

Recommendations for Implementation of the Repeal of “Don’t Ask, Don’t Tell”
Working Group, National LGBT Bar Association *

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In December 2010, Congress passed legislation repealing the ban on military service by openly gay and lesbian citizens (Section 654 of Title 10 of the United States Code, also known as “Don’t Ask, Don’t Tell”), which President Obama immediately signed into law.¹ The repeal only becomes effective, however, upon written certification to the congressional defense committees, signed by the President, the Secretary of Defense, and the Chairman of the Joint Chiefs of Staff, stating, among other things, that the President, the Secretary of Defense, and the Chairman of the Joint Chiefs of Staff have considered appropriate changes to existing policies and regulations, including but not limited to issues regarding personnel management, leadership and training, facilities, investigations, and benefits; appropriate changes (if any) to the Uniform Code of Military Justice (“UCMJ”); and that the Department of Defense (“DoD”) has prepared the necessary policies and regulations to implement the repeal.²

In February 2011, the National LGBT Bar Association formed a working group of attorneys, academics, and veterans (the “Working Group”) to make recommendations that might assist the DoD in the effective implementation of the repeal of “Don’t Ask, Don’t Tell.” The Working Group focused on five functional areas that affect implementation of the repeal: (1) transparency of the process; (2) training provided to military personnel; (3) amendment of the UCMJ and *Manual for Courts-Martial*; (4) changes to military regulations, instructions, guidance and policy governing administrative separations of military personnel, fraternization, and sexual harassment; and (5) oversight during the implementation process and beyond. This report is the culmination of the Working Group’s efforts. Except where noted, the recommendations contained in this report are the consensus of the Working Group.

Recommendations

1. **Transparency.** We urge the Department of Defense to open its implementation processes to the public so that the bench, bar, service members, veterans, and other stakeholders will gain understanding of the repeal and confidence in its implementation. This openness should embrace public participation in the drafting of regulations and policies, adopting standard notice-and-comment procedures, and providing access to updated proposals and timelines. Successful implementation of “Don’t Ask, Don’t Tell” repeal could potentially be needlessly

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¹ Don’t Ask, Don’t Tell Repeal Act of 2010, Pub. L. 111-321 (2010).

² *Id.* at Sec. 2(b).

undermined by the current process, which does not allow for public education or expert review.³

2. Training. Training of military personnel should be based on actual rules and regulations rather than on assumptions about the post-repeal regulatory regime. After the President signed the repeal of “Don’t Ask, Don’t Tell” in December 2010, each branch of service began extensive training of judge advocates, commanding officers, and service personnel. This training is now in its final phases, yet no implementing regulations or official guidance has been published since the November 2010 release of the “Report of the Comprehensive Review of the Issues Associated with a Repeal of ‘Don’t Ask, Don’t Tell’” (the “CRWG Study”).⁴ The CRWG Study noted that “[s]uccessful implementation of repeal of Don’t Ask, Don’t Tell will depend upon strong leadership, a clear message, and proactive education. Throughout our review, we heard from a number of senior officers and senior enlisted leaders in all the Services words to the effect of ‘If the law changes, we can do this; just give us the tools to communicate a clear message.’”⁵ A critical tool to communicate a clear message is the text of the actual rules and regulations by which the repeal of “Don’t Ask, Don’t Tell” is implemented.
3. Change to the UCMJ and *Manual for Courts-Martial*. The UCMJ should be amended to account for repeal of the ban on open service by homosexuals. All references to the offense of sodomy should be removed from the UCMJ and offenses involving sexual conduct or inappropriate relationships should be revised to ensure sexual orientation neutral application. Specific changes include:
 - a. Article 125, Sodomy. This article should be repealed. Sexual misconduct now punishable as “sodomy” can be prosecuted under Article 120 (Rape, Sexual Assault and Other Sexual Misconduct) or Article 134 (general offenses). There is no reason to preserve sodomy as a military crime; it is no longer a constitutional crime in civilian jurisdictions.⁶ Adult consensual sodomy should not be a crime absent special circumstances. Forcible sodomy, sodomy with minors, and other instances of “service discrediting” sodomy can be prosecuted under Articles 120 or 134. The CRWG Study also supports the repeal of Article 125 and removing private consensual sodomy between adults as a criminal offense. The CRWG Study notes

³ Letter, *National Institute of Military Justice to Robert M. Gates, Secretary of Defense* (Mar. 16, 2011) (requesting that the Secretary “open the process leading to the issuance of departmental rules currently in development to implement the repeal of 10 U.S.C. sec. 654, the military homosexual conduct statute”).

⁴ U.S. Department of Defense, “Report of the Comprehensive Review of the Issues Associated with a Repeal of ‘Don’t Ask, Don’t Tell’” (Nov. 30, 2010) (hereinafter the “CRWG Study”) (available at [http://www.defense.gov/home/features/2010/0610_gatesdadt/DADTReport_FINAL_20101130\(secure-hires\).pdf](http://www.defense.gov/home/features/2010/0610_gatesdadt/DADTReport_FINAL_20101130(secure-hires).pdf)).

⁵ CRWG Study at 10.

⁶ See *Lawrence v. Texas*, 539 U.S. 558 (2003); see also *United States v. Marcum*, 60 M.J. 198 (C.A.A.F. 2004).

that “[t]his change in law is warranted irrespective of whether Don’t Ask, Don’t Tell repealed.”⁷

- b. Article 120, Rape, Sexual Assault and Other Sexual Misconduct. This article should be revised to address concerns about its functionality in its current form. Congress, which amended Article 120 into a lengthy and comprehensive sexual misconduct statute in 2005, has already considered additional extensive changes to the Article but did not enact them in 2011, in part because of the pending repeal of “Don’t Ask, Don’t Tell.”⁸ We have suggested language (see Appendix A of this report), recommending that the revised Article 120 remove and avoid re-introducing the word “sodomy” because of the prejudice that the term evokes, both historically and in contemporary usage.⁹ We also recommend that the current definitions of “sexual act” and “sexual contact” in Article 120(t) be revised to prosecute instances of misconduct previously charged as sodomy and to permit the definition of “rape” to encompass sexual acts between same-sex individuals.¹⁰
- c. Article 134, the “General Article” (“disorders and neglects to the prejudice of good order and discipline, all conduct of a nature to bring discredit upon the armed forces, and all crimes and offenses not capital”). The following listed Article 134 offenses specified in the *Manual for Courts-Martial* should be amended (see Appendix A of this report for specific proposed language):
 - i. *Paragraph 64, Assault with intent to commit with intent to commit murder, voluntary manslaughter, rape, robbery, sodomy, arson, burglary, or*

⁷ CRWG Study at 16. The DoD Joint Service Committee on Military Justice, which is responsible for conducting an annual review of the Manual for Courts-Martial and recommends changes to both the UCMJ and the Manual, has developed a similar legislative proposal calling for the repeal of Article 125.

