Center for Military Readiness
— Policy Analysis —
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Hastings Bill to Invite Testimony from Ineligible Servicemembers Would Override the 1993 Law Re Homosexuals in the Military

Rep. Alcee Hastings and others are sponsoring (H.R. 4180), which would selectively suspend established law in order to orchestrate congressional hearings on legislation to repeal Section 654, Title 10, U.S.C. That law, which states that homosexuals are not eligible to serve in the military, is usually mislabeled "Don't Ask, Don't Tell," (DADT).

Passage of the Hastings bill would interfere with serious deliberation, create problematic incentives, and impose an irresponsible social experiment on the armed forces. There is no justification for effectively overriding a law that enjoys widespread support among members of the armed forces, and the courts have upheld as constitutional several times.

A. Legal Implications

Allowing people to "come out" for purposes of testimony effectively invalidates the 1993 law, without a compelling reason. Under the 1993 law, all active-duty participants admitting to homosexual conduct are subject to honorable discharge. The Hastings bill would protect disclosure of "sexual orientation" by homosexual, bisexual, and transgendered military personnel who are not eligible to serve in the military.

- A law forcing the military to retain professed lesbian, gay, bisexual and transgendered (LGBT) personnel would disregard and nullify the clear language and intent of Section 654, Title 10, U.S.C., which states that persons who engage in homosexual conduct are not eligible to serve. This departure from the requirements of a duly-enacted, constitutional law would demoralize others in uniform and invite disrespect for law.

- The proposed legislation incorporates the phrase "sexual orientation," even though the actual law uses the word "conduct" several times but does not mention the phrase "sexual orientation" even once. The language fails to recognize that anyone describing him- or herself as homosexual engages in the conduct that defines what homosexuality is.

- The bill defines "protected communication" as congressional testimony, and would allow potential witnesses who describe themselves as gay to remain in uniform, even though they are not eligible to serve. It is likely that many servicemembers who write letters requesting the opportunity to testify, or submit personal statements for the record of hearings, will expect and ultimately receive similar "protection" on demand.

- The legislation would create a perverse incentive for an unknown number of "closeted" homosexuals who would seek and obtain a "Stay in the Military Free Card" by writing letters to Congress. It is doubtful that members of Congress are prepared to take responsibility for the disruption in military personnel matters that numerous exceptions would create.

- The legislation also would create a large class of "protected" LGBT persons who could claim "discrimination" if their superiors do anything they consider "retaliatory." The obvious special treatment and double standards in disciplinary matters would create widespread resentment in the ranks.

- Laws regarding eligibility should be applied consistently, in the same way that laws involving other eligibility requirements, such as age, are enforced without exception. No one would suggest, for example, that *some* 19 year-olds who are smarter or more mature than most 21 year-olds should be exempt from laws limiting the purchase of alcohol to persons who are 21 years of age or older.

- The 1993 law says nothing about transgendered persons, but Rep. Patrick Murphy's bill to repeal the law (H.R. 1283) would forbid discrimination based on *"homosexuality or bisexuality, whether the orientation is real or perceived."* Consistent with the implications of Murphy's open-ended legislation, the Hastings bill would authorize transgendered military witnesses to testify at hearings.

- This scenario brings to mind several questions. If transgendered individuals testify before Congress, or request the opportunity to do so, would their "protected" behavior be considered acceptable indefinitely? Will the witnesses show up in uniforms inconsistent with their biological gender? Before or after surgery? Members of Congress should consider questions such as this as part of debate about the Murphy bill, but such issues should not be decided preemptively by passage of the Hastings bill.

B. Effect on Congressional Hearings

The title of Hastings' "Open and Honest Testimony" bill is disingenuous, ironic, and Orwellian in view of the legislation's contrary impact on congressional hearings.

- Members of Congress have the responsibility to ask specific questions about the consequences of repealing the 1993 Eligibility Law, but Hastings' bill would preemptively short-circuit congressional deliberations by upstaging military leaders who do not support repeal. A primary focus on individuals would turn future hearings into something less than a serious examination of the future consequences of the proposed LGBT Law.

- The question of whether gay individuals are "likeable" is beside the point of the1993 Eligibility Law. Everyone knows and likes gay individuals in various walks of life. As stated in Section 654, Title 10, however, the culture of the military remains unique. Forced acceptance of professed homosexual conduct would encourage indiscipline rather than discipline, and impose heavy burdens on the majority of men and women

who serve. This issue is about military morale and readiness, not the desires of individuals.

