

**Appendix of Evidence in
Support of Log Cabin Republican's
Opposition to Defendants'
Motion for Summary Judgment**

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(Part 18 of 19)**

SEN. LEVIN: Thank you, Sen. Wicker.

Sen. Webb.

SEN. WEBB: Thank you, Mr. Chairman.

Gentlemen, just – let me see if we can review the facts here. This is obviously quite an emotional issue, but it's also a legislative issue. My understanding from hearing both of your statements is, this year period that you're going to take in order to examine the issues will be followed then by clearer observations about the implications of changing the law. Would that be a correct way to state it? So you're not coming in here today and saying, we're going to change the law and this is the year that we're going to put into figuring out how to implement the change.

SEC. GATES: Our hope would be that the information we would develop during the course of this review would help inform the legislative process.

SEN. WEBB: Right. I salute both of you for very careful statements. And Adm. Mullen, I salute you for the courage of what you said. But I want to also emphasize that you balanced that, in your statement, saying you don't know what's going to come out of this. We don't know.

So you know, what we're looking for here is an examination of the present law. What is the most damaging aspect of the present policy? And I think, Adm. Mullen, you made a very powerful statement in terms of the integrity of the individual as your deciding factor on your personal view. And what is – on the other hand, what is the great value of this law, if we were to do away with it and move into something else?

And then, again, what are the perils of undoing the law? Where are we going? Do we – would we know we were going in the proper direction? We don't – we can't really say that today.

I think that, when you say that this is something that will ultimately decided – be decided by the Congress, I'd also like to emphasize my own agreement with what you have been saying about how important it is to hear from people who were serving. Because whether the ultimate decision might be here with the Congress, that decision can't be made in a proper way without a full and open input from all of those who are serving. Not just combatant commanders – family members, people who are in the operating units.

And the way that I am hearing this, which I would agree with, is that we have a duty here in a very proper way to understand the impact of this on operating units, to raise the level of understanding of the complexity of this issue among the American people and up here – as well as attempting to do fairly with this issue.

So again, I salute you both for a very responsible and careful approach to how we examine this.

Thank you, Mr. Chairman.

SEN. LEVIN: Thank you very much, Sen. Webb.

Sen. Chambliss.

SEN. SAXBY CHAMBLISS (R-GA): Thank you, Mr. Chairman.

And just as was stated by my friend, Sen. Udall, I think live and let live is not a bad policy to adhere to and that's what we have in place in the military with don't ask, don't tell right now.

To you, Secretary Gates and Adm. Mullen, you're in a tough spot and we understand that. This is an extremely sensitive issue and everybody on this committee, I'm satisfied, is very sensitive to the issue both inside and outside the military.

In the military, it presents entirely different problems than it does in civilian life, because there is no constitutional right to serve in our armed forces. And today we know we've got gay and lesbian soldiers serving. They've served in the past; they're going to serve in the future; and they're going to serve in a very valiant way.

But the primary purpose of the armed forces is to prepare for and to prevail in combat should the need arise. Military life is fundamentally different from civilian life in that military society is characterized by its own laws, rules, customs and traditions – including restrictions on personal behavior that would not be acceptable in civilian society. Examples include alcohol use, adultery, fraternization and body art. If we change this rule of don't ask, don't tell, what are we going to do with these other

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issues?

The armed forces must maintain personnel policies that exclude persons whose presence in the armed forces would create an unacceptable risk to the armed forces' high standards of morale, good order and discipline and unit cohesion. In my opinion, the presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would very likely create an unacceptable risk to those high standards of morale, good order and discipline, and effective unit cohesion and effectiveness. I'm opposed to this change and I look forward to a very spirited debate on this issue, Mr. Chairman.

SEN. LEVIN: Thank you, Sen. Chambliss.

I believe Sen. Burr is next.

SEN. ROLAND BURRIS (D-IL): Thank you, Mr. –

SEN. LEVIN: Sen. Burris.

SEN. BURRIS: Thank you, Mr. Chairman.

I'd like to extend my deep admiration for our two distinguished leaders in their position. And not only are you following the direction of the commander in chief, but Adm. Mullen, you expressed your personal view, which is to be commended.

What we need is a policy that allows any individual who has the integrity and the commitment to serve this country, to serve this country. We can go back to President Truman who took the audacity to integrate the services. At one time, my uncles and members of my race couldn't even serve in the military. And we moved to this point where they're some of the best and brightest that we've had – generals and even now the commander in chief is of African-American heritage.

So what we're doing here now is not looking at the integrity and the commitment that individuals can make not based on their sexual orientation, but the defense of this country. I say the policy needs to be changed; the policy must be changed. And we must have everyone who is capable, willing and able to volunteer to defend this country, defend this great American tradition of ours to have the opportunity to serve regardless to their sexual orientation.

And so based on that, we must continue to have the American spirit and have individuals who are willing to serve.

I don't have a question, Mr. Chairman. I just have the statement. I hope that we'll look at legislation. By the way, the House has drawn up a bill. There are 185 members on this House bill, which is House Bill 1283. And I'm hoping and praying that we will get moving on this issue, get it beside us and not be wasting the taxpayers' time and all of the energy on something that is so basic in human rights and opportunities for individuals in this country.

Thank you, Mr. Chairman.

SEN. LEVIN: Thank you very much, Sen. Burris.

Sen. Collins.

SEN. SUSAN COLLINS (R-ME): Thank you, Mr. Chairman. Mr. Chairman, unlike my colleagues, I do have some questions, rather than just a statement, to ask.

Adm. Mullen, we know that many of our NATO allies allow gays and lesbians to serve openly and many of these countries have deployed troops who are serving with us in Afghanistan.

Are you aware of any impact on combat effectiveness by the decision of our NATO allies to allow gays and lesbians to serve openly?

ADM. MULLEN: Sen. Collins, I've talked to several of my counterparts in countries whose militaries allow gays and lesbians to serve openly. And there has been, as they have told me, no impact on military effectiveness.

SEN. COLLINS: We've heard today the concerns that if don't ask, don't tell is repealed, that it would affect unit cohesiveness or morale. Are you aware of any studies, any evidence that suggests that repealing don't ask, don't tell would undermine unit cohesion?

ADM. MULLEN: I'm not. In fact, the 1993 RAND study focused heavily on unit cohesion

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and that became the principal point put forward by the military leadership at the time and I understand that.

I understand what it is; I understand what goes into it. And there are – there's been no thorough or comprehensive work done with respect to that aspect since 1993.

And that's part of what needs to be addressed as we move forward over the part of the – over this year.

SEC. GATES: I think I would just underscore that. I mean, part of – part of what we need to do is address a number of assertions that have been made for which we have no basis in fact.

SEN. COLLINS: Exactly.

SEC. GATES: We need the – the purpose of the review that we are undertaking is to find out what the force – what the men and women in our armed forces, and, as Sen. Webb said, and their families – really think about this. And the fact is, at this point, we don't really know.

SEN. COLLINS: Thank you.

Thank you, Mr. Chairman.

SEN. LEVIN: Thank you very much, Sen. Collins.

Sen. Lieberman is next; and then, assuming nobody else comes in, Sen. McCaskill would be next; and then Sen. Reed.

Sen. Lieberman.

SEN. LIEBERMAN: Thanks, Mr. Chairman.

I opposed the don't ask, don't tell policy when it was created by this committee in 1993 and I remain opposed to it today, therefore, I support repealing it as soon as possible. My feeling, stated simply then, was that what mattered most was not how a member of the military lived his or her private sexual life, but that they were prepared to risk their lives in defense our country.

And my judgment was that, in a combat situation, a member of the military – in a tank or an MRAP, today is going to care a lot more about the capability and courage of the soldier next to him than they are about the sexual orientation of that soldier, just as over the years, as Sen. Burris referred to, they came to care a lot less about the race of the soldier next to them than about his or her courage or capability.

What I hear – and, therefore, I'm grateful that the president has said he supports the repeal of don't ask, don't tell. I thank you, Secretary and Chairman, for saying that the question now is not "whether," but "how," and I think, for us, really "when" we will repeal don't ask, don't tell.

Am I right that what you're telling us today is that what (you're ?) going to do – as soon as possible, at least within 45, after 45 days – is to determine how you can reduce the impact of the don't ask, don't tell policy within the current state of the law? Is that correct?

SEC. GATES: Yes, sir. And the numbers – the numbers actually have gone down fairly substantially. They were about 600-and-some in 2008; 428 in 2009. And we don't know – I mean, we can't quantify what the possible changes that I've talked about here, what impact they would have on that. But at least it would – if we were able to do something I ke that, would make these folks less vulnerable to somebody seeking revenge, or whatever their motives, in terms of trying to wreck somebody's career.

SEN. LIEBERMAN: Am I correct – just to ask the question and get it on the record, that your judgment, as advised by counsel, is that it requires an act of Congress repealing don't ask, don't tell for the actual policy itself to be ended in the military? You can't do it by Executive action?

SEC. GATES: Yes, sir. That is correct.

SEN. LIEBERMAN: I wanted to ask you if – I'm sure one of the reactions to what you've announced today will be that this is a delay, I wanted to ask you to consider not only the 45-day limit, but whether you would think about providing regular reports to Congress, and, therefore, the public, on the program of the study that you're doing, during this next year?

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SEC. GATES: I don't see any reason why we can't do that.

SEN. LIEBERMAN: I appreciate that.

And, look, then the final, obviously, is that it's up to us in the Congress and in the Senate. We've got to – we've got to get 60 votes to repeal don't ask, don't tell, or else it will remain in effect. Thank you.

SEN. LEVIN: Unless there's a provision inside the Defense authorization bill; that goes to the floor, which would then require an amendment to strike it from the bill; in which case the 60-vote rule would be turning the other way. In fact –

SEN. LIEBERMAN: It is – (inaudible) – knowledge, but it is with great appreciation that I accept the higher wisdom – (laughter) – of the chairman of our committee.

SEN. LEVIN: (Laughs, laughter.)

SEN. LIEBERMAN: I think that's a great way to go.

SEN. LEVIN: That's on the record, everybody. (Laughter.)

SEN. LIEBERMAN: (Laughs.) Thank you.

SEN. LEVIN: Thank you, Joe.

Sen. McCaskill is next.

SEN. MCCASKILL: Thank you, Mr. Chairman.

I just want to make sure that we're crystal clear about a couple of things here. First, are gay and lesbian Americans currently serving in our military?

ADM. MULLEN: Yes.

SEN. MCCASKILL: And, in fact, isn't (it) the foundation of the current policy that we welcome their service?

ADM. MULLEN: Yes.

SEN. MCCASKILL: Are you aware of any morale issues or disciplinary problems surrounding the current service of gay and lesbian members – Americans, as members of our military?

ADM. MULLEN: Certainly not broadly.

SEN. MCCASKILL: Now, here's my – I think what you're embarking upon is important; I think it is welcomed, but here's my problem. We now have established that we have gay and lesbian Americans serving in the military; that they are not broadly causing any kind of disciplinary or morale problems; that we welcome their service.

So the issue isn't whether or not gay and lesbian Americans are serving in the military, it's whether or not we talk about it. So how are you going to get their input in this survey? (Applause.)

ADM. MULLEN: Oh, I'd, actually – I mean, my take on that is – well, hang on a second. (Laughs.) I think that we would have to look very carefully at how we would do that, specifically.

SEN. MCCASKILL: And that's the point I would like –

ADM. MULLEN: Yeah – (inaudible).

SEN. MCCASKILL: – to leave you with today, is that, unfortunately, because of this policy – we welcome their service –

ADM. MULLEN: Sure.

SEN. MCCASKILL: – they're serving bravely and well, we don't have any kind of issues with morale, and cohesiveness surrounding their service, but yet when it comes time to evaluate their service, they're not allowed to talk about it. And so you have a real challenge in getting perhaps maybe some of the most important input you may need as you consider this policy. And I'll be anxiously awaiting how you figure that one out.

ADM. MULLEN: Yes, ma'am.

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SEN. MCCASKILL: Thank you, Mr. Chairman.

SEN. LEVIN: Thank you, Sen. –

SEC. GATES: Well, one approach, Senator is to talk to those who have been separated.

SEN. MCCASKILL: And I think that's terrific. I think the ones who have been separated would be a great place that you can get good information. But I don't know that you're going to be able to get at those that are currently serving because, obviously, they're not going to be able to step forward and talk about it. But I agree, Secretary Gates, that's a great place, because so many of them voluntarily separated because of issues of integrity. Thank you.

SEN. LEVIN: Thank you, Sen. McCaskill.

Sen. Reed.

SEN. REED: Thank you very much, Mr. Chairman.

Mr. Secretary, I want to follow up on a point that Sen. Collins made. It's my understanding that both Canada and the United Kingdom have allowed gays and lesbians to serve openly – in the case of Canada, since the early '90s, and Great Britain since at least the early 2000.

They are fighting side-by-side with us today in Afghanistan. And, in fact, I would think that we would like to see more of their regiments and brigades there. Does that, I think, suggest, as Adm. Mullen mentioned before, that their combat effectiveness has not been impaired – and we've had the opportunity to work with them, you know, in joint operations; does that add credibility, evidence or weight to the discussions that you're undertaking?

SEC. GATES: Well, I think that it is clearly something we need to address. We need to talk to those countries' militaries in a more informal and in-depth way about their experience. I think that their experience is a factor. But I also would say that each country has its own culture and its own society, and has to be evaluated in those terms as well.

SEN. REED: I think one of the aspects you refer to in your prepared remarks is the, at least presumptive difference, in terms of the attitudes at differing ranks within the military. Is that something you can comment upon now? Have you done any research?

Or Adm. Mullen think on that, about the attitudes based on age, or based on other factors?

SEC. GATES: I think that really goes to the point of what – of what we, what we need to do in the months ahead. I think Adm. Mullen would agree that we don't know; we don't have information based on rank or anything like that.

ADM. MULLEN: Anecdotally, I mean, it would be my only comment, there really hasn't been any objective review of this and so I think it would too soon to comment, because actually, anecdotally, there are young people, NCOs, senior officers on both sides of this issue. And it gets to this strongly held views driving this as opposed to really understanding objectively what this policy change would mean.

SEN. REED: Let me ask a final question, which I think is implicit in your overall testimony. And that is, and this is rather simplistic, but there will be a decision and then there will be the implementation of that decision. I would assume that, at least in part, those have to be coordinated or referenced so that part of this discussion analysis going forward is not only a decision but it's also about how this policy would be implemented in a very detailed fashion. And that would be something that would be available to the Congress before they made the decision, or what's, can you comment at all about that aspect?

SEC. GATES: Let me just start by saying sure. And because one of the things that we will look at is, if there is a problem with unit cohesion, how would you mitigate it? How, through training or regulations or other measures, do you, if the Congress were to repeal the law, then how would we implement it, just as you say?

And part of our review process is, as we look at the different aspects of it, what are the problem areas that we're going to see, and how do we address those? And as I said in my statement, it's everything from base housing to various policies and regulations and so on. All of those have to be addressed.

ADM. MULLEN: For me, Senator it's the understanding the impact. It is then, in that

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understanding that speaks in great part to potential implementation, and that, then, really goes to the core of where I am on this, which is leadership. So I mean, understanding that, and they are integral to each other, impact and implementation, then says to me, Mullen, here's how you lead this. This is what you need to do to move through it, if the law changes.

SEN. REED: Thank you, Mr. Chairman.

SEN. LEVIN: Thank you.

Just briefly following up Sen. Reed's and Sen. Collins' point about other militaries, and Sen. Reed's point that our military is fighting side by side and with militaries who do not have a discriminatory policy against open service by gays. Have you noticed any impact on our troops who serve with Canadians or with Brits because of a British or Canadian policy that allows gays to openly serve? Admiral?

ADM. MULLEN: Since these wars started in 2003, it has not been brought to my attention that there's been any significant impact of the policies in those countries on either their military effectiveness or our ability to work with them.

SEN. LEVIN: All right. I have to make one comment on a suggestion that somehow or other, Admiral, you are simply following orders here of your commander in chief who's made a decision, in your testimony this morning. I think your testimony was not only eloquent, but it was personal, you made it very clear that you were reflecting your personal view, which you are obligated, under the oath you take, to give to us. We thank you for that.

And I thank you, not just because it happens that I agree with what you said, but more importantly because you were required to give us a personal view, and it was clear to me, and I think clear to most of us, that this was a view that you hold in your conscience and not giving to us because you were directed to by anybody, including the commander in chief. This statement of yours, in my judgment, was a profile in leadership this morning. It's going to take a great deal of leadership to have this change made. I hope it is.

The sooner the better, as far as I'm concerned, but with the kind of leadership that you've shown this morning, I think it's very doable, hopefully, in a short period of time. One other comment, and that has to do with what can be done in the interim. You're going to be looking at that without legislative change.

Secretary, it's my understanding that when service members are discharged under the Don't Ask, Don't Tell policy, with an honorable discharge, the DOD policy now is that they only receive half of their separation pay, which is authorized by statute. You're authorized to either give half or full pay. Would you take a look at that as something we can do in the interim here to indicate a greater sense of fairness about this issue? (Sounds gavel.)

You know you're sitting there quietly, Sen. Udall. I should have asked, do you have a final question? Okay.

I thank you both, it's been a long hearing this morning. We very much appreciate you, the men and women that serve with you and your families.

We will stand adjourned.

**THE EFFECTS OF INCLUDING GAY AND LESBIAN SOLDIERS
IN THE BRITISH ARMED FORCES: APPRAISING THE EVIDENCE**

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LCR 04706

I. EXECUTIVE SUMMARY

Like the U.S. military, the British Services is an all-volunteer force comprised of army, air force and navy contingents. Until January, 2000, when Britain lifted its gay ban following a ruling by the European Court of Human Rights, gay and lesbian soldiers were prohibited from serving in the British Armed Forces.

The first ten months of the new policy have been an unqualified success. The military's own classified, internal assessment at six months found that the new policy has "been hailed as a solid achievement" (Ministry of Defense, 2000e, p. 2). There have been no indications of negative effects on recruiting levels. No mass resignations have occurred. There have been no major reported cases of gay-bashing or harassment of sexual minorities. There have been no major reported cases of harassment or inappropriate behavior by gay or lesbian soldiers. There has been no perceived effect on morale, unit cohesion or operational effectiveness. The policy change has been characterized by a "marked lack of reaction" (Ministry of Defense, 2000e, p. 2).

The conclusions of the Ministry of Defense report have been confirmed by our conversations with more than twenty-five representatives from the military, academia, and non-governmental organizations. None of those interviewed know of any major problems associated with the policy change. No one has heard of any difficulties related to recruitment or training completion rates; recruitment levels are characterized as "quite buoyant."

None of those interviewed for this report have heard of cases of serious homophobic harassment. Open gay service personnel interviewed for this report and by other sources describe collegial treatment by their co-workers and other service members.

Experts in all fields acknowledged that more work remains to be done, and new obstacles could still emerge. Homophobic attitudes persist throughout the Services. It is possible that some problems will develop as more gay and lesbian service personnel acknowledge their sexual orientation to colleagues, or if the Armed Forces relaxes its vigilance against harassment and inappropriate behavior of all kinds. Issues of equality such as pension, accommodation and partnership rights have yet to be addressed. Still, concerns of dire consequences have been replaced by a general recognition that the transition has proceeded smoothly.

II. INTRODUCTION

Until January 12, 2000, the British Services maintained an official policy of discharging all known gay and lesbian soldiers.¹ It was felt that close living quarters and the stresses of military life precluded the inclusion of homosexual servicemembers; military commanders argued that “homosexual behavior can cause offence, polarize relationships, induce ill-discipline, and as a consequence damage morale and unit effectiveness” (Ministry of Defense, 1994, p.1). At the beginning of this year, the British Armed Forces ended its policy of excluding gay and lesbian soldiers. The change came as a result of a ruling by the European Court of Human Rights and after years of resistance by the Armed Forces to lifting the ban. Once the decision was announced, however, the Services quickly established a policy of nondiscrimination on the basis of sexual orientation. Instead, the social conduct rules were rewritten to prohibit sexual behavior, by both heterosexuals and homosexuals, that adversely affects operational effectiveness. Such misconduct includes, but is not limited to, sexual harassment, sexual contact with subordinates, and overt displays of affection between servicemembers. The new inclusive policy remains politically charged; even with the European Court decision, leaders of the Conservative Party have declared that they would reevaluate the policy if returned to majority status.

This report draws together military documents; press coverage; prior research on homosexual military issues; and interviews with military officials, academics, think tank and non-profit organization representatives, and sexual minorities presently serving in the military to provide an appraisal of the initial effects of the policy change. All available

¹ Original research and analysis conducted for this report were furnished by ELM Research Associates, an independent, non-partisan research consultancy.

information indicates that the removal of the ban has been a success in its first nine months. The military undertook its own internal review of the new policy six months after enactment and declared that the transition has been characterized by a “marked lack of reaction” (Ministry of Defense, 2000c, p. 2). The policy change has had no perceptible impact on unit cohesion, morale, or operational effectiveness. There is no indication of any discernible effects on recruiting, training completion or resignation rates. There have been no major problems of gay-bashing, harassment or sexual misconduct associated with the new policy. While the long-term consequences of the policy change remain to be seen, fears of upheaval within the military have largely been replaced with an awareness that the transition has proceeded smoothly.

III. METHODOLOGY

Information collected for this report was systematically gathered from publicly available primary and secondary sources relevant to an understanding of military outcomes associated with homosexual service in the British Armed Forces. Sources and methods included: identification, retrieval, and analysis of prior research bearing on homosexual service in the British military conducted by governmental, academic, and policy-focused organizations; content analysis of Lexis/Nexis search retrievals for all news articles and wire service dispatches relating to homosexual service in the British Armed Forces (n=101); interviews with present and former military officials (n=10); interviews with journalists and major academic, non-governmental, and policy observers familiar with gay-military issues in Britain or British military concerns generally (n=14);

and interviews with present and former sexual minority participants in the British Services who were located through snowball sampling (n=5²).

This report relies on a multi-method approach to compare and synthesize evidence provided by a variety of sources in order to draw conclusions. Whenever possible, independent observations from multiple sources are compared to draw out common findings that are consistent among observers in different sectors (e.g., military, academic, non-governmental). During the interview process, we also sought to ensure the broadest universe of sources by repeatedly asking expert observers from different sectors for recommendations of additional sources of information.

IV. POLITICAL AND CULTURAL CONTEXT

From 1864 to 1885, male homosexuality was illegal in Britain unless conducted in private and by consent. In 1885, the new offense of “gross indecency” criminalized all sexual activity between men, and male homosexuality remained wholly illegal until the passage of the 1967 Sexual Offences Act³. Female homosexuality was never similarly banned, purportedly because Queen Victoria refused to believe that lesbianism existed. In 1967, Parliament partially decriminalized gay sexual activity by legalizing private consensual sex between two men over the age of 21. Male homosexual sex with anyone under 21, in public, or between more than two men remained a criminal offense. The 1967 Sexual Offences Act also included an exemption for the Armed Forces, so that male

² This includes one former servicemember, Joan Heggie, who is also listed as an academic expert. Several other observers interviewed for this report are also former service personnel, but only Ms. Heggie was interviewed about her prior military experiences in addition to her present expertise.

³ The 1864 Sexual Offences Act was amended in 1885, when Henry Labouchère added a clause to the Criminal Law Amendment Act punishing “gross indecency” between males (Hansard, Col. 1397 + 1398). See Rayside (1998) and Hall (1995) for more information on the earlier legislation.

servicemembers could still be convicted for consensual homosexual sex of any kind (Rayside, 1998; Harries-Jenkins and Dandeker, 1994).

Although British attitudes towards homosexuality have become more tolerant over the last twenty-five years⁴ (Scott, 1998), polling data reveal continued widespread discomfort with sexual minorities. A 1994 study found that a majority of British respondents felt sex between members of the same sex is always wrong⁵ (cited in Hayes, 1997). The British public also continues to be conservative about issues such as gay and lesbian public school teachers and adoption by homosexuals (Hayes, 1997). The data does, however, show greater tolerance of sexual minorities in other areas. Polling on the age of sexual consent revealed that approximately 75% favored equality in principle, although less than 20% specifically supported changing the age of consent to sixteen (Rayside, 1998). With respect to the issue of homosexual service in the military, a 1999 Stonewall poll found that approximately 70% of Britons opposed the ban on homosexual soldiers, with a majority in every class and party in favor of inclusion of gays and lesbians in the military (Norton-Taylor, 1999)⁶.

Homosexuality has been the subject of fierce skirmishes between the Conservative and Labor parties, and between religious leaders and gay rights advocates, for more than a decade. The passage in 1987 of Section 28, a law that bans local authorities from promoting the acceptability of homosexuality in schools, became a

⁴ There is conflicting data about British attitudes toward homosexuality. Some attitudinal surveys have shown a gradual liberalization between 1985 and 1989, followed by a stabilization in public attitudes (see Hayes (1997)), while others suggest increases in disapproval between 1983 and 1987 followed by decreases in disapproval, with a particularly marked (more than 15%) change among British women (see Scott (1998)). Rayside (1988) notes that Britain was one of only two countries in Europe and North America where attitudes had become more negative during the 1980s. See also RAND (1993).

⁵ The original study was conducted by Wellings et al (1994). See Hayes (1997) for more detail.

⁶ See also Hall (1995b) for a discussion of British attitudes on homosexual service in the military.

catalytic force for supporters of expanded gay and lesbian rights (Rayside, 1998)⁷. After considerable pressure by the gay-rights groups Stonewall and Outrage!, the age of consent for homosexual sex was decreased from 21 to 18 in 1994; this new minimum was, however, still higher than the age of 16 for heterosexual consent (See Majendie, 1995). The Labor Party, which presently holds power, has long supported the inclusion of sexual minorities in the military and expanded rights for homosexuals (Rayside, 1998). The Labor government has been working on a code that will instruct employers to grant homosexual partners the same rights to health care, travel benefits and relocation allowances as heterosexual married couples (Sylvester, 2000; Sylvester, 2000a). The government has also been trying unsuccessfully for more than a year to repeal Section 28 (See Jones, 2000; Jones, 2000a; and Britton, 2000).

Until the Human Rights Act⁸ went into effect in October 2000, Britons were not protected by a set of enumerated fundamental human rights similar to that provided by the U.S. Bill of Rights. British citizens looking for judicial redress for governmental human rights violations had to pass what is known as the “Wednesbury test”, which mandated that courts could only overrule a governmental action if it “outrageously defies logic or accepted moral standards” so that “no sensible person who had applied his mind to the question could have arrived at it” (cited in The Lawyer On-Line, 1995). In practice, the Wednesbury test proved to be an extremely difficult hurdle to overcome. Since Britain was a signatory of the 1950 European Convention on Human Rights, British citizens could also take human rights complaints before the European Court of

⁷ See also Jones (2000).

⁸ For more information about the Human Rights Act, see Shaw (1999), Shrimley (1999), and Booth (2000).

Human Rights⁹. They could only do so, however, after exhausting all British channels, including the High Court, the Court of Appeals, and the House of Lords¹⁰¹¹. While the European Convention on Human Rights does not explicitly include sexual orientation, it has been interpreted expansively to encompass the rights of sexual minorities¹².

V. A HISTORY OF BRITAIN'S MILITARY POLICY CONCERNING SEXUAL MINORITIES

Like the U.S. military, the British Services is an all-volunteer force comprised of army, air force and navy contingents¹³. Military conduct is governed by the Queen's Regulations, which are reviewed by Parliament every five years (RAND, 1993). The British military includes approximately 211,000 soldiers; 7.9% of the officers and 5.4% of the enlisted soldiers are women. During the 1980s and early 1990s, women became more fully integrated into the British military. Women are employed in all corps except armor and infantry, although they are not permitted beyond the second echelon of brigade in combat. Women are allowed to serve at sea in most of the surface specialties, although they cannot work on small vessels such as submarines (Dandeker, 2000).

⁹ For the actual text of the European Convention, see Convention for the Protection of Human Rights and Freedoms (1950).

¹⁰ The opinions of the Strasbourg court are not strictly binding, but in practice Britain has always complied with its decision. Failure by the British government to uphold the rulings of the European Court could result in Britain being expelled from the Council of Europe; participation in the Council is mandatory for all countries in the European Union. See Cullen (1999).

¹¹ In 1998, Parliament passed the Human Rights Act, which incorporated the rights enumerated under the Human Rights Convention into British law. This meant that human rights protected under the convention would be enforceable for the first time in British courts, and that British citizens could invoke the protections in the European Convention without having to go to the European Court of Human Rights (See Shaw (1999a); Shaw and Shrimley (1997); Shrimley (1999); and Booth (2000)).

¹² See Rayside (1998) and Shaw and Jones (1996) for discussions of earlier European Court and European Parliament decisions. The European Court of Human Rights recently also ruled that the section of the 1967 Sexual Offenses Act that circumscribed consensual male homosexual sex was unlawful (Laville, 2000).

¹³ The Royal Marines serve under the Royal Navy.

Like most of its NATO allies, the British military has faced conflicting pressures since the end of the Cold War. Troop strength has been reduced by 30%, and the percentage of GDP devoted to defense decreased from 5.2% in 1984-85 to approximately 2.8% in 1997-98¹⁴ (Dandeker, 2000). At the same time, the scope of peacekeeping missions has expanded considerably, and the Armed Forces has had to prepare itself for a wider variety of operations due to changing defense roles. The British Services has also faced recruiting shortages since 1992 (Tweedle, 2000)¹⁵. The military has responded to these constraints in part by developing a recruitment initiative, increasing the use of reserves and by civilianizing and outsourcing some jobs previously performed by soldiers (Dandeker, 2000; Kirkbride, 1996).

Until January 2000, gay and lesbian soldiers were prohibited from serving in the British Armed Forces. Prior to 1967, British civil and military law were congruous with respect to male homosexuality – sodomy was illegal, and both civilians and soldiers could be imprisoned for homosexual activity. The 1967 Sexual Offences Act decriminalized gay male sex for civilians, but it included an exemption that allowed the British military to continue to prosecute servicemembers engaging in gay sex (Rayside, 1998; Harries-Jenkins and Dandeker, 1994). Gay soldiers could also be administratively discharged from the Services. While civil law did not cover same-sex female sex, however, the military was able to discharge lesbians under the offense of general misconduct¹⁶. Offenses for homosexuality were usually charged as “disgraceful conduct

¹⁴ This figure is based on 1995 estimates. See Dandeker (2000).

¹⁵ See also Smith, (2000); Smith, (2000a); and Schofield, (2000)

¹⁶ Because lesbian soldiers were not guilty of any crime under British statutes, they did not receive legal protections such as the right to counsel in their defense (Heggie, Personal Communication, October 2, 2000).

of an indecent kind”, “conduct prejudicial to good order or discipline”, or more rarely “scandalous conduct by officers” (Harries-Jenkins and Dandeker, 1994).

In the wake of considerable Parliamentary debate on the subject during discussions about the 1991 Armed Forces Bill, the government acknowledged that the military exemption from the 1967 Sexual Offenses Act was no longer justifiable. In June 1992, the Ministry of Defense (MOD) announced an administrative order to immediately halt criminal prosecution for sexual activities that were legal for civilians under the 1967 act. The British restricted court-martials for homosexuality to those male servicemembers who were found to have had sex in public or with anyone under the age of 21. The legislative reconciliation of military and civilian law occurred later with the passage of the 1994 Criminal Justice Act. The military persisted in maintaining, however, that both male and female homosexuality were incompatible with military service. Gay and lesbian soldiers continued to face discharge if their sexual orientation was discovered (Harries-Jenkins and Dandeker, 1994).

Figures for the number of gay and lesbian service members discharged while the ban was in place vary among sources. Estimates range between 60 and 100 each year between 1988 and 1995¹⁷. Harries-Jenkins and Dandeker report that 296 service members were administratively discharged between 1988 and 1992, while an additional 39 soldiers were dismissed following conviction for an offense involving homosexuality during the same period (Harries-Jenkins and Dandeker, 1994, p. 193)¹⁸¹⁹. When factoring

¹⁷ See Davies (1992); Campbell and Wharton (1995); Beaumont and Mcsmith (1995); O’Kelly (1995); Guardian (1995); Majendie (1995); Davies (1997); Macklin (1999); Cullen (1999).

¹⁸ Harries-Jenkins and Dandeker report the following conviction rates by Service: 9 in the Navy, 22 in the Army, and 8 in the Air Force.

¹⁹ Discharge figures for earlier periods are not available, because the Ministry of Defense did not keep track of such statistics (Hall, 1995). See also Hall (1995a).

in servicemembers who left without being discharged, Evans surmises that as many as 150 soldiers departed the military each year due to the policy on sexual orientation (Evans, 2000). Because the British Services did not keep statistics about the cost of the policy, no definitive figures exist about the fiscal impact of the ban on sexual minorities. Using GAO figures for the U.S. and extrapolating them to the British case, Edmund Hall estimated that the restrictive policy cost the British military L40 to 50 million between 1990 and 1995 (Hall, 1995)²⁰.

Prior to 1994, the Royal Navy was the only branch of the Armed Forces that maintained specific guidelines related to homosexuality²¹; the other Services dealt with homosexuality through general regulations. The Navy's guidelines provided the following instructions for medical officers when dealing with suspected gay or lesbian personnel:

...homosexuals are often a source of sexually transmitted diseases ... Tears and stains, particularly of the underpants, trousers and shirt, should be examined and, if available, an ultra-violet light should be used to screen the clothing, bearing in mind that semen is not the only substance which fluoresces under UV light. (cited in Hall, 1995, p. 75)

The guidelines also suggested that investigators seek to determine “whether the man may have played the passive role” and recommended that the agent “look for feminine gestures, nature of clothing and use of cosmetics” (Hall, 1995, p. 76).

²⁰ The U.S. GAO figures are based on training replacement costs and do not include the administrative costs of investigation and discharge. See GAO (1992).

²¹ Army and Air Force commanders discharged homosexual servicemembers under Section 64 (Disgraceful Conduct by Officers), Section 66 (Disgraceful Conduct of an Indecent Kind), and Section 69 (Conduct Prejudicial to Good Order and Service Discipline) of the 1955 Army and Air Force Acts, while the Royal Marines used Sections 36, 37 and 39 of the Naval Discipline Act of 1957. Royal Navy regulations, which were enforced at least until 1992, lumped together homosexuality with transvestism, sadism, masochism and ‘other forms of sexual deviancy’ (cited in Hall, 1995, p. 75).

In 1994, the Ministry of Defense issued Service-wide regulations concerning homosexual soldiers. The new regulations maintained the policy of barring homosexual service, but they standardized policy and provided more detailed protocol. Any recruit who admitted to being gay would not be allowed to enlist, and any servicemember who was discovered to be homosexual would be discharged from the military. Homosexual sex between adults of consensual age would not be considered a criminal offense, but the military could prosecute a gay or lesbian soldier for otherwise consensual sex if “the act was to the prejudice of good order and Service discipline”²² (Ministry of Defense, 1994, Annex 2). All recruits were to be informed that homosexuals were not allowed to serve in the British Armed Forces. The 1994 policy made it clear that homosexual orientation as well as homosexual behavior would be a bar to enlistment and service:

Even if a potential recruit admits to being homosexual, but states that he/she does not at present nor in the future intend to engage in homosexual activity, he/she will not be enlisted. (Ministry of Defense, 1994, p. 2)

The 1994 policy also included instructions for medical officers²³ in dealing with homosexual service personnel. The guidelines informed medical officers that “homosexuality is not in itself a medical condition” and “intimate examinations are not indicated purely on the grounds of homosexuality” (Ministry of Defense, 1994, Annex A). The medical officer was to be consulted to confirm the orientation of a professed homosexual, to advise commanders in dealing with cases of homosexuality, and to insure the emotional stability of the soldier in question. If a gay or lesbian soldier was referred to the medical officer after his or her sexual orientation was already known, the health

²² The instructions list this as an example only, leaving room to prosecute servicemembers on other grounds as well. See Ministry of Defense, 1994, Annex 1.

²³ The instructions applied only to those with a ‘medical qualification’. Nurses and medical assistants were not to undertake any form of examination of a gay or lesbian soldier; they instead were to refer all such cases to medical officers ‘as a matter of urgency’ (Ministry of Defense, 1994, Annex A).

practitioner's job was to "assess the individual's physical and mental wellbeing, including the need for onward referral to specialist services if required" (Ministry of Defense, 1994, Annex A). The Ministry of Defense recognized that revelation of one's homosexual orientation could be psychologically devastating in the context of the military's ban on sexual minorities:

The Medical Officer should remember that 'coming out', [sic] can be highly stressful, particularly because of the prospect of the loss of a career, and attention should be paid to assessment of the individual's mental state since some individuals are vulnerable to thoughts of self harm at this time. (Ministry of Defense, 1994, Annex A)

The military's need for information about gay and lesbian soldiers did, however, outweigh any medical confidentiality rules. If a soldier's sexual orientation was already known and the purpose of an interview was therefore not to establish sexual identity, the medical officer might still be required to discuss the "health and psychological development" of the soldier with a commanding officer (Ministry of Defense, 1994, Annex A). While the medical officer was advised to obtain the consent of the servicemember, disclosure would be expected even if consent was not procured. If a servicemember was acknowledging his or her orientation for the first time, the individual was to be informed that:

...notwithstanding medical confidentiality, the Medical Officer has a duty to report to the Commanding Officer any information relating to a serious offence or matters which might adversely affect the health, security or discipline of the unit. If the Medical Officer is satisfied that the individual is experiencing homosexual feeling then it would be most unusual not to discuss the matter with the Commanding Officer (again if possible having obtained the individual's consent). (Ministry of Defense, 1994, Annex A)

Commanding officers could handle cases of suspected homosexuality with their own staff or through official investigatory channels (Ministry of Defense, 1994, Annex

A). Military investigations were conducted by each service's police forces: the Royal Military Police (RMP) and Special Investigating Branch for the Army, the RAF police and Security Services (P&SS) for the Air Force, and the Royal Navy's Regulating Branch and Special Investigating Branch (SIB). Investigations could include undercover surveillance, lengthy questioning, medical examinations, and searches through personal materials to uncover information about other homosexual soldiers (Hall, 1995).

Former servicemember Joan Heggie experienced investigations for suspected homosexuals as both a military policewoman and a target of investigation. She describes common tactics used during her tenure with the British Army in the late 1970s and early 1980s:

The MPs conducted raids in the middle of the night to women's barracks to "catch people in the act". The military police would gain access to the garrison with the permission of the commanding officer. Nine out of ten times the commanders would give permission, because they wanted to show that they were not accepting of lesbianism. The MPs would bring dogs and say they were looking for drugs, even though drugs were not a major problem in the early 80s. They would look under beds, in wardrobes and even out windows to make sure that no one was hiding there. I've been told that some MPs who really had a thing about homosexuality, particularly with women, would keep information on people on an index card and build up a record. If they came across information that corroborated what they had heard earlier, even if it was years later, they would target that person for investigation²⁴. (Personal Communication, October 3 and 16, 2000)

Heggie added that, in such a restrictive environment, "Every day I woke up thinking 'Today might be the day that I get kicked out'" (Personal Communication, October 3 and 16, 2000). Other former service personnel have told of the military using information from blackmailers, staking out local gay

²⁴ Heggie added that if this report of information-gathering is true, keeping such information was illegal. Under British law, you cannot keep personal information about someone without his or her knowledge (Personal Communication, October 3 and 16, 2000).

bars and pubs, asking detailed and embarrassing questions about sexual practices in interrogations, and even recommending shock aversion treatment (Nunn, Personal Communication, October 17, 2000; O’Kelly, 1995; Mills, 1995; Hall, 1995).

Ministry of Defense officials in told journalist Edmund Hall in 1995 that they did not believe the police routinely carried out surveillance of gay and lesbian establishments. They did, however, acknowledge that individual surveillance probably occurred. One Ministry of Defense official declared:

Policemen are very difficult to control. . . . If you tell me that this kind of surveillance is taking place then it’s beyond the call of duty. Policemen have got to have their own agenda. (Hall, 1995, pp.78-79)

General Sir Charles Guthrie, Chief of the Defense Staff, admitted at the time of the removal of the ban that military police investigations of suspected gays and lesbians sometimes “went too far” and expressed regret at the way some interrogations had been carried out (cited in Evans, 2000). The European Court of Human Rights also condemned the investigations of the plaintiffs as “exceptionally intrusive” in their ruling against the Ministry of Defense (Evans, 2000).

The British Armed Services’ exclusion of homosexuals from service, even after gay sex was decriminalized by Parliament in 1967, stemmed from the conviction that the unique conditions and objectives of the military precluded behavior that was acceptable in civilian life. Defense Minister Nicholas Soames commented in 1996 that:

The view of the service chiefs and of Ministers is not based on any moral judgment but on the impracticality of homosexual behavior, which is clearly not compatible with service life. (The Lawyer Online, 1996)

Military commanders argued that the sacred duties of the Armed Forces - to protect the nation from harm and to advance Britain's interests even at the expense of loss of life - necessitated considerable caution when advocating changes in military organization or the composition of personnel. The inclusion of gay and lesbian soldiers was viewed as social engineering that could damage the integrity of military units.

The unique conditions specified by military officials included cramped living conditions, same-sex facilities and the dependence on one's comrades in life-threatening situations. Given extended excursions at sea and on foreign missions, military personnel often live under conditions of minimal privacy. First Sea Lord Admiral Sir Jock Slater declared in 1995 that:

Everyone who joins the Navy is committed to going to sea and therefore there is no question of 'it is acceptable ashore but not at sea'. I then look at the conditions at sea, where relatively they are cramped, they are crowded; it can be tough, it can be stressful. (Weale, 1995, p. 1)

Military leaders argued that the intimacy of living together in same-sex barracks, showering together, and sharing toilet and washing facilities made homosexual service impractical (see The Lawyer Online, 1995). They further contended that heterosexual servicemembers would feel uncomfortable showering or sleeping next to a homosexual soldier.

British commanders also asserted that the friction that could arise between gay and lesbian soldiers and their heterosexual colleagues would undermine morale and unit cohesion and even threaten the success of its operations. Soldiers need to depend on their comrades in life-threatening situations. Commanders argued that the introduction of distrust or ill-will among individuals within a unit due to differences in sexual orientation

could have disastrous consequences on the effectiveness of that unit. Defense Minister

Archie Hamilton argued during a 1991 debate in Parliament:

[B]oth homosexual activity and orientation are incompatible with service in the armed forces. The main reason centers on the need to maintain discipline and morale. The services are hierarchical, close knit [sic] overwhelmingly single sex and young communities. Units can work to full effectiveness only on the basis of mutual trust and the expectation of equal treatment among each rank. The formation within these units of sexually motivated relationships are potentially very disruptive of discipline and morale, particularly when they cross rank boundaries. (cited in Harries-Jenkins and Dandeker, 1994)

The 1994 regulations regarding homosexuality explicitly included concerns about operational effectiveness as well:

Homosexuality ... is considered incompatible with service in the Armed Forces. This is not only because of the close physical conditions in which personnel often have to live and work, but also because homosexual behavior can cause offence, polarize relationships, induce ill-discipline, and as a consequence damage morale and unit effectiveness. (Ministry of Defense, 1994, p.1)²⁵

Much was also made of the need of the military to protect its youthful servicemembers from the danger of homosexual sexual predators. One third of the British Armed Forces recruits in the mid 1990s were under the age of eighteen. Military officials argued that removal of the ban would result in “sexual exploitation by older, more senior, personnel” (cited in Harnden, 1996). Not only did the service chiefs feel they had a duty to protect the minors in their care, but they also worried that the potential for sexual abuse could also jeopardize recruitment among young men and women²⁶. Air Chief Marshal Sir John Willis warned in 1995 that “the confidence both of young people to join the Armed Forces, and their parents to permit them to join the Armed Forces, would be seriously damaged” (The Lawyer Online, 1995).

