

**BRIEF IN SUPPORT OF APPLICATION FOR DISCHARGE NARRATIVE CHANGE  
FOR ██████████**

I. Preliminary Statement

██████████ ██████████ ██████████ was discharged from the Marine Corps as a direct result of the Don't Ask Don't Tell (DADT) policy in effect from February 28, 1994 until September 20, 2011. Prior to his discharge, Mr. ██████████ was a promising young Marine who had been recommended for a Navy-Marine Achievement Award before he had completed two full years of service. Fearing prosecution and a dishonorable discharge were he discovered to be gay, Mr. ██████████ admitted to being homosexual and was summarily discharged. The DD214 paperwork from his separation includes invasive personal information that is irrelevant to his eligibility for veterans benefits, his future employment, or any other purpose for which a DD214 is required. Moreover, the discharge paperwork stigmatizes him as "unfit to serve" entirely on the basis of his sexual orientation. Mr. ██████████ requests that the narrative reason for separation, reentry code, and separation code be changed to remove unnecessary personal information and the implication that his sexuality rendered him "unfit" for continued military service.

II. Statement of Facts

██████████ ██████████ ██████████ enlisted in the Marine Corps ██████████ ██████████ and reported for active duty on ██████████. Following basic training, he was assigned to the Marine Air Ground Combat Center in ██████████, the Marines largest training base. Shortly after his reporting to the base personnel office, the office experienced a high number of separations, many as a result of the Department of Defense Directive 1304.26, commonly referred to as "Don't Ask, Don't Tell."

DADT was the result of a compromise between the new Clinton administration, which had hoped to repeal the ban on homosexuality in the military, and Congress who believed that

homosexuality was wholly incompatible with military service. At best DADT was a set of mixed messages to gay service members and their commanders. The policy became law in the Defense Authorization Act for Fiscal Year 1994, which included a “Policy Concerning Homosexuality in the Armed Forces,” which reads in part:

The presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability. <sup>1</sup>

The implementing policy, DoD Directive 1304.26, attempted to reduce the active persecution of gays, while maintaining a prohibition against homosexual activity. Thus, while being gay was no longer a bar to service entry, acting gay was a bar to continued service. The Directive stated:

A person's sexual orientation is considered a personal and private matter, and is not a bar to service entry or continued service unless manifested by homosexual conduct in the manner described in subparagraph E 1.2.8.2, below. Applicants for enlistment, appointment, or induction shall not be asked or required to reveal whether they are heterosexual, homosexual or bisexual. Applicants also will not be asked or required to reveal whether they have engaged in homosexual conduct, unless independent evidence is received indicating that an applicant engaged in such conduct or unless the applicant volunteers a statement that he or she is a homosexual or bisexual, or words to that effect. <sup>2</sup>

Thus it was permissible to enter the Marine Corps knowing one was gay, while it was impermissible to stay in the Marine Corps if one engaged in homosexual expression.

Despite the stated intention to reduce persecution of gay service members, discharges for homosexuality increased following the implementation of the policy. As the New York Times reported on April 7, 1998, the military “discharge[ed] 67 percent more gay and lesbian troops” in 1998 than it had than when DADT was first adopted in 1993.<sup>3</sup> When asked about the increase in

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<sup>1</sup> Defense Authorization Act for Fiscal Year 1994, Pub. L. 103-160, § 571(a)(15), Nov. 30, 1993, 107 Stat. 1670, (later codified in 10 USC § 654(a)(15) until repealed in 2011).

<sup>2</sup> DoDD 1304.26, Para. E1.2.8.1

<sup>3</sup> Tim Weiner, “Military Discharges of Homosexuals Soars,” NY Times Apr. 7, 1998, <http://www.nytimes.com/1998/04/07/us/military-discharges-of-homosexuals-soar.html>.

homosexual discharges, the Pentagon spokesman replied: "We think the rise is almost exclusively explained by the increase in the numbers of people stating they are homosexuals. We think they are voluntary statements. We can only speculate as to why they are doing this."<sup>4</sup>

One explanation for the increase in self-reports is that DADT did not result in a decrease in persecution of gay military members but instead led to more such harassment. In ██████████, one month before Mr. ██████ reported to active duty, the Servicemembers Legal Defense Network found that pursuit and harassment of gay service members in violation of DADT increased with each year following passage of DADT.<sup>5</sup> The report described increases in several types of violations:

- 124 cases of commanders asking soldiers if they were homosexual without sufficient cause, up from 89 reported violations in 1996;
- 235 violations of commanders investigating suspected homosexual troops without credible evidence, up from 191 the previous year; and
- 182 anti-gay harassment incidents, including death threats and assaults, a 38 percent increase from the 132 incidents reported in 1996.<sup>6</sup>

It was under this backdrop that Mr. ██████ reported for duty as a clerk in the base administration office for service records. The office had only one person working on separations when he first arrived, but due to the increased number of separations due to DADT, the job of processing separations required two people. Mr. ██████ was thus reassigned to process personnel separations, including those for homosexual conduct or admission under DADT.

