



SECRETARY OF DEFENSE AUTHORITY TO
IMPLEMENT “DON’T ASK, DON’T TELL”
IN A MANNER CONSISTENT
WITH NATIONAL SECURITY

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I. Introduction

In May, the Palm Center released its study, “How to End ‘Don’t Ask, Don’t Tell’: A Roadmap of Political, Legal, Regulatory, and Organizational Steps to Equal Treatment.” The document showed that the President has the legal authority to issue an executive order halting all discharges under the homosexual conduct policy governed by 10 U.S.C. § 654. The release of the study touched off a debate over how the application or enforcement of “don’t ask, don’t tell” might be modified in ways that are consistent with both federal law and national security. In June, Secretary of Defense Robert Gates announced that he had asked his general counsel to explore what flexibility the law allows for, and specifically if there is “a more humane way to apply the law until the law gets changed.” This legal memo explains the authority granted to the Secretary of Defense to modify how “don’t ask, don’t tell” is applied, and outlines several options for doing so.

II. Authority Granted to the Secretary of Defense by 10 U.S.C. § 654 (Policy Concerning Homosexuality in the Armed Forces) and by Department of Defense Regulations

The “don’t ask, don’t tell” policy, as codified by Congress, grants significant authority to the Secretary of Defense to devise and implement the procedures under which investigations, separation proceedings, and other personnel actions will be carried out. Section 654(b) states: “A member of the armed forces shall be separated from the armed forces under regulations prescribed by the Secretary of Defense if one or more of the following findings is made and approved in accordance with procedures set forth in such regulation.” Under this section, the Secretary of Defense has discretion to determine the specific manner in which “don’t ask, don’t tell” will be implemented, consistent with the interests of national security. He has broad authority to design the procedures under which investigations are conducted and findings are made.

Department of Defense regulations presently in force rely on the authority granted by 10 U.S.C. § 654 to set out procedures implementing “don’t ask, don’t tell.” The three principal Department of Defense regulations relating to the policy are Department of Defense Instruction 1304.26, “Qualification Standards for Enlistment, Appointment, and Induction” (July 11, 2007); Department of Defense Instruction 1332.14, “Enlisted Administrative Separations” (August 28, 2008); and Department of Defense Instruction 1332.30, “Separation of Regular and Reserve Commissioned Officers” (December 11, 2008).

The Secretary of Defense has used this regulatory authority to limit the circumstances under which investigations can be initiated. For example, the regulations prohibit commanders from conducting investigations unless they first have credible information from reliable sources that there is a basis for discharge. The regulations also specify that purely associational activities, such as having gay friends, reading gay magazines, or speaking in support of gay rights, are insufficient to justify investigation. The Secretary has broad authority to devise additional restrictions on the initiation of investigations.

Department of Defense regulations also highlight the Secretary's authority to administer "don't ask, don't tell" in a way that protects national security and is responsive to changing circumstances. For example, present regulations permit the Secretary to retain a gay service member on active duty "for a limited period of time in the interests of national security" (Enlisted Administrative Separations, Enclosure 3, paragraph 8.d (7)(c), page 21). A reasonable interpretation of this language would permit the Secretary to order the retention of gay service members until Congress has had full opportunity to consider repeal or amendment of "don't ask, don't tell."

Military commanders also have significant authority to implement "don't ask, don't tell" in a manner consistent with national security. They have discretion to decide whether they should initiate investigations or separation proceedings, or whether no action should be taken at all: "Commanders shall exercise sound discretion regarding when credible information exists. They shall examine the information and decide whether an inquiry is warranted or whether no action should be taken" (Enlisted Administrative Separations, Enclosure 5, paragraph 3.b, page 39; Separation of Regular and Reserve Commissioned Officers, Enclosure 8, paragraph 3.b, page 23).

III. Actions the Secretary of Defense Could Take to Limit Enforcement of "Don't Ask, Don't Tell" and Assessment of Likely Consequences

A. The Secretary could invoke his authority to retain all service members targeted under "don't ask, don't tell," who are otherwise eligible for continued service, for a limited period of time in the interests of national security. "Limited period of time" would be defined as the period necessary for Congress to consider fully a repeal or amendment of "don't ask, don't tell." Provided "retention" meant that affected service members were assigned to full duty without restriction, including deployment, this would be one of the most effective actions the Secretary could take to limit enforcement of the policy in the interests of national security.