²⁵ See also Copley (1996) and Shrimley (1996) for further justifications of the ban.

²⁶ See also Mills (1995).

VI. COURT CASES CONCERNING THE ARMED FORCES' BAN ON SEXUAL MINORITIES AND THE MILITARY'S RESPONSE

In 1994, four servicemembers discharged for homosexuality began a legal challenge in British courts against the military's ban on gay and lesbian soldiers. Lawyers for the servicemembers invoked the Wednesbury doctrine and the European Convention on Human Rights to argue that the privacy rights of the soldiers had been violated. The former service personnel included: Lt. Cdr. Duncan Lustig-Prean, a former naval supply officer; Sgt. Graeme Grady, a former RAF intelligence officer; Jeanette Smith, a former RAF nurse; and John Beckett, a former naval weapons engineer on a nuclear submarine. Their case was backed by Stonewall, a British gay and lesbian rights group.

The four plaintiffs had excellent military records and many years of service between them (see Lyall, 1999). Lieutenant Commander Lustig-Prean maintained an 'exemplary' service record of fifteen years (Hicklin, 1995). He was about to be appointed a military advisor to John Major when he was discharged after reporting a blackmail attempt. Sergeant Grady, the married father of two children, was the chief clerk at the British defense intelligence liaison office in Washington, D.C. and had high security clearance. He was released after he was seen attending a counseling group for gay married men (Agence France Presse, 1999; Guardian, 1999). Smith, an RAF nurse for five years who had been recommended for promotion four times, was dismissed after an anonymous caller informed her superiors of her relationship with a civilian woman (Booth, 1999; Guardian, 1999a). During her interrogation, Smith was asked if she had ever had sex with her partner's adolescent daughter, whether she used sexual appliances

during sex, and who was the dominant sexual partner in her relationship (Agence France Presse, 1999). Beckett was a potential officer candidate. He was released from service after disclosing his relationship with a civilian man to his chaplain, who encouraged him to tell his commanding officer. It was his only gay relationship. Beckett alleges that the Royal Naval psychiatrist suggested electric shock aversion therapy (Mills, 1995).

In June 1995, the High Court ruled against the discharged service members on the grounds that the British courts did not have the authority to invoke the European Convention on Human Rights. Justices of the High Court signaled, however, that the policy was unlikely to withstand judgement by the European Court. Lord Justice Simon Brown declared at the time that “the tide of history is against the Ministry”, and “so far as this country’s international obligations are concerned the days of this policy are numbered” (cited in *The Lawyer On-Line*, 1995). Britain’s Court of Appeals upheld the High Court’s decision in November 1995 (Majendie, 1995)²⁷.

In response to the High Court’s warning that the ban would likely be overturned by the European Court, the Ministry of Defense assembled the Homosexual Policy Assessment Team (HPAT) in 1995 to appraise the existing policy and determine if changes were needed (Butcher, 1995). The HPAT report²⁸, which was released in 1996, included survey data from servicemembers and analyses of the military policies toward sexual minorities in Australia, Canada, Israel, the Netherlands and the U.S. A month before the release of the report, an insider leaked to journalists that the HPAT committee would propose a compromise policy that would permit individuals with a homosexual orientation to serve while continuing to prohibit homosexual contact between

²⁷ For details on the appeals case, see Butcher (1995a).

²⁸ See Ministry of Defense (1996).

servicemembers. A source close to the committee commented, “We are looking to take some of the heat out of the issue. We need to make some changes while respecting the strong feeling in the Services” (Gilligan, 1995, p.1). But the source also acknowledged that the proposals were provisional and could be changed (Gilligan, 1995). By the time the report was released in February, the committee did in fact recommend the continued prohibition of homosexual service.

The HPAT report argued that lifting the ban on homosexual soldiers would be an “affront to Service people” and would harm fighting efficiency. The report maintained that while “evolving social attitudes towards homosexuality” might induce further review, “it may equally be that the permanent features of the military environment are such that it will never be possible to integrate homosexuals” (cited in Harnden, 1996). The report evoked the unique demands of military life to justify restrictions not necessary in civilian life, declaring: “No other employer sends its employees out in disciplined teams to kill and be killed”. Ending the ban would likely lead to “heterosexual resentment and hostility” and would be viewed by military personnel as “coercive interference in their way of life” (cited in Harnden, 1996).

The HPAT report also included an attitudinal survey of 13,500 servicemembers. 80% of those surveyed felt that the ban should continue indefinitely, while only 5% felt the ban should be lifted immediately. Only 3% believed that the Armed Forces would be a more comfortable environment if gays were accepted; 84% disagreed (Copley, 1996; Bowcott, 1996). Opposition to a more relaxed policy was strongest in the Army and weakest in the Air Force (Harnden, 1996), and women were less resistant than men to removal of the ban (Shrimley, 1996). Greater hostility toward male homosexuality than

to lesbianism was also reported (Bowcott, 1996). More than two-thirds of the men felt that admitting gay and lesbian soldiers would damage recruiting, and a similar amount said they would not willingly serve under those circumstances (Shrimpsley, 1996). Some complaints about bias in the survey and the methodology were, however, registered at the time (Bowcott, 1996; Bowcott, Stewart and Zinn, 1996).

In addition, the committee received 639 letters about the policy; 587 of those received, or 92%, opposed changing the regulations (Bowcott, 1996). The letters included comments like those expressed by a warrant officer in the Royal Marines who said, “Men don’t like taking showers with men who like taking showers with men”, and those from a senior aircraftsman who warned that, “Homosexuals would definitely get beaten up” (cited in the Daily Telegraph, 1996). A lieutenant in the Royal Marines argued that:

We do not want a citizen army with the same weaknesses as Continental forces. The role of British Forces is to mount successful operation as directed, not to be a medium of social change. (cited in the Electronic Telegraph, 1996)

However, not all of the comments were negative. For example, one lieutenant in the Army wrote, “When I go to war, I would rather have alongside me a guy [sic] who shoots straight, than a straight who shoots crooked” (cited in the Daily Telegraph, 1996).

The committee’s recommendation for the continuation of the ban came even though “...committee members who visited foreign armed forces, most of which permit homosexuality, were told that the admission of gays had made little practical difference to operational efficiency” (Gilligan, 1995). This view was reinforced by the comments of a Canadian officer who said that British researchers told him that, “We believe we could change our policy, based on your experience, and what we heard in terms of candid

comments from former commanders” (Belkin and McNichol, 2000). The British team also told the CF official, however, that they did not believe a more inclusive policy would be politically feasible in Britain at that time²⁹.

A legal advisor for the Ministry of Defense also warned military officials that the British Forces were likely to lose their case with the European Court of Human Rights, and that they would have a better case if they “mov[ed] to a compromise solution, eg. [sic] no open homosexuality” (cited in *The Lawyer Online*, 1996a). But the armed forces minister and the three service chiefs of staff were said to strongly support a continuation of the exclusion of homosexuals (Bowcott, Stewart and Zinn, 1996; Copley, 1996). Instead, defense ministers ordered a relaxation of the ban, which Armed Forces Minister Soames described as the “softly softly” approach (Gilligan and Wastell, 1996). Military police were instructed not to actively search for gay and lesbian soldiers; they were only to act if a problem was drawn to their attention. The defense ministers also made it clear that overzealous investigation, surveillance and harassment would no longer be tolerated (Gilligan and Wastell, 1996)³⁰.

Despite the recommendations of the HPAT report and the relaxed approach, it appears that over the next three years ministers and service chiefs behind the scenes were adjusting to the possibility that they would lose the case of the former servicemembers in the European Court of Human Rights (ECHR) (Sylvester and Thomson, 1998; Carrell, 1999)³¹. The Defense Minister announced in 1998 that the ban “in principle” should be

²⁹ Researchers for this report were unable to reach MOD employees who worked on the HPAT recommendations and could therefore not verify this assessment.

³⁰ See also Johnston (1997) and *The Observer* (1997) for further details of the MOD review.

³¹ Parliament upheld the ban on homosexuals in May, 1996 (Hibbs and Millward, 1996). The Labor Party announced the same month that it would accept a ruling from the European Court of Human Rights overturning the ban if it formed the next government (Hibbs, 1996).

lifted, and Rank Outsiders reported the same year that they were consulted on a draft code of conduct for all military personnel, heterosexual and homosexual (Gilligan, 1998). In a related case, the European Court ruled in July 1999 that discrimination against transsexuals fell under the definition of “sex discrimination” in the European Convention. The ruling undermined part of the Armed Forces’ defense in the European Court case, which, in accordance with the British Sex Discrimination Act, argued that neither transsexuals nor homosexuals suffered from sex discrimination as long as transsexuals or homosexuals of both sexes were treated identically. On August 2, 1999, it was reported that transsexuals would henceforth be permitted to serve in the Armed Forces (Davies and Jones, 1999). The decision was criticized by the Conservative shadow defense secretary, Iain Duncan-Smith, who accused the Government of having a “politically correct agenda” and seeking to “end by stealth” the ban on homosexual service (Jones, 1999). The Ministry of Defense continued to discharge homosexual service personnel, however, and the last gay servicemember was dismissed from the Armed Forces on September 24, 1999 (Norton-Taylor, 1999).

On September 27th, the European Court of Human Rights ruled unanimously that the ban on homosexual military service violated the privacy rights of the plaintiffs. The seventy cases being investigated by the Armed Forces were immediately put on hold (Norton-Taylor, 1999a; Cullen, 1999)³². Civil servants suggested that a new code of conduct could be put in place earlier than 2001, presumably because considerable work had already been done on it. The Conservative Party signaled that it might try to overturn the policy change if it were returned to power (Shrimley, 2000).

³² For greater detail about the ruling and the military’s response, see Norton-Taylor and Dyer (1999) and Butcher (1999).

A week after taking office, the new Secretary of State for Defense Geoffrey Hoon set aside “at least £4m” to cover pending compensation claims by homosexual ex-servicemembers (Syal and Gilligan, 1999). The more important question, however, was what model to choose for the new army regulations. There was considerable opposition from both gay groups and services chiefs to basing the regulations on the American model, which was seen as “a disaster”; services chiefs saw the Dutch and Israeli options as “too liberal” (Sparrow, 1999). Stonewall recommended the Australian regulations, which bans heterosexual and homosexual public displays of affection, as a possible model (Waugh, 1999). In mid-December, Hoon announced that the new code would be published the following month, and that it would govern “sex not sexuality” - a reference to the Australian rules.

With respect to the model that was chosen, Michael Codner of the Royal United Services Institute explained:

I think both sides of the debate saw “Don’t Ask, Don’t Tell’ as something which hadn’t worked, which was unworkable and hypocritical. The internal advice given to service chiefs by the civilian civil service was in favor of another model.

...But the Australian model was pushed strongly by Australian service chiefs. Their defense attaches were also very proactive in pushing the success of the Australian option. And I think the British service chiefs saw some logic to it. The two forces have a similar structure and ethos. (Personal Communication, September 26, 2000)

On January 12th, the Secretary of State for Defense announced the lifting of the ban to the Commons. He declared that the European Court judgement made the ban “not legally sustainable” and proclaimed that a new code of conduct governing personal relationships, based on that of the Australian armed forces, would be introduced. No legislation was required to effect this change, which went into effect immediately.

Discharged homosexuals were also invited to reapply for their jobs (Waugh, 2000). Shadow Defense Minister Iain Duncan-Smith voiced “regret”, and he said that if the Conservatives won the next election they would review the decision and allow military chiefs to decide (Waugh, 2000). On that day a sailor became the first homosexual servicemember to come out openly to colleagues (Fleet, 2000).

Since the January 2000 decision, the enactment of the Human Rights Act in Britain has resulted in the replication of the European Court decision by a domestic court. A former RAF officer won an employment tribunal appeal against the Ministry of Defense in September, after it was ruled that the officer suffered sex discrimination in his dismissal for homosexuality (Robertson, 2000). The original plaintiffs in the European Court case were also awarded more than L400,000 as compensation for loss of future earnings, the emotional and psychological impact of the investigations, and court costs (Dyer, 2000; BBC News, 2000). A number of other suits are presently pending.

VII. BRITAIN’S PRESENT POLICY CONCERNING SEXUAL MINORITIES

In their development of a new policy, the Ministry of Defense emphasized the need for: 1) compliance with the ECHR ruling, 2) regulations that were non-discriminatory; 3) the preservation of operational effectiveness, 4) accordance with the general requirements of the military, and 5) protection of individual rights under the Human Rights Act (Ministry of Defense, 2000). Homosexuality is no longer a bar to military service. Gay and lesbian soldiers are not, however, eligible for married accommodations, spousal pension or other partnership rights. In addition, a code of social conduct establishes rules of behavior that apply equally to heterosexuals and

homosexuals. Soldiers, regardless of sexual orientation or sex, are prohibited from engaging in social behavior that undermines, or may potentially undermine, the trust and cohesion, and therefore the operational effectiveness, of the Services. Enumerated inappropriate behavior includes: unwelcome physical or verbal sexual attention, overfamiliarity with the spouses of other service personnel, displays of affection which might cause offense to others, taking sexual advantage of subordinates, and behavior which damages the marriage or personal relationship of other service personnel. The code of conduct further covers other types of “social misbehavior” that have not been enumerated. Discretion is left up to the commanding officer to determine if behavior constitutes a threat to the cohesion of the unit or the military command chain. Abuse of authority, trust or rank, or taking advantage of a person’s separation, are deemed particularly serious types of misconduct (Ministry of Defense, 2000a)³³.

The new guidelines for social conduct are general and involve considerable discretion. The code therefore provides a “service test” for commanding officers to use in their assessment of the need to “intervene in the personal lives of personnel” (Ministry of Defense, 2000a, p. 1). Commanding officers must consider each case in light of the following question:

Have the actions or behavior of an individual adversely impacted or are they likely to impact on the efficiency or operational effectiveness of the Service? (Ministry of Defense, 2000a, p. 1)

In the event of an affirmative answer, commanders are instructed to take prompt and decisive action to minimize damage to the effectiveness of the unit. If the misconduct is sufficiently serious, commanders may institute immediate administrative or punitive action. Such action may include a formal warning, official censure, the posting of the

³³ See also *The Star Tribune* (2000), Reid (2000), and *The New York Times* (2000).

parties involved, or other disciplinary action. If the behavior is sufficiently serious, or if the servicemember has a history of social misconduct, termination of service may occur (Ministry of Defense, 2000a).

The Ministry of Defense also issued guidelines and speaking notes for commanding officers to help them explain and enforce the new policy. The speaking notes emphasize that the lifting of the ban brings the Armed Forces into greater concordance with the general society. A person's sexual orientation is to be considered a private matter, and every servicemember has a right to personal privacy. The speaking notes exhort service personnel to "[r]espect that right, and do not try to make their private business your concern" (Ministry of Defense, 2000c, p.2) Commanders were further advised to stress the continuity of the policy:

This change is not a major issue, and you should not make it into one. There have always been homosexuals serving in the Armed Forces. We do not expect that this change will result in a significant increase in the number of homosexuals coming into the Service. (Ministry of Defense, 2000c, p.2)

Continuity is emphasized with respect to the new code of social conduct as well. The speaking notes explain that the code "largely reflects existing policies" and "does not mean a tightening up on heterosexual relationships" (Ministry of Defense, 2000c, p. 2)

The notes for commanding officers state that their actions should be guided by the following principles:

- a. Sexual orientation is regarded as a private matter for the individual.
- b. Knowledge of an individual's sexual orientation is not a basis for discrimination.
- c. Incidents which involve the possible commission of civil or military offences, or which come to a Commanding Officer's attention through

- a formal complaint, should be investigated and dealt with in accordance with Service disciplinary or administrative procedures.
- d. The Service Test ... should be applied when there is any doubt about the impact on operational effectiveness of any particular incident.
 - e. The Armed Forces value the unique contribution which every individual makes to operational effectiveness, regardless of their sexual orientation.
 - f. The Armed Forces ... will only intervene in the private lives of individuals where it is necessary in the interests of preserving operational effectiveness.
 - g. The new policy makes no moral judgements about an individual's sexual orientation.
 - h. There is no place in the Armed Forces for harassment, bullying or victimization.
 - i. Commanders have a duty of care towards all those under their command. (Ministry of Defense, 2000d, p. 1)

The guidelines also include a list of questions and answers that commanding officers might encounter under the new policy. The list provides responses to such situations as: what to do regarding someone who wants to 'out' themselves³⁴; whether homosexual personnel will be able to bring their partners to 'semi-official' functions³⁵; how they should handle a situation in which a person is unwillingly 'outed'³⁶; whether an individual has a legal right to refuse to share

³⁴ It is a personal matter whether or not to publicly announce one's sexual orientation. Servicemembers should be advised to "bear in mind that sexual orientation is a private matter", and they should: particularly consider how such a declaration might be received by the colleagues ..., and what impact it might have on their future working relationships. If they decide to go ahead, they should be advised not to make an issue of their sexuality and to go no further than a simple acknowledgement of it. (Ministry of Defense, 2000d, p. 4)

³⁵ The Mess Presidents are to exercise discretion, as they do for all Mess guests. "In general, however, it would be appropriate to extend to homosexual partners the same arrangements as apply to unmarried heterosexual partners in respect of the particular function" (Ministry of Defense, 2000d, p. 5). The guidelines add:

Where partners wish to dance together, the circumstances will need to be judged: on some occasions this might pass virtually unremarked and cause no difficulty, on others it could cause offense (with, perhaps, further consequences). Where necessary, those responsible for the function should intervene as discreetly as possible with a view to minimizing any disturbance. It will always be appropriate for couples attending such functions to bear in mind that any overt displays of a partner's affection can cause offence. (Ministry of Defense, 2000d, pp. 5-6)

³⁶ It is up to the individual to decide whether or not to acknowledge their sexual orientation. If they decide to acknowledge their homosexuality, "they should do so with the minimum of fuss and not make a major issue of it" (Ministry of Defense, 2000d, p. 6). Knowledge of one's sexual orientation should not be reason in itself to move a servicemember. The commanding officer should be alert for any harassment or bullying

accommodations with a homosexual³⁷; and how to deal with an extra-marital relationship between heterosexual servicemembers³⁸. With respect to a question about protecting young soldiers from predatory homosexuals, the guidelines declare that “It would be wrong to assume that homosexuals are predatory” and remind commanding officers that they must be “particularly alert to ensure young people are protected, regardless of their sex” (Ministry of Defense, 2000d, p. 5). Commanding officers are advised to remember that an open display of sexual behavior of any kind can cause offense, and to respond quickly to defuse situations before they spread (Ministry of Defense, 2000d).

When the new policy was announced by Secretary of State for Defense Geoff Hoon on January 12, 2000, he highlighted the fact that the chiefs of staff were completely involved in the creation of the new policy and endorsed the changes. Secretary Hoon stated that the code would apply to all members of the Forces, regardless of “Service, rank, gender or sexual orientation” (Ministry of Defense, 2000b, p. 2). He further stressed that the code complemented existing policies, including “zero tolerance for harassment, discrimination and bullying” (Ministry of Defense, 2000b, p. 2). As for the use of the service test, Secretary Hoon declared that:

Commanders will have to apply this Service Test through the exercise of their good judgement, discretion and common sense – the essence of command and the effective management of people. (Ministry of Defense, 2000b, p. 2)

(Ministry of Defense, 2000d, p. 6).

³⁷ Individuals have no legal rights to do so under either the European Convention on Human Rights or the Human Rights Act. Accommodations and facilities will be assigned without regard to sexual orientation (Ministry of Defense, 2000d, p. 3).

³⁸ Commanders are instructed to first assess whether an offense has occurred and then apply the Code to determine whether administrative action is necessary. “The most serious cases, especially where there has been an abuse of position or trust, may warrant the most severe consequence and result in discharge, resignation or retirement” (Ministry of Defense, 2000d, p. 4).

Shifting gears from the public statements in support of the ban before the European Court ruling, Chief of the Defense Staff General Sir Charles Guthrie went on record at the time of the announcement of the new code of conduct to say that lifting the ban was likely to lead to some difficult situations for commanding officers, who would be required to decide if conduct was damaging to a unit's operational effectiveness. He added, however, that "As CDS (Chief of the Defense Staff), I don't believe that the operational efficiency of the Services will be affected, although I'm not saying we won't have some difficult incidents". He acknowledged that some people would still be against the ban "because they are homophobic or on religious grounds", and that his assessment of the new policy differed from that of former service chiefs and ministers. But he added that "times have changed", and he doubted that the change in policy would have any effect on recruiting (Evans, 2000). General Guthrie characterized the new code of conduct as "sensible and pragmatic" and said that it would be up to commanding officers to reassure their subordinates. "We think we can make it work". (Evans, 2000)

Discussions on the code of social conduct and the importance of equal treatment for heterosexuals and homosexuals have since been integrated into training at the Tri-Service Equal Opportunities Training Center, the training site for the Services' Equal Opportunity Advisors (Ministry of Defense, 2000c). In February, the Royal Air Force became the first service to include tolerance toward homosexuality in its officer training courses. The training course discusses the issue during the "beliefs and values" session, which is conducted by chaplains and staff. Officer candidates are informed that homosexuality is compatible with service and does not damage team morale. They are also taught that overt

displays of affection, whether heterosexual or homosexual, threaten team discipline (Butcher, 2000). The other Services have since followed suit.

In October, 2000 it was reported that a naval lieutenant-commander had won the right to some of the partnership benefits previously reserved for heterosexual personnel. The companion of Lieutenant-Commander Craig Jones will be flying out with other naval spouses to visit the HMS Northumberland in the Mediterranean. Spousal flights are subsidized by interest-free loans from the Navy. Jones' partner has also been invited to a black-tie dinner and other mess dinners on shore and aboard the ship (Gilligan, 2000).

VIII. INITIAL ASSESSMENT OF THE EFFECTS OF THE CHANGE IN POLICY

Six months after the lifting of the ban and the enactment of the new social code of conduct, the Ministry of Defense conducted its own assessment of the policy change. Commanders from each of the Services were asked to comment on a variety of issues related to the policy change and on developments arising from it. The assessment was for internal review only, and the resulting report was not released to the public. The Ministry of Defense report therefore constitutes the best evidence to date on the effect of the military's new policy. It conducted a comprehensive managerial review with access to all relevant data. Further, since it was not intended for a civilian audience, the report was not written with an eye toward shifting the public opinion or influencing policy debates. The Ministry of Defense provided the researchers of this report with a summation of the contents of the internal assessment. This marks the first time that the findings of the report have been released to the public.

The appraisal by the Ministry of Defense depicts the policy change as an unqualified success. No problems associated with the new policy were reported. It found that both the lifting of the ban on homosexual soldiers and the new social code of conduct have been effectively instituted. It also states that there have been no significant difficulties in the transition to the new policy, that servicemembers have come to widely accept the policy change, and that the implementation has gone surprisingly well. Given the success, the internal review found that no further changes in regulations or enforcement were needed:

... [T]he change in policy has generally been hailed as a solid achievement. It has been introduced smoothly with fewer problems than might have been expected and no changes either to the policy, the Code of Social Conduct, or the content of our training courses are planned at the present time. (Ministry of Defense, 2000e, p. 2)

The Ministry of Defense determined that the policy change has not affected recruitment levels. The three Services “reported that the revised policy on homosexuality had had no discernible impact, either positive or negative, on recruitment” (Ministry of Defense, 2000e, p. 2). The evaluation did, however, find that the more inclusive policy had positively affected their access to recruiting fairs. College recruiting fairs that used to forbid participation by the military have reversed themselves in the wake of the lifting of the ban:

Interestingly, some areas that had previously closed to the Forces, such as Student Union “Fresher’s Fairs”, are now allowing access to the Services because of what is seen to be a more enlightened approach. (Ministry of Defense, 2000e, p.2)

Because sexual orientation is now seen to be a private matter, the British Armed Forces will not set any quotas for the recruitment of sexual minorities and will not monitor

recruitment levels of sexual minorities. No records will be kept if recruits volunteer the information that they are homosexual.

The report acknowledges that the policy change was not popular with some military personnel before its enactment, as some servicemembers originally expressed apprehension about the lifting of the ban:

Within the Services, the change in policy was accepted as inevitable, although there were some expressions of 'political correctness' having gone too far. The majority of initial misgivings were in regard to the practical aspects of implementation and its consequences, often centered on shared accommodation. (Ministry of Defense, 2000e, p.2)

Such misgivings appear, however, to have been short-lived. After the new policy had been in place for only six months, the Ministry of Defense was able to report that service personnel had adjusted well to the lifting of the ban:

Over the longer term the feeling has been generated that there is widespread acceptance of the new policy. ... Generally people have demonstrated a mature and pragmatic approach which has allowed the policy to succeed. (Ministry of Defense, 2000e, p. 2)

Service personnel have gotten along well and adjusted quickly to the policy change; the actual inclusion of homosexual servicemembers has resulted in surprisingly little reaction. The report also found that harassment of gay and lesbian soldiers had not been a problem since the new social conduct code had been instituted. There were "no reported difficulties of note concerning homophobic behavior amongst Service Personnel" (Ministry of Defense, 2000e, p. 2).

The evaluation by the Ministry of Defense suggests that the success of the new policy was in large part due to the non-discriminatory nature of the Code of Social Conduct. The Code's emphasis on behavior allows the military to address problematic

behavior without resorting to discriminatory policies or restricting whole classes of people:

The Code of Social Conduct has been very well received and has been found to be a useful guide for commanding officers in dealing with all issues surrounding personal relationship and behavior, going wider than just homosexual issues. (Ministry of Defense, 2000e, p.2)

Because the focus has been placed on behavior instead of sexual orientation, sexual orientation has not become a source of antagonism as some had feared. Gay service personnel know that they have the code of conduct to back them up in the event of harassment or bullying. And all servicemembers know that they have recourse to complain if they witness inappropriate comments or actions. The report remarks on the noteworthy lack of focus by service personnel about the issue of sexual orientation:

[Homosexuality] has not been an issue of great debate, in part because of the underlying principle, embodied in the Code of Social Conduct, that sexual orientation is now regarded as a private matter. In fact there has been a marked lack of reaction. Discussion has rather been concerned with freedom of individual choice and exercising personal responsibility across the board, rather than a focus just on sexual orientation. (Ministry of Defense, 2000e, p.2)

In arguments for the continuation of the ban, military officials suggested that friction between heterosexual and homosexual servicemembers could result in distrust and offense among colleagues and even threaten operational effectiveness. In contrast, the Ministry of Defense's own internal assessment of the policy after six months suggests that heterosexual and homosexual soldiers alike have responded well to the change in policy. In spite of the concerns raised in the years and months prior to the lifting of the ban, no major problems have so far resulted from the policy change. At the request of the House of Commons Defense Committee, the Ministry of Defense will conduct another review of the

policy in two years. But the report indicates that at this stage military officials believe the new policy has been successfully implemented.

Since the ban has been lifted, several newspaper articles have recorded military reactions to the policy change³⁹. British newspapers have reported the assessment of Rear-Admiral Burnell-Nugent and two resignations over the policy. In addition, researchers for this report interviewed eight Armed Forces officials and two retired Armed Forces officers. The officials include: the director of personnel policy for the Ministry of Defense, a commander with Naval Personnel and Service Conditions who was involved in the writing of the new policy, a lieutenant colonel with Army Public Relations, a major with the Army Training and Recruiting Agency, a squadron leader with the Air Force Engineer Liaison Recruiting Team, an official with the Personnel Management Agency of the Air Force, an official with the Ministry of Defense Press Office, and a Whitehall source with knowledge of the policy's implementation. The retired officers were not apprised of the effect of the transition and were interviewed for background information.

Nine months after the ban was lifted, the assistant chief of the Navy staff, Rear-Admiral James Burnell-Nugent declared publicly that the change in policy had caused fewer problems than the inclusion ten years ago of women at sea. The Rear-Admiral stated that the removal of the ban had caused less difficulty than many of his colleagues had expected. He further stated that the ruling had raised some issues about accommodations aboard ships but that it had otherwise not caused serious problems. "I think it has caused less of a ruffle than the issue of women at sea did 10 years ago. That is not to say it is not without impact" (Paterson, 2000). The Rear-Admiral also

³⁹ Newspaper coverage of the experiences of two 'out' servicemembers are discussed in the section below.

commented that, “Although some did not welcome the change of policy, it has not caused any great degree of difficulty” (Paterson, 2000). Rear-Admiral Burnell-Nugent added:

There are issues to do with sharing accommodation and so on, which we shall deal with using normal management mechanisms. I am not saying everybody is happy with it, but on the whole it has not caused a great upset. (Paterson, 2000)

A straw poll of cadets immediately following the change in policy “revealed an already relaxed attitude to the issue” (Butcher, 2000a). One cadet responded, “It might just be that we belong to a different generation but I do not see it as a problem” (Butcher, 2000a). This attitude was shared by most of her fellow cadets. All those polled agreed that it was possible for homosexuals to serve in the RAF if their professional work was not influenced by their sexuality. One male cadet did say, however, that the presence of a gay or lesbian in a soldier in a unit could damage the team’s morale. “I personally do not have a problem with homosexuals but I can see it being a problem if everyone is cooped up together” (Butcher, 2000a)⁴⁰.

Two officers publicly resigned in the wake of the lifting of the ban. Brigadier Pat Lawless, the Deputy Commander of the Joint Helicopter Command, announced in January 2000 that he was resigning because the ban was lifted without adequate consideration for the military rationale for preserving it. Brigadier Lawless, who reported that he was “very sad to leave”, stated that he “couldn’t reconcile my strongly held moral and military convictions as a soldier and a citizen with the Government’s decision to lift the ban on homosexuals” (Wright, 2000). A friend of Lawless stated that “[Cdr. Lawless] was not taking this decision because he personally has a problem with

⁴⁰ At the time of the straw poll, there were no open homosexuals at the training college (Butcher, 2000a).

homosexuals. He saw it as a decision foisted on the Armed Forces for no good military reason” (Butcher, 2000).

Commander Colin Douglas, a senior naval commander who led an air squadron in Bosnia and was director of flying at the Fleet Air Arm’s Culdrose air station, also resigned in January because he felt that policy decisions were being made for political reasons instead of military ones. Cdr. Douglas said that the decision on homosexual inclusion was “the final straw”. He added, “There is plenty of sound military sense against lifting the ban, but the decision was taken for political and legal reasons” (Butcher, 2000). There have been no other public announcements of resignations due to the lifting of the ban.

An article on desertion and recruitment issues in June 2000 commented that the opening of the military to gays and lesbians and of combat positions to women would hopefully *increase* recruitment levels. Problems associated with desertion included bullying, harassment during initiation rites, and an inability of the military to successfully deal with soldiers far away from home when family problems such as terminal illness and marital strain develop (Burke, 2000)⁴¹. Problems in recruiting levels were first made public in 1996. Articles discussing recruitment problems cited the number of foreign operations and the number of humanitarian missions, as well as the family turbulence that results from long absences or overseas postings (Schoefield, 2000). The lifting of the ban was not mentioned as a source of problems.

Two months after the Ministry of Defense’s internal appraisal, the responses of military officials interviewed for this report confirm its findings. The transition to the new policy has gone surprisingly well, and there have been no major problems to date. A

⁴¹ See also Davies (2000).

Whitehall source who had access to the original, unabridged report emphasizes the definitiveness of its conclusions:

The assessment showed that there has been no impact at all. The report looked at all aspects, operational effectiveness, unit cohesion, and there has been no impact. At the end of the day, operational effectiveness is the critical matter, and there has been no effect at all. There haven't been any disciplinary problems. There have only been one or two minor incidents, and they have been handled individually. The whole thing has gone a lot better than people had expected. (Personal Communication, October 9 and 11, 2000)

None of the officials that we spoke to knew of any evidence or had heard of any that suggested any significant difficulties that had arisen as a result of the policy change. No one had heard of any problems with resignations⁴². None of the officials interviewed knew of any evidence to suggest that recruitment rates or training completion had been affected. There have been no major problems with harassment or gay-bashing. Military officials interviewed for this report affirm that the lifting of the ban has largely been a non-issue.

This is not to imply that all servicemembers approved of the new policy before it was implemented. Many soldiers maintain anti-gay attitudes and worried about how the lifting of the ban would affect them. While complaints about the sharing of facilities with homosexual in particular were vociferous before the policy change, such protests were surprisingly short-lived. Commander Cooper, who worked on the new social code of conduct, explains:

The prime concern, and really the only one raised by people in the run-up to the publication of this policy, which came into effect in January of this year, was sharing accommodations. ... straight chaps and straight girls might not necessarily like having to share living, changing and washing

⁴² Military officials interviewed for this report put the number of resignations as between one and three. An additional resignation that was not reported in the papers was mentioned. But more than one official noted that at least one of the published resignations was thought to have actually been due to other factors.

facilities with people of another sexual orientation. ... We've taken the view that we will not separate out homosexuals and give them separate living accommodations. Now I would characterize the reaction to that as being very short-term complaints, very loud but short-lived. And as far as I know, the Armed Forces of the United Kingdom has only lost three people who have resigned over this issue. (Personal Communication, October 13, 2000)

Military officials interviewed for this report were also not aware of any indications that the new policy had negatively affected recruit training completion rates or that there had been any training problems related to the lifting of the ban (Hodges, Personal Communication, October 10, 2000; Cooper, Personal Communication, October 13, 2000; Peebles, Personal Communication, October 17, 2000). Service personnel have responded well to the new code of social conduct and the equitable premise of all servicemembers' responsibility to act appropriately. As was suggested by the Ministry of Defense's internal report, more discussion appears to have been raised about exercising personal responsibility generally than about the specific issue of homosexuality. A Whitehall source explains:

In the commanding officers' course, they go over the code of social conduct. Homosexuality doesn't even come up anymore – it's no longer an issue. In the Equal Opportunities training, a whole raft of issues are discussed, and race and gender are bigger issues for us. There is one morning in the training where homosexuality gets discussed along with many other issues. One person in six months has argued vociferously against it, and that's it. Everyone else's attitude is to let people alone. No one wants to flaunt their sexuality, so let people have it. (Personal Communication, October 9 and 11, 2000)

Incidents of harassment or sexual misconduct related to sexual orientation by either heterosexual or homosexual soldiers have also not been a problem since the new policy was implemented in January. None of the military officials interviewed related a single case of gay-bashing or assault related to sexual orientation. Lieutenant Colonel

Hodges confirmed with a colleague at the Central Discipline Office there have been no incidents related to sexual orientation reported to that office since the ban on homosexual soldiers was lifted. He added: “The change in policy has been a complete non-event” (Personal Communication, October 9 and November 2, 2000).

Although precise data is not available, there are no indications that the policy change has affected recruitment levels (Bagley, Personal Communication, October 13, 2000; Fuller, Personal Communication, October 17, 2000; Payne, Personal Communication, October 9, 2000). The Armed Forces does not ask about sexual orientation when recruiting, so the military does not possess any statistics specifically concerning either increases in the number of homosexual recruits or decisions not to enlist because of the policy change. Further, so many factors affect recruiting that it is difficult to isolate the effects of one. But there have been no signs, from the experiences of recruiters or assessments within the Ministry of Defense, that recruiting numbers have decreased substantially as a result of the lifting of the ban. A Ministry of Defense official states, “Certainly recruitment hasn’t dropped dramatically – recruitment is quite buoyant at present” (Barnard, Personal Communication, October 13, 2000). After several years of recruiting shortages, the last two years have witnessed the fulfillment of recruiting targets (Hodges, Personal Communication, October 9 and November 2, 2000). Paul Barnard adds, “Nothing drastic has happened in terms of recruiting or anything else” (Personal Communication, October 13, 2000).

Military leaders emphasize that behavior rather than sexual orientation is what ultimately matters to the men and women in the Armed Services. As long as people do their jobs and contribute effectively to the teamwork of their units, individual differences

in opinion or in their personal lives are not considered relevant. The new policy's focus on behavior rather than on personal attributes has allowed heterosexual and homosexual soldiers alike to maintain their focus on the jobs at hand. It is the emphasis on effective teamwork that Lieutenant Colonel Hodges believes is ultimately behind the success of the policy change:

There has been absolutely no reaction to the change in policy regarding homosexuals within the military. It's just been accepted. In the military, it's important to fit in and be a member of the team. As regards homosexuals, if someone were acting 'camp', they would not fit into the team. But if they are discrete [sic], it doesn't matter. Our great strength as an Army is that we treat everyone [as] an individual who contributes to the team. We've won three recent wars – Sierra Leone, Kosovo and East Timor because we place a lot of importance on personal responsibility, down to the lowest level. Everyone has strengths and known weaknesses, and everyone is given responsibility. Your sexuality doesn't matter as long as you act as a member of the team. (Personal Communication, October 9 and November 2, 2000)

For those heterosexual soldiers who feared the new policy would bring major changes in interpersonal relationships, the continuity has been a relief. Since the lifting of the ban, heterosexual servicemembers have discovered that the Services after the policy change looks basically like the Services under the old policy. Paul Barnard explains:

And the media likes scare stories – about showers and what have you. A lot of people were worried that they would have to share body heat in close quarters or see two men being affectionate, and they would feel uncomfortable. But it has proved at first look that it's not an issue. (Personal Communication, October 13, 2000)

Now that the court case has been resolved, people have been able to effectively move past the controversy. There have been no major surprises, no radical or inappropriate behavior. Heterosexual and homosexual soldiers alike continue to focus on the primary task at hand: doing the job that they signed up for. Paul Barnard adds: "It's gone better

than a lot of people thought it would. It's almost gone unnoticed." (Personal Communication, October 13 and November 6, 2000)

Military officials also suggest that servicemembers were better prepared to adapt to the lifting of the ban than many military commanders expected. Both the on-the-ground reality of homosexual service and more accepting attitudes in general about homosexuality among the young were raised as partial explanations for the relatively tranquil transition. Homosexual service personnel have been a part of the Armed Forces since long before the policy change occurred – a fact that was not denied by military officials even during the legal battle. Barnard argues that for many heterosexual servicemembers, the admission by a colleague of his or her sexual orientation in the wake of the new policy has not come as a surprise:

A lot of gay people have gone about like before and not said anything. But in most cases with those that have said that they're gay, it was probably known already. Close associates who worked with them probably already knew, but they kept quiet about it, because they didn't want to get the person in trouble. So often it hasn't been a surprise. It just has not been an issue. (Personal Communication, October 13, 2000)

Commander Cooper in turn emphasizes the more liberal attitudes of younger service men and women:

We have a ground-breaking social policy here. ... But in broad terms, I don't think we're shy about the fact that there has been an atmosphere of resigned acceptance, particularly amongst the younger people in the Navy. ... There is a more relaxed attitude among younger people towards those of a different sexual orientation, and by and large it has been, therefore, a non-issue; it really has. (Personal Communication, October 13, 2000)

In interviewing military officials for this report, the theme of a lack of response was repeated. Officials emphasized that the policy transition had occurred more smoothly than expected, that any criticism to the lifting of the ban quickly died away, and

that the anticipated problems have not developed. People on all sides of the issue have behaved responsibly and respectfully. And while problems may still develop at a later date, many Service officials are genuinely surprised by how agreeable the transition has been. A number of interviewed officials commented on the disjuncture between the predicted difficulties and the reality of the change. The Ministry of Defense Director of Personnel Policy states:

And [the] code of conduct seems to have been accepted and applied generally around the Armed Forces, and we've had very few real problems that have emerged, and people seem to have, slightly surprisingly, settled down and accepted the current arrangements. And we don't really have the problems that we thought we'd have. (Fuller, Personal Communication, October 17, 2000)

Peebles concurs:

As far as I am aware, the rank and file airmen and airwomen have accepted the revised policy. The anticipated tide of criticism from some quarters within the Service was completely unfounded. (Personal Communication, October 17, 2000)

And Commander Cooper adds:

We now have chaps at sea that people now know are homosexuals – there are very few – we're talking about a handful of people who have come out, and there wasn't a [problem] coming out at all. And our youngsters have just taken it in stride. So it's a major non-issue, which has come as a considerable surprise. (Personal Communication, October 13, 2000)

Given the fact that the new policy has been in place for less than a year, insufficient time has passed for any quantitative or in-depth external study of the policy change. Nonetheless, researchers for this report felt that it was important to canvass relevant observers outside of the military to further assess the impact of the lifting of the ban on homosexual soldiers. Academics, journalists and non-

profit organization representatives⁴³ who have been following the controversy concerning sexual minorities in the military, or who are knowledgeable about British military personnel issues more generally, provide an independent check to the information provided by the Armed Forces. The outside experts may be aware of issues that have not been brought to the attention of the upper echelon of military commanders, they can provide a different perspective on events, and they may be more critical of the policies or the culture of the British Services than commanders.

Researchers for this report spoke with six respected academics and journalists who have been commentators on the military policy concerning homosexuality since before the ban was lifted. The interviewees included: Dr. Gwyn Harries-Jenkins, a professor of military sociology at the University of Hull; Dr. Christopher Dandeker, a professor of military sociology and head of the Department of War Studies at King's College; Dr. Hew Strachan, professor of military history at the University of Glasgow; and Edmund Hall, former journalist for the Sunday Times, Independent and the Evening Standard, and the author of the most widely-read book on the subject, We Can't Even March Straight. Professor Harries-Jenkins and Dandeker specialize in military personnel issues and have written specifically about homosexuality in the Armed Forces. Researchers also interviewed Joan Heggie, a doctoral candidate at the University of York who is presently working on a dissertation on lesbian service personnel in Britain, and Tim Butcher, a reporter for the Daily Telegraph who has covered the topic for that paper since 1995. The researchers asked these and other contacts if

⁴³ The opinions of relevant non-profit representatives are provided in the following section.

they knew of any other prominent scholars or commentators who should be reached for this report; we could uncover no other principal sources on this subject.

The academics and journalists contacted for this report agree that it is still too soon to determine what the long-term consequences of the policy would be. The information available so far does, however, suggest reason for cautious optimism. None of the respondents knew of any major problems that have occurred in the wake of the policy change. And the (admittedly scant) information that they have heard about indicates a relatively smooth transition.

