



CMR Notes

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The “Military Personnel Eligibility Act of 1993”

GAYS IN THE MILITARY: GIVE THE LAW A NAME

1993 Law Differs From “Don’t Ask, Don’t Tell” Policy

CLARITY RATHER THAN CONFUSION

The law excluding homosexuals from the military frequently is mislabeled with the catch phrase, “**Don’t Ask, Don’t Tell.**” There are four major reasons why this law, which should have been called the “**Military Personnel Eligibility Act of 1993,**” was never given a name of its own:

1. Inaccurate News Reports

On September 9, 1993, legislation sponsored by **Sen. Barbara Boxer** (D-CA), which would have allowed the Clinton Administration to accommodate gays in the military, was defeated **63-33**. On September 28 a similar amendment, sponsored by **Rep. Marty Meehan** (D-MA) and **Rep. Patricia Schroeder** (D-CO), was defeated with a second bipartisan veto-proof vote, **264-169**.

President Clinton’s proposal had gone down in flames, but major newspapers

See **CLARITY** (Cont. on page 2)

Liberal activists have been pushing hard for legislation, sponsored by Rep. Marty Meehan (D-MA), to repeal the 1993 law banning homosexuals from the military. A revved up public relations campaign is trying to create the illusion of momentum.¹ The campaign for repeal constantly refers to the law as “Don’t Ask, Don’t Tell,” even though there is nothing in the law resembling the convoluted policy that is known by that name.

On July 19, 1993, then-President **Bill Clinton** announced his “Don’t Ask, Don’t Tell,” concept, which was designed to accommodate gays in the military. According to Clinton’s plan, persons with a homosexual “orientation” could enlist or stay in the military as long as they did not *say* they were homosexual.

Congress gave serious consideration to Clinton’s “Don’t Ask, Don’t Tell” policy, but ultimately rejected it. Members in both houses knew that the concept would be impossible to understand, explain, or defend in federal court. Instead, Congress codified Defense Department regulations in place since 1981, which expressed the view that “*homosexuality is incompatible with military service.*”

This legislative strategy made sense, since the long-standing regulations barring homosexual conduct already had been upheld by the federal courts as constitutional. The decision to use near-identical language resulted in a law that is understandable, enforceable, consistent with the unique requirements of the military, and devoid of the First Amendment conundrums that were obvious in President Clinton’s “Don’t Ask, Don’t Tell” proposal. The only “compromise” involved allowed Bill Clinton to continue his January 1993 policy of not asking “the question” about homosexuality that used to be on induction forms. The law states, however, that routine inquiries about homosexuality can be reinstated at any time by the Secretary of Defense.

There was one flaw in the legislation. For reasons explained elsewhere on this page, no one gave the law a name of its own, other than “**Section 654, Title 10.**” That technical identifier is not as easy to remember as “Don’t Ask, Don’t Tell.” The Center for Military Readiness suggests that the statute henceforth

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failed to accurately report the story.

A thorough search of media archives reveals that only two newspapers reported on the defeat of the Meehan/Schroeder amendment. Neither account quoted Senate-approved statutory language making it clear that “*The prohibition against homosexual conduct is a long-standing element of military law that continues to be necessary in the unique circumstances of military service.*”¹ Instead, most news reports conveyed the erroneous impression that Congress had passed Clinton’s “compromise,” the “Don’t Ask, Don’t Tell” plan to accommodate discreet homosexuals in the military.

2. No Primary Author or Distinctive Name

Many congressional bills are identified with the names of their primary sponsors, or are given attractive sounding names to build support before and after passage. In this case, there was no individual author, and no descriptive “short title” for legislation to codify long-standing Defense Department regulations. “Section 654, Title 10,” also known as “P.L. 103-160,” continues to be misnamed “Don’t Ask, Don’t Tell.”

3. Political Self-Interest

The newly inaugurated President Clinton was determined to deliver on his campaign promise to repeal the Defense Department’s ban on gays in the military. Homosexual activists, who were fully engaged in private meetings at the White House and Pentagon, organized a mass rally on the Washington D.C. Mall on April 25, 1993. A spontaneous force of public opposition, however, made it impossible for Clinton to get his way with legislation. Clinton still had a political interest in *appearing* to have accomplished something.