⁸ See, e.g., Major Patrick Pflaum, *The Continuous Evolution of Military Sexual Assault Law*, AM. BAR ASS’N LAW TRENDS & NEWS (Winter 2011) (available at http://www.americanbar.org/content/newsletter/publications/law_trends_news_practice_area_e_newsletter_home/2011_winter/military_sexual_assault_law.html).

⁹ Specifically, the clause referring to sodomy should also be removed from Article 120(t)12(B), which defines a category of “indecent conduct.”

¹⁰ Art. 120(t) currently reads in part as follows:

(t) Definitions.— In this section:

(1) Sexual act.— The term “sexual act” means—

(A) contact between the penis and the vulva, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight; or

(B) the penetration, however slight, of the genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.

(2) Sexual contact.— The term “sexual contact” means the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of another person, or intentionally causing another person to touch, either directly or through the clothing, the genitalia, anus, groin, breast, inner thigh, or buttocks of any person, with an intent to abuse, humiliate, or degrade any person or to arouse or gratify the sexual desire of any person.

housebreaking. This specification includes assault with intent to commit rape and assault with intent to commit sodomy. It should be revised to include only “assault with intent to commit rape or sexual assault,” reflecting the new definitions set out in Article 120, the comprehensive sexual misconduct statute.

- ii. *Paragraph 69, Wrongful cohabitation*. We recommend this paragraph be eliminated from the Manual and that cohabitation by consenting adults no longer be considered a military crime.
- iii. *Paragraph 97, Pandering and prostitution*. We recommend changing “sexual intercourse” to “sexual act or sexual contact” in this specification. The CRWG Study made a similar recommendation.¹¹

4. Military regulations, instructions, and guidance.

- a. Administrative separation guidance. We recommend that guidance and instructions regarding the administrative separation of military personnel be revised to remove homosexual conduct as a valid reason for discharge from the armed services and that a new category of “Sexual Misconduct” be created for administrative discharges. Specifically, DoD Instruction 1332.14 “Enlisted Administrative Separations” should be revised to delete current Paragraph 8 “Homosexual Conduct” and replace it with new Paragraph 8 “Sexual Misconduct” (see Appendix B of this report for proposed language). The revised DoD Instruction 1332.14 should be used as a template for service-specific instructions and guidance regarding separation of commissioned officers. See Appendix B for specific proposed language.
- b. Military guidance regarding fraternization and sexual harassment. We recommend that service regulations related to fraternization and sexual harassment should include a statement similar to the following: “Whether potentially offending conduct occurs between members of the same sex or opposite sex, or could be characterized as heterosexual or homosexual, is irrelevant in determining culpability and appropriate punishment.” This is in conformity with the Comprehensive Review, which recommended that “the Department of Defense issue guidance that all standards of conduct apply uniformly, without regard to sexual orientation” and that “the Department of Defense direct the Services to review their current standards to ensure that they are sexual-orientation neutral and that they provide adequate guidance to the extent each Service considers appropriate on unprofessional relationships, harassment, public displays of affection, and dress and appearance.”¹²

¹¹ CRWG Study at 139 (recommending review of all other UCMJ offenses involving sexual conduct or inappropriate relationships to ensure sexual orientation-neutral application of the UCMJ in a post-repeal environment; noting as an example, that several offenses specified under Article 134 of the UCMJ have “sexual intercourse” as a required element of the offense and that the definition of “sexual intercourse” means only intercourse between a man and a woman; thus, homosexual sex is not currently covered under these offenses).

¹² CRWG Study at 11.

5. Oversight during the implementation process and beyond. We recommend that the secretary of each military department should designate an assistant secretary to function as an “oversight authority.” These “oversight authorities” would be responsible for overseeing all aspects of the repeal implementation within each military department, including training and revision of relevant policies and guidance.

We also recommend that the “oversight authorities” review all proposed cases of discharge for sexual misconduct in order to achieve uniformity of initiation and final disposition of such cases. We believe these appointments are necessary due to the stigma attached to a discharge for sexual misconduct and to deter any bias in cases involving same sex conduct. Such appointments should be made until it can be reasonably determined that systemic bias against same sex conduct has been sufficiently curtailed and that the “Don’t Ask, Don’t Tell” repeal has been uniformly implemented throughout the DoD.

Suggested Revisions to the Uniform Code of Military Justice and Manual for Courts-Martial

I. UCMJ

We recommend that the Uniform Code of Military Justice (UCMJ) be amended as follows to account for repeal of the ban on open service by homosexuals.

a. 10 U.S.C. § 920 – Article 120 “Rape, sexual assault, and other sexual misconduct”

We recommend that Article 120 be revised and avoid re-introducing the word “sodomy” because of the prejudice that word evokes, both historically and in contemporary usage. The current definitions of “sexual act” and “sexual contact” in Article 120(t) are sufficient to prosecute instances of misconduct previously charged as sodomy. Additionally, the definition for “sexual act” needs to be revised or the acts of rape and sexual assault (which are limited to a “sexual act” and do not include “sexual contact”) would be limited to an act involving only individuals of the opposite sex.

§ 920. Art. 120. Rape, sexual assault, and other sexual misconduct

(a) Rape.— Any person subject to this chapter who causes another person of any age to engage in a sexual act by—

- (1) using force against that other person;
- (2) causing grievous bodily harm to any person;
- (3) threatening or placing that other person in fear that any person will be subjected to death, grievous bodily harm, or kidnapping;
- (4) rendering another person unconscious; or
- (5) administering to another person by force or threat of force, or without the knowledge or permission of that person, a drug, intoxicant, or other similar substance and thereby substantially impairs the ability of that other person to appraise or control conduct;

is guilty of rape and shall be punished as a court-martial may direct.