Professor Dandeker states:

It's too early to say, but the reports I have heard say ... that so far there are few problems and indeed, perhaps less than the ones arising from gender integration. (Personal Communication, September 20, 2000)

Professor Harries-Jenkins also agrees that insufficient time had passed to definitively assess the outcome of the new policy, but he does add that “press statements (‘an informed source’) suggest a slight decrease in the incidence of harassment” (Personal Communication, October 16, 2000). Joan Heggie argues that the relative lack of news about the transition is itself a sign that no major problems had occurred. Since many military and political officials had been highly antagonistic to the removal of the ban, any sign of significant problems would have created a public furor. Heggie declares:

But there has been no feedback the new policy is not working. Certainly the fears of massive resignations or sexual harassment have not come true. (Personal Communication, October 2 and 16, 2000)

Professor Dandeker, Heggie and Hall all suggest that the relatively smooth transition may have been due in part to the fact that most gay and lesbian soldiers presently serving in the military have remained quiet about their sexual orientation and their private lives. Professor Dandeker and Heggie argue that such low visibility most likely stems from continued bias against homosexuality by most heterosexual soldiers. Professor Dandeker explains:

Most expect gay personnel to continue to be extremely discreet until attitudes within the services change further, and that this is an acceptable price to pay for achieving a lifting of the ban on personnel serving simply because of their homosexual orientation. (Personal Communication, September 20, 2000)

Heggie adds:

Even though the situation is better, soldiers don't want to set themselves up for a fall. Even though the rules have changed, not everyone feels comfortable. (Personal Communication, October 2 and 16, 2000)

Hall, however, argues that gay and lesbian service personnel were unlikely to be particularly conspicuous even in the most accepting environment:

When the ban was lifted, I think that many people who had been serving quietly in the armed forces breathed a sigh of relief. Gay people who go into the armed forces tend to be conservative in their politics, and reserved about their private lives. After the ban was lifted, you didn't find these people indulging in ostentatious out behavior. (Personal Communication, September 25, 2000)

Professors Harries-Jenkins and Dandeker, both noted experts on the British military in general, also concur that the issue of homosexual service in the military was minor given the priorities of the military at present. Like many other Western militaries in the wake of the Cold War, the British military has had to confront the effects of a shift in priorities and the extension of peacekeeping missions with shrinking resources. Professor Harries-Jenkins states that

homosexuality “is a minor issue in the light of major problems for recruitment and retention caused by overstretch, role uncertainty, turbulence and rates of remuneration” (Personal Communication, October 16, 2000). Professor Dandeker also cites overstretch, recruitment and retention as primary problems presently facing the British military, and he adds that the size of the defense budget is an additional source of concern (Personal Communication, September 20, 2000).

Echoing Rear-Admiral Burnell-Nugent, Professors Dandeker and Harries-Jenkins suggest that the integration of women into the Armed Services is perhaps a more vexing personnel problem than that of including homosexuals. Professor Harries-Jenkins declares:

At present, the major [personnel] issue is the political policy that women should be recruited to direct combat on the ground posts in armor, infantry and special forces units. Whilst it is possible to substitute males in terms of race and sexual preference, there is a strong body of opinion in the military which questions the ability of women to serve in such posts. The lifting of the ban on gays may or may not have effects upon good order and discipline but these can be covered by regulations. (Personal Communication, October 16, 2000)

Both Professors did, however, append caveats to this assessment. Professor Dandeker contends that it “remains to be seen” whether the integration of women and sexual minorities will “interact and lead to difficulties” (Personal Communication, September 20, 2000). Professor Harries-Jenkins adds that the legislative approval of gay marriages or the “active promotion of the rights of homosexuals” would “alarm service chiefs” (Personal Communication, October 16, 2000).

Finally, Dandeker, Heggie and Butcher all caution that while the rules may have changed, fundamental attitudes have not. Many military personnel

remain opposed to the change in policy, including a number of commanders. And a large number of those who are resigned to the new regulations continue to view homosexuality in an unfavorable light. Given the discretion placed with commanding officers in interpreting what constitutes social misconduct, such anti-gay feelings could result in harsh restriction of homosexuals. Professor Dandeker explains:

It should be pointed out that the ‘lifting of the ban’ is not quite right. Integration of open homosexuals is problematic and remains so under the new policy. ... Much will depend on how commanding officers use discretion and how much gay personnel wish to be discreet about their orientation as well as scrupulously careful about their behavior both on and off duty. (Personal Communication, September 20, 2000)

Heggie also warns that “the rules of conduct are so loose that they allow discrimination by individual commanders” (Personal Communication, October 2 and 16, 2000). How the implementation of the code of social conduct proceeds in the coming months will have a considerable effect on the ultimate success of the new policy. Because gay-bashing is punishable by administrative discharge, however, Butcher expects that “the quality of life for the average homosexual servicemember [will] go up considerably” (Personal Communication, August 8, 2000).

Researchers for this report also talked with representatives from relevant major non-governmental organizations to determine their assessments of how the policy change was proceeding. We contacted the Christian Institute, the major NGO opposing the new policy; TORCHe, the gay rights group of the Conservative Party; the Royal United Service Institute (RUSI), an independent military think-tank; Stonewall and Outrage!, the two primary gay-rights groups in Britain; and Rank Outsiders, an organization that promotes the rights of gay and lesbian servicemembers. Rank Outsiders has been

monitoring the inclusion of gay and lesbian service personnel closely since the policy change was announced in January.

Colin Hart, the executive director for the Christian Institute, does not feel that sufficient information was yet publicly available to assess the impact of the removal of the prohibition against homosexual servicemembers:

Well, it's far too early to say what the results of lifting the ban have been. Clearly some senior officers are so concerned that they have resigned. We have not yet been able to investigate the implementation of the policy. (Personal Communication, September 21, 2000)

Debbie Gupta, the Director of Policy and Public Affairs at Stonewall, also feels that her organization is not in a position to know the military effects of the policy change on morale, unit cohesion, or harassment levels. She points to the statements of Rear-Admiral Burnell-Nugent as providing the best public evidence of the impact of the policy change (Personal Communication, October 18, 2000).

None of the other organizations, including the non-partisan RUSI, know of any major problems with morale, unit cohesion or operational effectiveness that have developed in the wake of the policy change. Steven Johnston, the Chair of Rank Outsiders, posed the question of operational effectiveness and morale to Air Marshal Pledger at a RUSI presentation on September 28 concerning personnel matters:

I asked the very same question [concerning operational effectiveness and morale], and his direct reply was that there had been no change in either operational effectiveness or problems with moral[e]. In fact, I have three members of my Association who have been accepted back to full service (all in the Navy) where they have rejoined with the service knowing about their sexual orientation. These three individuals are of the three rank structures: Lt. [Commander], Chief Petty Officer and rating. This I believe is sufficient evidence to back up that statement. (Personal Communication, October 16, 2000)

Peter Tatchell, the Chairman of Outrage!, echoes Joan Heggie's comments about the lack of news about difficulties during the transition. Although Outrage! does not have the military connections that either RUSI or Rank Outsiders maintains, Tatchell suggests that the level of concern before the removal of the ban means that major post-change problems would have been brought to light:

But clearly, there has been none of the damage that the army chiefs were predicting to morale or operational effectiveness. ... [G]iven the dire warnings the service chiefs were making before the ban was lifted about how it would cripple morale, the consequences they predicted were so severe that we should be seeing something by now. But they have not come to pass. (Personal Communication, August 21, 2000)

RUSI, Rank Outsiders and Outrage! also have no knowledge of any increases in harassment related to sexual orientation. Rank Outsiders has been monitoring this issue and has been in close contact with the military on these matters. It is best positioned to assess the issue of anti-gay harassment, because they both support gay and lesbian service personnel and have access to the military's own analysis. Rank Outsiders might hear about cases of harassment of homosexual servicemembers that were not reported within the chain of command. Johnston, the Chair of Rank Outsiders, states that he knows of no significant harassment problems within the British military. He only knows of two minor instances of harassment, both of which were successfully resolved:

As an Association we have not heard of any major problems of harassment or assaults [sic] within the AF. I have been privy to two incidents in which we were able to advise and the problems were resolved quite quickly. ... Both incidents were of a 'name calling' situation with only one that included any physical efforts, that being belongings overturned and adverse comments painted onto a private motor vehicle. The local commanders were very sympathetic ... The end result was that the individual, by his own request, had moved units and is now an instructor at his unit Training Center! (Personal Communication, October 16, 2000)

Johnston further reports that the military has expressed a desire to work effectively with Rank Outsiders should any future problems arise. Johnston explains:

I have been to the Ministry of Defense a number of times in which [harassment] has been the subject of many discussions. It appears that there have not been any cases that they are aware of and were very positive as [to] this situation. I have been told, however, that if any do come to light that I am aware of and require assistance, they will investigate at the highest levels (Personal Communication, October 16, 2000).

Michael Codner, the Assistant Director for Military Sciences at RUSI, believes that assurances of this kind by military commanders are not simply empty gestures. He is convinced that the Armed Forces are strongly committed to making the new policy work. Codner argues that not only has the top brass invested in the policy change, but also that the new thinking about homosexual inclusion is part of a larger shift that has affected the military. Codner explains:

The intention is to be far more than cosmetic. If you look at the thinking of senior personnel, they have invested a great deal of credibility and authority into this policy shift. They want to see it fully implemented.

There has been a kind of generational shift. [For] the people who are moving into the rank of 1-star and 2-star general, who are around 50-53 ... for them this is just not so much of a major issue. (Personal Communication, September 26, 2000)

The Chairs of Rank Outsiders and OutRage! both suggest that the eradication of the ban on homosexual service in the military is just the first step in a longer process toward full equality in the military for sexual minorities. The attainment of equal access to domestic partner benefits, joint accommodations and pension benefits will signal a real acknowledgement of the contributions and

sacrifices that homosexual personnel have made, as well as their full acceptance into the fabric of military life. Johnston explains:

As to the future, there is still much to be done. The ban being overturned is a major step for the future, but equal rights with their heterosexual colleagues is a different matter. Full employment rights will include: pension rights, accommodation rights and partnership rights ... These, when obtained, will show the commitment by the [Armed Forces] hierarchy to full equality to every member of the [Armed Forces] ...

As for the transition to the new policy, well it has all been very much a 'matter of fact' and life goes on as it always has. In summary, there has simply been no change but a positive step forward that at last each and every person can be themselves and give their very best to the roles that they undertake! (Personal Communication, October 16, 2000)

Since the ban on homosexual servicemembers has been lifted, the British media has reported the first instance of a gay soldier coming out to his crewmates. Most recently, it has also reported the acceptance of the boyfriend of the first openly gay officer in the Royal Navy as a "naval wife", with rights to benefits such as subsidized flights to see his partner in port and invitations to formal Navy dinners (Gilligan, 2000). Researchers for this report also spoke with four sexual minorities presently serving in the British Armed Forces about their experiences before and after the policy change. The four men include: a chief petty officer in the Royal Navy, a lieutenant commander in the Royal Navy, a corporal in the Royal Air Force, and a junior technician in the Royal Air Force. The chief petty officer and the lieutenant commander were both discharged under the former policy and have recently been reinstated. The corporal has been in the military for ten years and was recently promoted. He has been out to his colleagues since the ban was lifted. The junior technician has served continuously for the past five years and has not disclosed his sexual orientation to any of his colleagues. Because these

interviewees do not constitute a representative sample of presently-serving homosexual soldiers, their experiences cannot be said to provide a complete picture of life for sexual minorities under the new policy. But their perspectives as servicemembers most affected by the policy change allow for a more detailed portrait of the present conditions on-the-ground than the comments by MOD staff members and other non-military observers.

At the end of January 2000, the first purported servicemember to publicly acknowledge his homosexuality in the wake of the lifting of the ban told his shipmates that he was gay. The sailor, who asked reporters not to disclose his name, announced his sexual orientation several hours after the lifting of the ban. The 280-member crew was ‘reminded’ of the rules against bullying and harassment, and that any allegation would be “thoroughly investigated” (Fleet, 2000). The man told members of the ship’s mess while docked near Portsmouth, Hants, his hometown. He reported that his announcement was well-received. “They were all fine about it. I was surprised. I had no problem with them about it at all”.

The sailor, who had been with the Navy for eight years but had only realized his sexual orientation four years ago, said that he was relieved to have been able to disclose his sexual orientation with his crewmates:

I was just fed up with lying to people, especially when I went home at the weekends. People have asked me where I have been, and I have had to make up somewhere because I had been to a gay club. I was living separate lives. I had my Navy life and I had my life at home. Coming out in the Navy has been a big weight off my shoulders. It has been a big relief. (Fleet, 2000).

The sailor added that he did not expect any problems in the wake of his announcement. He declared, “I do not expect any problems in the future or for it to affect my work” (Fleet, 2000).

On October 29, the Sunday Times reported that the partner of the first openly gay naval officer had won the right to some partner benefits, including joining naval spouses flying out to see their husbands and wives. Lieutenant Commander Craig Jones said that his partner Adam has been “made to feel welcome” by the navy and has been “fully integrated” into naval family life (Gilligan, 2000). Jones’ partner has attended formal dinners on ship and ashore:

Our first mess dinner, in Portsmouth, was a worry, but we had a great time. It was a difficult issue for Adam and me, but people generally, and particularly my colleague’s wives, looked after us very well. (Gilligan, 2000)

All of the out servicemembers interviewed for this report also state that they have had no major problems with their colleagues because of their sexual orientation. Corporal Andrew Blythe has had no difficulties with his colleagues at Bentley Priory, all of whom know that he is gay. Chief Petty Officer Rob Nunn and Lieutenant Commander Michael Griffiths, who have been recently reinstated in the Navy after earlier discharges due to sexual orientation, report that colleagues have responded well to their reinstatements. The circumstances of their departures and returns have meant that the sexual orientation of each officer is widely known by co-workers. This has not, however, resulted in problems for either officer. Lieutenant Commander Griffiths explains:

I am now out to anyone who wishes to know. Just about everyone who knew me before 1995 knows [my sexual orientation,] and I have already met about a dozen people who know since rejoining. They have been absolutely fine, welcoming me back to the Royal Navy and it obviously isn't causing them any difficulty. I have come out to one person who knew me [prior to discharge] but didn't know [my sexual orientation]. He was astonished, remarked that I kept it very quiet before and has been fine since. (Personal Communication, October 22, 2000)

Chief Petty Officer Nunn, who has served in the navy for a total of 21 years, may be returning to submarine duty and is in line for a promotion. He also reports a positive response from co-workers:

Now, the people in the mess have asked me all sorts of questions, and I've answered their questions. They think I'm very brave doing what I've done, and we've now got to the stage where the mess president a couple of nights ago asked if my partner was coming to the Christmas ball. (Personal Communication, October 17, 2000)

Chief Petty Officer Nunn believes that the best approach has been to allow for an open dialogue with colleagues about the subject of his sexual orientation and his reinstatement. This has enabled him to counter stereotypes, improve the knowledge of his colleagues, and put people at ease. Chief Petty Officer Nunn has not been subject to harassment either before his dismissal or after his return; he has, however, encountered several people since his reinstatement who have been unsure how to respond to him. He describes the experience:

Well, it's the not being able to ask me a question. It's the old – 'I don't know quite what to say'. In fact, one guy that I talked to who couldn't sort of talk to me, I said, 'Right, I'm going to ask the questions that you want to ask, and answer them.' So I did. (Personal Communication, October 17, 2000)

Chief Petty Officer Nunn adds that his open approach has been successful. Once colleagues are able to ask the questions that they have about homosexuality and about the service of gay and lesbian soldiers, any remaining discomfort seems to disappear. With respect to the colleague who was once afraid to voice his queries, Chief Petty Officer Nunn reports that he is "nice as pie now" (Personal Communication, October 17, 2000).

All four respondents feel positively about the policy change. While Lieutenant Commander Griffiths and the junior technician believe that it is too early to know if the policy will be implemented fairly for both heterosexual and homosexual soldiers, Corporal Blyth and Chief Petty Officer Nunn both feel that the army is committed to providing equal standards for heterosexual and homosexual soldiers alike. Corporal Blyth says that, "In fact I now feel more protected under the military code than my partner does at work ([h]e's a civilian)" (Personal Communication, October 27, 2000).

Chief Petty Officer Nunn believes that he has already seen evidence of the military's commitment to enforcing across-the-board both a code of social conduct and a zero-tolerance policy for harassment. He explains:

To a person, everybody I've talked to, commander downwards, has said – if you've got problems, come and see me. ... I can deal with most of it. But you know, I know full well that if I went to one of them with it, it would be sorted out. They are more than willing to use the legislation, which is very good news from our point of view. (Personal Communication, October 17, 2000)

He also reports that he has just acted as the Provost Marshal at a Court Martial for a male soldier who had been sexually harassing female trainees. The male soldier was severely disciplined; he was demoted a rank, had to forfeit a medal and lost twelve years of good conduct. Chief Petty Officer Nunn argues that this punishment was a good example of the military's willingness to apply the social code of conduct to all its servicemembers (Personal Communication, October 17, 2000).

Chief Petty Officer Nunn, Lieutenant Commander Griffiths and the junior technician also report that not much has changed in the day-to-day life in the Armed Forces. The primary alteration has been that homosexual service personnel now have the option to reveal their sexual orientation without fear of discharge. Having this choice

enables soldiers to confront comments or harassment by peers without having to worry about losing their jobs. Chief Petty Officer Nunn and Lieutenant Commander Griffiths both agree that service personnel were more receptive to a change in policy than MOD officials initially believed. Lieutenant Commander Griffiths declares:

The policy appears to have been put across as unwelcome but inevitable and the briefing officers seemed to be embarrassed by the requirement to tell their men and women of the change. Fortunately, the men and women seem to be much better able to cope with the change than senior officers were prepared to give them credit for and many of the men and women know friends or family outside of the Service who are gay. (Personal Communication, October 22, 2000)

For Chief Petty Officer Nunn, his assessment of the open-mindedness of the soldiers stems from both the reception he has received upon his return and the comments of his crewmates when he was discharged. When his co-workers originally heard that he was being dismissed, they expressed support for him:

In fact, all of them were coming up to me and saying 'if there's anything I can do, give us a shout', all this sort of stuff. And ... my commanding officer when he said goodbye to me, said that 'we can't afford to lose people like you, but my hands are tied'. And the attitude as far as I can see – certainly it's been proved since I got back - is that 'what the hell's the problem here?'. You do your job, and that's all they want from you. (Personal Communication, October 17, 2000)⁴⁴

At the same time, however, the servicemembers agree that negative stereotypes about homosexuals continue to be widespread among British soldiers. Because the Armed Forces is such an insular climate, many gay and lesbian soldiers still feel fearful of revealing their sexual orientation in a setting where anti-homosexual feelings remain pervasive. For the RAF junior technician, the homophobia of his colleagues has made

⁴⁴ For other stories about positive responses by heterosexual colleagues before the policy change, see Hall (1995).

him wary of telling anyone about the people that he dates or other aspects of his private life:

And [the restrictive military environment is] difficult, and that prevents people from coming out, the fact that it's such an insular environment, where everybody knows everyone else... and no matter if you get moved, someone else will find out, and that's the big problem for people at the moment, is that we know it's quite homophobic, and we know that there's not an easy way of getting away from it. And that's the worry we face at the moment – is the general perception of gay people. (Personal Communication, October 22, 2000)

But, he adds, 'Gay people are just like any other people' (Personal Communication, October 22, 2000). For Lieutenant Griffiths, changing heterosexual servicemembers's attitudes about gay and lesbian people will take time:

Overall, the [Royal Navy] seems to be treating the change in policy as a bit of a joke (I believe as an inherent defense mechanism) but this is likely to change as the numbers of openly gay people grow. I do not foresee a problem and the joke will stop once people get used to serving with lesbian and gay people. (Personal Communication, October 22, 2000)

For Corporal Blyth, such a change in attitudes has already begun:

Yes, there is less micky talking etc. We used to be a minority that was fair game to be the butt of someone's [sic] joke, but that is all changing. People are now aware that they used to serve with [closeted] gays and the ones I work with now know that they are serving with a gay man, [who] is proud of the fact he's gay. (Personal Communication, October 27, 2000)

IX. CONCLUSION

The British Services fought for a number of years to maintain its policy of excluding openly gay and lesbian soldiers. Even after the outcome of the European Court of Human Rights case appeared inevitable, the Armed Forces resisted calls to eliminate the ban. While the Ministry of Defense asked commanders to soften their enforcement of

the ban in the months before the decision was handed down, it both refused to alter its basic policy and continued to dismiss soldiers for homosexuality. The last gay soldier was discharged from the military just three days before the ruling that overturned the ban on homosexual service. Service officials argued that the inclusion of open homosexuals would engender distrust, splinter working relationships, damage morale, and even harm operational effectiveness. Efforts to overturn the ban were deemed by some military officials to be inappropriate political meddling in military operations and harmful social engineering.

Once the decision was handed down by the European Court, however, the military acted quickly to put in place a policy that would both accord with the ruling and address effectiveness concerns. The Armed Forces enacted a new policy within three months of the decision by the European Court. It established a nondiscriminatory mandate that focuses on behavior rather than on personal characteristics. It emphasized the importance of equal application of the new social code of conduct and instructed commanders to intervene in soldiers' personal lives only when operational effectiveness might be compromised. It invited discharged soldiers to reapply and accepted back several former service personnel. The Services also reemphasized the policy of zero tolerance for harassment, bullying and victimization.

While the long-term effects of the elimination of the ban remain to be seen, the first ten months of the new social code of conduct and the more inclusive policy have been a clear and unqualified success. The Services' own internal assessment at six months found that the new policy has "been hailed as a solid achievement" (Ministry of Defense, 2000e, p. 2). There have been no indications of negative effects on recruiting

levels. The social code of conduct has been effectively incorporated into the military's training courses. No mass resignations have occurred. There have been no major reported cases of gay-bashing or harassment of sexual minorities. There have been no major reported cases of harassment or inappropriate behavior by gay or lesbian soldiers. There has been no perceived effect on morale, unit cohesion or operational effectiveness. The new policy has been well received by soldiers, and the policy change has been characterized by a "marked lack of reaction" (Ministry of Defense, 2000e, p. 2).

The conclusions of the Ministry of Defense report have been confirmed by our conversations with more than twenty-five representatives from the military, academia, and non-governmental organizations. None of those interviewed know of any major problems associated with the policy change. No one has heard of any difficulties related to recruitment or training completion rates; recruitment levels are characterized as "quite buoyant" (Barnard, Personal Communication, October 13, 2000). There has not been a problem of mass resignations associated with the removal of the ban. None of those interviewed have heard of cases of serious homophobic harassment. Rank Outsiders, the only organization devoted exclusively to homosexual servicemembers, knows of only two cases of minor problems. The issues were quickly addressed by military personnel and effectively resolved. Out service personnel interviewed for this report and by other sources describe collegial treatment by their co-workers and other servicemembers.

Experts in all fields acknowledged that more work remains to be done, and new obstacles could still emerge. Homophobic attitudes persist throughout the Services, and many soldiers therefore feel the need to remain silent about their personal lives. It is possible that some problems will develop as more gay and lesbian service personnel

acknowledge their sexual orientation to colleagues, or if the Armed Forces relaxes its vigilance against harassment and inappropriate behavior of all kinds. Issues of equality such as pension, accommodation and partnership rights have yet to be addressed. Still, the distance that has been traveled over the past year is impressive. Concerns of dire consequences have been replaced by a general recognition that the transition has proceeded smoothly.

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Don't Ask, Don't Tell: Is the Gay Ban Based on Military Necessity?

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Ten years ago, President Bill Clinton, the US Congress, and much of the nation were swept up in a monumental debate on whether or not acknowledged gays and lesbians would be allowed to serve in the US military. Having promised in his campaign to extend this civil right to gays and lesbians, Clinton faced a difficult challenge when he attempted to fulfill his pledge, opposed as he was by the Joint Chiefs of Staff and prominent members of Congress, like Senator Sam Nunn. In spite of their opposition, Clinton pressed on, and on 29 January 1993, he suspended the former policy that banned gay and lesbian personnel from service outright. Initiated by President Carter and implemented by President Reagan, this policy had been under attack by gay and lesbian military personnel since its inception as discriminatory,¹ and Clinton intended to formulate a new policy that would be more tolerant of sexual minorities in the US military and preserve military effectiveness.²

Over the next six months, Congress held numerous hearings on this issue and ultimately included a new policy on homosexual soldiers in the 1994 National Defense Authorization Act, commonly referred to as “Don’t Ask, Don’t Tell.”³ Billed by many as a compromise, “Don’t Ask, Don’t Tell” has been the subject of much criticism by both experts and activists, who view it as an imperfect solution to the problem it tried to solve ten years ago.⁴ In many ways, it was a politically expedient policy that pleased no one, and on its ten-year anniversary, perhaps it deserves to be revisited and evaluated in light of the impressive amount of evidence that scholars and experts have gathered about this issue in the interim.

According to “Don’t Ask, Don’t Tell,” known homosexuals are not allowed to serve in the US armed forces. Unlike the previous policy, “Don’t Ask, Don’t Tell” does not allow the military to ask enlistees if they are gay, but similar to its predecessor, it does stipulate that service members who disclose that they are homosexual are subject to dismissal. The official justification for the current policy is the unit cohesion rationale, which states that military performance would decline if known gay and lesbian soldiers were permitted to serve in uniform.⁵ While scholars and experts continue to disagree whether lifting the ban would undermine military performance in the United States, evidence from studies on foreign militaries on this question suggests that lifting bans on homosexual personnel does not threaten unit cohesion or undermine military effectiveness. As imperfect an analogy as these countries’ experience may be to the United States, they serve as the best possible vantage point from which to evaluate the viability and necessity of “Don’t Ask, Don’t Tell.”

Currently, 24 nations allow gays and lesbians to serve in their armed forces, and only a few NATO members continue to fire homosexual soldiers. Despite the growing number of countries that have decided to allow gays and lesbians to serve in uniform, however, there has been little in-depth analysis of whether the lifting of a gay ban influences military performance. Even the best and most recent case studies of foreign countries are based on little evidence. Most were written in the immediate aftermath of a decision to lift a gay ban without waiting for evidence on the effects of the new policy to accumulate.

The lack of in-depth analysis of foreign experiences in lifting bans on homosexual personnel prompted the Center for the Study of Sexual Minorities in the Military (CSSMM) to examine four cases in detail: Australia, Canada, Israel, and Britain.⁶ CSSMM researchers focused on these countries because all four lifted their gay bans despite opposition from the military services; because the United States, Australia, Canada, and Britain share important cultural traditions; because the Israel Defense Forces are among the most combat-tested militaries in the world; and because prior to lifting its ban, Britain’s policy was often cited as support for those opposed to allowing homosexual personnel to serve openly in the United States. To prepare the case studies, every identifiable pro-gay and anti-gay expert on the policy change in each country was interviewed, including officers and enlisted personnel, ministry representatives, academics, veterans, politicians, and nongovernmental observers. During each interview, experts were asked to recommend additional contacts, all of whom were contacted. By the end of our re-

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search, 104 experts were interviewed and 622 documents and articles were examined. Although it is possible that additional data exist, CSSMM believes that the findings reflect a comprehensive appraisal of all relevant evidence.

Lessons from Australia, Canada, Israel, and Britain

Each of the four countries studied reversed its gay ban for different reasons. In Canada, federal courts forced the armed forces to lift the ban in October 1992, ruling that military policy violated Canada's Charter of Rights and Freedoms. In Australia, the liberal government of Prime Minister Paul Keating voted to lift the ban in November 1992 as the country was integrating a number of international human rights conventions into its domestic laws and codes. In Israel, the military lifted its ban in June 1993 after dramatic Knesset hearings prompted a public outcry against the armed forces' exclusion of gay and lesbian soldiers. And in Britain, in September 1999, the European Court of Human Rights ruled that Britain's gay ban violated the right to privacy guaranteed in the European Convention on Human Rights, and London reacted by lifting the ban in January 2000. Despite the different routes that led to the policy change in each country, the lessons drawn from each case were the same.

No Impact

Not a single one of the 104 experts interviewed believed that the Australian, Canadian, Israeli, or British decisions to lift their gay bans undermined military performance, readiness, or cohesion, led to increased difficulties in recruiting or retention, or increased the rate of HIV infection among the troops.

In a 1985 survey of 6,500 male soldiers, the Canadian Department of National Defence found that 62 percent of male service members would refuse to share showers, undress, or sleep in the same room as a gay soldier, and that 45 percent would refuse to work with gays. A 1996 survey of 13,500 British service members reported that more than two-thirds of male respondents would not willingly serve in the military if gays and lesbians were allowed to serve. Yet when Canada and Britain subsequently lifted their gay bans, these dire predictions were not confirmed.

In Australia, Commodore R. W. Gates, whose rank is equivalent to a one-star admiral, remarked that the lifting of the ban was "an absolute non-event."⁷ Professor Hugh Smith, a leading academic expert on homosexuality in the Australian military, observed that when the government ordered the military to lift the ban, some officers said, "Over my dead body; if this happens I'll resign." However, Smith said that there were no such departures and that the change was accepted in "true military tradition."⁸ Bronwen Grey, an official in the Australian Defence Ministry, reported, "There was no increase in complaints about gay people or by gay people. There was no known increase in fights, on a ship, or in Army units. . . . The recruitment figures didn't alter."⁹

In Canada, Steve Leveque, a civilian official in the Department of National Defence, commented that including gays and lesbians in the Canadian Forces is “not that big a deal for us. . . . On a day-to-day basis, there probably hasn’t been much of a change.”¹⁰ A 1995 internal report from the Canadian government on the lifting of the ban concluded, “Despite all the anxiety that existed through the late 80s into the early 90s about the change in policy, here’s what the indicators show—no effect.”¹¹

In Israel, Stuart Cohen, a professor at the Center for Strategic Studies who is recognized as a leading expert on the Israel Defense Forces, remarked, “As far as I have been able to tell, homosexuals do not constitute an issue [with respect to] unit cohesion in the IDF. In fact, the entire subject is very marginal indeed as far as this military is concerned.”¹² Reuven Gal, the director of the Israeli Institute for Military Studies, wrote, “According to military reports, [homosexuals’] presence, whether openly or clandestinely, has not impaired the morale, cohesion, readiness, or security of any unit.”¹³

An internal government report that appraised the British change in policy characterized it as a “solid achievement . . . with fewer problems than might have been expected.”¹⁴ The assistant chief of the navy staff, Rear-Admiral James Burnell-Nugent, concurred: “Although some did not welcome the change in policy, it has not caused any degree of difficulty.”¹⁵ Overall, the report suggests that “there has been a marked lack of reaction” to the issue of including homosexual personnel in the British armed services.¹⁶

These reactions were typical of the comments made during the interviews with politicians, academic experts, non-profit observers, ministry officials, veterans, active-duty officers, and enlisted soldiers. Even the leading opponents of allowing gays into the military concluded that the lifting of the bans did not damage the armed forces. In Australia, for example, spokesmen for the Returned and Services League, the country’s largest veterans’ group, had previously said that lifting the gay ban would jeopardize morale and military performance. Eight years after Australia’s 1992 decision to lift its ban, however, the President of the Returned and Services League, Major General Peter Philips, stated that gays in the military have “not been a significant public issue. The Defence Forces have not had a lot of difficulty in this area.”¹⁷ In addition, our review of 622 documents and articles revealed no evidence that the lifting of the gay bans undermined military performance, led to difficulties in recruiting or retention, or increased the rate of HIV infection.

Equal Standards and an Emphasis on Conduct

Military leaders of all four countries stressed their expectation of professional conduct from every service member regardless of sexual orientation or personal beliefs about homosexuality. And in each country military leaders issued regulations that held heterosexual and homosexual soldiers to the same standards. In Australia, for example, the 1992 Defence Instruction on Discrimi-

nation, Harassment, Sexual Offences, Fraternisation and other Unacceptable Behavior referred to unacceptable conduct without making a distinction between homosexuality and heterosexuality. Rather than define unacceptable conduct in terms of sexual orientation, the instruction prohibited any sexual behavior that undermined the group or took advantage of subordinates.¹⁸ As one Australian official said, “Our focus is on the work people do, and the way they do the work, and that applies to heterosexuals, bisexuals, and homosexuals.”¹⁹ In each case, although many heterosexual soldiers continue to object to homosexuality, the military’s emphasis on conduct and equal standards was sufficient for encouraging service members to work together as a team. As one Canadian military official reported, homosexuality is “a deeply moral issue and that is a real complication. . . . But our experience did not justify such apprehension. . . . Even though some have found it difficult, loyal members changed their behavior when the institution changed.”²⁰

While none of the four militaries studied attempts to force its service members to accept homosexuality, all four insist that soldiers refrain from abuse and harassment. In each case, the emphasis on conduct and equal standards seems to work. In Australia, for example, 25 out of 1,642 phone calls (1.52 percent) received on the Defence Ministry’s sexual harassment hotline between 1997 and 2000 involved homosexuality.²¹ In Canada, none of the 905 cases of sexual harassment that occurred in the three years after the ban was lifted involved “gay-bashing” or the sexual orientation of one of the victims.²² In Israel, the 35 experts, soldiers, and officers we interviewed were able to recall only a handful of cases involving harassment based on sexual orientation after the lifting of the gay ban.²³ In Britain, no military officials who were interviewed could think of a single case of gay-bashing or assault related to sexual orientation.²⁴

No Mass “Coming Out of the Closet”

In each of the four cases, most homosexual soldiers did not reveal their sexual orientation to their peers after the lifting of the gay ban. Before the lifting of the ban, some gay and lesbian soldiers already were known by their peers to be homosexual. Immediately after the policy change, more revealed their sexual orientation, yet the vast majority chose not to do so. As time passed, small numbers of gay and lesbian soldiers disclosed their sexual orientation; even so, most still refrain from acknowledging their homosexuality.

In Australia, for example, a 1996 report noted that three years after the lifting of the ban, only 33 homosexual soldiers were willing to identify themselves to the authors of the study.²⁵ In Canada, the Department of National Defence received only 17 claims for medical, dental, and relocation benefits for homosexual partners in 1998, six years after Canada lifted its ban.²⁶ Given the military’s own estimate that 3.5 percent of its personnel are gay or lesbian, the low figure suggests that service members may hesitate to out themselves by requesting benefits. The nine gay and lesbian service members from Canada who

were interviewed all described their professional personas as relatively private and discrete. While many confide in their close friends and invite their partners to military functions, they nonetheless do not feel the need to out themselves in any formal way. One lesbian soldier said that in the Canadian military, “Gay people have never screamed to be really, really out. They just want to be really safe from not being fired.”²⁷ That being said, most of the currently serving members we spoke with believe that at least some members of their units know of their status as sexual minorities.

In Britain, military experts have observed a similar phenomenon in the British armed services. Since the lifting of the ban, most gay and lesbian soldiers have refrained from acknowledging their sexual orientation, reflecting their keen awareness of appropriate behavior in the military. As Professor Christopher Dandeker, Chair of the War Department at King’s College, observed, “Most expect gay personnel to continue to be extremely discreet until attitudes within the services change further.”²⁸

In Israel, most gay and lesbian soldiers kept their sexual orientation private before the lifting of the ban due to fears of official sanctions as well as ostracism from fellow soldiers. In 1993, Rafi Niv, a journalist who writes on gay issues, confirmed that “most gay soldiers I know are in the closet.”²⁹ As more gay Israelis have grown comfortable about expressing their orientation in recent years, however, greater openness has been found in the military as well. Danny Kaplan and Eyal Ben-Ari, for example, conducted in-depth interviews with 21 gay IDF combat soldiers and found that five were known to be homosexual by at least one other member in their combat unit.³⁰ In 1999, one tank corps soldier reported, “In my basic training, people knew that I was gay and . . . there was one homophobe in my unit. . . . After that, I had nothing to be afraid of.”³¹ While no official statistics exist on the number of known gay and lesbian soldiers in the IDF today, most of the experts we interviewed indicated that some gay and lesbians soldiers are known by their peers to be homosexual, that the majority remain in the closet, and that there has been a growing openness in the military in recent years.

The Relevance of Foreign Militaries for the United States

Are the experiences of foreign militaries that lifted their gay bans relevant for American policymakers? Experts who support the exclusion of homosexual soldiers from the US armed forces often claim that foreign military experiences are not applicable to the American case. They claim that homosexual soldiers receive special treatment in foreign militaries, that cultural differences distinguish the United States from foreign countries, and that no known gay and lesbian soldiers serve in foreign combat units. These claims are only partially accurate, and they do not invalidate the relevance of foreign experiences for US policymakers.

Advocates of the ban claim that although many nations allow homosexuals to serve in the armed forces, gay and lesbian soldiers receive special treatment in foreign countries. They suggest that even if the decision to allow known

“Evidence from studies on foreign militaries . . . suggests that lifting bans on homosexual personnel does not threaten unit cohesion or undermine military effectiveness.”

homosexuals to serve does not harm the military, the special treatment that gays and lesbians receive can undermine cohesion, performance, readiness, and morale. During a program on National Public Radio, Professor Charles Moskos said, “All countries have some kind of de facto and many actually legal restrictions on homosexuals. . . . Even [in] the Netherlands, the most liberal you might say of all western societies, when they had conscription, if a gay said he could not serve because it would not make him feel comfortable living so closely with men, he was excluded from the draft.”³²

None of the four militaries studied treats homosexuals and heterosexuals perfectly equally. Despite the lack of perfectly equal treatment, however, unequal treatment is rare, and most gay and lesbian soldiers are treated the same as their heterosexual peers most of the time. Most cases of unequal treatment consisted of local attempts to resolve problems flexibly. For example, some *heterosexual* soldiers in Israel are allowed to live off base or to change units if they are having trouble with their group, and some commanders allow heterosexual soldiers to shower privately. In other cases, unequal treatment consists of minor privileges accorded to heterosexuals, not special rights for gay and lesbian soldiers. Homosexual soldiers in the Australian and British militaries, for example, are not entitled to the same domestic partner benefits that heterosexuals receive.³³ In Israel, the military offered survivor benefits to a same-sex partner for the first time in 1997, but the same-sex survivor received less compensation than heterosexual widows and widowers.³⁴

Most important, there is no evidence to show that differential treatment undermined performance, cohesion, readiness, or morale. Indeed, most of the 104 experts who confirmed that the decisions of Australia, Canada, Israel, and Britain to lift their gay bans did not undermine performance also confirmed that the treatment of gays and lesbians has not been perfectly equitable in all cases. Despite their awareness that treatment has not been perfectly equitable at all times, however, all the experts agreed that lifting the gay bans did not undermine military effectiveness.

Some US experts who support the gay ban claim that important cultural differences distinguish the United States from other countries that allow known

homosexuals to serve. More specifically, they argue that unlike most other countries, the United States is home to powerful gay rights groups as well as large and highly organized conservative organizations. While no two societies are the same, the United States, Australia, Canada, and Britain share many cultural traditions, and gay rights issues are highly polarized in all four countries. In addition, Australian, Canadian, Israeli, and British cultures are rather homophobic, even though all four countries offer more legal protections to gays and lesbians than the United States. Just as Australian, Canadian, Israeli, and British cultures are not overwhelmingly tolerant of gays and lesbians, American culture is not completely intolerant. For example, recent Gallup polls show that 72 percent of Americans believe that gays should be allowed to serve in the military and that 56 percent of Americans believe that open gays should be allowed to serve.³⁵ Advocates of the gay ban who use cultural arguments to justify their position should do a better job of explaining why the cultural factors that distinguish the United States from the 24 nations that allow homosexuals to serve render our military uniquely incapable of integration.

More significantly, tolerant national climates are not necessary for maintaining cohesion, readiness, morale, and performance after the integration of a minority group into the military. It would not be possible for the numerous American police and fire departments that include known homosexuals to continue to function smoothly if a fully tolerant national climate were necessary for the maintenance of organizational effectiveness. When President Harry Truman ordered the US military to allow African American soldiers to serve on an equal basis, 63 percent of the American public opposed integration.³⁶ Without equating the experiences of sexual and racial minorities, the racial example shows that tolerant cultural climates are not necessary for maintaining combat effectiveness when minority groups are integrated into the armed forces.

Finally, supporters of the gay ban claim that no known gay and lesbian soldiers serve in foreign combat units, yet the findings from the CSSMM studies suggest that this argument is incorrect. Although the vast majority of gay combat soldiers in Australia, Canada, Israel, and Britain do not acknowledge their sexual orientation to peers, some known gays serve in combat units. In Australia, for example, an openly gay squadron leader, Michael Seah, said that he served actively in what is widely considered to be one of Australia's most combat-like and successful deployments in recent years—the United Nations peacekeeping operation in East Timor.³⁷ Another gay soldier commented, “Looking at the current operation in East Timor, I’ve got a number of gay and lesbian friends in an operational situation. I have served in Bougainville, and there is no problem.”³⁸

In 2000, a colleague and I administered a survey to 194 combat soldiers in the Israel Defense Forces that included the following question: “Do you know (or have known in the past) a homosexual or lesbian soldier in your unit?”³⁹ We found that 21.6 percent of respondents knew a gay peer in their unit, and an additional 19.6 percent indicated they may have known a gay peer in their unit. The

***“Are the experiences of foreign militaries
that lifted their gay bans
relevant for American policymakers?”***

important point is that even in combat units with known gay soldiers, we found no evidence of deterioration in cohesion, performance, readiness, or morale. Generals, ministry officials, scholars, and NGO observers all have said that their presence has not eroded military effectiveness.

Experts who use the low number of open gay combat troops in overseas militaries to underscore the irrelevance of foreign experiences believe that if the American ban is lifted, many gays and lesbians will reveal their sexual orientation. This belief is premised on the flawed assumption that culture and identity politics are the driving forces behind gay soldiers’ decisions to disclose their homosexuality. What the evidence shows is that personal safety plays a much more powerful role than culture in the decision of whether or not to reveal sexual orientation. For example, a University of Chicago study of American police departments that allow open homosexuals to serve identified seven known gays in the Chicago Police Department and approximately one hundred in the New York Police Department.⁴⁰ If American culture and identity politics were the driving forces behind decisions to reveal homosexuality, then there would be a large number of open gays in all American police and fire departments that allow homosexuals to serve. As Dr. Paul Koegel of the RAND Corporation explains, however, “Perhaps one of the most salient factors that influences whether homosexual police officers or fire-fighters make their sexual orientation known to their departments is their perception of the climate. . . . [T]he more hostile the environment, the less likely it was that people publicly acknowledged their homosexuality.”⁴¹

Since safety varies from organization to organization depending on whether or not leaders express clear support for integration, the number of open gays varies as well. As a result, Dr. Laura Miller, previously on the faculty of the UCLA Sociology Department and now with the RAND Corporation, argues that similar to the experiences of foreign militaries that lifted their bans, most homosexual American soldiers will not disclose their sexual orientation if the United States changes its policy unless and until it is safe to do so.⁴²

Base Policy on Evidence, Not Anecdotes

Defenders of “Don’t Ask, Don’t Tell” commonly offer two types of evidence to show that known gays and lesbians undermine military performance.

First, advocates of the ban point to anecdotes that involve gay misconduct. During his testimony before the Senate Armed Services Committee in 1993, for example, General Norman Schwarzkopf said, "I am aware of instances where heterosexuals have been solicited to commit homosexual acts, and, even more traumatic emotionally, physically coerced to engage in such acts."⁴³ Second, supporters of the ban point to numerous statistical surveys showing that heterosexual soldiers do not like gay soldiers. When asked during a debate on National Public Radio to provide hard evidence showing that open gays and lesbians disrupt the military, Professor Moskos said, "If you want data, we have survey data on this question and there is . . . a vehement opposition by the majority of the men. If that isn't data, I don't know what is."⁴⁴

Neither type of evidence shows that gays and lesbians undermine military performance. Anecdotal evidence can be used to prove almost any point by selecting stories that support a particular point of view. For example, it would be easy to blame left-handed people for undermining military performance by presenting ten anecdotes in which left-handed service members engaged in misconduct. Indeed, this stacking of the deck is precisely the strategy that former Senate Armed Services Committee Chairman Sam Nunn used during the 1993 hearings on gays in the military. When Nunn learned that the testimony of retired Army Colonel Lucian K. Truscott III would include accounts of open gay soldiers who had served with distinction, Nunn deleted Truscott from the witness list.⁴⁵ Anecdotes do not serve as evidence if they are chosen to reflect only one side of the story.