Sen. Sam Nunn (D-GA), Chairman of the Senate Armed Services Committee, had been a key figure in the decision to reject various versions of the president’s “Don’t Ask, Don’t Tell” proposal, and to codify the pre-Clinton Defense Department Directives. Democrats nevertheless provided political cover to President Clinton by not correcting erroneous reports that Congress had approved Clinton’s “Don’t Ask, Don’t Tell” plan.

4. Inconsistent Enforcement Regulations

Primary blame for the confusion belongs to Bill Clinton himself. The determined President tried to mitigate his defeat in Congress by misusing the regulatory process. Signing the law on November 30, (apparently with his fingers crossed behind his back), Clinton subsequently announced enforcement regulations that implement the “Don’t Ask, Don’t Tell” concept that he had proposed, unsuccessfully, on July 19. This administrative policy circumvents and undermines the law because it is dramatically different from the statute Congress had passed.² (See article on Page 1)

The 1993 law requires Defense Department documents and briefings to accurately explain its meaning. Instead of complying with that mandate, the Under Secretary of Defense for Personnel & Readiness, **Edwin Dorn**, issued “guidelines” on how to implement Clinton’s July 19 “Don’t Ask, Don’t

Tell” proposal. The resulting confusion encourages dishonesty and complicates enforcement.

Glaring differences between Clinton’s policy and the law explain why factions on both sides of the issue are critical of “Don’t Ask, Don’t Tell.” President Bush should not have retained—and the next president should not continue—“Don’t Ask, Don’t Tell.”

ENDNOTES

1. See Michael Ross, “House Backs Modified Ban on Gays in Armed Forces,” *Los Angeles Times*, Sept. 29, 1993, at A11; and Rowan Scarborough, “Gay-Ban Deal Nearer to Becoming Law,” the *Washington Times*, Sept. 29, 1993, at A4.
2. 10 U.S.C. § 654 (1993) accompanied by Senate Report No. 103-112, pp. 263-297, and House Report No. 103-200, pp. 286-290. See the CMR website, www.cmrlink.org.

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be known as the “**Military Personnel Eligibility Act of 1993.**” The title is appropriate because the law makes it clear that homosexuals are one of many groups of people who are not eligible for service in the armed forces.

What the Law Says, and Why

In a definitive article published in the *University of Missouri-Kansas City Law Review*,² Prof. **William W. Woodruff** of the Norman Adrian Wiggins School of Law at Campbell University explained that the 1993 statute codified DoD directives in place since 1981. Legislative language included fifteen findings derived from Defense Department directives already in place:

“The [1981] policy was an exclusion policy premised upon the policy determination that ‘homosexuality is incompatible with military service.’ . . . The policy operated on the logical conclusion that as a class, homosexuals engaged in or were likely to engage in homosexual activity. In order to reduce, if not eliminate, the instances of homosexual activity in military units, the policy excluded from service the category most closely associated with homosexual activity: homosexuals.” (pp. 132-133)

The plain languages of the law states, “*there is no constitutional right to serve in the armed forces.*” (Finding 2) It also affirms, for the following reasons, that military life is “*fundamentally different from civilian life*”:

- (A) “*the extraordinary responsibilities of the armed forces, the unique conditions of military service, and the critical role of unit cohesion, require that the military community, while subject to civilian control, exist as a specialized society; and*
- (B) “*the military society is characterized by its own laws, rules, customs, and traditions, including numerous restrictions on personal behavior that would not be acceptable in civilian society.*” (Finding 13)

The law affirms that military standards of conduct “*apply to* ▶

a member of the armed forces at all times that the member has a military status, whether the member is on base or off base, and whether the member is on duty or off duty.” (Finding 10) It further explains that

“[T]he worldwide deployment of United States military forces, the international responsibilities of the United States, and the potential for involvement of the armed forces in actual combat, routinely make it necessary for members of the armed forces involuntarily to accept living conditions and working conditions that are often spartan, primitive, and characterized by forced intimacy with little or no privacy.” (Finding 12)

Unlike “Don’t Ask, Don’t Tell,” the statute unequivocally affirms *“[t]he prohibition against homosexual conduct is a long-standing element of military law that continues to be necessary in the unique circumstances of military service.”* (Finding 13)