(b) Rape of a Child.— Any person subject to this chapter who—

- (1) engages in a sexual act with a child who has not attained the age of 12 years; or
- (2) engages in a sexual act under the circumstances described in subsection (a) with a child who has attained the age of 12 years;

is guilty of rape of a child and shall be punished as a court-martial may direct.

(c) Aggravated Sexual Assault.— Any person subject to this chapter who—

- (1) causes another person of any age to engage in a sexual act by—
 - (A) threatening or placing that other person in fear (other than by threatening or placing that other person in fear that any person will be subjected to death, grievous bodily harm, or kidnapping); or
 - (B) causing bodily harm; or
- (2) engages in a sexual act with another person of any age if that other person is substantially incapacitated or substantially incapable of—

- (A) appraising the nature of the sexual act;
- (B) declining participation in the sexual act; or
- (C) communicating unwillingness to engage in the sexual act;

is guilty of aggravated sexual assault and shall be punished as a court-martial may direct.

(d) Aggravated Sexual Assault of a Child.— Any person subject to this chapter who engages in a sexual act with a child who has attained the age of 12 years is guilty of aggravated sexual assault of a child and shall be punished as a court-martial may direct.

(e) Aggravated Sexual Contact.— Any person subject to this chapter who engages in or causes sexual contact with or by another person, if to do so would violate subsection (a) (rape) had the sexual contact been a sexual act, is guilty of aggravated sexual contact and shall be punished as a court-martial may direct.

(f) Aggravated Sexual Abuse of a Child.— Any person subject to this chapter who engages in a lewd act with a child is guilty of aggravated sexual abuse of a child and shall be punished as a court-martial may direct.

(g) Aggravated Sexual Contact With a Child.— Any person subject to this chapter who engages in or causes sexual contact with or by another person, if to do so would violate subsection (b) (rape of a child) had the sexual contact been a sexual act, is guilty of aggravated sexual contact with a child and shall be punished as a court-martial may direct.

(h) Abusive Sexual Contact.— Any person subject to this chapter who engages in or causes sexual contact with or by another person, if to do so would violate subsection (c) (aggravated sexual assault) had the sexual contact been a sexual act, is guilty of abusive sexual contact and shall be punished as a court-martial may direct.

(i) Abusive Sexual Contact With a Child.— Any person subject to this chapter who engages in or causes sexual contact with or by another person, if to do so would violate subsection (d) (aggravated sexual assault of a child) had the sexual contact been a sexual act, is guilty of abusive sexual contact with a child and shall be punished as a court-martial may direct.

(j) Indecent Liberty With a Child.— Any person subject to this chapter who engages in indecent liberty in the physical presence of a child—

- (1) with the intent to arouse, appeal to, or gratify the sexual desire of any person; or
- (2) with the intent to abuse, humiliate, or degrade any person;

is guilty of indecent liberty with a child and shall be punished as a court-martial may direct.

(k) Indecent Act.— Any person subject to this chapter who engages in indecent conduct is guilty of an indecent act and shall be punished as a court-martial may direct.

(l) Forcible Pandering.— Any person subject to this chapter who compels another person to engage in an act of prostitution with another person to be directed to said person is guilty of forcible pandering and shall be punished as a court-martial may direct.

(m) Wrongful Sexual Contact.— Any person subject to this chapter who, without legal justification or lawful authorization, engages in sexual contact with another person without that other person's permission is guilty of wrongful sexual contact and shall be punished as a court-martial may direct.

(n) Indecent Exposure.— Any person subject to this chapter who intentionally exposes, in an indecent manner, in any place where the conduct involved may reasonably be expected to be viewed by people other than members of the actor's family or household, the genitalia, anus, buttocks, or female areola or nipple is guilty of indecent exposure and shall be punished as a court-martial may direct.

(o) Age of Child.—

- (1) Twelve years.— In a prosecution under subsection (b) (rape of a child), subsection (g) (aggravated sexual contact with a child), or subsection (j) (indecent liberty with a child), it need not be proven that the accused knew that the other person engaging in the sexual act, contact, or liberty had not attained the age of 12 years. It is not an affirmative defense that the accused reasonably believed that the child had attained the age of 12 years.
- (2) Sixteen years.— In a prosecution under subsection (d) (aggravated sexual assault of a child), subsection (f) (aggravated sexual abuse of a child), subsection (i) (abusive sexual contact with a child), or subsection (j) (indecent liberty with a child), it need not be proven that the accused knew that the other person engaging in the sexual act, contact, or liberty had not attained the age of 16 years. Unlike in paragraph (1), however, it is an affirmative defense that the accused reasonably believed that the child had attained the age of 16 years.
- (p) Proof of Threat.— In a prosecution under this section, in proving that the accused made a threat, it need not be proven that the accused actually intended to carry out the threat.
- (q) Marriage.—
- (1) In general.— In a prosecution under paragraph (2) of subsection (c) (aggravated sexual assault), or under subsection (d) (aggravated sexual assault of a child), subsection (f) (aggravated sexual abuse of a child), subsection (i) (abusive sexual contact with a child), subsection (j) (indecent liberty with a child), subsection (m) (wrongful sexual contact), or subsection (n) (indecent exposure), it is an affirmative defense that the accused and the other person when they engaged in the sexual act, sexual contact, or sexual conduct are married to each other.
- (2) Definition.— For purposes of this subsection, a marriage is a relationship, recognized by the laws of a competent State or foreign jurisdiction, between the accused and the other person as spouses. A marriage exists until it is dissolved in accordance with the laws of a competent State or foreign jurisdiction.
- (3) Exception.— Paragraph (1) shall not apply if the accused's intent at the time of the sexual conduct is to abuse, humiliate, or degrade any person.
- (r) Consent and Mistake of Fact as to Consent.— Lack of permission is an element of the offense in subsection (m) (wrongful sexual contact). Consent and mistake of fact as to consent are not an issue, or an affirmative defense, in a prosecution under any other subsection, except they are an affirmative defense for the sexual conduct in issue in a prosecution under subsection (a) (rape), subsection (c) (aggravated sexual assault), subsection (e) (aggravated sexual contact), and subsection (h) (abusive sexual contact).
- (s) Other Affirmative Defenses not Precluded.— The enumeration in this section of some affirmative defenses shall not be construed as excluding the existence of others.
- (t) Definitions.— In this section:
- (1) Sexual act.— The term “sexual act” means—
- (A) contact between the penis and the vulva or anus, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight; or
- (B) the penetration, however slight, of the genital opening or anus of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.
- (2) Sexual contact.— The term “sexual contact” means the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or

buttocks of another person, or intentionally causing another person to touch, either directly or through the clothing, the genitalia, anus, groin, breast, inner thigh, or buttocks of any person, with an intent to abuse, humiliate, or degrade any person or to arouse or gratify the sexual desire of any person.