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<sup>4</sup> *Ibid.*

<sup>5</sup> Eric Rosenberg, "Report Finds Military Uniformly Disregards 'Don't Ask, Don't Tell' Gay Rights Groups Says Policy Was Violated 563 Times Last year," *The Spokesman-Review*, Feb. 19, 1998. <http://www.spokesman.com/stories/1998/feb/19/report-finds-military-uniformly-disregards-dont/>

<sup>6</sup> *Ibid.*

Mr. [REDACTED] performed his duties well. He was awarded a certificate of commendation in [REDACTED] and a meritorious mast award in [REDACTED], and he was recommended for a Navy-Marine Achievement medal before his confession. Attachment 2 (Form NAVMC 118(9)), and Attachment 3 ([REDACTED] Letter). His commander, Second Lieutenant [REDACTED], described Mr. [REDACTED] as “the consummate professional in the performance of his duties.” Attachment 4 ([REDACTED] Letter).

Mr. [REDACTED] in keeping with the demands of Don't Ask Don't Tell, kept his sexual orientation a secret. He lived in fear, however, should his secret be discovered, a fear that increased as he continued to process an increasing number of homosexual discharges. Mr. [REDACTED] was alarmed by the fate of those discovered to have engaged in homosexual conduct, fates that included non-judicial punishment, dishonorable discharge, and criminal prosecution.

Seeing no other way to avoid a dishonorable discharge should his sexual orientation be discovered, Mr. [REDACTED] decided to confide to a chaplain that he was gay, knowing that the chaplain would be obliged to report the disclosure. From his experience processing separations, he knew that by confessing his sexual orientation, he was more likely to be discharged with a general under honorable conditions or an honorable discharge, than if he remained in the closet and were later discovered to be gay, in which case he might be separated with a dishonorable discharge or even face criminal prosecution. Because of the number of separations coming through his office, he felt that he needed to act quickly, even though he was short of the two years of active service required to vest his Montgomery GI Bill benefits despite having paid into the system.

He spoke to the chaplain on [REDACTED] and, after a brief investigation, he was discharged on [REDACTED]—one year, seven months, and 19 days after he had started active duty, and four months and 11 days before he would have been vested in the Montgomery GI Bill

benefit program. His discharge paperwork categorized the discharge as Honorable, but it included the narrative description “Homosexual Admission” and included Rentry Code RE-4, which indicated that he was “Not recommended for reenlistment” in the Marines, the Navy, or any other service. This code was selected entirely on the basis of his sexual orientation.

Mr. [REDACTED] confessed his sexual orientation voluntarily. Prior to that confession, he gave his chain of command no reason to suspect he was gay and followed the requirements of Don’t Ask Don’t Tell in refraining from homosexual conduct or making his sexual orientation publically known in any way. There were no aggravating factors such as misconduct involved in his separation. His supervisor, SSgt [REDACTED], described Mr. [REDACTED] performance and conduct as “outstanding.” Attachment 3.

Following his discharge, Mr. [REDACTED] felt rejected from the Corps and his chosen profession. He fell into depression and substance abuse. Because he had not served long enough for his Montgomery G.I. Bill educational benefits to vest, he believed that he was not qualified to receive any veteran’s benefits. It was not until [REDACTED] when in physical therapy for an injury unrelated to his service that Mr. [REDACTED] learned that his active duty service qualified him for assistance from the Veterans Administration despite its shortened duration. Upon so learning, he contacted the Veterans Administration office in [REDACTED] and discovered that he could request a change in his discharge characterization following the repeal of DADT.

### III. Legal Argument

Mr. [REDACTED] discharge was improper, and the narrative description and reentry code on the Discharge document are unjust. As delegated by the Secretary of the Navy, the Board of Correction of Naval Records may correct the military record of a Marine when necessary to

correct an error or remove an injustice.<sup>7</sup> Although the regulation for the BCNR does not define “error,” the regulations governing the Discharge Review Board provide that a discharge should be considered proper and without error unless

A change in policy by the Military Service of which the applicant was a member, made expressly retroactive to the type of discharge under consideration, requires a change in the discharge.