Understanding the Meaning of “Conduct” vs. “Status”

Prof. Woodruff has explained that the 1981 DoD Directives required separation of persons engaging in homosexual acts, but also those who disclosed by their own statements that they were homosexuals within the meaning of the DoD Directives. The statute, Woodruff wrote, does the same:

“The admission of homosexuality placed the soldier in an excluded class; a class defined by conduct or the propensity to engage in conduct the military determined was inimical to good order, morale, unit cohesion, and ultimately, combat effectiveness. Because the definition of homosexual was tied to sexual conduct rather than to amorphous concepts of sexual tendencies, preferences, or orientation, the policy presumed that one who claimed to be a homosexual has, will, or was likely to engage in the conduct that defines the class.” (p. 134)

The 1993 homosexual conduct law, like the previous DoD Directives, allows a military person to “rebut the presumption” of homosexual conduct, but only under narrow circumstances—i.e., a service member says or does something entirely out of character while intoxicated, or to escape military service. Prof. Woodruff explained that in general, however:

“Discharging soldiers based solely upon their self-identification as a homosexual without additional evidence of homosexual conduct avoided the necessity for intrusive investigations and inquiries into the soldiers’ sexual practices. Furthermore, because it is reasonable to believe homosexuals will engage in the conduct that defines the class, discharging those who claim to be homosexuals served the goal of preventing the disruption and adverse impact upon unit readiness, morale, and discipline that homosexual conduct within the military environment causes.” (p. 134)

Prof. Woodruff noted that the statute’s findings reveal several important principles that remain unchanged:

- “First, Congress was acting pursuant to a clear grant of con-

stitutional power to establish the qualifications and conditions of service in the military.

- “Second, American society demands unique rules that may not be the same as those found in other countries or in civilian society.
- “Third, Congress made clear the statutory policy was aimed at creating and preserving military effectiveness and cohesion. Noticeably absent from the findings section is any indication that military readiness was being balanced

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Respecting Sexual Privacy

In recent years, advocates of gays in the military have been promoting the idea that sexual modesty does not matter, since modern military facilities provide more privacy than older ones. Even if people are exposed to others in the field, they say, younger people are used to it, and this is not a big deal. This is an elitist argument.

The “Military Personnel Eligibility Act” recognizes the power of sexuality and the desire of human beings for sexual modesty, even when they must accept living conditions—still present today—that offer little or no privacy. In gender-neutral terms, the law states that *persons* living in conditions of “forced intimacy” should not have to expose themselves to *persons* who might be sexually attracted to them. To the greatest extent possible, the same principle applies to accommodations for heterosexual men and women in the military and civilian worlds.

A typical family-oriented recreation center, for example, has separate locker rooms for men and women. Inside the entrance of the women’s locker room is a sign clearly stating that boys of any age are not permitted. A similar sign, regarding girls, is posted in the men’s locker room. The signs are there not as an affront to young boys (or girls). They are there because the community respects the desire for sexual modesty in conditions offering little privacy. This is the case even though people who use the recreation center do not live and sleep there for months at a time.

Servicemen and women in the military deserve the same consideration, and much more. As columnist **Thomas Sowell** wrote, *“Military morale is an intangible, but it is one of those intangibles without which the tangibles do not work.”*

Military people depend on policymakers to remember basic realities and to guard their best interests. Considerations such as this strengthen vertical cohesion—the indispensable bond of trust between military leaders and the troops they lead. The conditions of military life are difficult enough, without the added stress of social experiments demanded by activists promoting the homosexual agenda.

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against the individual interests of homosexuals who wished to serve. In other words, combat effectiveness, not accommodation of homosexuals, either individually or as a class, was the purpose of the statute.

- “Fourth, Congress set out the factual predicate for the long-standing professional military judgment that homosexuality is incompatible with military service and carried that principle forward into the new law. Both the House and Senate reports specifically note that the statute recognizes and adopts the principle that homosexuality is incompatible with military service.” (p. 153)

Professor Woodruff explained why Congress wisely avoided use of the vague phrase “sexual orientation.”