(3) Grievous bodily harm.— The term “grievous bodily harm” means serious bodily injury. It includes fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, and other severe bodily injuries. It does not include minor injuries such as a black eye or a bloody nose. It is the same level of injury as in section 928 (article 128) of this chapter, and a lesser degree of injury than in section 2246 (4) of title 18.

(4) Dangerous weapon or object.— The term “dangerous weapon or object” means—

(A) any firearm, loaded or not, and whether operable or not;

(B) any other weapon, device, instrument, material, or substance, whether animate or inanimate, that in the manner it is used, or is intended to be used, is known to be capable of producing death or grievous bodily harm; or

(C) any object fashioned or utilized in such a manner as to lead the victim under the circumstances to reasonably believe it to be capable of producing death or grievous bodily harm.

(5) Force.— The term “force” means action to compel submission of another or to overcome or prevent another’s resistance by—

(A) the use or display of a dangerous weapon or object;

(B) the suggestion of possession of a dangerous weapon or object that is used in a manner to cause another to believe it is a dangerous weapon or object; or

(C) physical violence, strength, power, or restraint applied to another person, sufficient that the other person could not avoid or escape the sexual conduct.

(6) Threatening or placing that other person in fear.— The term “threatening or placing that other person in fear” under paragraph (3) of subsection (a) (rape), or under subsection (e) (aggravated sexual contact), means a communication or action that is of sufficient consequence to cause a reasonable fear that non-compliance will result in the victim or another person being subjected to death, grievous bodily harm, or kidnapping.

(7) Threatening or placing that other person in fear.— (A) In general.— The term “threatening or placing that other person in fear” under paragraph (1)(A) of subsection (c) (aggravated sexual assault), or under subsection (h) (abusive sexual contact), means a communication or action that is of sufficient consequence to cause a reasonable fear that non-compliance will result in the victim or another being subjected to a lesser degree of harm than death, grievous bodily harm, or kidnapping.

(B) Inclusions.— Such lesser degree of harm includes—

(i) physical injury to another person or to another person’s property; or

(ii) a threat—

(I) to accuse any person of a crime;

(II) to expose a secret or publicize an asserted fact, whether true or false, tending to subject some person to hatred, contempt or ridicule; or

(III) through the use or abuse of military position, rank, or authority, to affect or threaten to affect, either positively or negatively, the military career of some person.

(8) Bodily harm.— The term “bodily harm” means any offensive touching of another, however slight.

(9) Child.— The term “child” means any person who has not attained the age of 16 years.

(10) Lewd act.— The term “lewd act” means—

(A) the intentional touching, not through the clothing, of the genitalia of another person, with an intent to abuse, humiliate, or degrade any person, or to arouse or gratify the sexual desire of any person; or

(B) intentionally causing another person to touch, not through the clothing, the genitalia of any person with an intent to abuse, humiliate or degrade any person, or to arouse or gratify the sexual desire of any person.

(11) Indecent liberty.— The term “indecent liberty” means indecent conduct, but physical contact is not required. It includes one who with the requisite intent exposes one’s genitalia, anus, buttocks, or female areola or nipple to a child. An indecent liberty may consist of communication of indecent language as long as the communication is made in the physical presence of the child. If words designed to excite sexual desire are spoken to a child, or a child is exposed to or involved in sexual conduct, it is an indecent liberty; the child’s consent is not relevant.

(12) Indecent conduct.— The term “indecent conduct” means that form of immorality relating to sexual impurity which is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations. Indecent conduct includes observing, or making a videotape, photograph, motion picture, print, negative, slide, or other mechanically, electronically, or chemically reproduced visual material, without another person’s consent, and contrary to that other person’s reasonable expectation of privacy, of—

(A) that other person’s genitalia, anus, or buttocks, or (if that other person is female) that person’s areola or nipple; or

(B) that other person while that other person is engaged in a sexual act, sodomy (under section 925 (article 125)), or sexual contact.

(13) Act of prostitution.— The term “act of prostitution” means a sexual act, sexual contact, or lewd act for the purpose of receiving money or other compensation.

(14) Consent.— The term “consent” means words or overt acts indicating a freely given agreement to the sexual conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance or submission resulting from the accused’s use of force, threat of force, or placing another person in fear does not constitute consent. A current or previous dating relationship by itself or the manner of dress of the person involved with the accused in the sexual conduct at issue shall not constitute consent. A person cannot consent to sexual activity if—

(A) under 16 years of age; or

(B) substantially incapable of—

(i) appraising the nature of the sexual conduct at issue due to—

(I) mental impairment or unconsciousness resulting from consumption of alcohol, drugs, a similar substance, or otherwise; or

(II) mental disease or defect which renders the person unable to understand the nature of the sexual conduct at issue;

- (ii) physically declining participation in the sexual conduct at issue; or
- (iii) physically communicating unwillingness to engage in the sexual conduct at issue.

(15) Mistake of fact as to consent.— The term “mistake of fact as to consent” means the accused held, as a result of ignorance or mistake, an incorrect belief that the other person engaging in the sexual conduct consented. The ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances. To be reasonable the ignorance or mistake must have been based on information, or lack of it, which would indicate to a reasonable person that the other person consented. Additionally, the ignorance or mistake cannot be based on the negligent failure to discover the true facts. Negligence is the absence of due care. Due care is what a reasonably careful person would do under the same or similar circumstances. The accused’s state of intoxication, if any, at the time of the offense is not relevant to mistake of fact. A mistaken belief that the other person consented must be that which a reasonably careful, ordinary, prudent, sober adult would have had under the circumstances at the time of the offense.