Just as anecdotal evidence does not prove that gay and lesbian soldiers undermine military performance, survey results are equally unconvincing. While surveys certainly show that heterosexual soldiers do not like gays and lesbians, dislike has no necessary impact on organizational performance. Hundreds of studies of military units, sports teams, and corporate organizations, summarized by Professor Elizabeth Kier in the journal *International Security*, indicate that whether group members like each other has no bearing on how well organizations perform. The overwhelming scholarly consensus is that the quality of group performance depends on whether group members are committed to the same goals, not whether they like each other.⁴⁶ In the 29 years since the Dutch military lifted its gay ban in 1974, no study has shown that any of the 24 nations that allow homosexual soldiers to serve in uniform has suffered a decline in performance.

For many years, advocates of the Pentagon's policy cited British arguments for excluding homosexual soldiers to justify their own position. Numerous British officers and Defence Ministry representatives claimed in public that the military would suffer if Britain lifted its ban. Yet as discussed above, when Britain ended its ban in 2000, the change in policy generated few difficulties and has continued to pose little problem. Given the US military's use of the British example to support its opposition to allowing gays and lesbians to serve openly, the military undermines its credibility by ceasing to cite Britain when the anecdote no longer conforms to the argument the United States wishes to make.

While no single case is decisive, the combined evidence from the 24 countries that allow gays and lesbians to serve shows that if the United States lifts its ban, American military performance will not decline. As was the case in Australia, Canada, Israel, and Britain, American military leaders can preserve military effectiveness after they lift the ban by holding all soldiers to the same professional standards and by insisting that regardless of personal beliefs about homosexuality, they expect professional conduct from all service members. As Dr. Nathaniel Frank wrote in *The Washington Post*, “Certainly the United States has more international obligations than other countries do. But the question is not how similar our missions are to those of other nations but whether the United States is any less capable than other nations of integrating gays into its military.”⁴⁷

Perhaps it is time for the Administration, the Congress, and the Pentagon to reconsider the evidence that is used to justify the gay ban. Or, if political and military leaders remain unwilling to join most of the rest of NATO, they should at least have the integrity to admit that current American policy is based on prejudice, not on military necessity.

NOTES

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9. Interview with Bronwen Grey, Director, Defence Equity Organisation, 17 August 2000.
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**The Effects of Including Gay and Lesbian Soldiers in the Australian Defence Forces:
Appraising the Evidence**

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I. EXECUTIVE SUMMARY

In November 1992, the Australian Defence Forces lifted its ban on open gay and lesbian soldiers. Using all available data from military, academic, non-governmental, and other sources, this report assesses the extent to which the lifting of the gay ban has affected the well-being and performance of the Australian military.

Based on the results of prior studies, eighteen in-depth interviews with informed military and non-military observers, and other data, this study finds that the full lifting of the ban on gay service has not led to any identifiable negative effects on troop morale, combat effectiveness, recruitment and retention, or other measures of military performance. Furthermore, available evidence suggests that policy changes associated with the lifting of the ban may have contributed to improvements in productivity and working environments for service members. Key findings include:

- Senior officials, commanders, and military scholars within the ADF consistently appraise the lifting of the ban as a successful policy change that has contributed to greater equity and effective working relationships within the ranks.
- Prior to the lifting of the ban, ADF service chief argued that allowing homosexuals to serve openly would jeopardize recruitment, troop cohesion, and combat effectiveness while also spreading AIDS and encouraging predatory behavior
- Senior officials, commanders and scholars report that there has been no overall pattern of disruption to the military. However, some individual units have reported disruptions that were resolved successfully through normal management procedures.
- While the lifting of the ban was not immediately followed by large numbers of personnel declaring their sexual-orientation, by the late 1990s significant numbers of

officers and enlisted personnel had successfully and largely uneventfully come out to their peers.

- Recruitment and retention rates have not suffered as a result of the policy change. As Commodore R. W. Gates of the Royal Australian Navy states in the report, “There was no great peak...where people walked out, and there was no great dip in recruiting. It really was a non-event.”
- Self-identified gay soldiers, officers, and commanders describe good working relationships in an environment that emphasizes capable and competent job performance under uniform rules of conduct for all personnel. Gay soldiers and commanders have successfully served in recent active deployments in East Timor.
- Complaints regarding sexual orientation issues comprise less than 5% of the total complaints received by the ADF of incidents of sexual harassment, bullying, and other forms of sexual misconduct.
- Of 1,400 calls received by an anonymous “Advice Line” maintained by the ADF to help personnel and commanders manage potential misconduct issues since this service was initiated in August 1998, 17 (1.21 percent) have related to sexual orientation issues.
- Current debates in Australia related to the policy change are now focused on extending equal benefits to the partners of gay servicemembers, rather than on the policy itself. To the degree that harassment issues continue to exist in the Australian Forces, most observers believe that problems faced by women soldiers are more serious than those faced by gay personnel.

II. INTRODUCTION

Prior to 1992, the Australian Defence Forces (ADF) maintained both formal and informal rules to discourage known or suspected homosexuals from serving (Smith 2000, Agostino 2000). As a result of a number of external and internal pressures, in 1992 the Defence Forces issued a new directive that lifted the remaining ban on homosexual service by specifying uniform rules of appropriate and inappropriate sexual conduct that applied equally to both heterosexual and homosexual interactions. The change in policy met with strong opposition from the ADF service chiefs as well as from several service member organizations who argued that allowing homosexuals to serve openly would jeopardize recruitment, troop cohesion, and combat effectiveness while also spreading AIDS and encouraging predatory behavior (see e.g., Associated Press, 24 November 1993). In the months that followed the policy change, however, the issue largely and quickly faded from the public stage.

This report integrates prior studies of gay-military issues in Australia, press coverage, Australian Forces data, and interviews with eighteen ADF officials, academic observers, non-governmental actors, interest groups, and enlisted personnel to assess how and to what extent the performance and well-being of the Australian Defence Forces have been affected by the 1992 lifting of the ban on open gay service. Almost eight years after the ban was lifted, all available evidence indicates that the policy change has not led to deleterious consequences for recruitment or retention, effective unit functioning, or combat effectiveness. While very little quantifiable data appear to exist that bear directly on performance effects of the policy change, the experiences and observations of senior ADF officials, commanders of active-duty deployments, recruitment officers, and self-identified homosexual servicemembers all strongly suggest that the policy change has been implemented smoothly and successfully, albeit imperfectly. Their

opinions are corroborated by the research and evidence provided by informed scholars, journalists, and representatives of a number of interest and pressure groups. At the present time, public debates in Australia over gay-military issues have moved on to second-order concerns—to issues concerning spousal benefits and adequate enforcement of existing anti-discrimination policies in the workplace. For the ADF, the participation of homosexuals in the military is now very much a “non-issue.”

Part III begins the analysis by outlining the evidence collected and the methods used to appraise it. Part IV briefly reviews the historical context of the 1992 decision to lift the ban, describes the policy change, and addresses its implementation. Part V provides a systematic review of evidence from prior assessments, the Australian Defence Forces, and the independent Human Rights and Equal Opportunities Commission, before moving on to observations made by informed academics and representatives of relevant interest groups. Part V concludes by documenting the experiences of seven current and former self-declared homosexuals in the ADF. Finally, Part VI synthesizes the available evidence and concludes the analysis.

III. METHODOLOGY

Information collected for this report was systematically gathered from publicly available primary and secondary sources relevant to an understanding of military outcomes associated with homosexual service in the Australian Defence Forces. Sources and methods included: identification, retrieval, and analysis of all prior research bearing on homosexual service in the Australian Defence Forces conducted by governmental, academic, and policy-focused organizations in North America; content analysis of Nexis/Lexis search retrievals for all North American, European, and Asia-Pacific news articles and wire service dispatches relating to

homosexual service in the Australian Defence Forces before and after the ban was lifted (n=63); interviews undertaken with Australian Defence Forces units and their senior representatives (n=3 individuals); snowball identification and interviewing of major academic, non-governmental, and policy experts on gay-military issues in Australia since the ban was lifted (n=9); and interviews with sexual minority participants in the Australian Defence Forces who were located through the cooperation of leading non-governmental and military human rights organizations (n=7). Australian Defence Forces representatives were chosen by asking academic, non-governmental, and policy experts for suggested contacts who were knowledgeable about the military's policy on homosexuality, and then using snowball identification techniques to identify other interview subjects.

To draw its conclusions, this report relies on a multi-method approach to compare and synthesize evidence provided by a variety of sources. Whenever possible, we compare independent observations from multiple sources to elucidate findings that are consistent among observers in different sectors (e.g., military, academic, non-governmental). During the interview process, we also sought to ensure that the universe of sources drawn upon for the study was complete by repeatedly asking observers from different sectors for recommendations of additional sources of information. While it is possible that additional confidential information on outcomes not documented in this report may be maintained by the ADF, senior officials contacted for this study were not aware of any additional data. The final compilation of sources that informs this report thus reflects an exhaustive inventory of relevant data and opinions.

IV. CONTEXT OF THE 1992 LIFTING OF REMAINING BAN

1. Australian Society and Military Policy Regarding Homosexuals Prior to 1992

Like the Armed Forces in many other Anglophone countries, the Australian military maintained both formal and informal rules proscribing the participation of known homosexuals in the armed forces from 1986 to 1992. Prior to 1986, the ADF did not maintain a formal policy regarding the participation of homosexuals. According to a report by United States General Accounting Office (1993), recruits were not formally questioned about their sexual orientation before 1986. However, informal efforts frequently were made to identify and document activities of personnel suspected of homosexual conduct, usually followed by the removal of such personnel from duty (Agostino 2000). Existing state and federal laws proscribing sodomy and homosexual relations usually were invoked to enforce these actions (Croome 1992, 9; Livingstone 2000).

While most historical perspectives on the treatment of homosexual personnel have identified a number of instances of investigation and prosecution (referred to by some critics as “witch hunts”) between World War II and the mid-1980s, substantial evidence nonetheless exists that homosexuality was at times tolerated if not informally accepted in some units (Smith 2000). Anecdotal evidence provided by most experts interviewed for this report also indicates that many ADF personnel were aware that practicing homosexuals served in the ranks.

In the 1980s, as Australia incorporated international human rights accords into its national laws, federal and state governments actively dismantled existing laws against homosexuality and began to ratify new human rights bills that included protection against arbitrary discrimination. As a result, the ADF could no longer justify anti-homosexual practices on the basis of territorial laws and was required to issue its own policy. It did so in September

1986, and the ban on homosexual service became an explicit and formal part of ADF instructions (Croome 1992; Smith 1995).

Even so, according to Hugh Smith, Associate Professor of Politics at the Australian Defence Force Academy, the policy of banning gays was exercised with some degree of tolerance and senior military officials often used discretion to decide whether or not to implement the gay ban (Smith 2000). At the same time, however, other persons familiar with the situation between 1986 and 1992 assert that the military routinely engaged in “witch hunts” to root out members suspected of homosexuality. According to Dr. Katerina Agostino of the Macquarie University Department of Sociology, “The military invested lots of time and money in finding and rooting people out. Military police were used” (Agostino, 2000)”

2. Context of the Policy Change

In the late 1980s and early 1990s, a number of economic, social and cultural factors served to undermine the perceived legitimacy and rationale of the ADF ban on homosexual service. To begin, military leaders encountered criticisms of ADF policies concerning equality of opportunity and racial and ethnic diversity. In 1992, the government examined charges that the ADF was not recruiting a sufficient portion of its soldiers from non-European populations and the result was a major study of the ethnic makeup of the forces (Smith 1995, 535). Debates over the status and treatment of women in the ADF also influenced the perceived legitimacy of the ban on gay service. Though women had been able to participate in the Australian military for many years, either directly or through auxiliary branches like the Women’s Royal Australian Army Corps, they were not allowed to take combat roles until the late 1980s. Smith points out that the three service branches began to face difficulties in retaining qualified personnel: “The

ADF thus had a clear incentive to open more positions to women, thereby expanding the pool of potential recruits” (Smith 1995, 540). Related to these problems, considerations of sexual harassment and problems of sexual behavior in the ADF began to come to light. In late 1992, three women who had served on board *HMAS Swan* alleged that they had been sexually harassed quite severely at the hands of their male shipmates. Similar to the Tailhook sexual harassment incident in the United States, the case provoked widespread outrage and a call for the military to examine gender issues in the forces (Agostino 2000, Smith 1995, Smith 2000).

In the years shortly before government and ADF officials considered lifting the ban on homosexuals, Australia adopted several human rights measures into its laws and codes including the International Convention on Civil and Political Rights. Article 26 of the ICCPR posits the fundamental equality of all human beings and Article 2 addresses each individual’s right to equal treatment before the law (Sidoti 2000). Although sexual orientation is not included explicitly in the ICCPR’s list of prohibited justifications for discrimination, Australian Human Rights Commissioner Chris Sidoti says that the ICCPR’s list was meant to be inclusive rather than exclusive. Therefore, Sidoti continues, although not explicitly mentioned, sexual orientation is covered by the spirit of the ICCPR and it cannot serve as the basis of discrimination. Opponents of the ADF ban argued that the military was in violation of these human rights provisions in Australian law.

As civil rights considerations came to play an increasingly important role in the Australian political landscape, the ADF encountered a number of social and international trends that changed its understanding of its own mission and its relationship with civilian society. In particular, the end of the Cold War forced the ADF to reevaluate its role as a fighting force and many Australians came to see military service as a temporary occupation rather than a long-term

career.¹ Professor Hugh Smith has argued that during the Cold War, many Australians regarded the military as a calling and a lifetime vocation (1995). According to the old mindset, a career in the armed forces meant that military life always took precedence over other priorities. Smith says that according to the new “occupational” mindset of many Australians, however, a military career is “just another job.” Except in extraordinary circumstances like combat, soldiers now expect regular working hours, free weekends, pension and benefits, and other freedoms and privileges associated with the civilian world. In the late 1980s and early 1990’s, much of Australian society moved toward an occupational outlook on most careers including military service, and just as the rest of Australian society was moving toward greater tolerance and support for individual rights and freedoms, the military found itself needing to adjust (Smith 1995, 536-39).

As the center-left/left party in Australian politics, the Labour government that controlled Parliament in the late 1980s and early 1990s faced some disagreement within its own ranks over social issues such as the lifting of the ban on gays and lesbians in the military. As Croome (2000) points out, some members of Labour’s caucus supported “traditional family values” and opposed lifting the ban. Others were traditional progressives, committed to an expansion of what they argued were equal rights for all Australians.

In a 1990 test of the military ban on homosexuals, a servicewoman made a formal complaint to the Australian Human Rights and Equal Opportunities Commission and contended that her discharge had been partially based upon the fact that she was a lesbian. The HREOC asked the ADF to explain the reasoning behind its ban on homosexual service, and some observers believe that the complaint was a serious challenge to ADF policy and that it may have

¹ In the intervening decade, the ADF has become a significant contributor to international peacekeeping efforts, most recently in East Timor and Papua New Guinea.

prompted the ADF to review its rationale for discrimination (UK Ministry of Defence 1996, H1-1; Smith 1995, 544; Croome 1992, 10). In February 1992, the Minister for Defence Science and Personnel informed Parliament that the federal government would review the ADF's ban (Croome 1992, 10). In June 1992, however, the Defense Minister told Parliament that following the recommendation of the Chiefs of Staff, the Government would not lift the ban. Gay activists condemned the declaration as hypocritical and prejudiced. (Agence France Presse, 18 June 1992)

In reaction, the Government formed a special party committee to study the matter, to accept submissions from interested groups, and to make policy recommendations for the government. In September 1992, this committee recommended that the ban be dropped "immediately." The Caucus Committee also recommended that the ADF undertake a survey of members' attitudes and engage in an education campaign as part of the lifting of the ban. Committee members who favored lifting the ban contended that the military was not significantly different from other organizations and thus should not be exempt from anti-discriminatory policy changes being made elsewhere.² Those who opposed the removal of the personnel restrictions contended that such a change would hinder the military's operational effectiveness, combat performance, and morale. At the time, an ADF spokesperson said that the military would find the removal of the ban "disturb[ing]" and would likely react with disgust (Agence France Presse, 18 September 1992).

3. The Lifting of the Ban and Immediate Reactions

In late November 1992, the Cabinet accepted the Caucus Committee recommendation and the Government voted to drop the ban on the service of gays and lesbians in the Australian

² In 1992, for example, Australia was one of three countries (along with Finland and the Netherlands) that gave residency rights to the foreign partners of homosexual citizens. However, homosexuality was still illegal in Tasmania (Kyodo News Service, 2 December 1992).

military. Although the Defense Minister and the service chiefs opposed the removal of the ban, the Attorney General, the Health Minister, and the Prime Minister all supported its removal. The Attorney General argued that Australia's policy violated international human rights agreements not to discriminate against people based upon sexual orientation and the Health Minister said that by pushing military members to keep their relationships "underground", the ban contradicted efforts to fight AIDS. Prime Minister Paul Keating then made the decision to accept the policy change and to order its immediate implementation in the entire ADF. (Agence France Presse, 23 November 1992; United Press International, 23 November 1992; Reuters, 24 November 1992.)

In place of the previous military regulation banning gays and lesbians from service, the government issued a more general instruction on "sexual misconduct policy." Among other provisions, the new instruction referred to unacceptable conduct without making a distinction between homosexuality and heterosexuality. Rather than define what was unacceptable based upon sexual orientation, in other words, the new instruction prohibited any sexual behavior that negatively impacted group cohesion or command relationships, took advantage of subordinates, or discredited the ADF (Smith, 1995, 545). Thus, for example, "homosexual advances" were not illegitimate; threatening sexual behavior was. And the policy provided commanders with some latitude to judge whether a certain behavior was acceptable or not in a certain context. According to a report prepared by the British Defence Ministry, the Australian policy "recognises that sexual relations are a part of adult life and are predominately a private matter for each individual. Nevertheless, the ADF is concerned with the sexual behavior of its members where it is inconsistent with the inherent requirements of the ADF, or where it is unlawful. ... The term 'Unacceptable Sexual Behaviour' is not defined and thus left to a wide variety of command interpretation. This lack of prescriptive definition of unacceptable behavior is in line

with the Australian Sex Discrimination Act's emphasis on what is reasonable in the circumstances and the recipient's response to such behaviour" (UK Defence Ministry 1996, H1-3).

Reaction to the Australian change was swift and severe. The Returned and Services League, Australia's largest veterans group, condemned the policy change and argued that allowing open homosexuals to serve would shatter unit cohesion and lead to a deterioration of trust among soldiers, thus undermining the forces' fighting effectiveness (Associated Press, 24 November 1992). Other opponents raised the specter of AIDS and said that the battlefield practice of direct blood-to-blood transfers would lead to an increased incidence of HIV infection. Even within the military, however, opinion seemed to be somewhat mixed (Associated Press, 9 December 1992). As of January 1993, however, no members of the ADF declared themselves to be gay to military authorities (Associated Press, 27 January 1993). Early reports generated in the immediate aftermath of the policy change indicated that the ADF did not experience any decline in recruiting or combat performance and media attention to the issue largely disappeared approximately six months after new policy's implementation (New York Times, 30 April 1993).

After the lifting of the ban, the ADF introduced a variety of new programs and training courses to enforce and support the provisions of the Defence Instruction on Discrimination, Harassment, Sexual Offences, Fraternisation and other Unacceptable Behavior in the Australian Defence Forces (2000). In 1997, responsibilities for monitoring, education, and enforcement of the Instructions were consolidated into the new Defence Equity Organization (DEO) that reports directly to the Defence Personnel Executive (the head of personnel for the ADF). Currently, the DEO is planning to provide additional support for the integration of gay and lesbian soldiers by creating a new training course (Grey 2000).

V. EFFECTS OF FULL INCLUSION ON PERFORMANCE IN THE ADF: APPRAISING THE EVIDENCE

A. Prior Assessments: United States General Accounting Office (1993) And United Kingdom Ministry Of Defence (1996)

GAO (1993) Study

In June 1993, seven months after the Australian ban on homosexual service was lifted, the General Accounting Office of the United States conducted interviews with ADF officials to document early outcomes associated with the change (GAO 1993). The short overview of the policy change concludes with a summary statement based on comments from an “Australian official,” who stated that:

“...[A]lthough it is too early to assess the results of the revised policy, no reported changes have occurred in the number of persons declaring his or her sexual preference or the number of recruits being inducted. Effects on unit cohesiveness have not yet been fully determined. However, early indications are that the new policy has had little or no adverse impact” (19).

These claims are substantiated by additional evidence collected for this study, described below.

United Kingdom (1996) Assessment

In February 1996, the United Kingdom Ministry of Defence completed a report documenting the findings of its “Homosexuality Policy Assessment Team” that investigated homosexual personnel policies of a number of foreign militaries. The team sent to Australia met with representatives of the Royal Australian Air Force, Royal Australian Army, and Royal Australian Navy, as well as with Dr. Hugh Smith of the ADF Academy (also interviewed for this report) and service psychologists at ADF headquarters in Canberra. Their findings describe the context of the policy change, the manner in which it was implemented, and observed outcomes in practice.

Regarding implementation of the policy, the British team reported that service staffs believed that the change had not resulted in any notable problems for military functioning.

According to the report,

Service policy staffs all stated that following an initial outcry, homosexuality had become a non-issue...The difficulties of integrating open homosexuals were described as 'just another legitimate management problem' (UK Ministry of Defence 1996, H1-4).

The opinions of personnel drawn from the services, however, varied in their assessments of potential difficulties arising from the policy change. According to the report, male members of a random volunteer group from the Royal Australian Air Force were "very largely against the new policy and believe that, in a combat situation, the presence of open homosexuals would have a degrading effect on [o]perational effectiveness" (H1-4). However, personnel drawn from an Army Logistics unit, as well as a Royal Australian Navy group based in Sydney, emphasized equality and non-discrimination regardless of personal opinions on homosexuality per se (H1-4). The report concludes that HIV was "not regarded as a significant issue" in light of routine testing of personnel.

The British report noted that thirty-three homosexual soldiers, contacted through the president of the major gay servicemembers group, had been willing to identify themselves to members of the team. Senior members of the group included a RAN Commander and a former Army Lieutenant Colonel. The authors believed that another fifteen personnel were members of the group but were not willing to reveal their identities. The report speculates that the reasons for this "continuing reticence" were related to "fear of comrades [sic] rejection and informal sanctions, and anxiety about the effect on their careers" (H1-5). According to the report, gay service members were satisfied with the policy change but were still eager to push for additional acceptance and rights such as equal entitlements for same-sex partners.

B. Evidence from the Australian Defence Forces

Defence Equity Organization

The Defence Equity Organization (DEO) serves as the primary ADF unit responsible for development, implementation, training, and support for all policies regarding equity, diversity, and sexual misconduct in the military. Its self-described mission “is to inform, educate, encourage and ensure that equitable policies, processes and practices form an integral part of doing business in Defence as the basis for a fairer and better work environment” (DEO 2000). Formed in August 1997 during a widespread re-organization of the ADF, the DEO consolidated responsibilities that had been assigned separately to each service branch as well as a human rights policy area within Defence Headquarters (now defunct). In addition to supporting the implementation of ministry policies, DEO handles complaints regarding all matters of sexual misconduct including harassment, bullying and assault, provides an anonymous advice line for service members and commanders, and directs the training and outreach activities of “Equity Advisors” throughout the forces. The director of the Defence Equity Organization, Ms. Bronwen Grey, occupied the analogous Directorship in Defence Headquarters until 1997.

According to Director Grey, all available formal and informal evidence regarding outcomes associated with the 1992 policy change suggests that, in spite of early fears of deleterious consequences, the lifting of the gay ban has had no adverse effects on the capability or functioning of the Defence Forces:

I have to say, from that point on [the 1992 change], nothing happened. I mean people were expecting the sky to fall, and it didn't. Now, a number of gay people probably didn't come out at that point, but we've had an X.O. of a ship come out and say to the ship's company, "I'm gay," and, quite frankly, no one cared (Grey 2000).

The Director bases her conclusion on her experiences at Defence Equity as well as her tenure as Director of Personnel Policy at Headquarters (HQADF) before the 1997 re-organization. While quantifiable data associated with sexual conduct or performance outcomes prior to 1997 are not available, Director Grey says that

[T]here was no increase in complaints about gay people or by gay people. There was no known increase in fights, on a ship, or in Army units or something...The recruitment figures didn't alter.... At that time, it didn't figure in recruitment. Commanders were really on the watch at the time because they were told that had to really make sure that this worked.... [They] were watching out for problems. They didn't identify any. Now that doesn't mean there weren't any, but they didn't identify any (Grey 2000).

When pushed by the interviewer to identify any problems that may have arisen after the ban was lifted, the Director did note that some gay people probably did not feel comfortable revealing their sexual orientation immediately after the change. Nonetheless, she says that a number of individuals have unambiguously come out to peers and commanding officers and that their revelations had no negative consequences for their careers or personal relationships. When asked to clearly specify any other concrete observations of what she termed a virtual "non event," the Director added,

All I can say is, from the organizational point of view, while we were waiting for problems...we were ready. Nothing happened. There were no increased complaints or recruiting [problems] at all.... I mean nothing happened. And it's very hard to document nothing (Grey 2000).

While the ADF could not provide the authors of this study with quantifiable data on sexual misconduct that occurred during the first several years after the lifting of the ban, in 1997 Defence Equity began collecting aggregate data from its anonymous telephone "advice line" that concerned sexual misconduct and harassment. Table 1 summarizes the aggregate results and the specific instances related to homosexual conduct:

Table 1: Total and Sexual Orientation-Specific Instances Received Since Inception: Formal Complaints and Advice Line Calls Regarding Sexual Conduct

SOURCE	Total number	Number involving homo- sexuality	Percent involving homo-sexuality
Formal Complaints Received (March 1997-August 2000)	494	12	2.43%
Advice Line Phone Calls (September 1998-August 31, 2000)	1642	25	1.52%

According to Director Grey, these figures, while not providing a full portrait of possible problems relating to the service of open homosexuals, nonetheless suggest that “harassment regarding sexual orientation really isn’t significant in the ADF.” Reiterating the philosophy behind the ADF’s new position on sexual behavior enshrined in the 1992 lifting of the ban, she notes that the sexual behavior policy monitored and enforced by DEO is intended for all personnel, whether homosexual, bisexual, or heterosexual: “It doesn’t matter what the sexual orientation is. The reason we have [these policies] is because unfit behavior diminishes capability. We’re focused on work output and the impact on capability.” Thus, the military’s efforts to collect information and enforce sexual conduct policies do not reflect a particular concern over possible problems relating to homosexual service, but rather a focus on maintaining an appropriate environment for maximum capability and work output. Commenting on the philosophy and approach behind the ADF’s position on this issue, the Director adds:

[O]ur focus is on the work people do, and the way they do the work, and that applies to heterosexuals, bisexuals, and homosexuals. We don’t ask people if they’re homosexual because we don’t care. It doesn’t play a part in promotion, it doesn’t play a part in training, it doesn’t play a part in postings. It simply isn’t an issue. Now that doesn’t mean that we don’t have some complaints, but basically it is a non-issue (Grey 2000).

Evidence form Other ADF Commanders and Personnel

For this study, senior military officials familiar with recruiting, training, deployment, and performance were contacted for their perspectives on the impact of the 1992 decision to lift the gay ban. In this section, we review evidence from in-depth interviews with two senior ADF officials: a one-star Naval Officer with extensive command experience who now serves as Director General of Career Management Policy; and the Senior Marketing Officer of the Defence Course Recruiting Organisation, who oversees a variety of recruitment-related outreach activities across the ADF.

At the request of the authors of this study, the ADF arranged for an interview with a senior warfare officer with substantial command experience and widespread familiarity with deployments for his perspectives on the performance outcomes associated with the 1992 lifting of the ban. At the time of the interview, Commodore R.W. Gates had been in the Royal Australian Navy for twenty-nine years, having commanded a number of frigates and served in policy positions in the personnel division at Defence Headquarters in Canberra. Recently, he was promoted to Commodore (one-star Naval Officer) in the Joint Personnel area in Career Management Policy. In his interview with the study authors, Commodore Gates offered extensive and frank observations based on his experiences.

Consistent with other evidence collected for this study, Commodore Gates described the early 1990s as a time when a pro-active liberal government as well as complaints surrounding the *HMAS Swan* incident led to widespread concerns about equity and harassment in the ADF. And, like other observers, the Commodore described mixed opinions and strong emotions within the Forces at the prospect of allowing homosexuals to serve openly: while nobody would deny that homosexuals existed in the ADF, whether they should “declare” their orientation was

another matter. When the policy did change, serious protests all-but-disappeared, and formerly closeted personnel stepped forward successfully and largely uneventfully. In his recounting of the experiences of several personnel who have come out without major problems, the

Commodore offered the following example:

I must admit, after it happened, it's been an absolute non-event. We've had some major cases of people declaring. Probably the most that I recall...would be one of our executive officers of a destroyer, the second-in-command. He declared. And, I'll be frank, it created a bit of a stir. We're talking about a mid-rank lieutenant commander in an absolute critical position on board a major warship – one heartbeat from command.... That person under the new policy was certainly not removed from the ship, and in fact completed his full posting (Gates 2000).

According to the Commodore, in this case the lieutenant commander approached the ship's captain to explain his decision and reasons for declaring that he was gay. The lieutenant commander explained that he wanted to uphold honesty and integrity and could not continue to "live a lie." Upon hearing the news, both the captain and troops were generally supportive, continued to respect his position as second-in-command, and moved on with their missions. Since then, the lieutenant commander's career has continued successfully—he was promoted and is now serving in the RAN as a full commander.

The Commodore attributes the largely successful transition to a broader effort on the part of top officials in the Navy and the ADF to develop aggressive new training protocols to minimize harassment and maximize equality of opportunity. Like other experts interviewed for this study, he points to both external societal pressures as well as internal missteps within the ADF as motives for the change. In the Navy, efforts began shortly after the *HMAS Swan* incident with a program called "Good Working Relationships," followed by the new defence instruction on sexual misconduct in 1992 which was promulgated via promotion courses offered throughout the chain of command.

When asked specifically if the policy change seemed to have any affect on recruiting or retention, the Commodore replied,

In my opinion, it had no effect. It got a little bit of press back in '92, it was a normal flutter. And then something else came along, and the press moved on to something else. There was no great peak in "wasting trade" as we call it where people walked out, and there was no great dip in recruiting. It really was a non-event. I want to stress there was a lot of work in making sure it was a non-event (Gates 2000).

While he had no recollection of any specific person refusing to join or leaving the service because of the change, the Commodore noted the possibility that one or two cases might exist where a heterosexual soldier was personally offended and chose to leave. Given that the ADF included 70,000 people at the time, he considers such numbers as "very, very minor."

The observations made by Commodore Gates are consistent with the views of the recruitment director interviewed for this study as well as other recruitment officers. Squadron Leader Chris Renshaw, Senior Marketing Officer for Defence Force Recruiting, has not observed any deleterious effects of the policy change on recruiting or retention. Renshaw says that recruiting and retention rates have decreased but that the lifting of the gay ban had nothing to do with the trends. Rather, he says that government-mandated reductions in the size of the ADF as well as competing opportunities in the civilian sector explain the change.³ Renshaw says that the policy change has allowed personnel to spend less time monitoring rumors and innuendo and to devote more time to the execution of their missions.⁴

C. Evidence from the Human Rights and Equal Opportunity Commission and Government Officials

³ Medical Corps Sergeant Scott McLennan, who also holds civilian qualifications equivalent to Major, supervises recruitment at a training center. He makes similar observations that the drop in recruitment during the 1990s had nothing to do with the change in policy.

⁴ Squadron Leader Renshaw was contacted originally for this study as an ADF official with expertise in recruitment. During the course of the interview, Mr. Renshaw also reflected on his experiences as an out gay service-member. Additional comments regarding his personal experiences are included in Section F.

The Australian Human Rights and Equal Opportunities Commission is a statutory body that enjoys a relatively autonomous status in Australian politics that is analogous to courts. The Commission's members are appointed by the government and it receives its budget through the normal budgetary process but it is not accountable to the federal government, the bureaucracy, or political parties. In this section, we review evidence from just-retired Human Rights Commissioner Chris Sidoti, who made gay and lesbian equality one of the priorities of his five-year tenure at the Human Rights Commission. Although Sidoti had little authority to force organizations to change their practices, he was responsible for investigating complaints and suggesting legislative reforms to minimize and eliminate discrimination in Australia. He told us that HREOC has devoted considerable effort to monitoring sexual orientation issues in the military.

Sidoti agrees with most of the observations of military and academic experts we contacted. He indicates that there have been virtually no significant effects of the policy change on the military. In his five years as Human Rights Commissioner, Sidoti estimates that his office investigated half a dozen complaints of discrimination based upon sexual orientation. He also indicates that harassment of homosexuals also seems largely non-existent, at least at the official level.

Sidoti notes that cases of harassment and discrimination involving gays and lesbians have tended to occur when heterosexual service members have abused homosexual service members. He is aware of only one or two such cases but he cautions that the problem may be more widespread than is officially known. And, he emphasizes that although soldiers are told that gays and lesbians are welcome, one would not want to be gay and in the military. He explains that although there has been no major public scandal regarding harassment of gays, this does not

mean that such behavior does not occur: “Whether it is widespread or not, I don’t know. In some sense, it may not be as widespread as harassment of women, because gays have always been [around] and the military knows it” (Sidoti 2000).

Sidoti believes that the lifting of the ban may have had positive implications for military effectiveness. Not only does the policy shift “improve the career prospects of gays,” but “It’s bad for morale to have your guys snooping on other of your guys” (Sidoti 2000). He concludes that the 1992 policy change is indicative of and contributes to broader social change. “The military is the last bastion of traditional male values. These developments contribute to broader social acceptance for all” (Sidoti 2000). However, Sidoti notes that there are areas of military personnel policy in which progress has not been made such as the recognition of partners and the extension of benefits.

D. Opinions and Observations of Academic, NGO, and Other Informed Observers

Academic Observers

For a number of reasons, few scholars have examined outcomes associated with the 1992 policy change in detail.⁵ Professor Hugh Smith, of the School of Politics of the University of New South Wales at the Australian Defence Force Academy, remains the leading academic authority on matters relating to the policy change and military performance.⁶ In addition to interviewing Professor Smith, we also sought to contact other scholars at major Australian universities who maintain a professional interest in gender, the military, and sexuality. As a

⁵ Several respondents said that reason for the lack of scholarship in the area is that Australian academics who are concerned with issues of human rights and equity have focused on more pressing issues in recent years.

⁶ Professor Smith has been involved in examining the issue since before the ban was lifted, and was a consultant to the parliamentary committee that considered revising ADF policy in the early 1990s. He has published a number of articles relating to homosexuality in the ADF over the last decade (Smith 1992, Smith 1995, Smith 2000).

result, we identified and interviewed two additional academics who have conducted related research.

Based on his research and observations over the last eight years, Professor Smith believes that the lifting of the ban has not led to any significant effects on military performance, combat effectiveness, or unit cohesion. Like other respondents, he characterizes the outcome of the policy change as a virtual “non-issue,” with little remaining salience in government, media, or military circles. The lack of quantitative empirical data regarding the policy change constitutes, in his opinion, a form of evidence. In Professor Smith’s words, “This is not a subject that has troubled the Defence Force to the extent that they have felt that studies have needed to be done on it. The lack of evidence is evidence” (Smith 2000). He explains that when government ordered the military to lift the ban, some officers said: “Over my dead body, if this happens I’ll resign.” However, Smith says that there were no departures and that the change was accepted in “true military tradition”(Smith 2000).

When pushed by the interviewer to identify any possible negative outcomes associated with the lifting of the ban, Professor Smith acknowledged that there “may have been one or two resignations,” but that close government scrutiny of ADF policy implementation did not find any real effect on performance. While there have been occasional reports of coming-out incidents that may have made peers “a bit nervous,” Professor Smith does not believe that there have been any notable incidents of gay bashing or harassment (Smith 1995). To the degree that problems of sexual misconduct and harassment continue in the ADF, Professor Smith believes that they are mostly related to the treatment of women in the ranks and incidents of hazing (referred to as “bastardization”) in the Academy.

Professor Smith's views about the harassment of women are consistent with the findings of Dr. Katerina Agostino of the sociology department at Macquarie University in Sydney. Dr. Agostino, who has consulted with the ADF on sexual fraternization policy, argues that women who work in charged military environments such as ships often face cultural and institutional obstacles when their male peers equate heterosexual masculinity with effective military performance. Her research suggests that gay and lesbian personnel, like heterosexual women, may encounter difficulties when attempting to integrate fully into traditional military culture. However, her research also shows that women and gays can and do adopt a variety of strategies to negotiate these difficulties and integrate themselves into a changing environment that is, very slowly, becoming more egalitarian and less entrenched in masculinist beliefs (Agostino 1997, Agostino 1998a, Agostino 1998b, Agostino 2000). Nonetheless, instances of discrimination and harassment still occur, especially when individuals do not conform to traditional masculine stereotypes. In her interview with the authors of this study, Dr. Agostino was able to identify an example:

There is a senior naval officer that I know who's very good at what he does, but he's been unable to get promotion. It's quite clear from his reports that he is very good at what he does. He dyed his hair blond, but you can see his natural color at the roots. He dresses "gay" when off-duty.... He feels strongly that his opportunities have been curtailed since he's openly outed himself.... He was called up before his commanding officer, because the C.O. had heard through the rumor mill that his hair had been dyed pink. The C.O. saw it wasn't true. [The friend who is an officer] wasn't censured but he was certainly told off about it and told that he was being openly gay. He was also told there's nothing wrong with being gay, you just can't look so gay.

Like Professor Agostino, Dr. Jindy Pettman of the Australian National University observes that women and, quite possibly, gays, still face informal obstacles as they attempt to integrate into a traditionally masculine heterosexual military culture. Based on her research and observations, Dr. Pettman notes that the largest conflicts and challenges to the ADF in the early 1990s concerned gender equality; questions of sexual orientation were secondary. When the

possibility of lifting the gay ban was raised, military officials who were opposed to integrating women raised similar objections to the inclusion of gays and said that homosexuals would jeopardize unit cohesion, threaten the privacy of soldiers, and lead to performance problems. However, she says that after women were permitted to serve in most deployment environments and after the ban on gay and lesbian soldiers was lifted, the flurry of concern immediately died off and both issues fell from public attention. Dr. Pettman believes that this relatively uneventful adaptation, while not indicating the disappearance of all forms of discrimination, suggests that military culture is slowly becoming more inclusive (Pettman 2000).

Observations and Evidence Provided By Interest Groups, Non-Governmental Organizations, and Other Observers

For this study, all major interest groups, veterans associations, journalists, and non-governmental organizations that have been involved in public or policy discussions relating to outcomes of lifting of the ban and its consequences were contacted for their observations and any documented evidence they might possess. Interviews and supplemental documentation were obtained from five sources: the national president of the Returned and Services League of Australia, a major veterans group analogous to the American Legion; a well-known activist and co-convenor of the Australian Council for Lesbian and Gay Rights; a journalist who has written three major stories on gay/military issues in the last year; and a New Zealand-based consultant who is a specialist in gay/military integration issues and who has provided consulting services to the Australian Defence Forces. Additional resources were obtained from the International Lesbian and Gay Association and the Tasmanian Gay and Lesbian Rights Group.

Two of the individuals interviewed and their respective organizations have held divergent opinions regarding the lifting of the ban. The Returned and Services League (RSL) was an early

and active opponent of proposals to lift the ban, arguing that doing so would jeopardize morale, unit cohesion, performance, and decency in the Armed Forces and would hasten the spread of AIDS. Major General Peter Philips (ret'd), the current RSL president interviewed for this study, still opposes the participation of open homosexuals. Mr. Rodney Croome, on the other hand, was a vociferous gay rights activist who lobbied for the removal of the ban. Interestingly, however, Major General Philips' comments on outcomes associated with the lifting of the ban are more optimistic than those of Mr. Croome.

In a telephone interview with one of the study authors, RSL President Major General Philips reiterated the group's position and rationale behind opposing the removal of the ban. As summarized in the RSL's "Standing Policy of the RSL in Australia," the organization opposes open homosexual participation for four major reasons: (1) the presence of homosexuals will lower morale and military performance; (2) personnel will be at greater risk for contracting HIV; (3) homosexuals engage in predatory behavior; and (4) the military does not need to engage in social experimentation. However, when asked which of these or other problems relating to the lifting of the ban he or the organization believe have come to pass, he responded that, "It's [homosexuals serving openly] not been a significant public issue. The Defence Forces have not had a lot of difficulty in this area" (Philips 2000). When asked specifically by the interviewer whether he knows of any evidence that suggests that allowing homosexuals to serve might affect military performance, combat effectiveness, or unit cohesion, he replied,

We haven't fought in any wars since Vietnam, but we have been involved in some UN peacekeeping operations, most recently in East Timor.... If the issue had arisen, it would have in East Timor. I haven't heard of any gay issues in that (Philips 2000).

Major General Philips acknowledges that some gay personnel have come out to peers but disagreed with assertions made by some groups that there were significant numbers in combat units.

While he cannot identify any concrete data on the matter, Mr. Croome also believes that the lifting of the ban has not contributed to any negative performance consequences for the ADF as a whole. Generally, the change helped reduce the climate of fear and allowed some gay service members to come out to trusted colleagues. However, based on reports he has received, Mr. Croome also asserts that the change has been uneven: instances of discrimination and harassment have been reported, and entitlements for same-sex couples have yet to be granted.

Regarding harassment issues, Croome states,

Of those that are about harassment, some have to do with people who are out, and some are from people who are not out but are being gossiped about or suspected of being gay. The harassment is just like any other sort of workplace harassment, but there are no policies to deal with it (Croome 2000).

In recent years, Mr. Croome has been one of the most active critics of the implementation of the new sexual conduct policy, arguing that the ADF's enforcement of the equal treatment laws is imperfect and incomplete.

Mr. Eugene Moore, Director of Full Spectrum Ltd., a New Zealand consulting firm that addresses sexual orientation issues in the workplace, has been working with the ADF Defence Equity Organization during the past year to provide training and educational briefings to staff and service chiefs on how to best manage concerns relating to sexual orientation. Like other observers, Mr. Moore notes the lack of concrete data on outcomes of the policy change. In his view, the absence of data suggests in part that the ADF did not aggressively follow through with implementation and enforcement in the first several years after the ban was lifted. Moore says that gay service members' unwillingness to reveal their sexual orientation during the first few

years after the ban was lifted may have contributed to perceptions that the policy change was a “non event.” Regarding military performance issues more directly, Moore does not believe that any significant problems have occurred even as more service personnel have come out to peers in recent years.

The experiences of a journalist who covered the issue of gays in the military during the past year provide more direct evidence regarding the welfare of combat units with actively serving self-identified gay personnel. Mr. David Mills has interviewed service members for several stories dealing with same-sex partner benefits and combat service in East Timor. For his investigation of East Timor, Mr. Mills spoke with gay soldiers who had served actively. He was aware of seven or eight active duty soldiers serving in East Timor who self-identify as gay, and he recalls speaking to an enlisted Army soldier who worked as a firefighter:

I spoke with a guy who is serving in the Army, a six-month stint in East Timor, speaking about his experiences. He was an interesting guy who said there is a lot less homophobia in the Armed Forces than you might think, although he was pretty selective about who he was open about his sexuality with.... He said he didn't have any problem with that [coming out] whatsoever, although there was an element of surprise when he told people” (Mills 2000).