“Significantly, Congress did not say that ‘sexual orientation’ was a private matter or that it was a benign, non-disqualifying factor. The law did not define ‘sexual orientation’ or try to artificially separate homosexual orientation from homosexual conduct. . . . Equally as important, Congress made no mention of passing a law to accommodate homosexuals or creating a situation where they could serve under color of law like the July 19, [1993] policy contemplated.” (pp. 154-155)

The Military Personnel Eligibility Act assigns highest priority to the needs of the military and our men and women in uniform. Everyone can serve our country in some way, but not everyone is eligible to serve in the military.

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ENDNOTES

1. Rep. Meehan has resigned from Congress, effective July 1, but **Rep. Ellen Tauscher** (D-CA), is replacing him as the primary sponsor.
2. *UMKC Law Review*, Symposium, “Don’t Ask, Don’t Tell: Gays in the Military,” Vol. 64, Fall 1995, No. 1, “Homosexuality and Military Service: Legislation, Implementation, and Litigation,” pp. 121-178 and 195-198.

Repeal “Don’t Ask, Don’t Tell”

Two months after President Clinton signed the **National Defense Authorization Act for F.Y. 1994**, he released enforcement regulations that were dramatically different. Significantly, the Defense Department news release announcing Clinton’s administrative policy emphasized his July 19, “Don’t Ask, Don’t Tell” proposal, even though Congress had rejected it.¹ Few members of the media noticed (or chose to write about) glaring discrepancies between the law and the enforcement policy. The gap between the two has been the source of confusion and controversy ever since.

Prof. Charles Moskos, the respected military sociologist who proposed the “Don’t Ask, Don’t Tell” idea in 1993, noted in a *Wall Street Journal* article that “[t]he Pentagon policies are, in fact, somewhat more lenient than the language of the statute.”² Indeed, the Clinton Administration tried to change the meaning and effect of the law by including this contrary sentence in the original enforcement regulations: “Sexual orien-

tation 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.”

This unsupported “interpretation” has given rise to the mistaken notion that the law only applies if a person is “caught in the act” of misconduct. That is incorrect. A person who says he is homosexual is presumed to engage in the conduct that defines homosexuality.

A subsequent amendment to the DoD Directives changed the wording of the quoted sentence slightly, but the inappropriate phrase “sexual orientation” still remains. Pentagon briefing materials and training manuals do not include the actual text of the law, or accurate summaries of its meaning. Instead, instructional materials keep repeating the revised “Don’t Ask, Don’t Tell” mantra: “*Sexual orientation is considered a personal matter and is not a bar to military service unless manifested by homosexual conduct.*”³

The U.S. Court of Appeals for the Fourth Circuit

In 1996, the United States Court of Appeals for the Fourth Circuit looked beyond the “Don’t Ask, Don’t Tell” catch-phrase and recognized the difference between Clinton’s policy and the law.⁴ In a 9-4 decision that denied the appeal of Navy **Lt. Paul G. Thomasson**, a professed homosexual who wanted to stay in the Navy, U.S. Circuit Judge **Michael Luttig** wrote this: *Like the pre-1993 [policy] it codifies, [the statute] unambiguously prohibits all known homosexuals from serving in the military*

Judge Luttig added that the Clinton Administration “*fully understands*” that the law and DoD enforcement regulations are inconsistent and has engaged in “*repeated mischaracterization of the statute itself*”

Actually overruling the DoD enforcement regulations was not within the purview of the Court. Still, the Fourth Circuit’s decision in *Thomasson*, affirming the constitutionality of the law, should have prodded the Administration to correct inconsistencies in its administrative policy. But this was the Clinton Administration, which was fully committed to accommodating gays in the military, one way or another.

It is unfortunate that activist groups have exploited confusion about the 1993 law to mislead homosexual young people about their eligibility to serve in the military. The same people complain about the cost of discharging trainees after they reveal their homosexuality. Such costs could be reduced to near zero if “the question” about homosexuality were restored on induction forms.