(16) Affirmative defense.— The term “affirmative defense” means any special defense which, although not denying that the accused committed the objective acts constituting the offense charged, denies, wholly, or partially, criminal responsibility for those acts. The accused has the burden of proving the affirmative defense by a preponderance of evidence. After the defense meets this burden, the prosecution shall have the burden of proving beyond a reasonable doubt that the affirmative defense did not exist.

b. 10 U.S.C. § 925 – Article 125 “Sodomy”

Article 125 (“Sodomy”) should be repealed. Sexual misconduct now punishable as “sodomy” can be prosecuted under Articles 120 (“Rape, sexual assault, and other sexual misconduct”) or 134 (“General article”). There is no reason to preserve sodomy as a military crime.

II. Manual for Courts-Martial

The following paragraphs in the *Manual for Courts-Martial* listing specific Article 134 (“General article”) offenses should be amended:

a. Paragraph 64 “Assault with intent to commit murder, voluntary manslaughter, rape, robbery, sodomy, arson, burglary, or housebreaking”

Paragraph 64 should be revised to include only “assault with intent to commit rape or sexual assault,” reflecting the new definitions set out in Article 120 of the UCMJ (“Rape, sexual assault, and other sexual misconduct”). All references to the term “sodomy” should be removed and subparagraph c.(6) “Assault with intent to commit sodomy” should be deleted.

64. Article 134—(Assault—with intent to commit murder, voluntary manslaughter, rape, sexual assault, robbery, ~~sodomy~~, arson, burglary, or housebreaking)

a. Text of statute. See paragraph 60.

b. Elements.

- (1) That the accused assaulted a certain person;

(2) That, at the time of the assault, the accused intended to kill (as required for murder or voluntary manslaughter) or intended to commit rape, sexual assault, robbery, ~~sodomy~~, arson, burglary, or housebreaking; and (3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

c. Explanation.

(1) In general. An assault with intent to commit any of the offenses mentioned above is not necessarily the equivalent of an attempt to commit the intended offense, for an assault can be committed with intent to commit an offense without achieving that proximity to consummation of an intended offense which is essential to an attempt. See paragraph 4.

(2) Assault with intent to murder. Assault with intent to commit murder is assault with specific intent to kill. Actual infliction of injury is not necessary. To constitute an assault with intent to murder with a firearm, it is not necessary that the weapon be discharged. When the intent to kill exists, the fact that for some unknown reason the actual consummation of the murder by the means employed is impossible is not a defense if the means are apparently adapted to the end in view. The intent to kill need not be directed against the person assaulted if the assault is committed with intent to kill some person. For example, if a person, intending to kill Jones, shoots Smith, mistaking Smith for Jones, that person is guilty of assaulting Smith with intent to murder. If a person fires into a group with intent to kill anyone in the group, that person is guilty of an assault with intent to murder each member of the group.

(3) Assault with intent to commit voluntary manslaughter. Assault with intent to commit voluntary manslaughter is an assault committed with a specific intent to kill under such circumstances that, if death resulted therefrom, the offense of voluntary manslaughter would have been committed. There can be no assault with intent to commit involuntary manslaughter, for it is not a crime capable of being intentionally committed.

(4) Assault with intent to commit rape. In assault with intent to commit rape, the accused must have intended to complete the offense. Any lesser intent will not suffice. No actual touching is necessary, but indecent advances and importunities, however earnest, not accompanied by such an intent, do not constitute this offense, nor do mere preparations to rape not amounting to an assault. Once an assault with intent to commit rape is made, it is no defense that the accused voluntarily desisted.

(5) Assault with intent to rob. For assault with intent to rob, the fact that the accused intended to take money and that the person the accused intended to rob had none is not a defense.

~~(6) Assault with intent to commit sodomy. Assault with intent to commit sodomy is an assault against a human being and must be committed with a specific intent to commit sodomy. Any lesser intent, or different intent, will not suffice.~~

d. Lesser included offenses.

(1) Assault with intent to murder.

(a) Article 128—assault; assault consummated by a battery; assault with a dangerous weapon; assault intentionally inflicting grievous bodily harm

(b) Article 134—assault with intent to commit voluntary manslaughter; willful or careless discharge of a firearm

(2) Assault with intent to commit voluntary manslaughter.

- (a) Article 128—assault; assault consummated by a battery; assault with a dangerous weapon; assault intentionally inflicting grievous bodily harm
- (b) Article 134—willful or careless discharge of a firearm
- (3) Assault with intent to commit rape ~~or sodomy~~.
Article 128—assault; assault consummated by a battery; assault with a dangerous weapon
- (4) Assault with intent to commit sexual assault.
Article 128—assault; assault consummated by a battery; assault with a dangerous weapon
- (5) Assault with intent to commit burglary.
(a) Article 128—assault; assault consummated by a battery; assault with a dangerous weapon
(b) Article 134—assault with intent to commit housebreaking
- (56) Assault with intent to commit robbery, arson, or housebreaking. Article 128—assault; assault consummated by a battery; assault with a dangerous weapon
- e. Maximum punishment.
 - (1) Assault with intent to commit murder or rape. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 20 years.
 - (2) Assault with intent to commit voluntary manslaughter, sexual assault, robbery, ~~sodomy~~, arson, or burglary. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.
 - (3) Assault with intent to commit housebreaking. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.
- f. Sample specification.
In that (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about ____ 20__, with intent to commit (murder) (voluntary manslaughter) (rape) (sexual assault) (robbery) (~~sodomy~~) (arson) (burglary) (housebreaking), commit an assault upon _____ by _____.

b. Paragraph 69 “Wrongful cohabitation”

We recommend Paragraph 69 be eliminated from the Manual and that cohabitation by consenting adults no longer be considered a military crime.

c. Paragraph 97 “Pandering and prostitution”

We recommend changing “sexual intercourse” to “sexual act or sexual contact.” The inclusion of sexual contact would reach sexual conduct formerly included under sodomy. Additionally, references to “sodomy” should be removed.

97. Article 134—(Pandering and prostitution)

a. Text of statute. See paragraph 60.

b. Elements.

(1) Prostitution.