4. Experiences in the Field: Out Personnel, Their Commanders and Peers

Drawn from the opinions and observations of ADF officials and other observers, the evidence presented above strongly suggests that military performance—including recruitment and retention, harassment and sexual misconduct, and unit cooperation—have not suffered as a result of the 1992 decision to allow homosexuals to serve openly. However, the experiences of self-disclosed homosexual personnel themselves may offer the most direct and revealing evidence over how the policy change has impacted unit performance. Using a snowball sampling technique based on initial contacts provided through a gay servicemembers’

organization, seven current and former out ADF members were contacted and interviewed for this study. They include six actively serving members of the three main service branches – Army, Navy, and Air Force — at the ranks of Squadron Leader, Captain, and Flight Sergeant. An additional former enlisted ADF member who self-identifies as gay and who maintains active contact with currently-serving homosexual personnel was also interviewed. Their experiences, while representative of varying ranks, times, and service branches, can nonetheless be characterized by a number of shared qualities.

1. Self-identified gays and lesbians currently serve as enlisted personnel and officers in a range of positions in all of the major service branches of the ADF.

The snowball sample of respondents described here is small and possibly unrepresentative of the larger population of out gay servicemembers in the ADF. Nonetheless, the diversity of backgrounds and positions of the respondents, coupled with their frequent references to out peers in other units or services, suggest that out gay servicemembers are found at all levels and in all branches of the ADF.

Furthermore, most of our respondents have actively served in both troop deployments and managerial/administrative positions during their careers. One respondent, Squadron Leader Michael Seah, and colleagues of several others, actively served in what is widely considered to be Australia’s most “combat-like” and successful deployment in recent years — The United Nations’s peacekeeping operation in East Timor. As Medical Corps Sergeant Scott McLennan, who served in a peacekeeping exercise in Bougainville, New Guinea, comments,

Looking at the current operation in East Timor, I’ve got a number of gay and lesbian friends in an operational situation. I have served in Bougainville, and there is no problem. We all get work professionally, and it’s our jobs that come first. You don’t look at it from a gay or lesbian point of view, you don’t look at it from a straight point of view. You’re there to do a job, and you work together to ensure that the job gets done (McLennan 2000).

2. *Currently serving self-identified gay and lesbian service members have experienced largely uneventful coming-out processes and describe professional, friendly, and cooperative relationships with their peers and commanders.*

All of the self-identified gay and lesbian active personnel we spoke with describe their experiences of coming out as largely positive and uneventful. While some describe initial uneven reactions among their colleagues and commanders—ranging from warm acceptance to puzzlement to unease—over time all of our respondents experienced a transition to full acceptance. As one respondent who served in East Timor put it:

From the discrimination point of view, I haven't faced any overt discrimination. Most people I've come across...have been very supportive, certainly haven't treated me any differently. I've found it quite refreshing (Seah 2000).

A lesbian Squadron Leader in the Air Force assessed her situation similarly:

People, when they do find you're gay,...some might be a little bit weary, but...it very soon disappears, because what you're judged on is your professionalism and your ability. Who according to your sexual orientation you find attractive is not an issue (Renshaw 2000).

All of the respondents explain acceptance by their peers as a reflection of a shared respect for professional competence and capability: in the end, one's peers and colleagues come to recognize that one's sexual orientation has nothing to do with the ability to do one's job.

I've had nothing but support. It's an initial thing, but then they work with it, and they see you in an operational point of view, and they see your skill level, and they have no issue. If they cannot fault you professionally, they will not look for faults with you personally (McLennan 2000).

The fact that these people were there had no effect whatsoever on the effectiveness of the units, unit cohesion or morale. People are accepted for who they are and, as long as they can do the job, who cares. That's pretty much the view of most, I would say, in defence, here in Australia. As long as you are capable of doing your job, they don't care what you're doing in your spare time (Stuht 2000).

Once a gay soldier is out to his or her peers, his or her sexuality usually becomes largely irrelevant to professional identity. Perhaps the single most common way respondents describe their sexuality on the job is as a “non-issue.” As Army Captain Renshaw paraphrases it, “No one

gives a damn, no one worries about it. Totally a non-issue...Here people just don't care" (Renshaw 2000).

To the degree that evidence of their sexual orientation becomes a point of discussion, respondents described a number of ways in which the new policy has allowed their identity to be normalized as simply one aspect of their lives. A welcoming and open environment allows gay soldiers to spend less time monitoring their comments and more time focusing on their work:

Well, you can be more honest. That's one of the key things about being in the military — honesty and integrity. Because you haven't got to worry about if someone's saying something behind your back, or is someone gossiping or something, because if they gossip, I don't care. So I'm more focused on my job, I'm more focused on what I'm achieving here, and less worried about the [stories] and what people think. In terms of productivity, I'm far more productive now. Things like when you come into work and people say, what did you do over the weekend. Oh, what was her name... all that stuff disappears. What did you do over the weekend. Everything's out in the open, no fear, no nothing, no potential of blackmail, no security implications.. nothing (Renshaw 2000).

The majority of respondents also report that the newfound honesty they are permitted allows for more frank and sometimes even playful exchanges when uncomfortable situations do arise:

I took my ex-partner to the work Christmas party...I did the courtesy of telling my boss beforehand that I was going to do it. And, he just looked at me with a bit of a pained expression and said, "I expect you to behave." And I just sort of looked at him and said, "Look, knowing the other people that work on this floor and how they behave with booze, you're worried about me." Point taken.... (Renshaw 2000).

I'm quite open about my sexuality. Sometimes the boys decide to give me a bit of a ding-up with a joke or something like that, but that doesn't bother me. We work really well together, and I'm sure it's the same for other gay and lesbian soldiers and sailors who are out, and they're accepted by their peers. O.K. — they're the object of ridicule sometimes, but everybody is (Stuht 2000).

Other respondents also describe examples in which their orientation becomes integrated as one aspect of who they are, taken no more or less seriously than any other aspect of their lives.

3. While the ADF has succeeded in introducing new directives extending equal treatment to gay and lesbian soldiers, most self-identified personnel are aware of individual incidents of possible discrimination or harassment at the unit level.

While all out personnel we spoke with described their work environments as generally untroubled and productive, most were aware of scattered instances of anti-gay discrimination or harassment suffered by others since the new policy was introduced. Most of these incidents relate to isolated remarks made by individual peers, but there have been occasional references to alleged inappropriate conduct by commanders or officers. Perhaps the most dramatic example is the case of suspected promotion bias offered by Dr. Agostino (see section D, above). A second case is described by RAAF Flight Sergeant Livingstone, who recalls attending a training session where an Army warrant officer defended a homophobic response to a hypothetical scenario by claiming that the Army “did not care” about the changed policy on gay service (Livingstone 2000). Livingstone did not attribute an exact date to the event, but the comments were made in the mid-1990s. Other sources familiar with Army life acknowledge some individual instances of early resistance to the policy change but do not believe they are representative of a systematic pattern.

Generally, respondents report that incidents of discrimination or harassment brought to the attention of commanders are handled appropriately. Several respondents identified incidents in which peers who had made inappropriate remarks were disciplined by superiors promptly and without reservation. Based on the experiences of peers in a variety of units, several personnel we spoke with believed that most of the unevenness in treatment could be ascribed to the differences in particular work environments. As a former ADF service member familiar with the experiences of a number of gay soldiers remarks, “It is totally determined on the work environment of the individual. We’ve got some senior officers who are great—they deal with and address their [gay service members’] problems or whatever, and always work to offer help.” (Edwards 2000).

4. Gay personnel who were in the forces when the ban was lifted, or know of others who were, describe substantial, sustained changes in formal and informal understandings and procedures conducive to better work environments.

All of the respondents who were familiar with life in the ranks for homosexuals before the ban was lifted concur that working environments have improved markedly in the last eight years. While many of these improvements came as a direct consequence of formal implementations of the Defence Instruction issued in 1992 on sexual misconduct, others are seen as reflective of subtle but still important changes in military culture. Respondents concur with other observers interviewed for this study in describing an operating environment that now takes equality of opportunity and treatment quite seriously — for women, for ethnic minorities, and for homosexuals. While pockets of discrimination and unequal treatment still exist, most respondents feel that the ADF has come to embody the same commitment to human rights, equality of opportunity, and diversity (what the ADF calls “Equity”) that now characterize Australian civil society as a whole.

The current situation stands in sharp contrast to the atmosphere of fear, uncertainty, and betrayal that characterized military life for many personnel suspected of being homosexual prior to 1992. Squadron Leader Renshaw and others who joined the ADF before the ban was lifted identify a number of painful personal and professional consequences of being closeted — to oneself and to others — in order to safeguard careers. Seaman Colin Edwards, who was forced to leave the Royal Australian Navy in 1981 after voluntarily disclosing his homosexuality, recalls investigations designed to compel his friends to identify other homosexuals. One colleague, a heterosexual, committed suicide shortly after being investigated for his association with Seaman Edwards (Edwards 2000).

5. *Although gay personnel are generally satisfied with the new policy, they feel frustrated and marginalized by the failure of the ADF to extend equal treatment and benefits to same-sex partners.*

During their interviews, most out gay personnel spontaneously raised the topic of current debates over extending benefits to same-sex partners. Like other observers we contacted, gay soldiers interviewed for this study were largely untroubled by original concerns over morale, unit cohesion, and retention that surrounded the 1992 decision to lift the ban. Rather, they are focused on pressuring the ADF to fulfill what they believe to be legally binding obligations to extend equal treatment to same-sex domestic partners under Australian law. In fact, when asked to speculate on how the lifting of the ban may have affected the well-being of the Australian Forces, most respondents first focused on their frustrations over same-sex partner issues. Tellingly, these reactions suggest that most out gay soldiers, like the ADF and Australian society more generally, find the question of whether allowing gays to serve has reduced the performance capabilities of the Armed Forces almost impossible to fathom. They have instead moved on to other, more germane concerns.

5. SYNTHESIS AND CONCLUSION

Systematic evidence concerning the lifting of the Australian ban on gays and lesbians in the military is scarce. This report attempts to redress the gap by drawing together and comparing the findings and observations of informed observers from a variety of vantage points in the policy domain. Certainly, any one piece of evidence by itself cannot stand as a comprehensive appraisal of outcomes associated with the change. Nonetheless, taken together, the data presented in this report make a convincing and credible case that, notwithstanding uneven and partial implementation of the policy, the 1992 inclusion of self-described gay and lesbian

soldiers into the Australian Defence Forces has not led to any perceptible decline in operational effectiveness, morale, unit cohesion, retention, or attrition. In fact, ADF officials and a number of other observers, including commanders and soldiers, believe that changes associated with the policy have contributed to a working environment that is freer from the burdensome and unproductive consequences of mistrust, misunderstanding, and misjudgment that at times compromised the integrity of units in the past. As part of a broader commitment to equity in the ADF, then, the policy change has been a success.

While the general consensus in the findings above is clear, a close look at the evidence also reveals a number of concerns. Isolated instances of discrimination and harassment still exist, and some service branches may be less proactive in their policies than others. These difficulties may be even more pervasive among the ranks of heterosexual women, who experience higher rates of harassment than gay males. From the perspective of gay and lesbian soldiers and their allies, the failure of the ADF to extend benefits that are accorded to heterosexual spouses to same-sex partners stands as a reminder of a partially-fulfilled mission. At the same time, however, the fact that the debate over gays in the military has shifted away from the question of whether homosexual soldiers undermine military performance also stands as a testament to the success of the inclusive policy.

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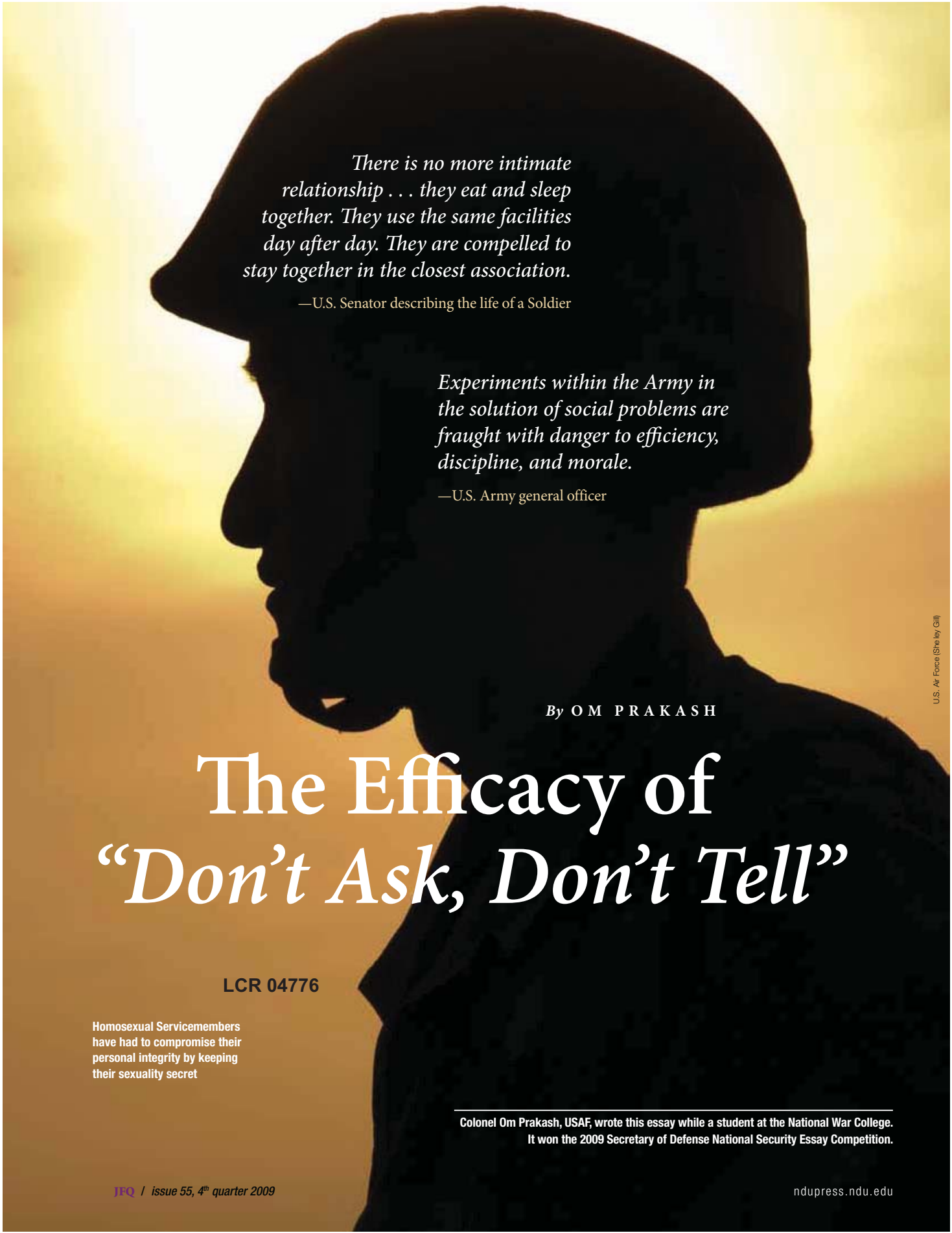
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There is no more intimate relationship . . . they eat and sleep together. They use the same facilities day after day. They are compelled to stay together in the closest association.

—U.S. Senator describing the life of a Soldier

Experiments within the Army in the solution of social problems are fraught with danger to efficiency, discipline, and morale.

—U.S. Army general officer

By OM PRAKASH

The Efficacy of “Don’t Ask, Don’t Tell”

LCR 04776

Homosexual Servicemembers have had to compromise their personal integrity by keeping their sexuality secret

Colonel Om Prakash, USAF, wrote this essay while a student at the National War College. It won the 2009 Secretary of Defense National Security Essay Competition.

Though the epigraphs echo arguments made against homosexuals serving openly in the Armed Forces, they are the words of Senator Richard Russell of Georgia and General Omar Bradley in opposition to President Truman's 1948 executive order to racially integrate the U.S. military.¹ The discourse has gone beyond what is best for the combat effectiveness of the military to become a vehicle for those seeking both to retract and expand homosexual rights throughout society. It has used experts in science, law, budgeting, and military experience in an effort to settle an issue deeply tied to social mores, religion, and personal values.

A turning point in the debate came in 1993. Keeping a promise made during his campaign, President Bill Clinton attempted to lift the ban on homosexuals serving in the military. After strong resistance from the leadership in both the Pentagon and Congress, a compromise was reached as Congress passed 10 United States Code §654, colloquially known as "Don't Ask, Don't Tell" (DADT).² This law, which allowed homosexuals to serve as long as they did not admit their orientation, survived the Clinton and Bush administrations essentially unchanged. Repealing the ban on homosexuals serving openly was also a campaign promise of Barack Obama, though his transition team stated that they did not plan to tackle the issue until 2010.³ As this debate reignites, it is worthwhile to reexamine the original premises that went into forming the DADT policy, explore the cost and effectiveness of the law, and finally, with 16 years of societal drift, revisit the premises on which it is based.

There are five central issues. First, §654 has had a significant cost in both personnel and treasure. Second, the stated premise of the law—to protect unit cohesion and combat effectiveness—is not supported by any scientific studies. Strong *emotional* appeals are available to both sides. However, societal views have grown far more accommodating in the last 16 years, and there are now foreign military experiences that the United States can draw from. Third, it is necessary to consider the evidence as to whether homosexuality is a choice, as the courts have traditionally protected immutable characteristics. To date, though, the research remains inconclusive. Fourth, the law as it currently stands does not prohibit homosexuals from serving in the military as long as they keep it secret. This



has led to an uncomfortable value disconnect as homosexuals serving, estimated to be over 65,000,⁴ must compromise personal integrity. Given the growing gap between social mores and the law, DADT may do damage to the very unit cohesion that it seeks to protect. Finally, it has placed commanders in a position where they are expected to know everything about their troops except this one aspect.

Origins

During the 1992 campaign, Presidential hopeful Bill Clinton made homosexuals in the military a political issue, promising to change the Pentagon's policy that only heterosexuals could serve in the military.⁵ On taking office,

it is necessary to consider the evidence as to whether homosexuality is a choice, as the courts have traditionally protected immutable characteristics

President Clinton initially assumed the ban could be lifted with an executive order, similar to the method President Harry Truman used to racially desegregate the military. He met fierce opposition in Congress led by Senator Sam Nunn (D-GA), who organized extensive House and Senate Armed Services Committee (HASC and SASC, respectively) hearings on the ban of homosexuals in the military. Two other factions emerged in Congress, one arguing for a complete repeal of the ban. A third compromise faction finally prevailed with the position that went on to become DADT, allowing homosexuals to serve as long as it was done in secret.⁶

Aside from the fierce divide in opinions, the debate also turned into a contest between Article I and Article II of the Constitution. Previously the ban on homosexuals was a

Pentagon policy, subject to the executive orders of the President. As a companion to the DADT policy, Congress permanently stifled this route, to the chagrin of the President. To preclude any future action to lift the ban via executive order, Congress wrote into law, "Pursuant to the powers conferred by Section 8 of Article I of the Constitution of the United States, it lies within the discretion of the Congress to establish qualifications for and conditions of service in the armed forces."⁷

Rationale

During congressional debate, there were three components to the argument supporting the ban on homosexuals serving in the military: health risks, lifestyle risks, and unit cohesion.⁸

The Army Surgeon General offered statistics showing a homosexual lifestyle was associated with high rates of HIV/AIDS, hepatitis B, and other sexually transmitted diseases. Aside from the increased health risk, statistics also showed a homosexual lifestyle was associated with high rates of promiscuity, alcoholism, and drug abuse.⁹ Ultimately, neither of the first two arguments made it into the rationale offered in §654—ostensibly because these risk factors are not uniquely associated with homosexuality and could be screened for and dealt with in a manner other than determining sexual orientation.

The central argument, and the only one that made it into law, rested on unit cohesion. The final language adopted by Congress stated:

One of the most critical elements in combat capability is unit cohesion, that is, the bonds of trust among individual service members that make the combat effectiveness of a military unit greater than the sum of the combat effectiveness of the individual unit members. . . . 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.¹⁰

Associated Costs

Before the inception of DADT, the rates of discharge for homosexuality had been steadily falling since 1982. Once the law was passed, rates climbed, more than doubling by 2001 before beginning to fall again.¹¹ Since



President Clinton attempted to fulfill campaign promise to lift ban on homosexuals in the military

U.S. Navy (Bob McFoy)

1994, the Services have discharged nearly 12,500 Servicemembers under the law.¹²

There are various explanations for the rise in discharges for homosexuality after 1993. One is that the increase reflects how discharges are recorded rather than an underlying change in practices. A senior Air Force Judge Advocate points out that prior to the change in the law, homosexual discharge actions during basic military training were classified as fraudulent enlistments because the person had denied being a homosexual when he or she enlisted and later changed position. After the change in the law, the Air Force no longer collected the information during the enlistment process, so fraudulent enlistment was no longer an option, and the Air Force began characterizing the discharges as homosexual conduct. Gay rights advocates argued that the increase was due to commanders conducting "witch hunts," yet commanders also reported fear of being accused of discrimination and only processing discharges when a case of "telling" was dumped in their laps.¹³ Another explanation is that given the law and recent reduction in stigma associated with homosexuality in society at large, simply declaring one is homosexual, whether true or not, is the fastest way to avoid further military commitment and receive an honorable discharge. In support of this supposition, Charles Moskos, one of the original authors of DADT, points out that the number of discharges for voluntary statements by Servicemembers accounted for 80 percent of the total, while

the number of discharges for homosexual acts actually declined over the years.¹⁴

The drop in discharges under the law since 9/11 has been used by both sides in support of their case. Gay rights advocates stated the military now needed every person it could get, so it looked the other way, but an equally compelling argument is that in the wake of the events of 9/11, pride and desire to serve reduced the numbers of those making voluntary statements in an effort to avoid further duty. An Air Force source also argues against the perceived need for personnel contributing in any way to the Air Force data because the response to indications of homosexuality has remained unchanged. The Air

commanders reported fear of being accused of discrimination and only processing discharges when a case of "telling" was dumped in their laps

Force investigates all cases when presented with credible evidence or a voluntary statement and has initiated discharge proceedings in all cases when the inquiry reveals a basis for such action.

Though the arguments explaining the patterns in discharges are compelling on both sides, ultimately it is difficult to prove any one factor because each explanation only partially explains the trends. Furthermore, whatever

the reasons, the fact remains that because of DADT, those Servicemembers no longer serve. It is also worth noting that the 12,500 figure is most likely low since it cannot capture the number of individuals who do not reenlist or who choose to separate because of the intense personal betrayal they felt continuing to serve under the auspices of DADT.

In a report released in February 2005, the Government Accountability Office (GAO) estimated the financial impact to be at least \$190.5 million for the previous 10 years of DADT policy. However, a University of California Blue Ribbon Commission that included former Secretary of Defense William Perry questioned the report's methodology. The commission faulted the GAO for not including recruiting and separation costs that brought the 10-year estimate to \$363 million.¹⁵ Also worth noting is that these figures do not account for the additional opportunity costs of high-profile, prized specialties such as Arabic speakers.¹⁶

If one considers strictly the lost manpower and expense, DADT is a costly failure. Proponents of lifting the ban on homosexuals serving openly can easily appeal to emotion given the large number of people lost and treasure spent—an entire division of Soldiers and two F-22s. Opponents of lifting the ban offer interesting but weak arguments when they compare the relatively small numbers of discharges for homosexuality with those discharged for drug abuse or other offenses. It is necessary to look past both of these arguments, remove the emotion, and instead examine the *primary* premise of the law—that open homosexuality will lead to a disruption of unit cohesion and impact combat effectiveness. If that assumption holds, then the troops lost and money spent could be seen as a necessity in order to maintain combat effectiveness just as other Servicemembers unfit for duty must be discharged.

Unit Cohesion/Combat Effectiveness

In 1993, as the language was drafted for §654, there were no direct scientific studies regarding the effects of acknowledged homosexuals on either unit cohesion or combat effectiveness. Furthermore, it is incorrect to equate the two because unit cohesion is only one of many factors that go into combat effectiveness. Potentially far outweighing unit cohesion, for example, are logistics, training, equipment, organization, and leadership, just to name a few.

Testimony before the HASC and SASC involved speculation on possible impacts from psychologists and military leaders.¹⁷ To date, there is still no direct scientific evidence regarding homosexuals serving openly, but there is now additional empirical data as several North Atlantic Treaty Organization Allies have since lifted the ban on homosexuals serving.

Though unit cohesion is not specifically defined in §654, it does refer to “bonds of trust,” the sum being greater than the individuals, and “high standards of morale, good order and discipline.” The *Dictionary*

there is no direct scientific evidence regarding homosexuals serving openly, but there is empirical data as several North Atlantic Treaty Organization Allies have lifted the ban

of U.S. Army Terms defines *unit cohesion* as the “result of controlled, interactive forces that lead to solidarity within military units directing soldiers towards common goals with an express commitment to one another and the unit as a whole.”¹⁸ As psychologists explored the concepts, experimental and correlation evidence supported dividing cohesion into two distinct types: social cohesion and task cohesion. *Social cohesion* is the nature and quality of the emotional bonds within a group—the degree to which members spend time together, like each other, and feel close. *Task cohesion* refers to the shared commitment and motivation of the group to a goal requiring a collective effort.¹⁹

When measuring unit performance, task cohesion ends up being the decisive factor in group performance. Common sense would suggest a group that gets along (that is, has high social cohesion) would perform better. Almost counterintuitively, it has been shown that in some situations, high social cohesion is actually deleterious to the group decision-making process, leading to the coining of the famous term *groupthink*. This does not imply that low social cohesion is advantageous, but that moderate levels are optimal.²⁰

Several factors contribute to cohesion. For social cohesion, the most important factors are propinquity—spatial and temporal proximity—and homogeneity. For task cohe-

sion, the factors include leadership, group size, shared threat, and past success. Interestingly, success seems to promote cohesion to a greater degree than cohesion promotes success.²¹

This leads to the conclusion that integration of open homosexuals might degrade social cohesion because of the lack of homogeneity; however, the effects can be mitigated with leadership and will further dissipate with familiarity. More importantly, task cohesion should not be affected and is in fact the determinant in group success. Given that homosexuals who currently serve do so at great personal expense and professional risk, RAND interviews suggest such individuals are deeply committed to the military’s core values, professional teamwork, physical stamina, loyalty, and selfless service—all key descriptors of task cohesion.²²

Homosexuality and Choice

As the debate reignites on DADT, it is necessary to consider whether homosexuality is a choice. Traditionally, courts have protected immutable characteristics, and Americans

writ large are demonstrably more accepting of characteristics that an individual cannot change. Contrasting this, many opponents of lifting the ban assume that homosexuality is a choice and use this as the basis of many arguments. Unfortunately,

research has not yet yielded a definitive answer to this question. Both sides of the debate are armed with ultimately inconclusive scientific studies. What follows is a brief overview of several studies that have attempted to settle the dispute.

Several studies in the early 1990s examined the sexual preferences of identical twins and fraternal twins in the hopes of finding a genetic linkage to sexual orientation. Since identical twins have 100 percent of nuclear genetic material in common and fraternal twins have only 50 percent in common, if

a high percentage of identical twins share a characteristic (such as green eyes) while a lower percentage of nonidentical twins share that trait, it suggests there is a genetic basis. Conversely, if identical and nonidentical twins share a characteristic at equal rates (such as preference for the color red), it suggests there is not a genetic basis. With homosexuality, a number of twin studies attempted this type of isolation, and while early studies seemed to indicate a genetic linkage, follow-on studies found the error rate too high based on sample selection.²³ Repeat studies showed a genetic linkage, if it existed, was only moderately heritable and not in the simple Mendelian model.²⁴

In a different approach, in 1993 Dean Hammer and others initially found a strong genetic linkage in male homosexuality dubbed by the press as the “gay gene.”²⁵ Their studies involved examining the X chromosome of homosexual men (homosexual brothers and their family members). Yet follow-on studies in 2005 and a complete analysis of the entire genome found a weaker correlation.²⁶ Even



Former Chairman of the Joint Chiefs of Staff, General Peter Pace, USMC (Ret.), stated that homosexuality is a “sin” in a 2007 interview

anthropomorphic differences in homosexuals such as left-handedness, spatial processing, and hypothalamus size²⁷ that seem to argue for a genetic linkage can also be explained by prenatal differentiation through pathways yet to be elucidated.²⁸ Though these scientific studies give compelling evidence that there is some biological basis to sexual orientation, possibly genetic, and perhaps something early in development or even prenatal, the exact mechanism is yet to be identified.

Anecdotal data is also compelling, as illustrated by statements from homosexual

military members: “I wish I could decide who I fell in love with; if someone thinks I would consciously choose such a life where I am forced to live in hiding and fear, knowing the bulk of the population is against you, is just crazy. I can’t help who I am.” “Why would I choose to suffer like this?” Ultimately, it is probable that sexual orientation is a complex interaction of multiple factors, some genetic and some developmental, and that elements of free choice exist only to the same degree that they do for heterosexuals ignoring powerful biological urges.

Taking another step back, the problem is further complicated by individual identification of sexual orientation. Frequently, individual men who have engaged in single, and sometimes numerous, homosexual acts do not identify themselves as homosexuals. Depending on the circumstances, such as prison populations that preclude sex with women, individuals treat certain events as occurring outside their sexual orientation.²⁹ The issue is far more complicated with women. Research

sexual harassment regulations and sensitivity training would need to be updated, and guidance from leadership would be necessary

indicates women’s ranks include primary lesbians, who are exclusively attracted to women, and elective lesbians, who shift back and forth depending not on the gender but on the personal qualities of a particular man or woman. This is a behavior not generally observed in men.³⁰ Such studies give insight and suggest some practical steps if homosexuals are to be integrated into the military.

There can be strong similarities between settings such as prisons and the Spartan field conditions Servicemembers must at times endure and the relatively weak correlation between isolated homosexual acts and self-described sexual orientation. This can manifest itself as homophobia and severe self-discomfort from conscious or subconscious clashes of sexual desires with values gained from society, family, or religion.³¹

Though many scientific experts will no doubt be called to testify during any future debates, lawmakers will not yet find any solid ground on which to base conclusions on the immutability of homosexuality. Ultimately,

the question of whether homosexuality is a choice can be treated as irrelevant. If the ban is lifted, basic respect of privacy will be required just as when women were fully integrated into the Services. Previously, the military found a lack of sexual privacy, as well as sex between male and females, undermined order, discipline, and morale.³² Dorm and facilities upgrades will no doubt be required. Sexual harassment regulations and sensitivity training would need to be updated, and guidance from leadership would be necessary. These would not be insurmountable obstacles.

Disconnects and Challenge

As social mores shift toward a greater acceptance of homosexuals, we slowly introduce cognitive dissonance into Servicemembers. Consider that a *Washington Post* poll stated 75 percent of Americans polled now believe that homosexuals should be allowed to serve openly in the military, up from 44 percent in 1993.³³ A 2006 Zogby poll of military serving in Iraq and Afghanistan found 37 percent disagreeing with the idea and 26 percent agreeing that they should be allowed.³⁴ The poll further found that a large percentage of Servicemembers are looking the other way, with 23 percent reporting that they are certain they are serving with a homosexual in their unit (59 percent of those reporting stated they were told directly by the individual).³⁵ Growing numbers, in both the Services and those considering service, see a gap between the traditional American creed of equality for all and the DADT law. To understand the moral dilemma this creates for many, consider the likely reaction if the forces were again racially segregated. Even former Chairman of the Joint Chiefs of Staff, General Peter Pace, who publically stated his opinion that homosexuality is a sin, also said, “Are there wonderful Americans who happen to be homosexual serving in the military? Yes.”³⁶ General Charles Dunlap, Jr., USAF Judge Advocate, points out that those serving want to serve honorably for what they believe to be the right causes.³⁷

The law also forces unusual personal compromises wholly inconsistent with a core military value—integrity. Several homosexuals interviewed were in tears as they described the enormous personal compromise in integrity they had been making, and the pain felt in serving in an organization they wholly believed in, yet that did not accept them. Furthermore, these compromises undermined the

very unit cohesion DADT sought to protect: “I couldn’t be a part of the group for fear someone would find out, I stayed away from social gatherings, and it certainly affected my ability to do my job.”

DADT also represents a unique challenge for commanders. Normally charged with knowing everything about their troops, commanders are now trying to avoid certain areas for fear of being accused of conducting witch hunts³⁸ or looking as if they are selectively enforcing a law they have moral reservations against. Vice Admiral Jack Shanahan, USN, stated, “Everyone was living a big lie—the homosexuals were trying to hide their sexual orientation and the commanders were looking the other way because they didn’t want to disrupt operations by trying to enforce the law.”³⁹

In the case of integration of the sexes, the U.S. military found lack of sexual privacy, as well as sex between males and females, undermined order, discipline, and morale.⁴⁰ These concerns were solved by segregated living quarters. Here the issue becomes complicated. Those opposed to lifting the ban point out that the living conditions of the military would at times make it impossible to guarantee privacy throughout the spectrum of sexual orientation. But would such measures actually be necessary? Considering that estimates put 65,000 as the number of homosexuals serving in the military,⁴¹ would revealing their identities lead to a collapse of morale and discipline? Many top military officials do not believe it would. For example, Representative Joe Sestak (D-PA), a retired Navy vice admiral, currently supports lifting the ban. He stated that he was convinced by witnessing firsthand the integration of women on board ships as he commanded an aircraft carrier group. There were similar concerns about privacy and unit cohesion that proved unwarranted.⁴² Paul Rieckhoff, executive director of the Iraq and Afghanistan Veterans of America and former Army platoon leader, illustrates an additional point: “Just like in the general population, there is a generational shift within the military. The average 18-year-old has been around gay people, has seen gay people in popular culture, and they’re not this boogeyman in the same way they were to Pete Pace’s generation.”⁴³

What to Expect

If the ban on homosexuals was lifted, it is worth considering what impacts there

U.S. Marine Corps (Michael J. Ayotte)



would be on the Services. There are potential lessons to learn from other countries that have lifted the ban on homosexuals serving openly. There was no mass exodus of heterosexuals, and there was also no mass “coming-out” of homosexuals. Prior to lifting their bans, in Canada 62 percent of servicemen stated that they would refuse to share showers with a gay soldier, and in the United Kingdom, two-thirds of males stated that they would not willingly serve in the military if gays were allowed. In both cases, after lifting their bans, the result was “no-effect.”⁴⁴ In a survey of over 100 experts from Australia, Canada, Israel, and the United Kingdom, it was found that all agreed the decision to lift the ban on homosexuals had no impact on military performance, readiness, cohesion, or ability to recruit or retain, nor did it increase the HIV rate among troops.⁴⁵

This finding seems to be backed by the 2006 Zogby poll, which found that 45 percent of current Servicemembers already suspect they are serving with a homosexual in their unit, and of those, 23 percent are certain they are serving with a homosexual.⁴⁶ These numbers indicate there is already a growing tacit acceptance among the ranks.

As pointed out above, basic respect of privacy will be required just as when women were fully integrated into the Services.⁴⁷ Dorm and facilities upgrades would be needed. Sexual harassment regulations and sensitivity training would need to be updated, and guidance from leadership would be required.

Aside from the heterosexual population, changes in the behavior of the homosexual population would also be necessary. Several homosexual Servicemembers interviewed reported that given their relatively small numbers, and the secrecy they are faced with, hidden networks have evolved. These networks, built under the auspices of emotional support, have also led to violations of the military regulations governing fraternization between ranks. With any lifting of the ban on homosexuals serving openly, internal logic that condoned abandonment of fraternization regulations would no longer have even a faulty basis for acceptance.

in a survey from Australia, Canada, Israel, and the United Kingdom, it was found that the decision to lift the ban had no impact on military performance

Ultimately, homosexuals must be held to the same standards as any others.

Homosexuals have successfully served as leaders. There are several anecdotal examples of homosexual combat leaders such as Antonio Agnone, a former captain in the Marine Corps. Though not openly gay during his service, he claims that “Marines serving under me say that they knew and that they would deploy again with me in a minute.”⁴⁸ Others who have served in command posi-

tions have made similar observations that though they were not open about their orientation, they knew some of their subordinates knew or suspected, yet they did not experience any discrimination in disciplinary issues. In many cases, more senior Servicemembers’ concerns went beyond how their subordinates would handle their orientation to focus on the legal standing and treatment of their partners—another vast area of regulations the Department of Defense would have to sift through since same-sex marriages are governed by state, not Federal, law.⁴⁹ Nevertheless, psychologists speculate that it will not be an issue of free acceptance. Homosexual leaders are predicted to be held to a higher standard where they will have to initially earn the respect of their subordinates by proving their competence and their loyalty to other traditional military values. The behavior of the next leader up the chain of command is expected to be critical for how subordinates will react to a homosexual leader.⁵⁰

No doubt there will be cases where units will become dysfunctional, just as there are today among heterosexual leaders. Intervention will be required; such units must be dealt with just as they are today—in a prompt and constructive fashion. Disruptive behavior by anyone, homosexual or heterosexual, should never be tolerated.⁵¹

There will be some practical changes and certainly some cultural changes if Congress and the President move to lift the ban on homosexuals serving openly in the Armed Forces. These changes will not be confined to the heterosexual populations. Education, leadership, and support will be key elements in a smooth transition even though the cultural acceptance of homosexuals has grown dramatically in the 16 years since the passage of DADT.

The 1993 “Don’t Ask Don’t Tell” law was a political compromise reached after much emotional debate based on religion, morality, ethics, psychological rationale, and military necessity. What resulted was a law that has been costly both in personnel and treasure. In an attempt to allow homosexual Servicemembers to serve quietly, a law was created that forces a compromise in integrity, conflicts with the American creed of “equality for all,” places commanders in difficult moral dilemmas, and is ultimately more damaging to the unit cohesion its stated purpose is to preserve. Furthermore, after a careful examination, there

is no scientific evidence to support the claim that unit cohesion will be negatively affected if homosexuals serve openly. In fact, the necessarily speculative psychological predictions are that it will not impact combat effectiveness. Additionally, there is sufficient empirical evidence from foreign militaries to anticipate that incorporating homosexuals will introduce leadership challenges, but the challenges will not be insurmountable or affect unit cohesion and combat effectiveness. Though, as Congress

the 1993 "Don't Ask Don't Tell" law was a political compromise reached after much emotional debate based on religion, morality, ethics, psychological rationale, and military necessity

clearly stated in 1993, serving in the military is not a constitutional right, lifting the ban on open service by homosexuals would more clearly represent the social mores of America in 2009 and more clearly represent the free and open society that serves as a model for the world. Ultimately, Servicemembers serving under values they believe in are the most effective force multipliers.

Repealing the ban now will be more difficult than when it was created in 1993. It is no longer a Pentagon policy, but rather one codified in law. It will require new legislation, which would necessitate a filibuster-proof supermajority in the Senate.⁵² Most likely, leadership on the issue will come from the executive branch, and President Obama's transition team has indicated it will likely tackle the issue next year.⁵³ It is also possible the law could be struck down by judicial action finding the law unconstitutional.

Based on this research, it is not time for the administration to reexamine the issue; rather, it is time for the administration to examine how to implement the repeal of the ban. **JFQ**

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the
**Williams
INSTITUTE**

R. Bradley Sears
Executive Director
The Williams Institute
on Sexual Orientation Law and Public Policy

February 23, 2010
Mr. Patrick Hagan
White & Case LLP
633 West Fifth Street, Suite 1900
Los Angeles, CA 90071

Patrick,

Per our prior communications, I am enclosing the physical originals of the documents you requested in response to the subpoena delivered on 1/29/10. Electronic (PDF) copies of the requested documents have already been e-mailed.

Sincerely,

A handwritten signature in black ink, appearing to read "Brad Sears", written over a horizontal line.

Brad Sears
Executive Director
The Williams Institute
UCLA School of Law

LCR WI 01013

COPY

UNITED STATES DISTRICT COURT
for the
Central District of California

LOG CABIN REPUBLICANS, a non-profit corporation,

Plaintiff

v.

UNITED STATES OF AMERICA and ROBERT M. GATES, SECRETARY OF DEFENSE, in his official capacity,

Defendant

Civil Action No. CV 04-8425 (VAP)

(If the action is pending in another district, state where: U.S. District Court for the Central District of California)

SUBPOENA TO TESTIFY AT A DEPOSITION IN A CIVIL ACTION

To:

The Williams Institute
UCLA School of Law
Box 951476
Los Angeles, CA 90095-1476

Testimony: YOU ARE COMMANDED to appear at the time, date, and place set forth below to testify at a deposition to be taken in this civil action. If you are an organization that is not a party in this case, you must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on your behalf about the following matters, or those set forth in an attachment:

Table with 2 columns: Place (White & Case LLP, 633 West Fifth Street Suite 1900, Los Angeles, California 90071-2007) and Date and Time (February 26, 2010, 10:00 A.M.)

The deposition will be recorded by this method: records only

Production: You, or your representatives, must also bring with you to the deposition the following documents, electronically stored information, or objects, and permit their inspection, copying, testing, or sampling of the material: 2005 Report entitled "Lesbians and Gay Men in the US Military: estimates from Census 2000;" all other reports regarding gay and lesbian service members in the U.S. Armed Forces; January 2010 Report entitled "Lesbian, gay, and bisexual men and women in the US military: Updated estimates." Format is specified as electronic (pdf) and paper hard copies.

The provisions of Fed. R. Civ. P. 45(c), relating to your protection as a person subject to a subpoena, and Rule 45 (d) and (e), relating to your duty to respond to this subpoena and the potential consequences of not doing so, are attached.

Date: 1/29/10

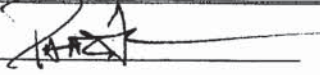
CLERK OF COURT

OR

Signature of Clerk or D

LCR WI 01014





Attorney's signature

Patrick Hagan

The name, address, e-mail, and telephone number of the attorney representing *(name of party)* _____
Log Cabin Republicans, who issues or requests this subpoena, are:

WHITE & CASE LLP

Patrick J. Hagan

633 W. Fifth Street, Suite 1900

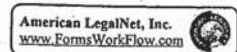
Los Angeles, CA 90071-2007

Telephone: (213) 620-7700

Facsimile: (213) 452-2329

Email: phagan@whitecase.com

LCR WI 01015



Civil Action No. CV 04-8425 (VAP)

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

This subpoena for *(name of individual and title, if any)* _____
was received by me on *(date)* _____

I served the subpoena by delivering a copy to the named individual as follows: _____

_____ on *(date)* _____; or

I returned the subpoena unexecuted because _____

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also
tendered to the witness fees for one day's attendance, and the mileage allowed by law, in the amount of
\$ _____

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ 0.00

I declare under penalty of perjury that this information is true.

Date: _____

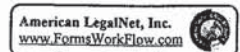
Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc:

LCR WI 01016



Federal Rule of Civil Procedure 45 (c), (d), and (e) (Effective 12/1/07)

(c) Protecting a Person Subject to a Subpoena.