32 CFR §70.9 (b)(2)

A discharge shall be considered just or equitable unless:

(1) In the course of a discharge review, it is determined that the policies and procedures under which the applicant was discharged differ in material respects from policies and procedures currently applicable on a Service-wide basis to discharges of the type under consideration provided that:

(i) Current policies or procedures represent a substantial enhancement of the rights afforded a respondent in such proceedings; and

(ii) There is substantial doubt that the applicant would have received the same discharge if relevant current policies and procedures had been available to the applicant at the time of the discharge proceedings under consideration.

32 CFR §70.9 (c)

Although Don't Ask Don't Tell was legal at the time of Mr. [REDACTED] separation, the policy and governing law have since been repealed. Due entirely to DADT in place at the time of his discharge, Mr. [REDACTED] was identified as “unfit for reenlistment” solely because of his sexual orientation. All evidence suggests that Mr. [REDACTED] would not have been identified as unfit for reenlistment if he had separated today. Indeed, much suggests that he would have encouraged to continue his career in the Marines. His commanding officer and his supervisor, 2LT [REDACTED] and SSgt [REDACTED], both praised Mr. [REDACTED] performance of his duties and noted that Mr. [REDACTED] had been placed in consideration for a Naval/Marine Achievement medal due to his exemplary performance. Were it not for DADT, there would have been no cause for Mr. [REDACTED] to separate

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<sup>7</sup> 10 USC § 1552

from the Marines at the beginning of a promising career, well in advance of completing his enlistment commitment and four months short of vestment of his Montgomery GI Bill benefits.

Although the statute repealing DADT and the implementing regulations do not address retroactivity of the change in policy, statements from the President and the then Secretary of Defense and Chairman of the Joint Chiefs of Staff indicate from the Commander in Chief through the chain of command considered the repeal a correction to an erroneous policy. Both the President and the Secretary praised the change in the policy as an improvement in the force. Upon implementation of the repeal act, President Obama hailed the repeal as the end of a “discriminatory law.”<sup>8</sup> Then-Secretary of Defense Leon Panetta told reporters, “Thanks to this change, I believe we move closer to achieving the goal at the foundation of the values that America's all about -- equality, equal opportunity and dignity for all Americans.”<sup>9</sup> At the same press conference, then-Chairman of the Joint Chiefs of Staff Admiral Michael Mullen stated, “It was fundamentally against everything we stand for as an institution to force people to lie about who they are just to wear a uniform.”<sup>10</sup>

Most tellingly, the Under Secretary of Defense for Personnel and Readiness issued a memorandum for all service secretaries addressing the likelihood of requests for discharge reviews following the repeal of Don't Ask Don't Tell. The memo stated:

Effective 20 September 2011, Service DRBs [Defense Review Boards] should normally grant requests to change the narrative reason for a discharge (the change should be to “Secretarial Authority” (Separation program designator code (SPD) code JFF)), requests to recharacterize the discharge to honorable and/or requests to change the reentry code to an immediately-eligible-to-reenter category (the new RE should be RE 1J) when both of

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<sup>8</sup> Pres. Barack Obama, Statement by the President on the repeal of Don't Ask Don't Tell, Press Statement, Sept. 20, 2011. Available at <https://www.whitehouse.gov/the-press-office/2011/09/20/statement-president-repeal-dont-ask-dont-tell>

<sup>9</sup> Tyrone C. Marshall Jr., Defense Leaders Laud Repeal, Return of ‘Equality’, American Forces Press Service, Sept. 20, 2011, available at <http://archive.defense.gov/news/newsarticle.aspx?id=65390>

<sup>10</sup> *Ibid.*

the following conditions are met: (1) the original discharge was based solely on DADT and (2) there were no aggravating factors in the record, such as misconduct.”

Attachment 5 (USecDef Letter 20 Sep. 2011). Mr. ██████ discharge meets both conditions and thus the narrative reason for discharge and the reentry code should be changed in keeping with this memo. Mr. ██████ therefore requests that the narrative reason for separation be removed or changed to “Convenience of the Government,” “Secretarial Authority” or other neutral language.

#### IV. Timeliness of this Application

Because Mr. ██████ separated more than 15 years ago, he is completely barred from review of his case by the DRB [citation in CFR]. He thus makes this application to the BCNR. Veterans must apply to the BCNR within three years of “discover[ing] the error or injustice” for which they seek relief.<sup>11</sup> Mr. ██████ believes this application is timely made, but in the alternative asks the board to consider this application in the interest of justice regardless of the limitation period. The earliest date Mr. ██████ might have applied for reconsideration of his discharge status was after ██████ when DADT was fully repealed.