B. The Secretary could also require that no investigation of possible violations of "don't ask, don't tell" be initiated without the specific approval of the Secretary of Defense. This would concentrate the authority to investigate in the Secretary rather than in individual commanders, reducing inconsistent application and, more importantly, eliminating the possibility that commanders may choose to investigate based on improper motives or concern that they could be disciplined for exercising discretion against investigation. This option would also be effective in limiting enforcement of the policy in the interests of national security.

C. The Secretary could require that administrative separations under "don't ask, don't tell" be final only when approved by the Secretary of Defense. This option would be much less effective than the two previously mentioned. During the lengthy appeal process following an adverse administrative finding recommending separation, the affected service member would probably not be available

for full duty or deployment. This option would defeat the national security purpose behind a relaxation of enforcement of the policy.

D. The Secretary could amend regulations implementing “don’t ask, don’t tell” in accordance with the Ninth Circuit Court of Appeals decision in *Witt v. Department of the Air Force*, 527 F.3d 806 (9th Cir. 2008). This decision called into question whether “don’t ask, don’t tell,” as implemented by regulations prescribed by the Secretary of Defense, violates the due process rights of service members under the Fifth Amendment of the U.S. Constitution. The court remanded the case for further findings on whether the separation of the specific service member involved would significantly further an interest in military effectiveness. Consistent with *Witt*, the Secretary could require the military to prove in each individual separation proceeding that the service member’s statements or conduct prejudiced good order and discipline in the service member’s unit. This would be a more difficult showing to justify separation than required by current regulations, which permit separation even if there has been no prejudicial effect on good order and discipline and no effect on military readiness. Although this amendment has surface appeal in softening the impact of “don’t ask, don’t tell,” it would be ineffective and subject to abuse. If so motivated, it would be easy for military officials to produce witnesses alleging prejudicial effect even in cases in which there was no actual prejudicial effect.

E. The Secretary could modify the regulatory definitions of evidence sufficient to justify initiation of an investigation, which presently require “credible information” from “reliable sources.” For example, the Secretary recently issued a statement suggesting he might consider new rules under which the military would disregard allegations of “don’t ask, don’t tell” violations from individuals motivated by vindictiveness or other suspect motives. This could be helpful in the handful of cases in which investigations begin on the basis of vindictive third-party allegations, but these cases are far from representative of “don’t ask, don’t tell” cases in general. This minor amendment would accomplish very little in improving the general quality of life for gay service members forced to live under secretive conditions. In most cases, the source of evidence that prompts a separation is not a vengeful or vindictive third party, although this has indeed been a problem; rather, the policy itself prohibits gay service members from open and honest communication, i.e. even when the source of allegations against them is considered “credible” or “reliable.”

F. The Secretary could modify the regulatory definitions of evidence sufficient to justify initiation of an investigation to tie the decision more closely to military needs. For example, in the same way the regulations currently instruct commanders to disregard allegations related to associational activities perceived to be gay-related, the Secretary could introduce new rules instructing commanders to disregard allegations related to off-post or off-base conduct or statements. This amendment would provide a very small zone of privacy to gay service members, but it remains unsatisfactory because it still prevents them from engaging in the routine conversations and exchanges that establish bonds with military colleagues.

IV. Conclusion

This memo is meant to provide the Secretary of Defense with an outline of enforcement and application options with brief assessments of the likely impact of each one. Any of the steps outlined above, however, which fall short of ceasing all discharges under “don’t ask, don’t tell,” will have a negligible effect on gay and lesbian troops, and therefore on our national security. This is because, so long as Pentagon regulations allow commanders to initiate investigations for, and make findings of, homosexual conduct, service members will continue to be separated in substantial numbers. And until all discharges under “don’t ask, don’t tell” are halted, gay, lesbian and bisexual service members will serve under fear that their private lives will be invaded and their careers will be terminated. There is, in addition, a danger in granting new forms of discretion to individual commanders, as inconsistent enforcement is a critical factor in producing the climate of fear and anxiety in which gay and lesbian troops currently must serve. There are high national security costs to the continuation of any policy which prohibits gay service members from engaging in the routine conversation that builds bonds with colleagues, bars gay service members from having private lives of personal intimacy that sustain effective military careers, and deprives the military of continued service from qualified individuals.