(1) Avoiding Undue Burden or Expense; Sanctions. A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The issuing court must enforce this duty and impose an appropriate sanction — which may include lost earnings and reasonable attorney's fees — on a party or attorney who fails to comply.

(2) Command to Produce Materials or Permit Inspection.

(A) Appearance Not Required. A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) Objections. A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials or to inspecting the premises — or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the issuing court for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) Quashing or Modifying a Subpoena.

(A) When Required. On timely motion, the issuing court must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person who is neither a party nor a party's officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person — except that, subject to Rule 45(c)(3)(B)(iii), the person may be commanded to attend a trial by traveling from any such place within the state where the trial is held;

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) When Permitted. To protect a person subject to or affected by a subpoena, the issuing court may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information;

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party; or

(iii) a person who is neither a party nor a party's officer to incur substantial expense to travel more than 100 miles to attend trial.

(C) Specifying Conditions as an Alternative. In the circumstances described in Rule 45(c)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(d) Duties in Responding to a Subpoena.

(1) Producing Documents or Electronically Stored Information. These procedures apply to producing documents or electronically stored information:

(A) Documents. A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) Form for Producing Electronically Stored Information Not Specified. If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) Electronically Stored Information Produced in Only One Form. The person responding need not produce the same electronically stored information in more than one form.

(D) Inaccessible Electronically Stored Information. The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) Claiming Privilege or Protection.

(A) Information Withheld. A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) Information Produced. If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(e) Contempt. The issuing court may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena. A nonparty's failure to obey must be excused if the subpoena purports to require the nonparty to attend or produce at a place outside the limits of Rule 45(c)(3)(A)(ii).

LCR WI 01017

DECLARATION OF CUSTODIAN OF RECORDS

I HEREBY DECLARE, under penalty of perjury, that the following statements are true to the best of my knowledge and belief.

I am the duly authorized custodian of records of the below named and certify that the accompanying records are true and complete copies of records maintained in the regular course and scope of business of my employer and were prepared by authorized personnel at or near the time of the acts, conditions or events which they intend to convey. No documents, records or other materials have been withheld except as noted below.

Certain records were omitted because: _____

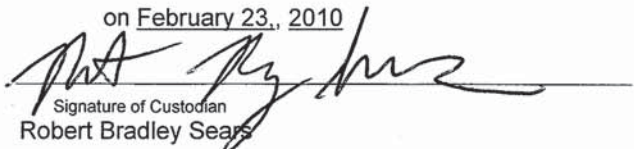
OR, IN THE ALTERNATIVE

I HEREBY DECLARE, under penalty of perjury, that I have NO RECORDS on the patient, employee, or subject in request.

Please explain if you have no-records: _____

Records Subpoenaed From:
The Williams Institute, UCLA School of Law, Box 951476, Los Angeles, CA 90095-1476

Re:
2005 Report entitled "Lesbians and Gay Men in the US Military: estimates from Census 2000;" all other reports regarding gay and lesbian service members in the U.S. Armed Forces; January 2010 Report entitled "Lesbian, gay, and bisexual men and women in the US military: Updated estimates." Format is specified as electronic (pdf) and paper hard copies.

on February 23, 2010

Signature of Custodian
Robert Bradley Sears

File Number _____
W.C.A.B. No. _____
Case Number CV 04-8425 (VAP)

LCR WI 01018

American LegalNet, Inc.
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Effects of "Don't Ask, Don't Tell" on Retention among Lesbian, Gay, and Bisexual Military Personnel

Gary J. Gates
Senior Research Fellow

This research brief quantifies how the United States military's "Don't Ask, Don't Tell" (DADT) policy affects retention rates among lesbian, gay, and bisexual military personnel. If the "Don't Ask Don't Tell" policy had not been instituted, an estimated 4,000 lesbian, gay, and bisexual military personnel would have been retained each year since 1994. The military intends to add more than 18,000 new troops each year for the next five years. If patterns observed in 2004 were to continue for the next five years, the estimated retained LGB personnel would account for nearly one in six of the additional troops required.

What is "Don't Ask, Don't Tell"?

The United States military policy known as "Don't Ask, Don't Tell" (DADT) requires that lesbians, gay men, and bisexuals (LGB) must remain silent about their sexual orientation and behavior if they are to serve in the military. In turn, the military is restricted from asking personnel about their sexual orientation.

Findings from a survey of LGB veterans suggest that this policy causes many of them to decide not to reenlist and continue their service when they reach the end of their tours of duty or, in the case of officers, resign their commissions at the end of their obligated service.

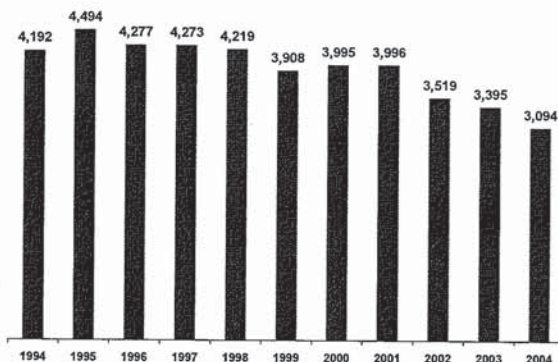
LGB Retention without DADT

Since the initiation of the DADT policy in 1994, an average of nearly 4,000 LGB military personnel each year on active duty or in the guard or reserves would have been retained if they could have been more open about their sexual orientation (see Figure 1). The estimate for the annual retention of LGB people has generally declined over time due to fewer discharges under the DADT policy coupled with fewer separations.

Estimates for the number of LGB military personnel retained in the absence of DADT for a given year begin with an estimate of the percentage of the total number of LGB individuals separating each year from active duty or the guard and reserves. Gates (2004) estimates that 2.5 percent of active duty military personnel and 3.2 percent of those in the guard and reserve are LGB. The estimation process assumes that the proportion of LGB individuals among those separating from the military each year is the same as the proportion in the broader military population.

A survey of 445 LGB veterans (Cochran et al. 2005) found that when asked about why they left the military, 19.6 percent said that it was because they

Figure 1.
Estimated number of separated and discharged LGB personnel who would be retained in the absence of "Don't Ask, Don't Tell"



could not be open about their sexual orientation. The estimation procedure uses this figure and assumes that in the absence of DADT, 19.6 percent of LGB individuals who separate in a given year would otherwise decide to remain in the military.

Finally, it is assumed that those discharged under the DADT policy would not have been discharged and would remain in military service. Adding the number of annual DADT discharges to the 19.6 percent of LGB separations each year yields an estimate of the number of LGB military personnel retained each year in the absence of DADT.

What does this mean for current military operations?

Following an announcement in President Bush's 2007 State of the Union address, the U.S. Department of Defense plans to add 92,000 more men and women to active duty military forces over the next five years.

LCR WI 01019

According to a study by the Michael D. Palm Center, the number of convicted felons who enlisted in the U.S. military nearly doubled from 2004 to 2006, suggesting a lowering of standards in order to meet recruitment targets (Boucai 2007). With recruiters clearly struggling to find more troops to meet the President's goals, it becomes increasingly important to increase retention of well-trained and seasoned military personnel.

In order to meet the target of 92,000 additional troops in the next five years, the military must add 18,400 per year to its active duty ranks.

The estimates in Table 1 show that in 2004 nearly 1,000 active duty LGB soldiers would have been retained if they had been able to serve and be open about their sexual orientation. An additional 1,400 LGB personnel would be retained in the guard and reserve and be available for active duty. Finally, more than 600 soldiers were discharged under DADT.

If that pattern were to continue for the next five years, the military could gain more than three thousand troops per year. That is nearly one in six (16 percent) of the additional troops needed in each of the next five years.

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Table 1. Estimated lesbian, gay, and bisexual retention in the absence of DADT.

	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004
Active Duty Separations	299,948	285,794	253,610	246,835	238,736	233,765	217,239	215,478	188,524	190,303	211,265
Estimated LGB Active Duty Separations ^a	7,499	7,145	6,340	6,171	5,968	5,844	5,431	5,387	4,713	4,758	5,282
Guard and Reserve Separations	335,636	370,115	345,139	327,894	300,746	273,711	269,323	265,772	269,292	267,089	224,077
Estimated LGB Guard and Reserve Separations ^a	10,740	11,844	11,044	10,493	9,624	8,759	8,618	8,505	8,617	8,547	7,170
Number of Active Duty GLB separations that would otherwise been retained ^b	1,470	1,400	1,243	1,209	1,170	1,145	1,064	1,056	924	932	1,035
Number of Guard and Reserve LGB separations that would otherwise been retained ^b	2,105	2,321	2,165	2,057	1,886	1,717	1,689	1,667	1,689	1,675	1,405
Number of DADT discharges	617	772	870	1,007	1,163	1,046	1,241	1,273	906	787	653
Total GLB separations that would be retained	4,192	4,493	4,278	4,273	4,219	3,908	3,994	3,996	3,519	3,394	3,093

^aAssuming that 2.5% of separations are GLB, based on the estimate that 2.5% of active duty personnel and 3.2% of reserve personnel are GLB (Gates 2004)
^bAssuming that 19.6% of separated GLB personnel would be retained in the absence of DADT (Cochran et al. 2005)

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Lesbian, gay, and bisexual men and women in the US military: Updated estimates

by Gary J. Gates



the
Williams
INSTITUTE
January 2010

Estimated number of LGB men and women in the US military

2008 American Community Survey & General Social Survey

Active Duty		All military		Guard/Reserve	
12,952		65,752		52,800	
Men	Women	Men	Women	Men	Women
7,216	5,736	29,855	35,897	22,945	29,855

Executive Summary

This research brief uses new data from the American Community Survey and the General Social Survey to provide updated estimates of how many lesbians, gay men, and bisexuals (LGB) are serving in the US military. It also updates estimates of the cost of the US military's "Don't Ask/Don't Tell" (DADT) policy.

Key findings from the analyses are as follows:

- An estimated 66,000 lesbians, gay men, and bisexuals are serving in the US military, accounting for approximately 2.2% of military personnel.
 - Approximately 13,000 LGB people are serving on active duty (comprising 0.9% of all active duty personnel) while nearly 53,000 are serving in the guard and reserve forces (3.4%).
 - While women comprise only about 14% of active duty personnel, they comprise more than 43% of LGB men and women serving on active duty.
- Lifting DADT restrictions could attract an estimated 36,700 men and women to active duty service along with 12,000 more individuals to the guard and reserve.
- Since its inception in 1994, the "Don't Ask/Don't Tell" policy has cost the military between \$290 million and more than a half a billion dollars.
 - The military spends an estimated \$22,000 to \$43,000 per person to replace those discharged under DADT.

Introduction

A widely cited study published in 2004 (Gates 2004) used Census 2000 data to estimate that approximately 65,000 lesbian, gay, and bisexual men and women were serving in the US military, accounting for 2.8% of military personnel. In February 2005, the Government Accountability Office (GAO) released a report showing that the costs of discharging and replacing service members fired for homosexuality during the policy's first ten years, from fiscal year 1994 through fiscal year 2003, totaled at least \$217 million (adjusting original figures to 2009 dollars). In 2006, the Palm Center at the University of California, Santa Barbara convened a Blue Ribbon Commission which challenged those GAO estimates and suggested that the DADT policy actually cost nearly \$415 million (also adjusted to 2009 dollars). This research brief updates estimates of the number of LGB men and women serving in the military using 2008 data sources and offers new estimates for the cost of the DADT policy through 2008.

Data and Methodology

LGB men and women in the military

Analyses estimating the number of LGB people in the military replicate the statistical methods used in Gates (2004) and are described in the Appendix. The analyses incorporate new estimates of the size of the LGB community derived from the 2008 General Social Survey (Davis and Smith 2009). For these analyses, the percent LGB in the population is defined as the percent of men and women who either identify as gay, lesbian or bisexual or who have had exclusively same-sex

sexual partners in the last five years. Data from same-sex couples in the 2008 American Community Survey are used to estimate the fraction of LGB men and women who are on active duty or who have served in the guard or ready reserve. Estimates of the size and sex composition of active duty personnel come from US Department of Defense personnel and procurement statistics and are as of September, 2008.ⁱ Data on the size and sex composition of the guard and ready reserve are reported in the US Census Bureau's *2010 Statistical Abstract* and are also from 2008.ⁱⁱ

Comparing prior and new estimates

Two key differences should be considered when comparing these estimates to those derived in Gates (2004). Gates (2004) assumed an underlying prevalence estimate of LGBs in the general population of 3% for women and 4% for men. These analyses use the most recent estimates of LGB prevalence derived from the 2008 General Social Survey and assume that 3.3% of men and 5.2% of women are LGB. Mathematically, this means that new estimates of LGB prevalence in the military will be lower for men and higher for women.

The cost of Don't Ask/Don't Tell

Existing cost estimates for DADT come from the GAO (2005) and Palm Center Blue Ribbon Commission (2006). Both attempt to estimate costs for the first ten years of the policy (1994-2003). During that period, 9,682 individuals were discharged under DADT. In order to estimate the costs from 2004 through 2008, this analysis derives a cost per discharge

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(total costs divided by number of DADT discharges) for the first decade of the policy using both GAO and Palm Center estimates. Those figures are then multiplied by the 3,279 DADT discharges from 2004-2008 to estimate the additional cost accruals. All figures are adjusted and reported in 2009 dollars.ⁱⁱⁱ

Findings

LGB men and women in the military

Similar to estimates based on Census 2000 data showing that approximately 65,000 LGB men and women were serving in the military, updated estimates shown in Table 1 suggest that 65,752 LGB men and women are currently serving, comprising 2.2% of military personnel (a full summary of findings, including upper- and lower-bound estimates is shown in Appendix Table A).

Table 1. LGB personnel on active duty and in the guard/reserve.

		All	Men	Women
% LGB (among military personnel)	Active Duty	0.9%	0.6%	0.9%
	Guard/Reserve	3.4%	2.3%	8.7%
	Total Military	2.2%	1.5%	6.2%
# LGB	Active Duty	12,952	7,216	5,736
	Guard/Reserve	52,800	29,855	22,945
	Total Military	65,752	37,071	28,681

Several patterns persist when comparing these analyses to those using Census 2000 reported in Gates (2004). Lesbians and bisexual women are still substantially more likely to serve in the military than are gay/bisexual men or heterosexual women. An estimated 2.9% of women on active duty are lesbian/bisexual compared to only 0.6% of men. Women in same-sex couples are twice as likely as other women to report either being on active duty or serving in the guard or reserve.

Also similar to estimates from Census 2000 data, these updated figures suggest that LGB men and women are more common among those in the guard and reserve than among those on active duty, 3.4% versus 0.9% respectively.

One contrast with the estimates based on data from Census 2000 is that the updated figures show lower proportions of LGB men and women on active duty (1.8% in prior estimates versus 0.9% using 2008 data) and higher proportions in the guard and reserve (3.2% versus 3.4%).

Additional troops if DADT restrictions are lifted

One way to assess the effect of lifting restrictions on LGB service in the military is to assume that, absent Don't Ask/Don't Tell restrictions, the percent of LGB men and women in the military would be the same as their percentage in the population.

Under this assumption, lifting DADT restrictions would attract an additional 36,700 individuals (32,000 men and 4,700 women) to active duty service. Since the estimated percentage of lesbians in the guard and reserve exceeds the estimated percentage in the population, we assume no change for women among those personnel. However, there would be an additional 12,000 men among the guard and reserve ranks.

The cost of Don't Ask/Don't Tell

The Palm Center and GAO estimates imply that the government incurs costs of an estimated \$22,000 to \$43,000 per person as a result of DADT-related discharges. From 2004-2008, an additional 3,279 men and women have been discharged, suggesting additional costs of \$74-140 million in that time period (see Table 2).

Table 2. Cost estimates of Don't Ask/Don't Tell (in 2009 dollars).

	Palm Center Blue Ribbon Commission (2006)	Government Accountability Office (2005)
Estimate of costs, 1994-2003	\$437.7 million	\$217.2 million
Cost per DADT discharge: 9,682 discharges (1994-2003)	\$42,835	\$22,430
Additional costs, 2004-2008: 3,279 discharges (2004-2008)	\$140.5 million	\$73.6 million
Total cost	\$555.2 million	\$290.7 million

These figures suggest that since the inception of Don't Ask/Don't Tell, the US government has had to spend between \$290 million and more than a half billion dollars to implement the policy.

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APPENDIX

Deriving the Proportion of Lesbians, Gay Men, and Bisexuals Serving in the Military

The ideal way to derive the number of lesbians, gay men, and bisexuals currently serving on active duty would be to conduct a random survey of active duty personnel and ask respondents to identify their sexual orientation. Clearly, the DADT policy restricts such a survey. However, applying a common statistical procedure known as Bayes Rule allows one to derive an estimate of the proportion of men and women in the military who are LGB. The procedure requires the following key estimates:

1. The proportion of all LGB individuals in the U.S. who are in the military
2. The proportion of the non-LGB population in the U.S. who are in the military
3. The proportion of the US population who are LGB.

All respondents in the 2008 American Community Survey Public Use Microdata Sample (PUMS) indicate if they are currently on active duty or serving in the guard or reserve. Estimates in these analyses use the proportion of those in same-sex couples who say they are in the military as a proxy for (1), an estimate of the fraction of LGB people in the military. Similarly, information about those not in same-sex couples is used to derive an estimate for (2). Findings from the 2008 General Social Survey suggest that 3.3% of men and 5.2% of women either identify as LGB or have had exclusively same-sex sexual partners in the last five years. Those estimates are used to derive (3).

Equation (1) shows the Bayes's rule calculation used to derive $P(\text{LGB} | M)$, the probability that someone is lesbian, gay, or bisexual given that he or she is in the military.

$$P(\text{LGB} | M) = \frac{P(\text{LGB})P(M | \text{LGB})}{P(\text{LGB})P(M | \text{LGB}) + P(H)P(M | H)} \quad \text{Equation (1)}$$

The terms of the equation and sources for each are as follows:

- $P(\text{LGB})$: Probability that an adult in the population is LGB. The analyses use estimates from the 2008 General Social Survey: 3.3% for men and 5.2% for women.
- $P(M | \text{LGB})$: Probability that someone is in the military given that he or she is LGB. This estimate is derived from the proportion of individuals in same-sex unmarried partner couples who report military service.
- $P(H)$: Probability that an adult in the population is heterosexual. This is calculated as one minus the fraction of LGB men and women in the adult population (96.7% for men and 94.8% for women).
- $P(M | H)$: Probability that someone is in the military given that he or she is heterosexual. ACS figures are used to estimate the proportion of the adult population other than those in same-sex unmarried partnerships who report active military service.

Estimates are calculated separately for men and women as they differ substantially in the probability of serving in the military.

Same-sex couples in the 2008 American Community Survey

Same-sex couples in the 2008 ACS PUMS are identified when a household includes two adults of the same sex where one is designated as either a "husband/wife" or an "unmarried partner" of the other. US Census Bureau procedures recode all same-sex husbands and wives to be unmarried partners in the PUMS data. Gates and Steinberger (2009) have shown that a potentially large portion of same-sex couples who designate one partner as a "husband/wife" may be comprised of different-sex married couples who miscode the sex of one of the spouses. While same-sex spouses cannot be directly identified in the 2008 ACS data, Gates and Steinberger (2009) show that a variable indicating that the original marital status response has been altered provides a proxy for indicating that a same-sex unmarried partner couple originally used the terms husband or wife to describe a partner. Consistent with their recommendations, the sample used in these analyses is restricted to only those couples whose marital status was not altered (meaning they called themselves "unmarried partners") along with couples who responded via a computer-assisted interview that verifies the sex of any same-sex husband or wife. The data are further restricted to only men and women aged 18-60 since very few individuals over age 60 are serving in the military.

Appendix Table A. Estimates of the percent and number of LGB people in the US military.

		Estimate		95% Confidence Interval			
		Men	Women	Men	Women	Men	Women
General Social Survey, 2008	LGB-identified or same-sex sexual behavior in last five years	3.3%	5.2%	1.9%	3.5%	4.6%	6.9%
	Total	4.3%		3.2%		5.4%	
American Community Survey, 2008	Same-sex couples						
	Active duty	0.2%	0.1%	0.04%	0.01%	0.4%	0.2%
		0.9%	0.8%	0.5%	0.5%	1.2%	1.1%
	Guard/reserve	Other adults					
1.1%		0.2%	1.1%	0.2%	1.2%	0.2%	
	Guard/reserve	1.2%	0.5%	1.2%	0.4%	1.3%	0.5%
Derived estimates	% LGB						
	Active duty	0.6%	2.9%	0.1%	0.2%	1.5%	6.7%
			0.9%		0.1%		2.2%
	Guard/reserve	2.3%	8.7%	0.8%	4.1%	4.4%	14.4%
			3.4%		1.4%		6.1%
	All military	1.5%	6.2%	0.5%	2.4%	3.0%	11.1%
			2.2%		0.8%		4.3%
	Number of LGB						
	Active duty	7,216	5,736	774	407	18,093	13,360
			12,952		1,181		31,453
Guard/reserve	29,855	22,945	10,832	10,717	57,206	37,954	
		52,800		21,548		95,161	
All military	37,071	28,681	11,605	11,124	75,299	51,314	
		65,752		22,729		126,615	

ⁱ See <http://siadapp.dmdc.osd.mil/personnel/MILITARY/rg0809.pdf> for statistics on all active duty personnel and <http://siadapp.dmdc.osd.mil/personnel/MILITARY/rg0809f.pdf> for statistics on women.

ⁱⁱ See <http://www.census.gov/compendia/statab/2010/tables/10s0502.pdf> for data on the Ready Reserve and <http://www.census.gov/compendia/statab/2010/tables/10s0503.pdf> for data on the National Guard.

ⁱⁱⁱ Adjustments use the US Bureau of Labor Statistics Consumer Price Index inflation calculator found at http://www.bls.gov/data/inflation_calculator.htm.

Testimony on "Don't Ask, Don't Tell" by Gary J. Gates
Friday, 18 July 2008

Submitted to: U.S. House of Representatives, Armed Services Committee, Military Personnel Subcommittee

I am a demographer and Senior Research Fellow at the Williams Institute on Sexual Orientation Law and Public Policy, UCLA School of Law. Prior to taking my position at the Williams Institute three years ago, I served as a Research Associate at the Urban Institute in Washington, DC. I have studied the geographic, economic, and demographic characteristics of the lesbian, gay, and bisexual (LGB) population for more than fifteen years and have a particular expertise in analyses of same-sex couples using data from the U.S. Census Bureau.

As a demographer, I have a particular interest in counting people. Under the constraints of "Don't Ask/Don't Tell" (DADT), it is virtually impossible to easily enumerate LGB people currently serving in the U.S. Armed Forces. Because the policy clearly restricts military personnel from discussing their sexual orientation, it would be impossible to conduct a random survey of military personnel that asks them to reveal their sexual orientation. However, data from Census 2000 coupled with standard statistical methods provides a way to estimate the number of lesbian and gay individuals serving on active duty, in the ready reserve, and veterans. This was the focus of my research brief entitled "Gay Men and Lesbians in the Military: Estimates from Census 2000".ⁱ

A large body of research has shown that same-sex "unmarried partners" identified in the U.S. Census are primarily composed of lesbian and gay couples. The Census includes questions about both current and past military service. My estimates for the military service rates of LGB men and women are based on these responses and assume that the military service patterns of men and women in same-sex couples are the same as those for the entire LGB population. I should note that this likely provides a conservative estimate with regard to active duty service since it seems reasonable to assume that single gay men and lesbians would be more likely than their coupled counterparts to serve on active duty. This is true for heterosexual men and women and further, the constraints of

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the DADT policy would place an added burden on coupled individuals who would be forced to hide the nature of their relationship.

My analyses provided a range of estimates using various statistical assumptions, but the mid-range estimates suggest that more than 36,000 gay men and lesbians are serving on active duty, representing 2.5% of active duty personnel. When the ready reserve is included, nearly 65,000 men and women in uniform are likely gay or lesbian, accounting for 2.8% of military personnel. Other key findings of this research brief include:

- There are nearly one million lesbian and gay veterans in the United States.
- These lesbian and gay veterans have served in all military eras in the later part of the 20th century.
- Military service rates for women in same-sex couples far exceed rates for other women in every military era of the later 20th century.
 - Nearly 10% of women in same-sex couples who were age-eligible report serving in Korea, compared with less than 1% of other women.
 - In the Vietnam era, 6% of age-eligible women in same-sex couples served, compared to only 0.8% of other women.
 - In the most recent service period available in these data (from 1990 to 2000), service rates among age-eligible women in same-sex couples are more than three times higher than rates among other women.
- Women in same-sex couples report longer terms of service than other women. Among all women age 18–67 who report military service, nearly 82% of those in same-sex couples. Less than 74% of other women report serving more than two years.

Drawing on this research, I have also considered how service patterns of gay men might change if the DADT policy were lifted.ⁱⁱ My research shows that the estimated proportion of gay men in the military falls below the estimated proportion of gay men in the general population (the proportion of lesbians among women in the military exceeds their proportion in the general population). An estimated 1.2% of men on active duty are

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gay or bisexual, implying that there are approximately 14,500 gay/bisexual men on active duty.

In the absence of DADT, it seems reasonable to assume that the proportion of these men in the military would eventually mirror that of the population. A nationally representative government sponsored survey (the National Survey of Family Growth, 2002) found that 4% of men identified as gay or bisexual. If that figure held among those on active duty, then there would be approximately 48,500 gay/bisexual men or an additional 34,000 gay/bisexual men among those on active duty. Using the same procedure for men in the ready reserve implies that an additional 7,000 gay/bisexual men would serve. All told, this suggests that if lifting DADT restrictions raises the portion of gay men in the military to that within the population, then the military could raise their numbers by an estimated 41,000 men (see attached Williams Institute press release).

I have also considered how lifting DADT restrictions could affect retention of military personnel.ⁱⁱⁱ A recent survey of LGB veterans found that when asked about why they left the military, 20% said that it was because they could not be open about their sexual orientation. My estimates suggest that by adding exiting active duty and ready reserve service personnel who would otherwise stay in military service to those who are discharged under DADT, the military would retain at least 3,000 trained personnel per year in the absence of DADT.

To summarize, my research has focused on developing credible estimates of the size of the LGB population in the U.S. military. Using those estimates, I have also considered the impact that lifting DADT would have on recruitment and retention. I find that:

- An estimated 65,000 LGB people are currently serving in the U.S. Armed Forces.
- In the absence of DADT, I would expect that an additional 41,000 gay and bisexual men might eventually join the military.
- The military could expect an additional 3,000 personnel to retain their positions each year if they could serve openly and not be subject to DADT restrictions.

ⁱ http://www.urban.org/UploadedPDF/411069_GayLesbianMilitary.pdf

ⁱⁱ <http://www.law.ucla.edu/williamsinstitute/press/PressReleases/ImpactOfLiftingDontAskDontTell.html>

ⁱⁱⁱ <http://www.law.ucla.edu/williamsinstitute/publications/EffectsOfDontAskDontTellOnRetention.pdf>

Lesbians and gay men in the U.S. military: estimates from Census 2000

by
Gary J. Gates

Abstract

Very little is known about the extent to which gay men and lesbians choose to serve their country through military service. This lack of knowledge contrasts with intense policy debates about the compatibility between homosexuality and service in the United States armed forces. Bayesian inference techniques applied to data from Census 2000 that enumerates characteristics of same-sex "unmarried partners" provide a mechanism for estimating the size of the gay and lesbian population currently serving in the military and exploring historical gay and lesbian military service patterns. Analyses suggest that rates of gay men and lesbians in current military service range from 1.32 to 3.78 percent, implying that at least 30,446 gay men and lesbians and as many as 87,202 are currently in uniform. The findings also show that gay men and, to an ever greater degree, lesbians have served in relatively large portions in all of the major military conflicts of the later 20th century.

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Lesbians and gay men in the U.S. military: estimates from Census 2000

Introduction

Very little is known about the extent to which gay men and lesbians choose to serve their country through military service. This lack of knowledge contrasts with intense policy debates about the compatibility between homosexuality and service in the United States armed forces. The current "Don't Ask, Don't Tell" (DADT) policy enforced in all branches of the U.S. military officially enforces a policy of invisibility and silence in relation to gay and lesbian military service. Gay men and lesbians must remain silent about their sexual orientation if they are to serve in the military and in turn, the military is restricted from asking personnel about their sexual orientation. In this legal climate, data collection that focuses on sexual minorities within the military is virtually impossible. However, Bayesian inference techniques applied to data from Census 2000 that enumerates characteristics of same-sex "unmarried partners" provide a mechanism for estimating the size of the gay and lesbian population currently serving in the military and exploring historical gay and lesbian military service patterns.

Data

All data for these analyses are drawn from the United States 2000 Decennial Census. Specifically, estimates of characteristics of the same-sex unmarried partner population are derived from a combined 5% and 1% Public Use Microdata Sample (PUMS). The two PUMS samples represent independent draws from the responses to the census long-form, which contains detailed information about all members of the household, including military service.

The census household roster includes a number of relationship categories to define how individuals in a household are related to the householder (the person filling out the form). These fall into two broad categories: related persons (e.g., husband/wife, son/daughter, brother/sister), and unrelated persons (e.g., unmarried partner, housemate/roommate, roomer/boarder, and other nonrelative). Since 1990, the Census Bureau has included an “unmarried partner” category to describe an unrelated household member’s relationship to the householder. If the householder designates another adult of the same sex as his or her “unmarried partner” or “husband/wife”, the household counts as a same-sex unmarried partner household. These same-sex couples are commonly understood to be primarily gay and lesbian couples (Black et al. 2000) even though the census does not ask any questions about sexual orientation, sexual behavior, or sexual attraction—three common ways used to identify gay men and lesbians in surveys.

There are several selection bias and measurement error issues associated with the same-sex unmarried partner data that could affect estimated rates of military service within the whole gay and lesbian population. There is reason to believe that some of the sample selection issues related to the same-sex unmarried partner sample bias estimates of military service rates among gay men and lesbians downward. First, it is important to note that the sample is only a representation of couples. Their characteristics may differ substantially from those of single gay men and lesbians. Coupling likely increases the difficulty of gay men and lesbians adhering to the military’s DADT policy as they would be forced to not only hide their sexual orientation, but also

hide the existence of a partner. As a result, military service rates among same-sex partners are likely lower than those of single gay men and lesbians.

Secondly, concerns about confidentiality may lead some same-sex couples to indicate a status that would not provide evidence of the true nature of their relationship. Other couples may believe that "unmarried partner" or "husband/wife" does not accurately describe their relationship. A study of undercount issues relating to same-sex unmarried partners in Census 2000 indicates that these were the two most common reasons that gay and lesbian couples chose not to designate themselves as unmarried partners (Badgett and Rogers 2003). It seems reasonable to believe that census tends to capture same-sex couples who are more willing to acknowledge their relationship and are potentially more "out" about their sexual orientation. This likely further biases the sample toward those who would have the greatest difficulty adhering to military policy regarding sexual orientation.

These selection biases suggest that estimates of gay and lesbian service rates derived from the census same-sex unmarried partner sample can be understood as a lower bound. However, an unfortunate measurement error issue creates a potential bias in the other direction. In the 1990 U.S. census, the Census Bureau edited a household record that includes a same-sex "husband/wife" such that, in most cases, the sex of the husband or wife was changed and the couple became a different-sex married couple in publicly released data (Black et al., 2000). This decision is reasonable if most of the same-sex husbands and wives were a result of the respondent checking the wrong sex for either him- or herself or his or her spouse. In Census 2000, officials decided that some same-sex couples may consider themselves married, regardless of

legal recognition. As a result, these records were altered such that the same-sex “husband/wife” was recoded as an “unmarried partner.”

This process inadvertently creates a measurement error issue. Some very small fraction of the different-sex couples likely make an error when completing the census form and miscode the sex of one of the partners. Under Census 2000 editing procedures, all these miscoded couples would be included in the counts of same-sex unmarried partners. Because the ratio between different-sex married couples and same-sex couples is so large (roughly 90 to 1), even a small fraction of sex miscoding among different-sex married couples adds a sizable fraction of them to the same-sex unmarried-partner population, possibly distorting some demographic characteristics. Gates and Ost (2004) observe that if 1 in 1,000 different-sex married couples miscode the sex of one of the partners (and get reclassified as same-sex unmarried partners), then approximately 10% of the same-sex unmarried partner couples are actually miscoded different-sex married couples.

Black et al. (2003) propose a method for at least identifying the direction of the bias when considering various demographic characteristics of same-sex couples. Same-sex unmarried partner households where one member of the couple was identified as “husband/wife” are the “at-risk” group for this form of measurement error. There is no simple way to identify this group, but one way to isolate same-sex “spouses” is to consider the marital status variable allocation flag (a variable indicating that the original response had been changed). Census Bureau officials confirm that their editing procedures altered the marital status of any unmarried partners who said they were “currently married.” (Changes in marital status occurred after editing all of the same-sex

“husbands” and “wives” into the “unmarried partner” category.) A large portion of the same-sex unmarried partners who had their marital status allocated likely originally responded that they were “currently married” given that one of the partners was a “husband/wife.”¹ Same-sex partners who have not had their marital status variable allocated are likely free of significant measurement error. Using the Black et al. (2003) procedure, Carpenter and Gates (2004) show that the census same-sex couple sample may suffer from some “contamination” with different-sex couples. As such, the analyses include estimates of military service rates among only same-sex partners who have not had their marital status allocated.

Since most active military personnel exit the military by age 60, the analyses of current military service calculate rates for the population aged 18–59. The same-sex couple sample for this age group from the combined PUMS sample includes 31,868 men and 34,144 women. Of those, 102 men and 106 women report active duty military service; 715 men and 755 women report guard or reserve training. Estimates of characteristics in the broader population are derived from the 1% PUMS alone. This sample includes 788,093 men and 803,949 women. All estimates are derived using the person-level weights provided in the PUMS.

Estimates of historical military service calculate service rates within “age-eligible” groups, meaning anyone who was aged 18-59 within a given era of military service.

¹ Using internal files to compare same-sex unmarried partners with an without marital status allocation, Census bureau officials find that ten percent of couples where both partners have a marital status allocation did not actually have their relationship status changed from “husband/wife” to unmarried partner, and conversely approximately 10-15 percent of the couples that were edited in this fashion are not included in those with a marital status allocation. Thanks to Martin O’Connell and Jason Fields at the US Census Bureau for this analysis.

Deriving the proportion of gay men and lesbians serving in the military

Eq. (1) shows the Bayes' rule calculation used to derive $P(GL|M)$, the probability that someone is gay or lesbian, given that he or she is in the military.

$$P(GL|M) = \frac{P(GL)P(M|GL)}{P(GL)P(M|GL) + P(H)P(M|H)} \quad \text{Eq. (1)}$$

The terms of the equation and sources for each are as follows:

- $P(GL)$: Probability that an adult in the population is gay or lesbian. The analyses will use several estimates derived from surveys representing the U.S. population where questions of sexual behavior and/or sexual orientation were asked.
- $P(M|GL)$: Probability that someone is in the military given that he or she is gay or lesbian. This estimate is derived from the census figures of the proportion of same-sex female unmarried partners who report active military service.
- $P(H)$: Probability that an adult in the population is heterosexual. This is calculated as one minus the fraction of gay men and lesbians in the adult population.
- $P(M|H)$: Probability that someone is in the military given that he or she is heterosexual. This estimate is derived from the census figures as the proportion of the adult population other than same-sex unmarried partners who report active military service.

Estimates are calculated separately for men and women since they differ both in terms of the likelihood of reporting homosexual behavior or orientation and in the probability of serving in the military.

Three additional sensitivity analyses are conducted for the estimates of those currently serving in the military. These analyses compensate for the potential biases correlated with military service. First, to compensate for the measurement error issue related to the possible presence of men and women from different-sex couples within

the same-sex couple sample, results are shown using estimates for same-sex partners without a marital status allocation.

A second selection bias relates to the age distribution of same-sex couples. They have proportionally fewer individuals at both ends of the age distribution, particularly within the 18-21 year old range, when compared to the adult population. It is difficult to determine if and how the age distribution of the "true" gay and lesbian population might differ from that of the general population. It could certainly be that individuals within same-sex couples are on average older than their single counterparts and the skewed age distribution amounts to a selection bias related to using only same-sex couples to estimate traits of the whole gay and lesbian population. One strategy to compensate for this potential selection bias is to standardize the age distribution of the same-sex couples to that of the adult male and female populations. Methodologically, this means multiplying all of the person-level weights for those in a same-sex couple by the proportion of the population of a given age divided by the proportion of those in same-sex couples of the same age. This amounts to assuming that the true age distribution of the gay and lesbian population is no different than that of the general population. It could very well be that the gay and lesbian population is actually older than the general population since some fraction of gay or lesbian people likely do not identify as such until later in life.

Another bias associated with using only same-sex couples as a proxy for the gay and lesbian population is that coupled gay men and lesbians are probably less likely to serve on active duty than their single counterparts as they would be forced to hide their relationships. Indeed, even among those in different-sex partnerships, uncoupled men

are 1.16 times more likely than those coupled with women to report service on active duty, while uncoupled women are 2.29 times more likely than women partnered with men to report serving on active duty. For service in the guard and reserve, coupling has the opposite effect for men. Those coupled with women are 1.2 times more likely than men who are not coupled to report service in the guard and reserve. Non-coupled women are slightly more likely than those coupled with men (1.1 times) to serve in the guard or reserve. Eq. (2) offers a mechanism to adjust for the lack of single gay men and lesbians in the sample. Adjusted estimates of $P(M|GL)$ (see Eq. 1) are calculated as a weighted average of service rates for single and coupled lesbians as follows:

$$P(M | GL)_a = (A_{GL}D(1 - C_{GL})) + A_{GL}C_{GL} \quad \text{Eq. (2)}$$

Where:

- A_{GL} : Active duty rates among same-sex partners (observed in census).
- D : Differential between service rates of single and coupled people calculated as the active duty service rate of uncoupled adults divided by the active duty service rate of coupled adults (among those not in same-sex partnerships).
- C_{GL} : Proportion of gay men and lesbians who are coupled.

The calculations also assume that 25 percent of gay men and 42 percent of lesbians are coupled (see Black et al. 2000). Eq. (1) is then recalculated using $P(M|GL)_a$ in place of $P(M|GL)$ to estimate gay and lesbian service rates adjusted for partnership status.

Estimates of historical military service are adjusted only for marital status allocation. The relationship between partnership status and military service over time is not clear. Further, the delineation of age-eligible populations over time provides a control for differences in age distribution.

Prevalence estimates of the proportion of men and women in the United States who are gay or lesbian drawn from samples that can be used to make nationally representative estimates are rare: In the National Health and Social Life Survey (NHSLs), Laumann et al. (1994) find that while 2.8 percent of men and 1.4 percent of women self-identify as homosexual, more than 4 percent of women and more than 6 percent of men report a sexual attraction to people of the same sex. Analyses reported in Black et al. (2000) consider other definitions of "gay" and "lesbian" based on reported sexual behavior. Their work uses the NHSLs and the General Social Survey (GSS) to show that 3.6 percent of women and nearly 5 percent of men report having had sexual contact with a partner of the same sex since they were age 18. Using a more restrictive definition, they find that 1.8 percent of women and 3.1 percent of men had more same-sex than different-sex partners since age 18. Further, 1.5 percent of women and 2.6 percent of men report having exclusively same-sex sexual partners in the last five years. One consistency in all of these findings is that women are less likely than men to report same-sex attraction, behavior, or homosexual identification.²

Given the variation in these estimates, the analyses of current military service include two possibilities for the prevalence of gay men and lesbians in the U.S. population. In each case, consistent with most surveys, the prevalence for women is assumed to be less than that for men. Prevalence rates for women are varied from 2 to 4 percent while the rates for men are varied from 3 to 5 percent.

² It should be noted that these calculations do not attempt to address the issue of bisexuality. It could very well be that the differences observed between men and women with regard to defining same-sex behavior may be mitigated when bisexuality is considered, but research in this area is quite limited and clear patterns in this regard are not available.

Estimates of current gay and lesbian military service

The first step in estimating the number of gay men and lesbians in the military is to explore service rates among individuals within same-sex couples compared to other men and women. In general, men in same-sex partnerships are less likely to serve in the military than other men, while lesbians are more likely than other women to serve (see Table 1). Using the unadjusted samples, 0.35 percent of men in same-sex couples report being on active duty compared to 1.16 percent of other men. Conversely, 0.32 percent of women in same-sex couples report being on active duty, compared to just 0.18 percent of other women. Adjusting for partnership increases the rate among men in same-sex couples to 0.39 percent and nearly doubles the rate among women in same-sex couples to 0.63 percent.

The adjustment for marital status allocation decreases the service rates among men in same-sex couples to 0.23%. If heterosexual men are more likely than their gay counterparts to serve in the military, then this finding is consistent with the same-sex unmarried couple sample being "contaminated" with men actually coupled with women. Like men in same-sex couples, adjusting the sample of women in same-sex couple based on marital status allocation decreases military service rates. This finding is somewhat puzzling as the opposite is to be expected if lesbians have higher service rates than heterosexual women (a finding of Black et al. 2000 using data from the 1990 Census, the GSS, and the National Health and Social Life Survey). It could be that the same-sex female couple sample includes a sufficient number of miscoded men from different-sex couples to skew the unadjusted figures toward higher rates of military service. Given that men are more than six times more likely than women to serve on

active duty, even a small group of miscoded men within the female same-sex couple sample could significantly affect this statistic.

Service rates among those who report guard and reserve training³ do not differ as much between men and women in same-sex couples and other men and women. While 2.15 percent of men in same-sex couples report training for the guard or reserve, the comparable figures for other men are 2.81 percent. Adjusting for marital status allocation and partnership status lowers estimated service rates for men in same-sex couples. Rates of females who report guard and reserve training are also more similar between coupled lesbians and other women (2.26 percent vs. 1.55 percent among the full sample) than are differences in the rates of active duty service.

Standardizing the age distribution of men and women in same-sex couples to that of the adult population generally increases active duty service rates among men in same-sex couples and has very little effect on these rates for women in same-sex couples (see Table 2). The age adjustment slightly lowers reserve and national guard service rate estimates for men and women in same-sex couples.

Applying Eqs. (1) and (2) to figures shown in Tables 1 and 2 yields estimates of the proportion and size of the gay and lesbian population serving on active duty and within the National Guard and reserve forces (see Tables 3 and 4). Without adjusting for the age distribution and assuming that three percent of adult men are gay, findings from Table 3 suggest that likely less than one percent of men on active military duty are gay (the range of estimates run from 0.69 percent to 1.03 percent). Age adjusted

³ Estimates for service rates in the guard and reserve are complicated somewhat because the census data do not indicate if individuals are currently in the guard or reserve, but rather if they have ever been trained for guard or reserve duty. For simplicity, the figures in these analyses assume that all are currently in the guard or reserve.

estimates shown in Table 4 increase the estimated probability of being a gay man on active duty to between 0.78 percent and 1.23 percent. If five percent of adult men are gay in the population, the range of estimates for gay men on active duty runs from 1.04 percent to 2.08 percent.