- (a) That the accused ~~had engaged in a~~ sexual ~~intercourse with~~ act or sexual contact with another person not the accused’s spouse;
- (b) That the accused did so for the purpose of receiving money or other compensation;
- (c) That this act was wrongful; and

- (d) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.
- (2) Patronizing a prostitute.
- That the accused ~~had~~engaged in a sexual ~~intercourse with~~act or sexual contact with another person not the accused's spouse;
 - That the accused compelled, induced, enticed, or procured such person to engage in ~~an a sexual~~ act ~~of~~for sexual ~~intercourse in~~contact in exchange for money or other compensation; and
 - That this act was wrongful; and
 - That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.
- (3) Pandering by inducing, enticing, or procuring act of prostitution.
- That the accused induced, enticed, or procured a certain person to engage in ~~an a~~ sexual ~~intercourse~~act or ~~sodomy~~sexual contact for hire and reward with a person to be directed to said person by the accused;
 - That this inducing, enticing, or procuring was wrongful;
 - That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.
- (4) Pandering by arranging or receiving consideration for arranging for a sexual ~~intercourse~~act or ~~sodomy~~sexual contact.
- That the accused arranged for, or received valuable consideration for arranging for, a certain person to engage in a sexual ~~intercourse~~act or ~~sodomy~~sexual contact with another person;
 - That the arranging (and receipt of consideration) was wrongful; and
 - That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.
- c. Explanation. Prostitution may be committed by males or females. ~~Sodomy for money or compensation is not included in subparagraph b(1). Sodomy may be charged under paragraph 51. Evidence that sodomy was for money or compensation may be a matter in aggravation. See R.C.M. 1001(b)(4).~~
- d. Lesser included offense. Article 80—attempts
- e. Maximum punishment.
- Prostitution and patronizing a prostitute. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 1 year.
 - Pandering. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.
- f. Sample specifications.
- Prostitution.
- In that _____ (personal jurisdiction data), did, (at/on board-location) (subject-matter jurisdiction data, if required), on or about ____ 20____, wrongfully engage in (~~an a sexual~~ act) (sexual acts) ~~of~~ (sexual intercoursecontact) with _____, a person not his/her spouse, for the purpose of receiving (money) (____).

(2) Patronizing a prostitute.

In that _____ (personal jurisdiction data), did, (at/on board location) (subject-matter jurisdiction data, if required), on or about ____ 20____, wrongfully (compel) (induce) (entice) (procure) _____, a person not his/her spouse, to engage in (~~ana~~ sexual act) (sexual acts) ~~of~~ (sexual intercourse contact) with the accused in exchange for (money) (_____).

(3) Inducing, enticing, or procuring act of prostitution.

In that _____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about ____ 20____, wrongfully (induce) (entice) (procure) _____, to engage in (~~ana~~ sexual act) (sexual acts) ~~of~~ (sexual intercourse contact) (for hire and reward) with persons to be directed to him/her by the said _____.

(4) Arranging, or receiving consideration for arranging for a sexual intercourse act or ~~sodomy~~ sexual contact.

In that _____ (personal jurisdiction data), did, (at/on board-location) (subject-matter jurisdiction data, if required), on or about ____ 20____, wrongfully (arrange for) (receive valuable consideration, to wit: _____ on account of arranging for -) _____ to engage in (~~ana~~ sexual act) (sexual acts) ~~of~~ (sexual intercourse) (~~sodomy~~ contact) with _____.

Suggested Revision to DoD Instruction 1332.14 “Enlisted Administrative Separations” Paragraph 8

Recommend deletion of current Paragraph 8 of Enclosure (3), “Homosexual Conduct,” and replacing it with new Paragraph 8, Enclosure (3), “Sexual Misconduct”:

8. SEXUAL MISCONDUCT

a. Basis. Sexual misconduct is grounds for separation from the Military Services when it is determined under the guidance set forth in paragraph 1 of Enclosure 4 that the Service member is unqualified for further military service by reason of one or more of the following circumstances:

(1) Sexual harassment. Sexual harassment is a form of sex discrimination that involves unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when:

1. Submission to such conduct is made either explicitly or implicitly a term or condition of a person’s job, pay, or career, or
2. Submission to or rejection of such conduct by a person is used as a basis for career or employment decisions affecting that person, or
3. Such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creates an intimidating, hostile, or offensive working environment.

Separation processing under this subparagraph is normally appropriate when the misconduct involves a pattern of misconduct, when any of the aggravated circumstances mentioned in subparagraph 8.a.(3) are present, when the conduct meets the definition of serious offense in paragraph 11 of this Enclosure, or when the victim of the harassment experiences physical or mental harm.

(2) Sexual assault. Sexual assault is the intentional sexual contact, characterized by use of force, physical threat or abuse of authority or when the victim does not or cannot consent. It includes rape, nonconsensual oral or anal sex, indecent assault (unwanted, inappropriate sexual contact or fondling), or attempts to commit these acts. Sexual assault can occur without regard to gender or spousal relationship or age of victim. “Consent” shall not be deemed or construed to mean the failure of the victim to offer physical resistance. Consent is not given when a person uses force, threat of force, coercion, or when the victim is asleep, incapacitated, or unconscious. Sexual assault is considered a serious offense, as defined in paragraph 11 of this Enclosure.

(3) Sexual acts involving aggravating circumstances. Sexual misconduct includes sexual acts or conduct, not otherwise a basis for separation, involving aggravating circumstances or other factors affecting the performance of duty. Examples of such sexual conduct involving aggravating circumstances or other factors affecting the performance of duty include child

molestation, prostitution, acts or conduct accompanied by coercion, or intimidation, and acts or conduct taking place between service members of disparate rank, grade, or status when a service member has taken advantage of his or her superior rank, grade, or status to engage in a sexual act.

b. Counseling and Rehabilitation. Separation processing for sexual harassment (subparagraph 8.a.(1) of this Enclosure) involving only multiple minor disciplinary infractions as described in paragraph 11.a.(1) of this Enclosure may not be initiated until the Service member has been formally counseled concerning deficiencies and has been afforded an opportunity to overcome those deficiencies as reflected in appropriate counseling or personnel records. Counseling and rehabilitation are not applicable when the basis for discharge is a pattern of misconduct or a serious offense, such as sexual assault or sexual conduct under aggravating circumstances.

c. Characterization or Description. Characterization of service shall normally be under other than honorable conditions, but characterization as general (under honorable conditions) may be warranted under the guidelines in paragraph 3 of Enclosure 4.