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ENDNOTES

1. DoD Directive No. T332.14, and DoD News Release No. 605-93, Dec. 22, 1993.
2. Charles Moskos, *Wall Street Journal*, “Don’t Knock ‘Don’t Ask, Don’t Tell,’” Dec. 16, 1999.
3. See *CMR Notes*, Jan. 14, 2002, describing the Army comic book “Dignity and Respect: A Training Guide on Homosexual Conduct Policy.” Available at <http://www.cmrlink.org/Hmilitary.asp?docID=112>. Also see Office of the Chief of Public Affairs, U.S. Army, “Questions and Answers About Army’s Policy on Homosexual Conduct,” Winter 2000, at 6.
4. *Thomasson v. Perry*, 80 F.3d 915, U.S. Court of Appeals for the Fourth Circuit, 1996, concurring opinion of Judge Michael Luttig, pp. 937-939.

PR Push for Gays in the Military

A high-profile public relations campaign keeps generating *faux* news events to promote repeal of the law banning homosexuals from the military. These stories frequently focus on former members of the military who were discharged when they announced that they were homosexual.

A case in point is the story of former Navy Petty Officer **Jason D. Knight**, recently reported in the *Boston Globe* (Bryan Bender, “Don’t Ask, Don’t Tell, Don’t Bother,” May 7) Former Navy Petty Officer Knight received an honorable discharge in April 2005, shortly after he informed the Navy that he was homosexual. Nine months later, however, the U.S. Navy recalled Knight to serve as a Hebrew linguist in Kuwait. Knight and fellow activists of the Servicemembers Legal Defense Network consider his re-enlistment by the Navy to be hypocritical. Commanders ignore the law, activists claim, when the military needs people to serve in a war.

A quick investigation revealed that the PR spin did not hold up. As the *Boston Globe* reported, Knight informed his superiors of his homosexuality near the end of his original enlistment term. Officials initiated paperwork for an honorable discharge, but his enlistment contract expired before that process was complete. *Stars & Stripes* reported the rest of the story in a May 12 article by Joseph Giordano, titled “Navy Disputes Gay Sailor’s Claim of Discharge, Recall.”

In an improper administrative shortcut, Knight’s DD-214 discharge papers were not properly coded to reflect that he was homosexual. That bureaucratic error explains why he received a computer-generated inquiry, along with many other former servicemembers, asking if he would consider volunteering for re-mobilization in the war.

Petty Officer Knight could have been honest with Navy officials who re-enlisted him when he voluntarily responded to the routine inquiry. Instead, by his own admission reported by *Stars & Stripes*, “when he was recalled to duty he said nothing of the circumstances of his sexual orientation or earlier discharge because he wanted to go back on active duty.” The Navy’s computer error has been corrected, but that has not deterred homosexual activists from pushing Petty Officer Knight’s disingenuous story in their relentless campaign to repeal the law banning homosexuals from the military.

Anecdotes such as this demonstrate the need for accurate information on what the 1993 statute actually says. The administration has successfully defended the homosexual conduct law in federal court, but President Bush could derail the gay activists’ public relations campaign by administratively dropping Clinton’s “Don’t Ask, Don’t Tell” policy. **CMR**

Backroom Attack Sinks Gen. Pace

On June 8 Secretary of Defense **Robert Gates**, looking slightly ill, announced the premature replacement of Marine **General Peter Pace** as Chairman of the Joint Chiefs of Staff. Using words almost identical to those of Senate Armed Services Committee Chairman **Carl Levin** (D-MI), Secretary Gates expressed concern that hearings on the two-year reconfirmation of Gen. Pace would become a “*divisive ordeal*” focusing on the “*past rather than the future.*”

Gen. Pace, who has been through the confirmation drill three times, is an articulate man. He would have stated his position on the war, and even his views on gays in the military, with conviction and poise. Chairman Pace will not have that opportunity, however, because partisan control of Congress has shifted to the Democrats. Some are promoting self-serving political agendas by trying to politicize the military officer confirmation process.

Several commentators have suggested that Gen. Pace’s career was endangered last March, during an interview with the *Chicago Tribune*. Chairman Pace expressed personal views regarding morality and gays in the military, and a wave of name-calling and demands for an apology ensued.

As CMR wrote at the time, Gen. Pace had no reason to apologize for a law enacted by Congress, which has been upheld as constitutional several times.

The “Military Personnel Eligibility Act of 1993” reflects the views of people who see the issue in moral terms, but it uses secular language throughout, emphasizing military discipline. Congressionally approved laws—including prohibitions against lying, stealing, and murder—should not be repealed just because they coincide with religious principles and moral codes such as the Ten Commandments.