The estimated proportion of lesbians among women on active duty is substantially higher than that for men and the variation among the estimates is substantially greater. Assuming that two percent of women are lesbians in the population yields estimates of lesbians on active duty that range from 1.88 percent to 6.8 percent. Under the assumption that four percent of women in the adult population are lesbians, the estimates of the proportion of lesbians on active duty range from 3.76 to 12.96 percent. Regardless of assumptions, the proportion of lesbians among women on active duty is always much higher than the proportion of gay men among men on active duty—in most cases by a factor of three to four times.

The estimates of gay men and lesbians serving in the guard and reserve are much closer to the assumed rates of homosexuality in the population. Under an assumption that three percent of adult men are gay in the population, estimated proportions of gay men within men in the guard and reserve range from 1.78 to 2.31 percent. Assuming five percent of adult men are gay yields comparable estimates of 3 to 3.86 percent. Assuming that two percent of women are lesbian in the general population, the estimated proportions range from 2.49 to 3.34 percent. The range is 4.95 to 6.6 percent under the assumption that four percent of women are lesbian.

Estimates of historical military service

Patterns of military service over time are shown in Table 5. The findings again demonstrate the increased probability of military service among women in same-sex couples relative to other women, although these differences have apparently decreased over time. The findings also again demonstrate that the measurement error issue that potentially adds members of different-sex couples to the same-sex couple sample likely adds men to the female same-sex couples sample. The rates of service for these women drop substantially among those who did not have their marital status allocated. But even among that group, rates of military service among women in same-sex couples are typically more than four times the service rates of other women.

If two percent of women in the adult population are lesbian, the analyses suggest that more than one in ten women serving during the Korea and Vietnam conflicts were lesbian. It should be noted that during these eras, women who got married or pregnant were automatically discharged from the military, perhaps at least partially explaining the relatively high rates of lesbian service. In the early 1990s, the estimates suggest that eight percent of women in the military were lesbian. The figure drops to four percent in the later 1990s.

A puzzling finding with regard to men concerns the sensitivity analysis using the marital status allocation flag. In the case of current military service, restricting the sample to those without a marital status allocation reduced military service rates. In the case of historical service patterns, the same restriction either increases or does not substantially alter the probability of military service among men in same-sex couples.

There are notably few differences between service patterns of men in same-sex couples and other men among those who could serve during World War II and the

Korean conflict. In both eras, estimated proportions of gay men serving do not differ much from the estimated rate of gay men in the general population. This is perhaps predictable since these are eras that included a military draft. However, beginning with Vietnam (which also included a draft but perhaps a larger resistance to service among those drafted than in earlier conflicts), estimates suggest a decline in service rates among gay men. The trend is most notable in the later 1990s when the analyses suggest that only 1.5 percent of men in the military are gay assuming that three percent of men in the population are gay.

Discussion

Census data provide perhaps the only data source available to make credible estimates of the size of the gay and lesbian population among those serving in the U.S. military. Exploring the range of estimates shown in Tables 3 and 4, the analyses suggest that rates of gay men and lesbians in any military service (active, guard, or reserve) range from 1.32 to 3.78 percent, implying that at least 30,446 gay men and lesbians and as many as 87,202 are currently in uniform.

The census data also provide the rare opportunity to examine historic service patterns among the gay and lesbian population. The findings show that gay men and, to an ever greater degree, lesbians have served in relatively large numbers in four major conflicts of the twentieth century: World War II, Korea, Vietnam, and the Persian Gulf.

Of course, these analyses also highlight some of the difficulties associated with using census data to measure the number of gay men and lesbians serving in the military with great precision. Estimates, especially those for women on active duty, are

sensitive to potential measurement error and to assumptions designed to overcome sample bias. Changes in key assumptions, among them the underlying proportion of gay men and lesbians within the adult population, can have a substantial effect on any point estimates of the military service rates of gay men and lesbians.

Despite the sensitivity of the estimates to the various assumptions, several general observations can be drawn from the results:

- The proportion of gay men currently serving in the military tends to be below the proportion within the general population. However, historically, their service rates do not differ substantially from those of other men.
- The proportion of lesbians in military service, both currently and historically, exceeds the proportion of lesbians within the population and they are substantially more likely to serve than gay men.
- The proportion of gay men and lesbians within the guard and reserve corps are generally more similar to their rates in the population than the differences observed for those on active duty.

Conclusion

These analyses offer a heretofore unavailable glimpse at military service patterns among a population that is hidden implicitly by social stigma and explicitly by U.S. military policy. This study does not attempt, nor do census data really allow for, either a comprehensive analysis of U.S. military treatment of gay men and lesbians or an assessment of the effects of particular policies like "Don't Ask, Don't Tell." However, the findings highlight a consistent pattern observed in other analyses of census data. Demographically speaking, large numbers of gay and lesbian Americans do not look

very different from their heterosexual counterparts, including with regard to military service. Despite formidable obstacles placed in their way, they have and continue to serve in America's armed forces.

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Tables

Table 1. Military service rates for men and women in Census 2000.

	Other men	Male same-sex unmarried partners		Other women	Female same-sex unmarried partners		
		All	No marital status allocation		All	No marital status allocation	
% Active duty	1.16	0.35	0.23	0.18	0.32	0.18	
% Reserves/national guard	2.81	2.15	1.89	1.55	2.26	2.03	
		Partnership status adjustment					
% Active duty	-	0.39	0.26	-	0.63	0.35	
% Reserves/national guard	-	1.89	1.66	-	4.47	4.02	

Table 2. Military service rates for men and women in Census 2000, age distribution adjusted for same-sex couples.

	Male same-sex unmarried partners		Female same-sex unmarried partners	
	All	No marital status allocation	All	No marital status allocation
% Active duty	0.42	0.30	0.32	0.17
% Reserves/national guard	2.11	1.87	2.19	1.94
	Partnership status adjustment			
% Active duty	0.47	0.33	0.64	0.33
% Reserves/national guard	1.86	1.65	4.34	3.83

Table 3. Estimated percentages and numbers of gay men and lesbians serving on active military duty and who report National Guard and Reserve training.

	Est. % Lesbian/Gay in the Adult Population							
	2% / 3%				4% / 5%			
			Partnership status adjustment				Partnership status adjustment	
	All	No marital status alloc.	All	No marital status alloc.	All	No marital status alloc.	All	No marital status alloc.
Active Duty								
Est. % lesbians among women	3.49	1.96	3.56	1.88	6.87	3.92	12.74	7.46
Est. % gay men among men	0.92	0.61	1.03	0.69	1.56	1.04	1.74	1.17
Est. % GL	1.31	0.82	1.88	1.16	2.36	1.47	3.40	2.11
Est. lesbians	7,475	4,195	14,300	8,142	14,727	8,393	27,299	15,991
Est. gay men	11,148	7,428	12,501	8,333	18,850	12,587	21,120	14,112
Est. GL	18,623	11,623	26,801	16,475	33,577	20,980	48,419	30,103
National Guard and Reserve								
Est. % lesbians among women	2.89	2.61	3.34	3.02	5.74	5.19	6.60	5.97
Est. % gay men among men	2.31	2.03	2.04	1.80	3.86	3.41	3.42	3.02
Est. % GL	2.41	2.13	2.26	2.01	4.18	3.72	3.97	3.53
Est. lesbians	4,396	3,966	5,078	4,584	8,712	7,883	10,019	9,073
Est. gay men	16,842	14,857	14,880	13,122	28,204	24,926	24,966	22,052
Est. GL	21,238	18,823	19,958	17,706	36,916	32,809	34,985	31,125
Combined Active Duty and Guard and Reserve								
Est. % lesbians among women	3.24	2.23	5.29	3.48	6.40	4.44	10.19	6.84
Est. % gay men among men	1.44	1.15	1.41	1.11	2.42	1.93	2.37	1.86
Est. % GL	1.73	1.32	2.03	1.48	3.06	2.33	3.61	2.65
Est. lesbians	11,871	8,161	19,379	12,726	23,439	16,276	37,318	25,064
Est. gay men	27,990	22,285	27,381	21,455	47,054	37,513	46,086	36,165
Est. GL	39,861	30,446	46,760	34,181	70,493	53,789	83,404	61,229

Note: Estimates of the total number of gay men and lesbian on active duty are derived by multiplying the proportions shown in the table by total number of men and women on active duty. Counts of active duty personnel are derived from military strength reports for January 2004 (Department of Defense, Directorate for Information Operations and Reports, Military Personnel Statistics: <http://web1.whs.osd.mil/mmid/military/RG0404.pdf>). Counts of male and female personnel assume the male/female sex ratio found in military strength figures reported in September 2002 (<http://web1.whs.osd.mil/mmid/military/rq0209f.pdf>).

Table 4. Estimated percentages and numbers of gay men and lesbians serving on active military duty and who report National Guard and Reserve training, age distribution adjusted for same-sex couples.

	Est. % Lesbian/Gay in the Adult Population							
	2% / 3%				4% / 5%			
			Partnership status adjustment				Partnership status adjustment	
	All	No marital status alloc.	All	No marital status alloc.	All	No marital status alloc.	All	No marital status alloc.
Active Duty								
Est. % lesbians among women	3.56	1.88	6.80	3.65	7.00	3.76	12.96	7.18
Est. % gay men among men	1.10	0.78	1.23	0.88	1.86	1.33	2.08	1.49
Est. % GL	1.47	0.95	2.07	1.30	2.63	1.69	3.71	2.34
Est. lesbians	7,620	4,026	14,569	7,821	15,003	8,062	27,777	15,383
Est. gay men	13,303	9,495	14,914	10,649	22,466	16,070	25,162	18,010
Est. GL	20,924	13,521	29,483	18,469	37,468	24,131	52,940	33,393
National Guard and Reserve								
Est. % lesbians among women	2.81	2.49	3.25	2.88	5.57	4.95	6.41	5.70
Est. % gay men among men	2.27	2.02	2.00	1.78	3.79	3.39	3.36	3.00
Est. % GL	2.36	2.10	2.22	1.97	4.10	3.66	3.88	3.46
Est. lesbians	4,268	3,779	4,931	4,368	8,465	7,520	9,737	8,658
Est. gay men	16,541	14,737	14,614	13,016	27,708	24,729	24,525	21,877
Est. GL	20,809	18,516	19,545	17,384	36,174	32,248	34,262	30,535
Combined Active Duty and Guard and Reserve								
Est. % lesbians among women	3.25	2.13	5.33	3.33	6.41	4.26	10.24	6.57
Est. % gay men among men	1.54	1.25	1.52	1.22	2.58	2.10	2.56	2.05
Est. % GL	1.81	1.39	2.12	1.55	3.19	2.44	3.78	2.77
Est. lesbians	11,888	7,804	19,499	12,189	23,468	15,581	37,515	24,041
Est. gay men	29,844	24,232	29,528	23,665	50,174	40,798	49,687	39,887
Est. GL	41,732	32,036	49,027	35,853	73,642	56,380	87,202	63,928

Note: Estimates of the total number of gay men and lesbian on active duty are derived by multiplying the proportions shown in the table by total number of men and women on active duty. Counts of active duty personnel are derived from military strength reports for January 2004 (Department of Defense, Directorate for Information Operations and Reports, Military Personnel Statistics: <http://web1.whs.osd.mil/mmids/military/RG0404.pdf>). Counts of male and female personnel assume the male/female sex ratio found in military strength figures reported in September 2002 (<http://web1.whs.osd.mil/mmids/military/rq0209f.pdf>).

Table 5. Historical military service rates of gay men and lesbians.

Military era	Percent in military service among age-eligible population					
	Other men	Same-sex male partners		Other women	Same-sex female partners	
		All	No marital status alloc		All	No marital status alloc
World War II	53.1	43.8	50.4	1.6	15.9	4.1
Korea	22.1	15.5	21.9	0.3	7.3	2.0
Vietnam	16.5	10.9	13.6	0.4	5.2	2.9
Aug 90 – Apr 95 (inc. Persian Gulf)	1.8	1.3	1.4	0.3	1.1	1.2
May 1995 and later	2.3	1.2	1.1	0.4	1.0	0.9
	Estimated percent gay and lesbian in military service (assuming 2/3% gay/lesbian in population)					
World War II		2.5	2.9		16.5	4.9
Korea		2.1	3.0		30.3	10.8
Vietnam		2.0	2.5		20.7	12.7
Aug 90 – Apr 95 (inc. Persian Gulf)		2.1	2.3		7.6	8.0
May 1995 and later		1.6	1.4		4.8	4.3

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REMARKS BY THE PRESIDENT
AT LGBT PRIDE MONTH RECEPTION

East Room

4 35 P.M. EDT

THE PRESIDENT: Hello, everybody. Hello, hello, hello. (Applause.) Hey! Good to see you. (Applause.) I'm waiting for FLOTUS here. FLOTUS always politics more than POTUS.

MRS. OBAMA: No, you move too slow. (Laughter.)

THE PRESIDENT: It is great to see everybody here today and they're just -- I've got a lot of friends in the room, but there are some people I want to especially acknowledge. First of all, somebody who helped ensure that we are in the White House, Steve Hildebrand. Please give Steve a big round of applause. (Applause.) Where's Steve? He's around here somewhere. (Applause.)

The new chair of the Export-Import Bank, Fred Hochberg. (Applause.) Where's Fred? There's Fred. Good to see you, Fred. Our Director of the Institute of Education Sciences at DOE, John Easton. Where's John? (Applause.) A couple of special friends -- Bishop Gene Robinson. Where's Gene? (Applause.) Hey, Gene. Ambassador Michael Guest is here. (Applause.) Ambassador Jim Hormel is here. (Applause.) Oregon Secretary of State Kate Brown is here. (Applause.)

All of you are here. (Laughter and applause.) Welcome to your White House. (Applause.) So --

AUD ENCE MEMBER: (Inaudible.) (Laughter.)

THE PRESIDENT: Somebody asked from the Lincoln Bedroom here. (Laughter.) You knew I was from Chicago too. (Laughter.)

It's good to see so many friends and familiar faces, and I deeply appreciate the support I've received from so many of you. Michelle appreciates it and I want you to know that you have our support, as well. (Applause.) And you have my thanks for the work you do every day in pursuit of equality on behalf of the millions of people in this country who work hard and care about their communities -- and who are gay, lesbian, bisexual, or transgender. (Applause.)

Now this struggle, I don't need to tell you, is incredibly difficult, although I think it's important to consider the extraordinary progress that we have made. There are unjust laws to overturn and unfair practices to stop. And though we've made progress, there are still fellow citizens, perhaps neighbors or even family members and loved ones, who still hold fast to worn arguments and old attitudes; who fail to see your families like their families; and who would deny you the rights that most Americans take for granted. And I know this is painful and I know it can be heartbreaking.

And yet all of you continue, leading by the force of the arguments you make but also by the power of the example that you set in your own lives -- as parents and friends, as PTA members and leaders in the community. And that's important, and I'm glad that so many LGBT families could join us today. (Applause.) For we know that progress depends not only on changing laws but also changing hearts. And that real, transformative change never begins in Washington.

(Cell phone "quacks.")

Whose duck is back there? (Laughter.)

MRS. OBAMA: It's a duck.



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THE PRESIDENT: There's a duck quacking in there somewhere. (Laughter.) Where do you guys get these ring tones, by the way? (Laughter.) I'm just curious. (Laughter.)

Indeed, that's the story of the movement for fairness and equality -- not just for those who are gay, but for all those in our history who've been denied the rights and responsibilities of citizenship; who've been told that the full blessings and opportunities of this country were closed to them. It's the story of progress sought by those who started off with little influence or power; by men and women who brought about change through quiet, personal acts of compassion and courage and sometimes defiance wherever and whenever they could.

That's the story of a civil rights pioneer who's here today, Frank Kameny, who was fired -- (applause.) Frank was fired from his job as an astronomer for the federal government simply because he was gay. And in 1965, he led a protest outside the White House, which was at the time both an act of conscience but also an act of extraordinary courage. And so we are proud of you, Frank, and we are grateful to you for your leadership. (Applause.)

It's the story of the Stonewall protests, which took place 40 years ago this week, when a group of citizens -- with few options, and fewer supporters -- decided they'd had enough and refused to accept a policy of wanton discrimination. And two men who were at those protests are here today. Imagine the journey that they've travelled.

It's the story of an epidemic that decimated a community -- and the gay men and women who came to support one another and save one another; and who continue to fight this scourge; and who demonstrated before the world that different kinds of families can show the same compassion and support in a time of need -- that we all share the capacity to love.

So this story, this struggle, continues today -- for even as we face extraordinary challenges as a nation, we cannot -- and will not -- put aside issues of basic equality. (Applause.) We seek an America in which no one feels the pain of discrimination based on who you are or who you love.

And I know that many in this room don't believe that progress has come fast enough, and I understand that. It's not for me to tell you to be patient, any more than it was for others to counsel patience to African Americans who were petitioning for equal rights a half century ago.

But I say this: We have made progress and we will make more. And I want you to know that I expect and hope to be judged not by words, not by promises I've made, but by the promises that my administration keeps. And by the time you receive -- (applause.) We've been in office six months now. I suspect that by the time this administration is over, I think you guys will have pretty good feelings about the Obama administration. (Applause.)

Now, while there is much more work to do, we can point to important changes we've already put in place since coming into office. I've signed a memorandum requiring all agencies to extend as many federal benefits as possible to LGBT families as current law allows. And these are benefits that will make a real difference for federal employees and Foreign Service Officers, who are so often treated as if their families don't exist. And I'd like to note that one of the key voices in helping us develop this policy is John Berry, our director of the Office of Personnel Management, who is here today. And I want to thank John Berry. (Applause.)

I've called on Congress to repeal the so-called Defense of Marriage Act to help end discrimination -- (applause) - - to help end discrimination against same-sex couples in this country. Now, I want to add we have a duty to uphold existing law, but I believe we must do so in a way that does not exacerbate old divides. And fulfilling this duty in upholding the law in no way lessens my commitment to reversing this law. I've made that clear.

I'm also urging Congress to pass the Domestic Partners Benefits and Obligations Act, which will guarantee the full range of benefits, including health care, to LGBT couples and their children. (Applause.) My administration is also working hard to pass an employee non-discrimination bill and hate crimes bill, and we're making progress on both fronts. (Applause.) Judy and Dennis Shepard, as well as their son Logan, are here today. I met with Judy in the Oval Office in May -- (applause) -- and I assured her and I assured all of you that we are going to pass an inclusive hate crimes bill into law, a bill named for their son Matthew. (Applause.)

In addition, my administration is committed to rescinding the discriminatory ban on entry to the United States based on HIV status. (Applause.) The Office of Management and Budget just concluded a review of a proposal to repeal this entry ban, which is a first and very big step towards ending this policy. And we all know that HIV/AIDS continues to be a public health threat in many communities, including right here in the District of Columbia. And that's why this past Saturday, on National HIV Testing Day, I was proud once again to encourage all Americans to know their status and get tested the way Michelle and I know our status and got tested. (Applause.)

And finally, I want to say a word about "don't ask, don't tell." As I said before -- I'll say it again -- I believe "don't ask, don't tell" doesn't contribute to our national security. (Applause.) In fact, I believe preventing patriotic Americans from serving their country weakens our national security. (Applause.)

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Now, my administration is already working with the Pentagon and members of the House and the Senate on how we'll go about ending this policy, which will require an act of Congress.

Someday, I'm confident, we'll look back at this transition and ask why it generated such angst, but as Commander-in-Chief, in a time of war, I do have a responsibility to see that this change is administered in a practical way and a way that takes over the long term. That's why I've asked the Secretary of Defense and the Chairman of the Joint Chiefs of Staff to develop a plan for how to thoroughly implement a repeal.

I know that every day that passes without a resolution is a deep disappointment to those men and women who continue to be discharged under this policy -- patriots who often possess critical language skills and years of training and who've served this country well. But what I hope is that these cases underscore the urgency of reversing this policy not just because it's the right thing to do, but because it is essential for our national security.

Now, even as we take these steps, we must recognize that real progress depends not only on the laws we change but, as I said before, on the hearts we open. For if we're honest with ourselves, we'll acknowledge that there are good and decent people in this country who don't yet fully embrace their gay brothers and sisters -- not yet.

That's why I've spoken about these issues not just in front of you, but in front of unlikely audiences -- in front of African American church members, in front of other audiences that have traditionally resisted these changes. And that's what I'll continue to do so. That's how we'll shift attitudes. That's how we'll honor the legacy of leaders like Frank and many others who have refused to accept anything less than full and equal citizenship.

Now, 40 years ago, in the heart of New York City at a place called the Stonewall Inn, a group of citizens, including a few who are here today, as I said, defied an unjust policy and awakened a nascent movement.

It was the middle of the night. The police stormed the bar, which was known for being one of the few spots where it was safe to be gay in New York. Now, raids like this were entirely ordinary. Because it was considered obscene and illegal to be gay, no establishments for gays and lesbians could get licenses to operate. The nature of these businesses, combined with the vulnerability of the gay community itself, meant places like Stonewall, and the patrons inside, were often the victims of corruption and blackmail.

Now, ordinarily, the raid would come and the customers would disperse. But on this night, something was different. There are many accounts of what happened, and much has been lost to history, but what we do know is this: People didn't leave. They stood their ground. And over the course of several nights they declared that they had seen enough injustice in their time. This was an outpouring against not just what they experienced that night, but what they had experienced their whole lives. And as with so many movements, it was also something more: It was at this defining moment that these folks who had been marginalized rose up to challenge not just how the world saw them, but also how they saw themselves.

As we've seen so many times in history, once that spirit takes hold there is little that can stand in its way. (Applause.) And the riots at Stonewall gave way to protests, and protests gave way to a movement, and the movement gave way to a transformation that continues to this day. It continues when a partner fights for her right to sit at the hospital bedside of a woman she loves. It continues when a teenager is called a name for being different and says, "So what if I am?" It continues in your work and in your activism, in your fight to freely live your lives to the fullest.

In one year after the protests, a few hundred gays and lesbians and their supporters gathered at the Stonewall Inn to lead a historic march for equality. But when they reached Central Park, the few hundred that began the march had swelled to 5,000. Something had changed, and it would never change back.

The truth is when these folks protested at Stonewall 40 years ago no one could have imagined that you -- or, for that matter, I -- (laughter) -- would be standing here today. (Applause.) So we are all witnesses to monumental changes in this country. That should give us hope, but we cannot rest. We must continue to do our part to make progress -- step by step, law by law, mind by changing mind. And I want you to know that in this task I will not only be your friend, I will continue to be an ally and a champion and a President who fights with you and for you.

Thanks very much, everybody. God bless you. (Applause.) Thank you. It's a little stuffed in here. We're going to open -- we opened up that door. We're going to walk this way, and then we're going to come around and we'll see some of you over there, all right? (Laughter.) But out there. (Laughter.)

But thank you very much, all, for being here. Enjoy the White House. Thank you. (Applause.)

END 4 53 P.M. EDT

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For Immediate Release October 11, 2009

Remarks by the President at Human Rights Campaign Dinner

Walter E. Convention Center, Washington, D.C.

8:10 P.M. EDT

THE PRESIDENT: Thank you, everybody. Please, you're making me blush. (Laughter.)

AUDIENCE MEMBER: We love you, Barack!

THE PRESIDENT: I love you back. (Applause.)

To Joe Solmonese, who's doing an outstanding job on behalf of HRC. (Applause.) To my great friend and supporter, Terry Bean, co-founder of HRC. (Applause.) Representative Patrick Kennedy. (Applause.) David Huebner, the Ambassador-designee to New Zealand and Samoa. (Applause.) John Berry, our Director of OPM, who's doing a great job. (Applause.) Nancy Sutley, Chairman of Council on Environmental Quality. (Applause.) Fred Hochberg, Chairman of Export-Import Bank. (Applause.) And my dear friend, Tipper Gore, who's in the house. (Applause.)

Thank you so much, all of you. It is a privilege to be here tonight to open for Lady GaGa. (Applause.) I've made it. (Laughter.) I want to thank the Human Rights Campaign for inviting me to speak and for the work you do every day in pursuit of equality on behalf of the millions of people in this country who work hard in their jobs and care deeply about their families -- and who are gay, lesbian, bisexual, or transgender. (Applause.)

For nearly 30 years, you've advocated on behalf of those without a voice. That's not easy. For despite the real gains that we've made, there's still laws to change and there's still hearts to open. There are still fellow citizens, perhaps neighbors, even loved ones -- good and decent people -- who hold fast to outworn arguments and old attitudes; who fail to see your families like their families; who would deny you the rights most Americans take for granted. And that's painful and it's heartbreaking. (Applause.) And yet you continue, leading by the force of the arguments you make, and by the power of the example that you set in your own lives -- as parents and friends, as PTA members and church members, as advocates and leaders in your communities. And you're making a difference.

That's the story of the movement for fairness and equality, and not just for those who are gay, but for all those in our history who've been denied the rights and responsibilities of citizenship -- (applause) -- for all who've been told that the full blessings and opportunities of this country were closed to them. It's the story of progress sought by those with little influence or power; by men and women who brought about change through quiet, personal acts of compassion -- and defiance -- wherever and whenever they could.

It's the story of the Stonewall protests, when a group of citizens -- (applause) -- when a group of citizens with few options, and fewer supporters stood up against discrimination and helped to inspire a movement. It's the story of an epidemic that decimated a community -- and the gay men and women who came to support one another and save one another; who continue to fight this scourge; and who have demonstrated before the world that different kinds of families can show the same compassion in a time of need. (Applause.) And it's the story of the Human Rights Campaign and the fights you've fought for nearly 30 years: helping to elect candidates who share your values; standing against those who would enshrine discrimination into our Constitution; advocating on behalf of those living with HIV/AIDS; and fighting for progress in our capital and across America. (Applause.)

This story, this fight continue now. And I'm here with a simple message: I'm here with you in that fight. (Applause.) For even as we face extraordinary challenges as a nation, we cannot -- and we will not -- put aside issues of basic equality. I greatly appreciate the support I've received from many in this room. I also appreciate that many of you don't believe progress has come fast enough. I want to be honest about that, because it's important to be honest among friends.

Now, I've said this before, I'll repeat it again -- it's not for me to tell you to be patient, any more than it was for others



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October 10, 2009

[President Obama Speaks for Gay Civil Rights](#)

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to counsel patience to African Americans petitioning for equal rights half a century ago. (Applause.) But I will say this: We have made progress and we will make more. And I think it's important to remember that there is not a single issue that my administration deals with on a daily basis that does not touch on the lives of the LGBT community. (Applause.) We all have a stake in reviving this economy. We all have a stake in putting people back to work. We all have a stake in improving our schools and achieving quality, affordable health care. We all have a stake in meeting the difficult challenges we face in Iraq and Afghanistan. (Applause.)

For while some may wish to define you solely by your sexual orientation or gender identity alone, you know -- and I know -- that none of us wants to be defined by just one part of what makes us whole. (Applause.) You're also parents worried about your children's futures. You're spouses who fear that you or the person you love will lose a job. You're workers worried about the rising cost of health insurance. You're soldiers. You are neighbors. You are friends. And, most importantly, you are Americans who care deeply about this country and its future. (Applause.)

So I know you want me working on jobs and the economy and all the other issues that we're dealing with. But my commitment to you is unwavering even as we wrestle with these enormous problems. And while progress may be taking longer than you'd like as a result of all that we face -- and that's the truth -- do not doubt the direction we are heading and the destination we will reach. (Applause.)

My expectation is that when you look back on these years, you will see a time in which we put a stop to discrimination against gays and lesbians -- whether in the office or on the battlefield. (Applause.) You will see a time in which we as a nation finally recognize relationships between two men or two women as just as real and admirable as relationships between a man and a woman. (Applause.) You will see a nation that's valuing and cherishing these families as we build a more perfect union -- a union in which gay Americans are an important part. I am committed to these goals. And my administration will continue fighting to achieve them.

And there's no more poignant or painful reminder of how important it is that we do so than the loss experienced by Dennis and Judy Shepard, whose son Matthew was stolen in a terrible act of violence 11 years ago. In May, I met with Judy -- who's here tonight with her husband -- I met her in the Oval Office, and I promised her that we were going to pass an inclusive hate crimes bill -- a bill named for her son. (Applause.)

This struggle has been long. Time and again we faced opposition. Time and again, the measure was defeated or delayed. But the Shepards never gave up. (Applause.) They turned tragedy into an unshakeable commitment. (Applause.) Countless activists and organizers never gave up. You held vigils, you spoke out, year after year, Congress after Congress. The House passed the bill again this week. (Applause.) And I can announce that after more than a decade, this bill is set to pass and I will sign it into law. (Applause.)

It's a testament to the decade-long struggle of Judy and Dennis, who tonight will receive a tribute named for somebody who inspired so many of us -- named for Senator Ted Kennedy, who fought tirelessly for this legislation. (Applause.) And it's a testament to the Human Rights Campaign and those who organized and advocated. And it's a testament to Matthew and to others who've been the victims of attacks not just meant to break bones, but to break spirits -- not meant just to inflict harm, but to instill fear. Together, we will have moved closer to that day when no one has to be afraid to be gay in America. (Applause.) When no one has to fear walking down the street holding the hand of the person they love. (Applause.)

But we know there's far more work to do. We're pushing hard to pass an inclusive employee non-discrimination bill. (Applause.) For the first time ever, an administration official testified in Congress in favor of this law. Nobody in America should be fired because they're gay, despite doing a great job and meeting their responsibilities. It's not fair. It's not right. We're going to put a stop to it. (Applause.) And it's for this reason that if any of my nominees are attacked not for what they believe but for who they are, I will not waver in my support, because I will not waver in my commitment to ending discrimination in all its forms. (Applause.)

We are reinvigorating our response to HIV/AIDS here at home and around the world. (Applause.) We're working closely with the Congress to renew the Ryan White program and I look forward to signing it into law in the very near future. (Applause.) We are rescinding the discriminatory ban on entry to the United States based on HIV status. (Applause.) The regulatory process to enact this important change is already underway. And we also know that HIV/AIDS continues to be a public health threat in many communities, including right here in the District of Columbia. Jeffrey Crowley, the Director of the Office of National AIDS Policy, recently held a forum in Washington, D.C., and is holding forums across the country, to seek input as we craft a national strategy to address this crisis.

We are moving ahead on Don't Ask Don't Tell. (Applause.) We should not be punishing patriotic Americans who have stepped forward to serve this country. We should be celebrating their willingness to show such courage and selflessness on behalf of their fellow citizens, especially when we're fighting two wars. (Applause.)

We cannot afford to cut from our ranks people with the critical skills we need to fight any more than we can afford -- for our military's integrity -- to force those willing to do so into careers encumbered and compromised by having to live a lie. So I'm working with the Pentagon, its leadership, and the members of the House and Senate on ending this policy. Legislation has been introduced in the House to make this happen. I will end Don't Ask, Don't Tell. That's my commitment to you. (Applause.)

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It is no secret that issues of great concern to gays and lesbians are ones that raise a great deal of emotion in this country. And it's no secret that progress has been incredibly difficult -- we can see that with the time and dedication it took to pass hate crimes legislation. But these issues also go to the heart of who we are as a people. Are we a nation that can transcend old attitudes and worn divides? Can we embrace our differences and look to the hopes and dreams that we share? Will we uphold the ideals on which this nation was founded: that all of us are equal, that all of us deserve the same opportunity to live our lives freely and pursue our chance at happiness? I believe we can; I believe we will. (Applause.)

And that is why -- that's why I support ensuring that committed gay couples have the same rights and responsibilities afforded to any married couple in this country. (Applause.) I believe strongly in stopping laws designed to take rights away and passing laws that extend equal rights to gay couples. I've required all agencies in the federal government to extend as many federal benefits as possible to LGBT families as the current law allows. And I've called on Congress to repeal the so-called Defense of Marriage Act and to pass the Domestic Partners Benefits and Obligations Act. (Applause.) And we must all stand together against divisive and deceptive efforts to feed people's lingering fears for political and ideological gain.

For the struggle waged by the Human Rights Campaign is about more than any policy we can enshrine into law. It's about our capacity to love and commit to one another. It's about whether or not we value as a society that love and commitment. It's about our common humanity and our willingness to walk in someone else's shoes: to imagine losing a job not because of your performance at work but because of your relationship at home; to imagine worrying about a spouse in the hospital, with the added fear that you'll have to produce a legal document just to comfort the person you love -- (applause) -- to imagine the pain of losing a partner of decades and then discovering that the law treats you like a stranger. (Applause.)

If we are honest with ourselves we'll admit that there are too many who do not yet know in their lives or feel in their hearts the urgency of this struggle. That's why I continue to speak about the importance of equality for LGBT families -- and not just in front of gay audiences. That's why Michelle and I have invited LGBT families to the White House to participate in events like the Easter Egg Roll -- because we want to send a message. (Applause.) And that's why it's so important that you continue to speak out, that you continue to set an example, that you continue to pressure leaders -- including me -- and to make the case all across America. (Applause.)

So, tonight I'm hopeful -- because of the activism I see in this room, because of the compassion I've seen all across America, and because of the progress we have made throughout our history, including the history of the movement for LGBT equality.

Soon after the protests at Stonewall 40 years ago, the phone rang in the home of a soft-spoken elementary school teacher named Jeanne Manford. It was 1 00 in the morning, and it was the police. Now, her son, Morty, had been at the Stonewall the night of the raids. Ever since, he had felt within him a new sense of purpose. So when the officer told Jeanne that her son had been arrested, which was happening often to gay protesters, she was not entirely caught off guard. And then the officer added one more thing, "And you know, he's homosexual." (Laughter.) Well, that police officer sure was surprised when Jeanne responded, "Yes, I know. Why are you bothering him?" (Applause.)

And not long after, Jeanne would be marching side-by-side with her son through the streets of New York. She carried a sign that stated her support. People cheered. Young men and women ran up to her, kissed her, and asked her to talk to their parents. And this gave Jeanne and Morty an idea.

And so, after that march on the anniversary of the Stonewall protests, amidst the violence and the vitriol of a difficult time for our nation, Jeanne and her husband Jules -- two parents who loved their son deeply -- formed a group to support other parents and, in turn, to support their children, as well. At the first meeting Jeanne held, in 1973, about 20 people showed up. But slowly, interest grew. Morty's life, tragically, was cut short by AIDS. But the cause endured. Today, the organization they founded for parents, families, and friends of lesbians and gays -- (applause) - - has more than 200,000 members and supporters, and has made a difference for countless families across America. And Jeanne would later say, "I considered myself such a traditional person. I didn't even cross the street against the light." (Laughter.) "But I wasn't going to let anybody walk over Morty." (Applause.)

That's the story of America: of ordinary citizens organizing, agitating and advocating for change; of hope stronger than hate; of love more powerful than any insult or injury; of Americans fighting to build for themselves and their families a nation in which no one is a second-class citizen, in which no one is denied their basic rights, in which all of us are free to live and love as we see fit. (Applause.)

Tonight, somewhere in America, a young person, let's say a young man, will struggle to fall to sleep, wrestling alone with a secret he's held as long as he can remember. Soon, perhaps, he will decide it's time to let that secret out. What happens next depends on him, his family, as well as his friends and his teachers and his community. But it also depends on us -- on the kind of society we engender, the kind of future we build.

I believe the future is bright for that young person. For while there will be setbacks and bumps along the road, the truth is that our common ideals are a force far stronger than any division that some might sow. These ideals, when voiced by generations of citizens, are what made it possible for me to stand here today. (Applause.) These ideals

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are what made it possible for the people in this room to live freely and openly when for most of history that would have been inconceivable. That's the promise of America, HRC. That's the promise we're called to fulfill. (Applause.) Day by day, law by law, changing mind by mind, that is the promise we are fulfilling.

Thank you for the work you're doing. God bless you. God bless America. (Applause.)

END 8:35 P.M. EDT

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**CONDUCT UNBECOMING CONTINUES:
THE FIRST YEAR UNDER "DON'T ASK, DON'T TELL, DON'T PURSUE"**

Executive Summary

Servicemembers Legal Defense Network's review of the first year of the military's new policy on homosexuals, "Don't Ask, Don't Tell, Don't Pursue," reveals a pattern of violations that often renders the policy little more than "Ask, Pursue and Harass." SLDN has documented death threats and other specific violations of the new policy from March 1, 1994 - February 28, 1995, and concludes that many military officials continue to ask questions about sexual orientation, conduct witch hunts and condone harassment of lesbian and gay servicemembers in direct violation of "Don't Ask, Don't Tell, Don't Pursue." SLDN concludes that the chief reasons for the continuing violations are lack of information, lack of adequate training and guidance regarding the new policy, and in some cases, willful disregard of military policy by commanders and investigators.

SLDN recommends that the Department of Defense ensure the proper implementation of "Don't Ask, Don't Tell, Don't Pursue" through adequate training of all servicemembers about the new policy, common sense remedies when inquiries or investigations are started improperly, and clear accountability for violations of the policy by military officials.

SLDN reports the following findings from its monitoring activities during the past year:

- 1. 340 total violations of "Don't Ask, Don't Tell, Don't Pursue, Don't Harass."¹**
- 2. 37 cases with "Don't Ask" violations.**

¹ Multiple violations per case make total violations exceed total cases. Thus, findings that state total number of SLDN cases involving violations present the most conservative picture of violations servicewide.

3. 18 cases with "Don't Tell" violations.
4. 65 cases with "Don't Pursue" violations.
5. 62 cases with "Don't Harass" violations.
6. 15 actual or attempted witch hunts among the "Don't Pursue" violations.
7. 10 cases where servicemembers faced death threats in violation of "Don't Harass" because of their actual or perceived sexual orientation.
8. The U.S. Navy and U.S. Army accounted for the most number of cases with "Don't Ask" violations; the U.S. Army accounted for the most number of cases with "Don't Tell" violations; the U.S. Air Force accounted for the most number of cases with "Don't Pursue" violations; and the U.S. Navy accounted for the most number of cases with "Don't Harass" violations.²
9. Servicewide, violations of "Don't Pursue" and "Don't Harass" were the most significant problems.
10. Women accounted for 47 of SLDN's cases, or 25%, a percentage disproportionate to their numbers in the military.
11. The worst witch hunt occurred in the U.S. Marine Corps in Okinawa, Japan at Camp Hansen from March to June 1994 in which over 21 servicemembers were questioned about the sexual orientation and activities of themselves and other servicemembers. Despite careful documentation of abuses by SLDN and cooperating attorneys in the New York-based law firm, Skadden, Arps, Slate Meagher & Flom, U.S. Navy and U.S. Marine Corps officials have yet to acknowledge any impropriety in the witch hunt.
12. An Air Force memorandum dated November 3, 1994, violates (1) "Don't Pursue" by directing inquiry officials to start actions "against other military members" "discovered" during their investigations, and (2) "Don't Tell" by directing inquiry officials to interrogate "parents, siblings and close friends" to obtain information to be used against servicemembers for purposes of discharge.

² These figures indicate the Service with the most cases involving particular violations. The figures do not reflect, as a percentage of total active force in each Service, which Service had the highest rate of cases with violations of "Don't Ask, Don't Tell, Don't Pursue, Don't Harass."

13. **A U.S. Navy memorandum dated June 1994 violates "Don't Pursue" by (1) instructing attorneys to conduct their own off-line inquiries into the private lives of servicemembers; and (2) by expanding the scope of an investigation from a status case to an acts case, suggesting that inquiry officials find "final evidence" of acts in cases involving statements of sexual orientation only.**
14. **Despite conceding violations of "Don't Ask, Don't Tell, Don't Pursue," government officials have argued at discharge boards that violations of policy are not grounds for the servicemember to object.**
15. **The rate of discharge of homosexual servicemembers did not decrease in fiscal year 1994. In fact, the rate of discharge for 1991, 1992, 1993 and 1994 has remained constant.**
16. **At least 15 homosexual servicemembers have served openly for one to three years with only a good effect on their unit.**

SLDN received over 400 phone calls for assistance, and monitored 188 cases covering each branch of service worldwide. The cases SLDN monitored are just the tip of the iceberg and suggest a systemic problem that will require steps by the Department of Defense to ensure that its actions are consonant with law.

All findings are well-documented. Memoranda, servicemembers and attorneys who worked on the cases reported are available upon request.

**CONDUCT UNBECOMING CONTINUES
THE FIRST YEAR UNDER "DON'T ASK, DON'T TELL, DON'T PURSUE"**

Introduction

February 28, 1995 marks the first anniversary of "Don't Ask, Don't Tell, Don't Pursue," the military's new regulations on homosexuals. There are two striking results during the past year: one good and one bad.

The good news results not from the policy but from federal court and military commands with strong leadership. In cases where courts have allowed lesbian and gay servicemembers to serve openly, there have been no problems. In fact, the opposite has proven to be the case. As reported in U.S. News & World Report on February 6, 1995 in regard to Petty Officer Keith Meinhold, who won his case before the Ninth Circuit Court of Appeals last year, "Meinhold...has been not only tolerated by the majority of his colleagues - he has been embraced by them." Meinhold's flight crew was recently named the most combat effective in the Pacific fleet.

Colonel Margarethe Cammermeyer has also received strong support: after she won her court case in June 1994, she immediately received calls from her unit welcoming her back to the Washington State National Guard. Petty Officer Mark Phillips was given a chocolate cake by his crewmembers on the one-year anniversary of his coming out to his unit. And, Captain Rich Richenberg's co-workers threw a surprise birthday party for him in February 1995 as he continues to fight to stay in the military. These servicemembers are only a handful of those who have been serving openly for the past one to three years, and who, as clear documentation shows, have had a positive impact on their unit's good order, discipline and morale.

The bad news results from the implementation of "Don't Ask, Don't Tell, Don't Pursue" in the field. The new policy promised to stop questions about sexual orientation, witch hunts and harassment. Through a lack of proper training and willful disregard of the new policy, many commanders continue to ask, witch hunt and harass suspected homosexual servicemembers in direct violation of the new policy. The result has been that the discharge rate for homosexuals in fiscal year 1994 has not declined and the cost of training replacements for those discharged has exceeded \$17.5 million. The costs of conducting investigations, holding discharge hearings, administering the new policy and defending the policy in federal court are far higher.

This report, "Conduct Unbecoming Continues: The First Year Under "Don't Ask, Don't Tell, Don't Pursue"" details four specific violations of the new policy occurring in the field. The report documents cases where military officials have (1) asked servicemembers about their sexual orientation; (2) punished statements of sexual orientation that are permissible under the new policy or expanded the situations where telling is prohibited; (3) pursued or witch hunted suspected homosexuals; and (4) condoned harassment based on sexual orientation. This report does not include other clear violations, including situations, among others, where suspected homosexuals receive improper or inadequate legal representation within the military; are treated in an unevenhanded manner with respect to potential criminal prosecution; and are "outed" to their units and family by commanders in direct violation of the Privacy Act.

This report is based on violations of "Don't Ask, Don't Tell, Don't Pursue" documented by Servicemembers Legal Defense Network (SLDN), located in Washington, D.C. SLDN is the sole national legal aid and watch dog organization for those targeted by the military's new policy on homosexuals, and the only means currently available to document abuses. The Department of

Defense has instituted no method of identifying and correcting abuses of the new policy.

SLDN's documented cases reflect only the tip of the iceberg of all servicemembers affected by the "Don't Ask, Don't Tell, Don't Pursue" policy. Many servicemembers are discharged by the Department of Defense for homosexuality without ever having contacted SLDN, and others are removed from service for homosexuality through ulterior means, such as denial of reenlistment. SLDN's outreach is limited by its scarce resources, but even with such constraints, it received over 400 calls for direct assistance in the past year, suggesting that SLDN's figures represent only a fraction of the total violations of the new policy.