(1) For respondents who have completed entry-level status, characterization of service as honorable is not authorized unless the respondent's record is otherwise so meritorious that any other characterization clearly would be inappropriate. In such cases, separations for sexual misconduct with an honorable characterization shall be approved by such authority as specified by the Secretary concerned.

(2) When characterization of service under other than honorable conditions is not warranted for a Service member in entry-level status under paragraph 3 of Enclosure 4, the separation shall be described as an entry-level separation.

d. Procedures. Cases involving sexual misconduct will be processed under the provisions of paragraph 11 of this Enclosure. The Administrative Board procedure in paragraph 3 of Enclosure 6 shall be used in all cases involving sexual misconduct. All cases involving sexual misconduct that recommend separation of the Service member shall be approved by such authority as specified by the Secretary concerned.

Markup of Suggested Changes to DoD Instruction 1332.14

8. ~~HOMOSEXUAL CONDUCT~~SEXUAL MISCONDUCT

a. ~~Basis~~——(1) ~~Homosexual conduct is grounds for separation from the Military Services under the terms set forth in subparagraph 8.a.(2) of this enclosure. Homosexual conduct is engaging in, attempting to engage in, or soliciting another to engage in a homosexual act or acts, a statement by a Service member that he or she is a homosexual or bisexual, or words to that effect, or marriage or attempted marriage to a person known to be the same biological sex. A Service member's sexual orientation is considered a personal and private matter, and is not a bar to continued service under this paragraph unless manifested by homosexual conduct in the manner described in subparagraph 8.a.(2) of this enclosure. (2) A Service member shall be separated under this paragraph if one or more of the following approved findings is made:~~ Sexual misconduct is grounds for separation from the Military Services when it is determined under the guidance set forth in paragraph 1 of Enclosure 4 that the Service member is unqualified for further military service by reason of one or more of the following circumstances:

——(a) ~~The Service member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts, unless there are approved further findings that the Service member has demonstrated that:~~

——1. ~~Such acts are a departure from the Service member's usual and customary behavior;~~

——2. ~~Such acts under all the circumstances are unlikely to recur;~~

——3. ~~Such acts were not accomplished by use of force, coercion, or intimidation;~~

——4. ~~Under the particular circumstances of the case, the Service member's continued presence in the Armed Forces is consistent with the interest of the Armed Forces in proper discipline, good order, and morale; and~~

——5. ~~The Service member does not have a propensity or intent to engage in homosexual acts.~~

——(b) ~~The Service member has made a statement that he or she is a homosexual or bisexual, or words to that effect, unless there is a further approved finding that the Service member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts. A statement by a Service member that he or she is a homosexual or bisexual, or words to that effect, creates a rebuttable presumption that the Service member is a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts. The Service member shall be advised of this presumption and given the opportunity to rebut the presumption by presenting evidence demonstrating that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts. Propensity to engage in homosexual acts~~

~~means more than an abstract preference or desire to engage in homosexual acts; it indicates a likelihood that a person engages in or will engage in homosexual acts. In determining whether a Service member has successfully rebutted the presumption that he or she is a person who engages in, attempts to engage in, or has a propensity or intent to engage in homosexual acts, some or all of the following may be considered~~

(1) Sexual harassment. Sexual harassment is a form of sex discrimination that involves unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when:

1. ~~A statement under oath by the Service member that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts;~~ Submission to such conduct is made either explicitly or implicitly a term or condition of a person's job, pay, or career, or
2. ~~Whether the Service member has engaged in homosexual acts;~~ Submission to or rejection of such conduct by a person is used as a basis for career or employment decisions affecting that person, or
3. ~~Testimony from others about the Service member's past conduct, character, and credibility;~~ Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creates an intimidating, hostile, or offensive working environment.
4. ~~—The nature and circumstances of the Service member's statement;~~
5. ~~—Any other evidence relevant to whether the Service member is likely to engage in homosexual acts. (This list is not exhaustive; any other relevant evidence may also be considered.)~~
6. ~~—Aboard a military vessel or aircraft.~~
7. ~~—In another location subject to military control under~~

Separation processing under this subparagraph is normally appropriate when the misconduct involves a pattern of misconduct, when any of the aggravated circumstances mentioned in subparagraph 8.a.(3) are present, when the conduct meets the definition of serious offense in paragraph 11 of this Enclosure, or when the victim of the harassment experiences physical or mental harm.

(2) Sexual assault. Sexual assault is the intentional sexual contact, characterized by use of force, physical threat or abuse of authority or when the victim does not or cannot consent. It includes rape, nonconsensual oral or anal sex, indecent assault (unwanted, inappropriate sexual contact or fondling), or attempts to commit these acts. Sexual assault can occur without regard to gender or spousal relationship or age of victim. "Consent" shall not be deemed or construed to mean the failure of the victim to offer physical resistance. Consent is not given when a person

uses force, threat of force, coercion, or when the victim is asleep, incapacitated, or unconscious. Sexual assault is considered a serious offense, as defined in paragraph 11 of this Enclosure.

(3) Sexual acts involving aggravating circumstances~~noted in the finding that have an adverse impact on discipline, good order, or morale comparable to the impact of such activity aboard a vessel or aircraft.~~

~~_____ (c) The Service member has married or attempted to marry a person known to be of the same biological sex (as evidenced by the external anatomy of the persons involved).~~ Sexual misconduct includes sexual acts or conduct, not otherwise a basis for separation, involving aggravating circumstances or other factors affecting the performance of duty. Examples of such sexual conduct involving aggravating circumstances or other factors affecting the performance of duty include child molestation, prostitution, acts or conduct accompanied by coercion, or intimidation, and acts or conduct taking place between service members of disparate rank, grade, or status when a service member has taken advantage of his or her superior rank, grade, or status to engage in a sexual act.