Gen. Pace also equated homosexuality with adultery, a moral offense prohibited by the **Uniform Code of Military Justice (UCMJ)**. If there were a “Don’t Ask, Don’t Tell” policy on adultery in the military, military law would condone adulterous relationships as long as the people involved do not *say* they are adulterers.

It is unfortunate that a demoralizing message has been sent to military people and voters who agree with Gen. Pace on traditional values. Homosexual activists and liberals who targeted Gen. Pace must have celebrated when Secretary Gates announced capitulation. They will not stop pushing their agenda, but the 1993 law—and officers who agree with its purpose—deserve continued support. **CMR**

President's Comments

by Elaine Donnelly



Candidates and Questions

It was interesting to watch the Democratic and Republican presidential candidates debating separately in **New Hampshire** earlier last month. All were asked to state a position on “Don’t Ask, Don’t Tell,” the controversial administrative policy that former President Bill Clinton established in an attempt to *accommodate* homosexuals in the military. The 1993 law that Congress actually passed, which *excludes* homosexuals from the military, is slandered every time it is referred to as “Don’t Ask, Don’t Tell.”

The only candidate who seemed to know what she was talking about was **Sen. Hillary Rodham Clinton** (D-NY). Her quip about “shooting straight”—an old cliché that wowed the media anyway—distracted attention from her comment that her husband’s “Don’t Ask, Don’t Tell” policy was supposed to be a “*transitional policy*.” The next question should have been, “Transitional toward

what?” Full acceptance of professed homosexuals in the military, that’s what. Democrats in the New Hampshire debate raised their hands in unanimous agreement.

On the Republican side, former New York Mayor **Rudy Giuliani** appeared aghast at the question—as if the issue should not be discussed. **Sen. John McCain**, former Arkansas Governor **Mike Huckabee**, and former Massachusetts Governor **Mitt Romney** said they supported “the policy” on gays in the military, but none of the candidates demonstrated that they understand what “the policy” is. Will they and others running for Commander in Chief support the law that Congress passed, the “Military Personnel Eligibility Act of 1993?” Or will they prolong needless confusion by retaining Clinton’s “transitional” policy to accommodate gays in the military? CMR will be asking these and other relevant questions soon—stay tuned.

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CMR ACTIVITIES:

- A comprehensive article authored by CMR President **Elaine Donnelly**, titled **Constructing the Co-Ed Military**, has been published by the **Duke University Journal of Gender Law & Policy** in the May 2007 edition. <http://www.law.duke.edu/shell/cite.pl?14+Duke+J.+Gender+L.+&+Pol%27y+815>.

Written in academic language that is credible, persuasive, and supported by more than 600 footnotes, Donnelly’s 138-page article constitutes a breakthrough for CMR in this field of public policy. The article provides citations and Internet links to many reports and Defense Department documents that are difficult to obtain anywhere else. By citing historic news accounts to clearly explain military values and concepts, it provides context and “connects the dots” between significant events. There are seven major sections, covering the **Tailhook** scandal, land combat, submarines, tactical aviation and the **Kara Hultgreen** story, co-ed basic training, double standards, sex scandals, family issues, and gays in the military.

Constructing the Co-Ed Military analyzes flawed reasoning and inaccurate information, and recommends ways to

strengthen the military in constructive ways. In summary, our military is a gender-integrated volunteer force, and it is our responsibility as citizens to protect its underlying culture and values. Reprints of the article are available from CMR for \$13, including postage, and a complimentary copy will be sent to persons who make a tax-deductible contribution to CMR of \$100 or more.

- CMR is pleased to announce the appointment of **William Thomas “Tommy” Sears** as our Executive Director, based in Washington D.C. Mr. Sears has spent a 14-year career in government affairs focusing on military and strategic forces agreements, national security, energy, and information/high-technology issues. He has been an associate with several prominent Washington firms, and an analyst with Science Applications International Corporation (SAIC). Tommy Sears graduated from Georgia Southern University, in its Bell Honors Program, and completed his Master of Arts in National Security Studies at Georgetown University. He has been active in politics in Georgia, his home state, and has served on the staff of Senate Minority Leader Mitch McConnell of Kentucky. Mr. Sears has hit the ground running and is a credit to CMR in the nation’s capital.

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