- The Hastings bill uses the phrase "sexual orientation" to the exclusion of any reference to the 1993 law's language regarding conduct. This is a clear indication that the witnesses in question would discuss their personal experiences with "Don't Ask, Don't Tell," instead of discussing the future consequences of repealing the 1993 law.

- Testimony centering only on "Don't Ask, Don't Tell," an administrative policy that Congress never voted for, would be of little use to congressional committees considering the consequences of H.R. 1283, the proposed new LGBT Law for the military.

- Potential witnesses also would be questionable because they would be, by definition, serving in violation of current law. Their situational dishonesty, which Bill Clinton's DADT policy actually encourages, should not be rewarded with "immunity." (That term is inaccurate, since the issue is eligibility, not punishment.)

- The legislation purports to cover active-duty people who support the 1993 law and oppose its repeal. This is a false promise, since President Obama's stated expectations on this issue already have deterred candid testimony from military witnesses who support the current law. Dissenting comments would be perceived as contrary to those of the Commander-in-Chief, and could well be career-ending.

- In addition, all military supporters of the 1993 law would know that if the Murphy bill passes, they would be vulnerable to career penalties under corollary policies mandating "zero tolerance" of dissent under the new LGBT Law.

- The legislation could create scenarios similar to what occurred at the HASC hearing in July 2008. Then-Congressman Chris Shays, who was not a member of the HASC, tried to get CMR President Elaine Donnelly, an invited witness, to say something critical of the three former military people testifying on the panel opposite her. She declined to do so, and Shays browbeat her for not cooperating with his own preconceived scenario.

- Shays and others also treated with disdain a signed letter from a former female soldier who had experienced sexual abuse from other women while on active duty, and criticized Donnelly for even mentioning the soldier's personal communication with the Chairman and Ranking Member of the HASC. Any committee member asking challenging questions of professed LGBT witnesses likely would face the same backlash. The tactic would deter "honest and open" discussion, not encourage it.

C. Desperation in the Gays in the Military Campaign (GIMC)

This is the second time in 2009 that Hastings, who is not a member of the HASC, has tried to commandeer deliberations on an issue about which he knows little. The effort betrays desperation and weakness in the case for repealing the 1993 Eligibility Law.

- Hastings' attempt in July to deny funding for enforcement of the 1993 law betrayed ignorance as well as arrogance. (There is no such budget line item, and the annual numbers of discharges caused by the DADT administrative policy have been minuscule compared to separations for other legitimate reasons.)

- HASC and SASC leaders should not hesitate to reject and block Hastings' current effort, but also take note. When hearings do occur, all members will need to be prepared with questions and comments that put serious focus on the issue at hand: the importance of findings incorporated in the 1993 Eligibility Law and the consequences of its replacement with a new LGBT Law.

- The Hastings' effort was announced by the University of California-based Michael D. Palm Center, a gay activist group formerly known as the Center for the Study of Sexual Minorities in the Military. In support of Hastings' bill, the Palm Center quoted a University of Pennsylvania law professor's 2005 article, which apparently failed to mention that the 1993 Eligibility Law was not written to codify then-President Clinton's administrative policy known as "Don't Ask, Don't Tell." Any law professor who does not know or acknowledge this fact should not be taken seriously.

D. Over-Arching Concerns

The Hastings bill and accompanying news stories initiated by the activist Michael D. Palm Center appear to be yet another attempt to deter, upstage or discredit testimony from senior military leadership, and to chip away at the underlying law by suspending enforcement and creating the impression that repeal of the 1993 law would be completely harmless.

Former HASC Ranking Member and current Secretary of the Army John McHugh has launched trial balloons suggesting that some units could be opened to homosexuals, but not others. Any such plan would be utterly unworkable, especially in expeditionary forces such as the Marine Corps. All of the services rotate people in and out of operating forces into other in-service or joint assignments. To designate some occupational fields as open to homosexuals while retaining restrictions on others would severely restrict personnel assignments — indeed, cripple them.

This is the type of unrealistic proposal that Congress should analyze and derail, instead of diverting valuable time to participate in professionally staged media events, featuring testimony about narrowly-focused personal stories describing past experiences. The focus of hearings, analysis, and debate should be on future long-term consequences of repealing the 1993 Eligibility Law.

The military is not a "jobs" program, and there is no "civil right" to serve in uniform. All Members of Congress who support our men and women in the military should understand and be prepared to defend findings and principles of the 1993 law, all of which remain important for readiness and morale in the All-Volunteer Force.

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