b. ~~Burden of Proof. See subparagraphs 8.d.(5) and 8.d.(6) of this enclosure for guidance as to the burden of proof and when a finding regarding retention is required.~~ Counseling and Rehabilitation. Separation processing for sexual harassment (subparagraph 8.a.(1) of this Enclosure) involving only multiple minor disciplinary infractions as described in paragraph 11.a.(1) of this Enclosure may not be initiated until the Service member has been formally counseled concerning deficiencies and has been afforded an opportunity to overcome those deficiencies as reflected in appropriate counseling or personnel records. Counseling and rehabilitation are not applicable when the basis for discharge is a pattern of misconduct or a serious offense, such as sexual assault or sexual conduct under aggravating circumstances.

c. Characterization or Description. Characterization of service ~~or description of separation shall be in accordance with the guidance in paragraph 3 of Enclosure 4. When the sole basis for separation is homosexual conduct, a characterization under other than honorable (OTH) conditions shall normally be under other than honorable conditions, but characterization as general (under honorable conditions) may be issued only if such a characterization is warranted under paragraph 3 of Enclosure 4, and if there is a finding that during the current term of service the Service member attempted, solicited, or committed a homosexual act. Circumstances that warrant consideration of an OTH include a finding that the Service member attempted, solicited, or committed a homosexual act as follows:~~ warranted under the guidelines in paragraph 3 of Enclosure 4.

~~By using force, coercion, or intimidation.~~ For respondents who have completed entry-level status, characterization of service as honorable is not authorized unless the respondent's record is otherwise so meritorious that any other characterization clearly would be inappropriate. In such cases, separations for sexual misconduct with an honorable characterization shall be approved by such authority as specified by the Secretary concerned.

~~With a person under 16 years of age.~~ When characterization of service under other than honorable conditions is not warranted for a Service member in entry-level status under paragraph 3 of Enclosure 4, the separation shall be described as an entry-level separation.

~~(3) With a subordinate in circumstances that violate customary military superior-subordinate relationships;~~

~~(4) Openly in public view;~~

~~(5) For compensation;~~

d. Procedures. Cases involving sexual misconduct will be processed under the provisions of paragraph 11 of this Enclosure. The Administrative Board procedure ~~under~~in paragraph 3 of Enclosure 6 shall be used, ~~subject to the following guidance:~~ in all cases involving sexual misconduct. All cases involving sexual misconduct that recommend separation of the Service member shall be approved by such authority as specified by the Secretary concerned.

~~——— (1) Separation processing shall be initiated if there is probable cause to believe separation is warranted under subparagraph 8.a.(2) of this enclosure. For purposes of making this probable cause determination, the standards set forth in paragraphs 2.e. — 2.f. of Enclosure 5 are applicable.~~

~~——— (a) Only a commander in the Service member's chain of command, in the grade of O-7 or higher, is authorized to initiate separation proceedings on the basis of alleged homosexual conduct.~~

~~——— (b) Procedures for inquiries into homosexual conduct are outlined in Enclosure 5.~~

~~——— (2) The Administrative Board shall follow the procedures set forth in subparagraph 3.e. of Enclosure 6, except with respect to the following matters:~~

~~(a) ——— If the Board finds that one or more of the circumstances authorizing separation under subparagraph 8.a.(2) of this enclosure is supported by a preponderance of the evidence, the Board shall recommend separation unless the Board finds that retention is warranted under the circumstances described in that paragraph.~~

~~——— (b) If the Board does not find that one or more of the circumstances authorizing separation under subparagraph 8.a.(2) of this enclosure is supported by a preponderance of the evidence, the Board shall recommend retention unless the case involves another basis for separation of which the Service member has been duly notified.~~

~~——— (3) The separation authority disposing of the case shall be a general or flag officer, of equal grade or senior to the commander initiating a fact-finding inquiry or separation proceeding, in the Service member's chain of command or serving as a Service-designated centralized separation authority.~~

~~——— (4) The separation authority shall dispose of the case according to the following provisions:~~

~~——— (a) If the board recommends retention, the separation authority shall take one of the following actions:~~

~~1. Approve the finding and direct retention; or~~

~~2. Forward the case to the Secretary concerned with a recommendation that the Secretary separate the Service member under the Secretary's plenary authority in paragraph 15 of this enclosure.~~

~~(b) If the board recommends separation, the separation authority shall take one of the following actions:~~

~~1. Approve the finding and direct separation; or~~

~~2. Disapprove the finding on the basis of the following considerations:~~

~~a. There is insufficient evidence to support the finding; or~~

~~b. Retention is warranted under the circumstances described in subparagraph 8.a.(2) of this enclosure.~~

~~(c) If there has been a waiver of Board proceedings, the separation authority shall dispose of the case in accordance with the following provisions:~~

~~1. If the separation authority determines there is not sufficient evidence to support separation under subparagraph 8.a.(2) of this enclosure, the separation authority shall direct retention unless there is another basis for separation of which the Service member has been duly notified.~~

~~2. If the separation authority determines that one or more of the circumstances authorizing separation under subparagraph 8.a.(2) of this enclosure is supported by a preponderance of the evidence, the Service member shall be separated unless retention is warranted under the circumstances described in that subparagraph.~~

~~(5) The Service member shall bear the burden of proving throughout the proceeding, by a preponderance of the evidence, that retention is warranted under the circumstances described in subparagraphs 8.a.(2)(a) and 8.a.(2)(b) of this enclosure.~~

~~(6) Findings regarding whether or not retention is warranted are required if the Service member clearly and specifically raises such circumstances as described in subparagraph 8.a.(2) of this enclosure.~~

~~(7) Nothing in these procedures:~~

~~(a) Limits the authority of the Secretary concerned to take appropriate action in a case to ensure compliance with this issuance;~~

~~(b) Requires that a Service member be processed for separation when a determination is made in accordance with regulations prescribed by the Secretary concerned that:~~

~~1. The Service member engaged in acts, made statements, or married or attempted to marry a person known to be of the same biological sex for the purpose of avoiding or terminating military service; and~~

~~2. Separation of the Service member would not be in the best interest of the Armed Forces.~~

~~(c) Precludes retention of a Service member for a limited period of time in the interests of national security as authorized by the Secretary concerned;~~

~~(d) Authorizes a Service member to seek Secretarial review unless authorized in procedures promulgated by the Secretary concerned;~~

~~(e) Precludes separation in appropriate circumstances for another reason in this Instruction; or~~

~~(f) Precludes trial by courts martial in appropriate cases.~~