But the statute requires actual notice, not constructive notice, of the injustice.<sup>12</sup> Until Mr. ██████ contacted the Connecticut Veteran’s Law Center in 2015, he was unaware that discharges made under DADT were considered erroneous or unjust. Because he had received an Honorable Discharge under the then-legal policy of DADT, he was unaware that there was any error applicable or remedy available to his case. Having separated from the Marines 12 years before the repeal of DADT, and separated from veteran culture because he erroneously believed he was not entitled to any veterans benefits due to his separation prior to the expiration of his term of service and before his Montgomery G.I. Bill benefits were vested, Mr. ██████ did not know that his discharge paperwork could be corrected following repeal of DADT. Indeed, there was no

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<sup>11</sup> 10 U.S.C. S1552.

<sup>12</sup> *Ridgely v. Marsh*, 866 F. 2d 1526, 1529 (DC Cir. 1989).

statement available to the public that would have given him notice that he could have his paperwork corrected. There is nothing in the Congressional repeal of DADT or the president's signing statement of the repeal that publically identified the potential to remedy discharges under DADT. Indeed, the statute explicitly states that nothing in the repeal of DADT "shall be construed to create a private cause of action."<sup>13</sup> Thus, it is not surprising that Mr. [REDACTED] did not know that he could correct his erroneous discharge paperwork.

Indeed, although Service Secretaries were instructed to reconsider the terms of prior discharges under DADT following the repeal, it was not until September 2016 that members and veterans publically invited to submit their DADT discharge cases for review. As part of the celebration of the fifth anniversary of the repeal of DADT, Acting Undersecretary of Defense Peter Levine issued a memorandum to all service members, veterans and their families explicitly inviting those who believe that they were treated unjustly as a result of the policy to "com[e] forward to request correction." Attachment 6 (Acting USecDef Letter 20 Sep. 2016).

For the reasons above, this petition is timely filed. But should the Board disagree, Mr. [REDACTED] asks that the Board consider his petition in the interest of justice. The current wording of Mr. [REDACTED] discharge paperwork unjustly exposes his private and personal in on a document intended to provide the public with information about a veteran's military service, violating his civil right to privacy solely because he had the misfortune to serve in the Marine Corps while DADT was in force. The narrative reason for separation (Block 28) on his Certificate of Discharge reads "homosexual admission." As such it provides very personal information to individuals and organizations who have no need and no right to such information. This certificate is required not only to receive veterans' benefits from the Veterans Administration, but also to

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<sup>13</sup> PL 111-321, 124 Stat. 3515, Section 3(e).

obtain veterans' benefits at the state level for everything from property tax relief to health assistance, and in job applications. In states where there is no prohibition against discrimination on the basis of sexual orientation, this certificate makes public information Mr. [REDACTED] would prefer to keep private and would provide a basis for those who wish to discriminate on the basis of sexual orientation. Even in states where such discrimination is prohibited, the narrative reveals private information that is irrelevant to the purpose for which the DD214 is being proffered.

Mr. [REDACTED] was compelled to reveal his sexuality, personal information that was irrelevant to his performance as a Marine, due to an unjust policy that was rightfully repealed. This policy shortened his promising career in the Marines and set his life into a tailspin into substance abuse following his separation. Having his personal information and the unjust assessment that he was "unfit" for service on his discharge paperwork compounds the injustice of Mr. [REDACTED] experience under DADT. For these reasons, Mr. [REDACTED] petitions the Board to correct the injustice of the characterization of his separation and fitness for reentry.

## V. Conclusion

Mr. [REDACTED] suffered a great injustice when a policy later found to be erroneous was the sole reason he felt it necessary to admit his sexual orientation, information which is entirely irrelevant to his ability to perform as a Marine, and start the process for separation under Don't Ask Don't Tell, cutting short a promising career and denying him the educational benefits of the Montgomery GI Bill to which he had contributed. Having his personal information and the judgment that he was unfit for reentry into the Marines purely based on his sexual orientation codified on a document that will follow him for the rest of his life magnifies the injustice of the DADT policy. He respectfully requests that the narrative description, separation codes, and reentry code be changed to remove this stigma.

## List of Attachments

1. Brief in Support of Application for Discharge Narrative Change
2. Form NAVMC 118(9) for CPL [REDACTED] W. [REDACTED]
3. Letter from Staff Sergeant [REDACTED] [REDACTED] to Commanding Officer, [REDACTED]
4. Letter from Second Lieutenant Robert L. [REDACTED] to Commanding Officer, [REDACTED]
5. Clifford L. Stanley, Under Secretary of Defense, Memorandum for Secretaries of The Military Departments, Correction of Military Records Following Repeal of Section 654 of Title 10, United States Code, Sep. 20 2011
6. Letter from Peter Levine, Acting Under Secretary of Defense, to Service members, Families, and Veterans, Sep. 20 2016