released and conducted by reputable polling institutions, though few have tracked the trend over time, and few suggestions have been made to the United States military on how it can adjust its policies to help the stigma surrounding openly homosexual or bisexual service members. While studies conducted on United States military members show some negative reactions towards openly homosexual services members (Standifer, 2012), studies that have been conducted on the general United States public show a general trend of increased distaste for policies banning gay service members (Gallup, 2010). This new research hopes to corroborate that trend by breaking down the numbers by tracking the trend since the inception of the DADT policy, and this study hopes to answer several specific questions:
• What was the constitutionality of the Don't Ask, Don't Tell policy?

• What were the legal challenges to the Don't Ask, Don't Tell policy, and why did the Federal Courts of Appeal not overturn this policy when given the opportunity?

• How did changing public perception impact the enforcement of and the repeal of Don’t Ask, Don’t Tell?

• How does the United States compare to other developed nations in terms of acceptance for homosexual behaviors on the part of troops?

• What can the United States military do to promote acceptance within ranks for openly homosexual or bisexual troops?

Methodology

For this research, a review was conducted of the 1993 Defense Directive 1304.26, which created the “Don’t Ask, Don’t Tell” policy. A review of other legislation addressing homosexuality within the military before the time of Directive 1304.26 was also performed. This review will look at the language behind the enactment of the policy, and how that was later interpreted by the Federal Courts of Appeal opinions that challenged the policy. In the final piece, a review of the constitutionality of the law will be compared with the Federal Courts of Appeal opinion that overturned DADT during the seventeen year reign of this policy.

To compare policies of multiple countries with the policies of the United States, this research will access legislation that other countries have put forth in the area of gays in the military. Specifically, this study will look at five countries that once had DADT-like policies in place, but have since repealed those pieces of legislation. These countries include: Canada, Britain, Australia, Israel, and South Africa.

Part of this research includes a graphic analysis of changing public opinion over time.
This public opinion graph will be constructed by looking at popular polling institutions over time and gathering their data to construct a linear graph that tracks data over time.

**Organization**

This paper will follow with a specific organization. First, this research will address the history of homosexuality within the American military and the ban on gays, as well as the background behind the Don’t Ask, Don’t Tell policy. Next, the administration of the policy will be examined, discussing the effects that implementation had, both immediately after the implementation of the policy, and throughout the policy, examining the number of discharges under Don’t Ask, Don’t Tell. Legal challenges to Don’t Ask, Don’t Tell and the constitutionality of the policy will be discussed. Changing public opinion under the policy will be addressed graphically with trend lines for support or lack of support for the policy. This changing opinion will also be examined as to how it could have affected the number of discharges under the DADT policy, as well as how this changing opinion could have affected the legislature and laws surrounding DADT. This research will address the repeal of Don’t Ask, Don’t Tell, examining the circumstances behind the end to DADT. It will also analyze policies similar to DADT that had at one time been in effect in other countries, using their adjustment policies to analyze how troops in their countries have adjusted to openly gay troops. Using these countries’ policies as a basis, this research will recommend suggestions for the future path of the United States’ military through an examination of what has worked and what has not worked. This paper will also suggest areas for future research.
REFERENCES

Able v. United States, 155 F.3d 628 (2d Cir. 1998).


Cook v. Gates, 528 F.3d 42 (1st Cir. 2008).


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Thomasson v. Perry, 80 F.3d 915 (4th Cir. 1996).


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