SLDN is headed by two attorneys, C. Dixon Osburn and Michelle M. Benecke. Mr. Osburn is a former legal/policy advisor to the Campaign for Military Service, the national coalition that worked to lift the ban legislatively. Mr. Osburn holds a J.D. and M.B.A. from Georgetown University, and an A.B. from Stanford University. Ms. Benecke is a former Captain and Battery Commander in the U.S. Army, and former staff attorney at the Campaign For Military Service. She has written extensively on the military policy's disproportionate impact on women. Ms. Benecke is a graduate of Harvard Law School and holds a B.A. from the University of Virginia.

Background/Definition of Terms

From March 1, 1994 to the present, over 400 servicemembers contacted SLDN needing assistance. The servicemembers were typically between the ages of 18 and 25 and had limited financial resources. The types of assistance requested ranged from basic information about how to comport one's behavior under the new policy to intensive efforts to stop witch hunts or prevent death threats from being carried out. Of the 188 calls requiring intervention, SLDN's staff

attorneys, in conjunction with aides in Republican and Democratic Congressional offices and with cooperating attorneys from SLDN's network of over 200 attorneys from the finest law firms in the country, carefully monitored and documented violations of the "Don't Ask, Don't Tell, Don't Pursue" policy. This report documents common command violations of four regulatory provisions in the "Don't Ask, Don't Tell, Don't Pursue" policy. Those provisions are called, not surprisingly, "Don't Ask," "Don't Tell," "Don't Pursue" and "Don't Harass." "Don't Harass" was never added to the common title of the new policy, but is nevertheless an explicit component of the policy.

"What is Don't Ask?" The "Don't Ask" regulations state that "servicemembers will not be asked about or required to reveal their sexual orientation." Violations of "Don't Ask" monitored by SLDN include (1) direct questions about sexual orientation, such as "Are you gay?"; (2) surrogate questions about sexual orientation where a servicemember is not asked directly about his or her orientation, but is asked through creative phrasing, as in "Do you find men attractive?"; and (3) inadvertent questions, where a commander does not realize that the question asked requires disclosure of sexual orientation, such as when a commander, out of concern for someone in his or her unit, asks what is troubling the servicemember, and the answer is that the servicemember is grappling with issues related to sexual orientation. The question would not pose a problem for a heterosexual servicemember but it does for the homosexual servicemember.

"What is Don't Tell?" With respect to "Don't Tell," the new regulations do not prohibit all statements about sexual orientation. Indeed, the new regulations do not forbid statements made to lawyers, chaplains, spouses or security clearance personnel. In violation of the new

policy, however, security clearance personnel continue to punish servicemembers who state they are gay by removal of or protracted delays in granting the clearances or, also in direct violation of the new policy, by threatening servicemembers with the denial of their clearance if they do not confess to their sexual orientation and any sexual activity. Additionally, the Pentagon has expanded "Don't Tell," in ways that the public is not aware, to include statements to family members, close friends, doctors and mental health professionals. Thus, violations of "Don't Tell" include incidents where statements to family members, close friends, doctors and mental health professionals and security clearance personnel have resulted in discharge or the threat of discharge of homosexual servicemembers.

"What is Don't Pursue?" The "Don't Pursue" portion of the new regulations states that (1) "sexual orientation is a personal and private matter;" (2) "inquiries shall be limited to the factual circumstances directly relevant to the specific allegations;" and (3) "credible information exists when the information, considering its source and the surrounding circumstances, supports a reasonable belief that a service member has engaged in homosexual conduct." Additionally, it is widely understood that the new regulations would "bring an end" to witch hunts, as President Clinton stated on July 19, 1993, and General Colin Powell reiterated upon the issuance of the new regulations. Some military commands continue to pursue homosexual or suspected homosexual servicemembers in a variety of ways. Violations of "Don't Pursue" include (1) witch hunts, (2) improper searches and seizures, (3) expanding investigations beyond the instant allegation, and (4) misapplication of the credible information standard.

While there is some overlap among these four prongs, each prong can be roughly defined as follows. Witch hunts are situations where inquiry officials ask servicemembers or take other

affirmative steps to identify suspected homosexuals or those they suspect have engaged in homosexual acts. "Improper searches and seizures" include illegal, warrantless searches, as well as zealous investigations where commanders confiscate personal and private property such as diaries and letters. "Expanding investigations beyond the instant allegation" includes situations, among others, where a servicemember who has been alleged to have engaged in a homosexual conduct on a specific occasion is investigated for any additional conduct in which the servicemember may have engaged in order to fish for information that could lead to criminal prosecution or lower discharge characterization. "Misapplication of the credible information standard" contemplates situations where a commander has not seriously evaluated the "source and the surrounding circumstances" of the allegations as required by the new regulations. Examples include situations where the commander has failed to examine or take into account (a) the retaliatory motives of an individual making the allegations, (b) the lack of consistency and coherence in the allegations, (c) recanted testimony, (d) exculpatory evidence, and (e) inadvertent discoveries in which no one knows about a servicemember's sexual orientation except through, for example, the discovery of a private letter by a commander during a surprise inspection.

"What is Don't Harass?" Lastly, the "Don't Harass" portion of the new regulations makes explicit that "the Armed Forces do not tolerate harassment or violence against any servicemember, for any reason." Violations of "Don't Harass" include death threats, physical harassment and verbal harassment made against servicemembers who are or are suspected of being homosexual. "Don't Harass" violations also include downgraded performance evaluations, denial of reenlistment and failure to promote due to sexual orientation.

Findings

SLDN CASES BY SERVICE

Service	Total # Cases	% Total Cases	Men	Women	Gender n/a
Air Force	49	26%	38	9	2
Army	55	29%	31	24	0
Navy	68	36%	56	11	1
Marine Corps	15	8%	12	3	0
Coast Guard	1	1%	1	0	0
TOTAL	188	100%	138	47	3

The cases received by SLDN spanned every branch of military service and were geographically dispersed. 36% of SLDN's cases came from military personnel in the U.S. Navy; 29% came from the U.S. Army; 26% from the U.S. Air Force; 8% from the U.S. Marine Corps; and 1% from the U.S. Coast Guard. Of the 188 cases followed, 138 servicemen contacted SLDN for help (73%), and 47 servicewomen contacted SLDN (25%). The number of women who contacted SLDN is disproportionate to their representation among the total active armed forces.

**SLDN CASES INVOLVING VIOLATIONS OF
 "DON'T ASK, DON'T TELL, DON'T PURSUE, DON'T HARASS"
 BY SERVICE
 (Total #, %)**

Service	Don't Ask	Don't Tell	Don't Pursue	Don't Harass
Air Force	8 (21%)	5 (28%)	24 (37%)	15 (24%)
Army	11 (30%)	9 (50%)	16 (25%)	17 (27%)
Navy	13 (35%)	2 (11%)	15 (23%)	23 (37%)
Marine Corps	4 (11%)	1 (5.5%)	10 (15%)	6 (10%)
Coast Guard	1 (3%)	1 (5.5%)	0 (0%)	1 (2%)
TOTAL	37 (100%)	18 (100%)	65 (100%)	62 (100%)

Of SLDN's 188 cases under the new policy, SLDN documented 37 cases where there were violations of "Don't Ask" (20% of its cases); 18 cases where there were violations of "Don't Tell" (18% of its cases); 65 cases where there were violations of "Don't Pursue" (35% of its cases); and 62 cases where there were violations of "Don't Harass" (33% of its cases). See Chart on the following page.

The U.S. Navy and U.S. Army accounted for the most cases involving violations of "Don't Ask," accounting for 35% and 30% of such cases respectively. The U.S. Army accounted for the most cases misapplying or redefining "Don't Tell," accounting for 50% of all such cases. The U.S. Air Force accounted for the most cases involving violations of "Don't Pursue" accounting for 37% of all such cases. The U.S. Navy accounted for the most cases involving violations of "Don't Harass," accounting for 37% of all such cases.

The total number of cases involving violations does not total the 188 cases received by SLDN because some cases did not involve any regulatory infractions by military officials. Thus,

the total number of cases involving violations reported above is 182.

The total number of cases involving violations also does not take into account multiple violations occurring in the same case. In the past year, SLDN documented 65 violations of "Don't Ask," 21 violations of "Don't Tell," 114 violations of "Don't Pursue," and 140 violations of "Don't Harass," for a documented total of 340 overall violations during the past year. The multiple violations indicate that in cases where there is one incident of asking, pursuit or harassment, others are likely.

It is clear that some commanders continue to violate "Don't Ask, Don't Tell, Don't Pursue, Don't Harass" in a myriad of ways. A few examples of how the new policy on homosexuals is being improperly implemented in the field are the following.

Examples of Violations of "Don't Ask." Violations of Don't Ask include asking direct, surrogate, or inadvertent questions about sexual orientation.

Asking direct questions about sexual orientation. One Chief of Boat asked a sailor "You not going to tell me you're a f___ faggot, are you?" In Japan, CID Special Agent Jose Abrante asked a marine point blank: "Are you gay?" In Florida, recruiters asked one recruit whether she is homosexual five times, both verbally and through use of outdated written forms. In the Washington, D.C. area, a security clearance investigator asked, "I'm not going to ask you if you're homosexual, but if I did ask, how would you respond?"

Asking surrogate questions about sexual orientation. An inquiry official asked a male Sergeant, "Do you find men attractive?" An executive officer asked a PFC whether she had "homosexual tendencies." A security clearance investigator asked an Army Major about her female roommate, "Do you have a physical relationship with your roommate?" Another security clearance investigator at Ft. William, AL, asked during an interview whether the individual knew "any homosexuals?"

Asking inadvertent questions about sexual orientation. Out of concern, a Naval commander asked one his unit members why he had not reported to work one day. The servicemember honestly told him that he and his male partner had a family emergency, and was subsequently discharged for his statement. Another commander asked why a servicemember's security clearance had been held up.

The reason was that the member had followed regulations and was honest with the investigators about his orientation.

Violations of "Don't Tell." Violations of "Don't Tell" include using statements from family members, doctors and psychologists and security clearance personnel for purposes of discharge.

Using statements from family members. Air Force Capt. Earl Brown's parents were asked in detail about their son's sexual orientation and statements made by Capt. Brown to his mother and father were included among the statements for which he was to be discharged. An Air Force doctor's mother says she was shocked when an inquiry official contacted her to ask about her son's sexual activities. Indeed, the Department of Air Force issued a memorandum on November 3, 1994 specifically directing inquiry officials to "interview...parents and siblings" to obtain information to be used as a basis for discharge.

Using statements from doctors and psychologists for purposes of discharge.

Corporal Kevin Blaesing, with the Marine Security Force in Charleston, South Carolina, was turned in by his Naval psychologist for asking questions about sexuality during private counseling sessions. His commander, Lt. Col. Martinson, ordered that he face discharge proceedings despite advice from his legal advisors not to proceed. Another servicemember in the Air Force was advised by his psychologist that disclosure of his sexual orientation would be conveyed to his commanding officer for purposes of discharge; the servicemember, however, stated that his priority was mental health services and that he could not obtain full and adequate treatment without some discussion of issues related to his sexuality. He now faces discharge.

Using statements made during security clearances for purposes of discharge.

In violation of the new policy, security clearance personnel continue to punish servicemembers who state they are gay by removal of or protracted delays in granting the clearances. In direct violation of the new policy, servicemembers are also threatened with the denial of their clearance if they do not confess to their sexual orientation and sexual activity.

Violations of "Don't Pursue." Violations of "Don't Pursue" include (1) witch hunts, (2) improper searches and seizures, (3) expanding inquiries beyond the instant allegations, and (4) misapplying the credible information standard.

Witch hunts: Asking about the orientation and conduct of others. SLDN documented 15 actual or attempted witch hunts under the new regulations where commanders and inquiry officials asked military members to identify other servicemembers who were or were suspected to be homosexual. In Japan, over twenty-one servicemembers were questioned regarding the sexual orientation and private lives of their co-workers. At New River Station, North Carolina, immediately after briefing his unit about the military's new policy on March 1, 1994, a marine Master Sergeant told his troops that, despite the regulations, they had "a moral duty and an obligation" to turn in suspected homosexuals. At Pope Air Force Base, North Carolina, a commander reportedly asked for a list of all Combined Federal Campaign (CFC) contributors to gay and AIDS organizations; the commander dropped his order once the incident was publicly reported.

Improper searches and seizures. Overzealous commands continue to conduct or condone illegal searches and seizures of items belonging to suspected homosexual servicemembers. Additionally, they continue to confiscate personal and private items, as well as circumstantial evidence, that should have no bearing on an inquiry, per regulation. Commanders and inquiry officials routinely seize personal diaries, private letters, address books, personal computers, erased computer files, photos of friends, copies of popular gay-themed books and videos like "Torch Song Trilogy," HIV pamphlets, academic notes from classes on human sexuality, and, in one servicemen's case, even a pair of men's platform shoes.

Expanding inquiries beyond the "instant allegations." Commands routinely expand the scope of an investigation beyond the instant allegations. Thus, a person who has admitted to being gay will be asked to additionally confess to homosexual acts in order to gather information that could lead to criminal prosecution or lower discharge characterization. Servicemembers who are under investigation for allegations of homosexual acts are often questioned about other acts beyond the instant allegation. Inquiry officials in North Carolina, for example, asked more than 25 servicemembers to speculate about the sexual orientation and activities of one marine, beyond the two allegations she faced.

Misapplying credible information standard. A seaman faces discharge after his roommate, while snooping in the seaman's personal desk, discovered and read several letters from which he concluded that the seaman might be gay, and turned the letters over to the command. In another case, a seaman was asked by his superior if he is gay and he answered truthfully; the command has decided to proceed with a discharge board despite the clear "don't ask" violation.

Violations of "Don't Harass." Violations of "Don't Harass" include (1) death threats

based on sexual orientation, (2) targeted physical and verbal harassment based on sexual orientation, and (3) downgraded performance evaluations, denial of reenlistment and failure to promote due to sexual orientation.

Improper response to death threats. SLDN received 10 cases where servicemembers were threatened with their lives for being or being suspected of being gay. One commander in Misawa, Japan, Captain Miller reportedly told a heterosexual servicemember "You're going to die," after the servicemember's recommended separation for alleged homosexual conduct had been overturned. A new recruit at Parris Island was told she was not "going to walk out of here alive" if she reported being physically assaulted for being suspected of being lesbian. A seaman reports finding a noose next to his berthing onboard ship having previously found a note scrawled on a magazine photo that read "Die Fag." The Pentagon has established no means whereby servicemembers can report death threats with a guarantee that the report will not be used as a basis to start an investigation against them.

Improper response to harassment (physical/verbal) and extortion.

As with death threats, the Pentagon has established no means whereby servicemembers can report harassment with a guarantee that the report will not be used as a basis to start an investigation against them. SLDN has received 69 reports of targeted physical and verbal abuse based on their perceived orientation. A majority report command climates rife with derogatory comments about gays. One servicemember reports that someone gouged his new car with keys and scrawled into the paint the word "fag."

Downgraded performance evaluations, denial of reenlistment and failure to promote due to sexual orientation.

Lt. Col. Trask admitted on the record at a discharge board that he downgraded the evaluation of and recommended against promotion for Captain Rich Richenberg, an officer who ranked in the top ten percent of all Air Force officers prior to Lt. Col. Trask's actions, solely because Richenberg is gay. After Corporal Kevin Blaesing, Marine of the Quarter for his unit, succeeded in having his recommended separation overturned, his commander, Lt. Col. Martinson, downgraded his performance evaluations contrary to the recommendations of Blaesing's supervisors and gave Corporal Blaesing the lowest possible recommendation for reenlistment, thus effectively killing Blaesing's opportunity to reenlist and continue his military career.

Notably, there is little to no harassment of open lesbian and gay service personnel who

have remained in service due to court order or discharge board recommendation. In fact, all documentation shows that those individuals enjoy the wide support of their colleagues, co-workers and commands.

These cases make clear that either through a lack of training or willful disregard of the new policy, some commanders continue to ask, pursue and harass servicemembers in direct violation of the new policy.

DOD DISCHARGES OF SERVICEMEMBERS FOR HOMOSEXUALITY

Fiscal year	Air Force	Army	Navy	Marine Corps	Total	% Total Armed Forces
1991	151 (15.9%)	206 (21.7%)	545 (57.4%)	47 (5.0%)	949 (100%)	.04
1992	111 (15.7%)	138 (19.5%)	401 (56.6%)	58 (8.2%)	708 (100%)	.04
1993	152 (22.2%)	156 (22.9%)	334 (49.0%)	40 (5.9%)	682 (100%)	.04
1994	180 (30.1%)	136 (22.8%)	245 (41.0%)	36 (6.0%)	597 (100%)	.04
Total	594	636	1525	101	2936	.04

The result of the widespread violations is that the rate of discharge for homosexuals has not declined, as expected. Despite the belief that the interim and new regulations would be as President Clinton remarked, "a major step forward," the rate of discharge of homosexuals from

1991 to 1994 has remained constant at .04% of the total active force.

The distribution of discharge cases by service as reported by the Pentagon, however, has markedly changed for two services. The Navy's percentage of homosexual discharge cases compared with other services has declined from 57.4% of total discharges in 1991 to 41% of total discharges in 1994. On the other hand, the U.S. Air Force has contributed more to total discharges during the same time frame. In 1991, the U.S. Air Force accounted for only 15.9% of total homosexual discharges; in 1994, the U.S. Air Force accounted for 30.1% of total homosexual discharge cases. The Pentagon's figures suggest that the Air Force has significantly increased its efforts to target and discharge homosexual servicemembers over the last four years, and especially during fiscal year 1994.

The dollar costs of the military's policy on homosexuals continues to be high. Based on figures the Pentagon supplied to the General Accounting Office in 1992, the last time the Pentagon provided such information, the cost of training servicemembers to replace those discharged for homosexuality totaled \$17.5 million in fiscal year 1994 (See Table on following page). The costs from 1991 to 1994 totaled \$86.5 million. These figures are not adjusted for inflation and do not include the costs to investigate servicemembers, the costs of holding and preparing for administrative discharge hearings or the costs of administering the policy. Nor do the figures include the significant cost of defending the policy in federal court. SLDN has no independent estimates of the costs of the DOD policy.

**COSTS OF TRAINING REPLACEMENTS FOR SERVICEMEMBERS
DISCHARGED UNDER HOMOSEXUAL CONDUCT POLICY**

Year(s)	# Discharged	Costs³
1980-1990	16,919	\$498,555,244
1991	949	\$27,964,355
1992	708	\$20,862,764
1993	682	\$20,096,617
1994	597	\$17,591,907
TOTAL	19,855	\$585,070,887

In summary, it is clear that many military commanders continue to ask, pursue and harass servicemembers in direct violation of the new policy. Evidence of the continuing violations comes not only from servicemembers' cases documented by SLDN and its cooperating attorneys, but from memoranda issued by the Department of the Air Force, Department of Navy and others. The question is why these abuses have occurred.

Analysis

³ Costs are based on figures and percentages reported in a General Accounting Office study, Defense Force Management: Statistics Related To DOD's Policy on Homosexuality (June 1992). The GAO reported that the Department of Defense discharged 16,919 servicemembers for homosexuality from 1980-1990 at a cost of \$498,555,244. The costs figures for 1991-1994 are based on the ratio of discharges in year x divided by the costs in year x set equal to the ratio of discharges in years 1980-1990 divided by the costs in years 1980-1990. *The cost figures have not been adjusted for inflation.*

Reasons for command violations. There are four common reasons for command violations of "Don't Ask, Don't Tell, Don't pursue, Don't Harass: (1) commanders and others lack information; (2) commanders and others do not understand the policy; (3) insubordination by commanders, investigators and prosecutors; and (4) commanders and others have no incentive to learn or follow the rules.

Commanders and Other Leaders Lack Information. Some command violations can be attributed to lack of information about the new policy. A major problem has been inadequate distribution of the new regulations. Throughout the past year, numerous commanders, defense attorneys and servicemembers have contacted SLDN in search of current copies of the DoD and service regulations because they were not available in their commands. As recently as three weeks ago, SLDN was required to ship these regulations to an overseas trial defense office.

Commanders and Others do not Understand the Policy. Other command violations stem from insufficient training, and therefore understanding, of the policy. Even the Pentagon concedes that training on the new policy has been handled less diligently than other personnel policies, such as those on sexual harassment.⁴ The most striking gap in training has been the failure of the Department of Defense (DoD) to issue sufficient guidance regarding the intent of the new policy to military leaders as well as servicemembers. This is an especially critical oversight in light of the broad discretion afforded commanders under the policy. Without an understanding of the intent of the policy, many commanders and prosecutors have focused their efforts on how to skirt the letter of the regulations.

⁴ Art Pine, "Few Benefit From New Military Policy on Gays," Los Angeles Times, A1, A8.

Insubordination by Commanders, Investigators and Prosecutors. An alarming number of command violations documented by SLDN result from outright insubordination, not lack of information or inadequate training. These violations are fueled, in part, by a climate of backlash in many units. The controversy over President Clinton's proposal to lift the ban charged the atmosphere in the military and focused unprecedented attention on the private lives of servicemembers. Since that time, everyone from private to general officer has speculated about who in the ranks might be gay. In this climate, many commanders and others have taken the Congressional vote against lifting the ban as a license to go after those whom they suspect are gay. As Lawrence J. Korb, former Assistant Secretary of Defense for Personnel and Readiness under President Reagan, recently stated, "I think the military feels they have beaten Clinton back on this issue and they're not going to change."⁵ As a result, many servicemembers are actually worse off than before.

Commanders Have No Incentive to Learn or Follow the Rules. A major problem is that the Department of Defense has established no means to monitor cases and to correct violations and misapplications of the policy. Although Department of Defense regulations provide that commanders and others who violate the policy may be disciplined, this provision has been roundly ignored. SLDN knows of no commander or other military member who has yet been disciplined for abusing the policy, despite numerous complaints.

The military's treatment of servicemembers who are harmed by command violations of the policy exacerbates the problem of accountability. Servicemembers presently have no official means of redress for command violations. As just one example, a young sailor is currently being

⁵ Id.

discharged solely because he responded truthfully to his supervisor's direct question about his sexual orientation, even though the command admitted on the record that the supervisor's action violated the new policy. To date, DoD and the services have been unwilling to provide a common sense resolution to this and similar situations.

The clear message to commanders is that they do not have to take the new policy seriously and that, if so inclined, they may violate it with impunity.

Analysis of "Don't Ask" Violations. "Don't Ask" is a simple, well-publicized mandate. Unlike some other provisions, there is no ambiguity in this part of the regulations. Nevertheless, commanders and other leaders continue to ask servicemembers about their sexual orientation, often repeatedly. While a few commanders have done so inadvertently, the overwhelming majority have violated "Don't Ask" through direct questions about sexual orientation and surrogate questions designed to circumvent the letter of the regulations. The facts and circumstances surrounding these violations indicate that almost all were deliberate. The degree of thought and ingenuity evident in devising many of the surrogate questions further indicates a climate of insubordination in many commands.

Analysis of "Don't Tell" Violations. Most military leaders fail to understand that the new policy does not preclude all statements regarding sexual orientation and that it recognizes a zone of privacy for all servicemembers.⁶ Over the past year, military leaders have established two clear trends that violate "Don't Tell." They have (1) punished statements of sexual orientation

⁶ In announcing the new policy, President Clinton charged DoD civilian and military leaders to "carry out this policy with fairness, with balance and with due regard for the privacy of individuals." "Text of President Clinton's Announcement of the New Policy," Washington Post, July 20, 1993, A12. The new regulations also state that "sexual orientation is a personal and private matter."

that are permissible under the new policy, and (2) expanded the situations where telling is prohibited in order to reach the most private spheres of servicemembers' lives. The most prominent cases involving the first trend have occurred in the context of security clearance investigations. Security clearance regulations encourage gay servicemembers to be forthcoming about their sexual orientation and to reveal whether their family and close associates are aware of it. The regulations state that "information about homosexual orientation or conduct obtained during a security clearance investigation will not be used...in separation proceedings." The regulations further state that a servicemember may decline to answer questions about sexual orientation without adverse consequence. In reality, however, security clearance personnel continue to threaten servicemembers with denial of clearances for either stating or declining to state their sexual orientation. Denial of a security clearance effectively kills the servicemember's career. Additionally, some commands have attempted to use the information obtained during security clearance interviews for purposes of discharge, in direct violation of the new policy.

The chief problem with the security clearance regulations is that they are inconsistent with the other sections of the military's policy on homosexuals. Those charged with implementing the security clearance regulations in light of the other policy provisions do not know whether or not to ask about sexual orientation and how to respond to the answers forthcoming. Servicemembers do not know how or if to respond to questions about sexual orientation, given the regulations' conflicting guidance. Thus, confusion results and homosexual servicemembers typically receive the short end of the stick.

Servicemembers and their families have also been shocked by the Department of Defense's expansion of situations where telling is prohibited. At least some commanders have violated this

prong of "Don't Tell" as a direct result of guidance from the top levels of the Pentagon. A Department of the Air Force memo from Judge Advocate General Headquarters to all Staff Judge Advocates and military judges dated November 3, 1994 actually instructs inquiry officers to question parents about the sexual orientation and activities of their children to obtain information for purposes of discharging their sons and daughters. The memo also instructs officers to interrogate close civilian friends and mentors, such as high school guidance counselors, to determine whether a servicemember has ever discussed their orientation.

Additionally, the Department of Defense instructs psychologists to turn in servicemembers who seek private counseling about their sexual orientation. In response to public outcry in the wake of one case, the Department of Defense General Counsel's office simply announced that the military would not treat statements to psychologists as privileged and confidential. The response entirely brushes aside the issue of whether such private statements are the kind of statements contemplated as a grounds for discharge under the new policy.

This attempt to enforce a gag rule in the context of communications with family and professional health care providers is chilling. Most Americans would be appalled to learn that their tax dollars are being spent on such unprecedented invasions into relationships that are generally considered private and confidential.

A related problem is the "outing" of gay servicemembers by their commanders. Although a detailed analysis is outside the scope of this report, it should be noted that some commanders have told their units, and even a servicemember's spouse and parents, that the servicemember was under investigation for homosexual conduct, in direct violation of the Privacy Act. "Outing" is not only a violation of servicemembers' privacy, but it has also jeopardized the safety of

servicemembers in commands where harassment is tolerated.

Analysis of "Don't Pursue" Violations. The words "Don't Pursue" do not actually appear in the policy or regulations. Instead, the concept is communicated through two primary standards. First, commanders or investigators may not initiate an inquiry or investigation unless, considering the source and surrounding circumstances, they have credible evidence that a servicemember has engaged in homosexual conduct. Information based on opinion, rumor and capricious claims does not constitute credible information. Second, inquiries and investigations must be limited to the scope of the instant allegation.

"Don't Pursue" was intended, in part, to stop the military's infamous witch hunts of suspected homosexuals. Like "Don't Ask," this concept has been well-publicized and communicated through the ranks. General Colin Powell testified before the Senate Armed Services Committee that the new regulations held forth that "We won't witch hunt. We won't chase. We will not seek to learn orientation."⁷ Nevertheless, SLDN documented fifteen attempted and actual witch hunts over the past year. Most were initiated in deliberate violation of the new policy.

Among those commanders who wish to follow the regulations, most do not comprehend the actual standards of "Don't Pursue." Some commanders know that they must be able to articulate a basis to begin an inquiry against a servicemember. Army and Air Force commanders are supposed to write down their justification for beginning an inquiry. A significant problem, however, is that the vast majority of commanders do not know what constitutes credible

⁷ Federal News Service, Testimony Before Senate Armed Services Committee, July 21, 1993.

information. The policy itself provides little guidance on how to interpret this inherently subjective and vague standard. A major consequence is that commanders apply the policy inconsistently throughout the services and even in the same commands. Additionally, commanders routinely initiate inquiries and investigations against servicemembers based only on hearsay or circumstantial evidence, contrary to the clear intent of the regulations. These trends are evident in the following examples.

In the case of Corporal Blaesing, who asked questions of his psychologist, his first commander did not consider his questions as evidence of homosexual conduct and allowed him to continue service. When this commander later retired, his successor revived the case, notwithstanding the fact that the Navy psychologist testified that she did not know Blaesing's orientation and that he had not stated it to her. As a result, Blaesing was forced to face discharge proceedings and was recommended for separation.

In identical cases from the Air Force, two commanders inadvertently discovered private letters belonging to one of their airmen that contained language that could be interpreted as hints about homosexuality. One commander made no issue of the letters and allowed the airman to stay; the other investigated and discharged the airman based solely on the letters. SLDN has also found that most commanders are not even aware of the standard to limit inquiries to the scope of the instant allegations. Thus, even where inquiries are properly initiated, they inevitably become fishing expeditions into all aspects of a servicemember's private life. In the case of Lance Corporal Elena Martinez, an inquiry that was not initiated properly, her supervisor directly solicited co-workers to make allegations of homosexual conduct against her. Two male marines lodged allegations that Martinez had danced with both men and women at a popular local club

and that, on another occasion, she had given another woman a goodbye peck on the cheek. Based on this report, the command initiated an inquiry in which they questioned over twenty-five co-workers and civilian acquaintances, including former landlords, inviting them to speculate about every detail of Martinez' private life. Further, her supervisor directly ordered co-workers to monitor and report on Martinez's social activities. Even if the basis of this inquiry had been legitimate, the command's wide-ranging campaign into Martinez's personal life clearly violated the requirement to limit inquiries to the scope of the instant allegation.

Many commanders and investigators use this tactic of expanding investigations beyond the scope of the instant allegation in a deliberate effort to dig up information to support a less than honorable discharge characterization or criminal charges against servicemembers who are or are perceived to be gay.

Analysis of "Don't Harass" Violations. Like "Don't Ask," the mandate against harassment is unambiguous. It forbids harassment of any kind against any servicemember. This mandate is not unfamiliar to commanders. In the wake of the Tailhook scandal, it has become a standard order. Nevertheless, SLDN's cases show that harassment and death threats against suspected gay servicemembers are worse than ever.

Poor leadership is the primary reason for the high incidence of harassment. A majority of servicemembers who have called SLDN report that their supervisors have witnessed incidents of harassment and have taken no steps to correct it. In an alarming number of SLDN's cases, members of the chain-of-command have actually participated in harassment against suspected gays. In addition, some commanders have retaliated against gay servicemembers through downgraded performance evaluations or by denying them reenlistment. These actions send a clear

message that harassment is condoned.

SLDN's data also show a high correlation between harassment and "Don't Pursue" violations. In units where commanders pursue gays, servicemembers report that they feel great pressure to prove that they are not gay. One way to do so is to make derogatory comments about gays in the company of co-workers and to directly harass other servicemembers who are perceived as gay. Servicemembers report that, if they do not participate in such activities, they are quickly labeled as gay and harassed.

In light of these findings, it is not surprising that the majority of servicemembers who have called SLDN report that derogatory comments and harassment of suspected gays has been a regular occurrence in their units since the national debate.

Servicemembers who wish to complain about harassment or death threats face significant obstacles. There is no guarantee that commands will not use a report of harassment or death threats as a basis for investigation and discharge of the threatened servicemember. At best, servicemembers who have dared to file complaints have simply been ignored by their chain-of-command. As a result of the lack of response and threat of discharge, most incidents of death threats and harassment go unreported.

In stark contrast, there has not been a problem with harassment in those units with openly gay servicemembers, many of whom are serving by court order. Nor has there been a problem in units with commanders who have made it clear to their troops that they will not tolerate harassment. This suggests the truth of the old maxim that "Troops follow the flag." In short, harassment occurs because of a unit's leadership, not despite it.

Conclusion/Recommendations

SLDN concludes that many military officials continue to ask questions about sexual orientation, conduct witch hunts and condone harassment of lesbian and gay servicemembers in direct violation of "Don't Ask, Don't Tell, Don't Pursue." SLDN further concludes that the chief reasons for the continuing violations are lack of information, lack of adequate training and guidance regarding the new policy, and in some cases, willful disregard of military policy by commanders and others.

SLDN recommends that the Department of Defense ensure the proper implementation of "Don't Ask, Don't Tell, Don't Pursue" by providing (1) adequate information to and training for all servicemembers about the new policy, (2) common sense remedies to servicemembers who are harmed by command violations, and (3) clear accountability for violations of the policy by military officials.

Provide Adequate Information and Training. The Department of Defense should ensure that full DOD Directives, Guidance and Service Regulations reach the field. Attorneys and commanders often possess only the message text of the service regulations sent to the field on February 28, 1994, with no guidance on how to interpret those regulations. At a minimum, military officials should have the full DOD Directives, Commander's Guidance, DOD Guidelines dated July 20, 1993, and all DOD and service guidance necessary to interpret the regulations.

Additionally, the Department of Defense should clearly and strongly communicate the intent of the new policy to stop anti-gay harassment and pursuits of suspected homosexual servicemembers. At present, the intent of the new policy has not been adequately disseminated to the field and, thus, is not widely known or understood. In order to apply the legal standards of the new policy, commanders must, as with all regulations, understand the "commander's intent"

behind the policy itself. Advisors to the command, particularly military attorneys and Inspectors General, must also understand its intent. Clear intent is vital given the current hostile command climate in many commands, the wide discretion afforded commanders and the ambiguity of some policy standards. At a minimum, all existing command and advisory channels should be vigorously utilized to communicate and reinforce the intent of the policy. All servicemembers and unit leaders need to be trained on the policy and the expectations for their behavior.

The Department of Defense should also issue further guidance on legal standards. Even armed with all existing materials, there is still a clear need for more information on the meaning of the new standards. The credible information standard needs particular elaboration. Credible information should be defined to exclude reports of harassment or death threats, information obtained by the command through illegal means, use of private statements to parents, siblings and psychologists, or inadvertent disclosures, such as when a supervisor discovers a letter after snooping through the personal possessions of a unit member.

Provide Common Sense Remedies for Command Violations. "Don't Ask, Don't Tell, Don't Pursue" means nothing if servicemembers must pay the price for improper questions, witch hunts, and harassment. Enforcement of military regulations and acts of law is not discretionary. Thus, homosexual servicemembers who are discovered through improper methods should be afforded a common sense remedy, like other victims of command impropriety. Decisionmakers, for example, are not permitted to disregard claims by women that they have been retaliated against for reporting sexual harassment and rape. Where claims are substantiated, they must take steps to correct the retaliation.

The Department of Defense should establish measures to ensure command compliance

with the new regulations. Advisors to the command, including military prosecutors and Inspectors General, must understand their role to ensure that credible information exists at the outset of an inquiry or investigation, not merely to justify poor, let alone illegal, actions by the command. Where an inquiry is appropriate, JAGs need actively to advise inquiry officers, who typically have no legal training or experience with the regulations, on the parameters of the inquiry.

The Department of Defense should also order Staff Judge Advocates to monitor violations by investigative agents. SJAs should make clear to base MCIOs that investigative violations will not be tolerated and ensure that agents are trained in proper and improper investigative tactics.

The Department of Defense should also issue strong, clear guidance regarding harassment and threats. The one sentence in the "Don't Ask, Don't Tell, Don't Pursue" regulations forbidding harassment has proven inadequate. A top-down policy of zero tolerance is required instead. As a minimum, servicemembers must be able to report death threats and harassment and their underlying basis without fear that the report will be turned against them for purposes of investigation and discharge. Based on SLDN's experience, many complaints are likely to require disclosure of a servicemember's sexual orientation or details of their private lives. For this reason, and because even legitimate questions going to a servicemember's safety can result in "incriminating" answers, complainants should be exempted from discharge and investigation and should be afforded counsel. It is reasonably foreseeable that if the Department of Defense does not take corrective actions now, deaths of actual and perceived homosexual servicemembers, like slain sailor Allen Schindler, will occur.

The Department of Defense should prevent the use of security clearance interviews as a

loophole for targeting suspected homosexuals. DOD should take strong steps to ensure compliance by Defense Investigative Service (DIS) agents with DIS regulations and the intent of the DOD directives. The present situation putting servicemembers' careers and liberty in jeopardy for truthful responses regarding their sexual orientation is untenable. Already, without such attention, the security clearance process has become a back channel to obtain information for commands and pursue suspected homosexuals.

Provide Adequate Review And Accountability. Those who are willfully disobeying the letter and intent of the new policy on homosexuals will continue to do so unless they are held accountable for their insubordination. Those violating the new regulations out of ignorance will also continue to do so as long as there is no incentive to learn and abide by the policy.

The Department of Defense needs to amplify disincentives to prevent violations of the policy. Currently, guidance is needed regarding procedures to initiate discipline against commanders and others who violate the policy, as provided for in the DOD directives. To date, no commander has been disciplined for violating provisions in "Don't Ask, Don't Tell, Don't Pursue" despite many complaints. Further, information obtained as the result of violations should be excluded and inquiries/investigations found to have been initiated without credible information should bar prosecution and discharge. Security clearance regulations should bar transfer of information to the military command. Annotations in servicemembers files based on information obtained as the result of improper command actions should be prohibited.

These three broad recommendations, information and training, common sense remedies, and accountability, are only a handful of recommendations specifically targeted to the violations detailed in this report. The recommendations are intended to bring commanders and other

military officials into compliance with military regulations and law. The recommendations are intended to ensure that "Don't Ask" means don't ask; "Don't Tell" does not mean interrogate family, doctors and psychologists; "Don't Pursue" means don't pursue; and "Don't Harass" means don't harass.

SLDN will continue to monitor the Department of Defense's implementation of its newest policy on homosexuals and report on its progress in complying with the policy's provisions.

**CONDUCT UNBECOMING:
SECOND ANNUAL REPORT ON “DON’T ASK, DON’T TELL, DON’T PURSUE”**

MARCH 1, 1995 - FEBRUARY 27, 1996

In South Korea, a young Private First Class reported that male soldiers assaulted and threatened to rape her. The soldiers then spread false rumors that she was a lesbian. Rather than investigate the men who attacked her, the command in South Korea investigated her. The command tried to force her to confess to being gay. She refused. The command threatened her with prison if she did not identify suspected lesbians in her unit. She refused. The command started discharge proceedings against her based on the same trumped up allegations. She still refused to buckle. In July 1995, after ten months of intense efforts by her family, Servicemembers Legal Defense Network and its cooperating private attorney, the Army finally dropped all charges and retaliatory actions against her. Her new command is excellent, but she and her family should never have had to go through what they did. What happened to her is common. Straight or gay, the “Don’t Ask, Don’t Tell, Don’t Pursue” policy has been used to retaliate against hundreds of servicemembers.

EXECUTIVE SUMMARY

In its second annual report on the impact of the “Don’t Ask, Don’t Tell, Don’t Pursue” policy, Servicemembers Legal Defense Network (SLDN) reveals a continuing pattern of abuse that has effectively rendered the current policy as bad as, if not worse than, its predecessors. Many military members clearly continue to ask, pursue and harass suspected gay troops in blatant disregard of the policy’s limits. From March 1, 1995 - February 27, 1996, SLDN documented 363 specific violations of the current policy.¹ The result, in part, is that the Department of Defense (DOD) discharged more servicemembers under its gay policy in fiscal year 1995 than in each of the past four years at a cost exceeding \$21 million in 1995.²

¹ See Exhibit A. SLDN had documented 340 violations in the policy’s first year of operation, resulting in 703 documented violations for the past two years. The documented violations do not include violations that fall outside “Don’t Ask, Don’t Tell, Don’t Pursue” but are nevertheless serious breaches of military regulations, such as denial of or ineffective assistance of counsel, threats of adverse action by criminal agents against servicemembers unless they cooperate, and violation of the servicemembers’ rights under the Privacy Act.

² See Exhibits B & C. The cost of training replacements for those discharged in 1995 exceeded \$21 million, bringing the cost under the current policy to more than \$38.5 million, and the cost since 1980 to more than one-half billion

Among SLDN's specific findings for March 1, 1995-February 27, 1996:

1. DOD discharged 722 people under the gay policy in fiscal year 1995 - a four year high, and a 21% increase over 1994 levels.
2. According to DOD figures, the Air Force accounted for 32% of gay discharges – a figure that has doubled under the current policy. The Navy accounted for 36% of gay discharges, a decrease of 21% since 1992; the Army and Marine Corps discharge rates remained about the same at 25% and 6% of the totals, respectively.
3. SLDN documented 363 violations of "Don't Ask, Don't Tell, Don't Pursue, Don't Harass." The Navy was the worst service with 126 documented violations, followed by the Air Force with 114 documented violations, the Army with 101 and the Marine Corps with 22.
4. SLDN documented 141 violations of "Don't Pursue" and 127 violations of "Don't Harass" making them the leading problems under the current policy for the second year in a row. The Air Force was the worst violator of "Don't Pursue;" the Navy was the worst at "Don't Harass."
5. The Air Force, more than the other services, is actively pressing criminal charges and imprisoning gay servicemembers for allegations of consensual adult sexual relationships, in violation of current regulations.
6. Women were disproportionately hurt by the new policy, accounting for 30% of SLDN cases and 21% of DOD discharge figures, despite making up only 13% of the military's active force. Women are often accused as gay after reporting sexual harassment or rape, regardless of their actual sexual orientation.
7. SLDN documented 28 witch hunts. Witch hunts of women occurred in locations ranging from Korea to Texas to the Mediterranean last year.
8. After one lesbian officer succeeded in arguing for retention, DOD, on August 18, 1995, quietly issued a memorandum that prohibited the services from accepting similar arguments by other gay servicemembers. The memo also undercuts limits on investigations of suspected gay troops contrary to the original letter and intent of the current policy. The new DOD memo was apparently in response to lobbying by Senators Coats, Nunn and Thurmond, as revealed by the Family Research Council in federal court.

dollars. These cost estimates do not include the substantial costs of investigating servicemembers, holding administrative discharge hearings or defending the new policy in federal court.

9. On a positive note, President Clinton issued Executive Order 12968 on August 4, 1995, prohibiting discrimination based on sexual orientation in the issuance of security clearances for gay military and civilian government employees.
10. Another positive finding is that DOD officially recognizes that more than one dozen gay servicemembers have been serving openly and honestly for one to fourteen years.

Three primary reasons account for the increase in discharges and the continued violations of the current gay policy. The first reason is that, according to DOD's own data, discharges from the Air Force have skyrocketed while discharges from the other services have declined or remained the same. The Air Force now accounts for 32% of all gay discharges, while in 1992, it accounted for only 16% of all gay discharges. The Navy, by contrast, accounted for 57% of all gay discharges in 1992, but now accounts for 36% of all gay discharges. Furthermore, the Air Force's 1995 figures are higher than would be predicted given its size. The Air Force accounts for only 26% of total active duty troops, but it accounts for 32% of all gay discharges. The fact that the Air Force discharges have increased so dramatically is reflected in SLDN's finding that the Air Force is the worst violator of "Don't Pursue."

A second reason discharges under the gay policy remain high is that the military uses the policy to retaliate against women. DOD data show that women are being singled out for investigation and discharge at rates exceeding those for men. Though women comprise only 13% of the total active duty force, they account for 21% of all discharges and 30% of SLDN's cases under the gay policy. A disturbing constant in women's cases is the frequency with which women are accused as lesbian after reporting sexual harassment or rape, regardless of their actual sexual orientation. It was believed that "Don't Ask, Don't Tell, Don't Pursue" would stop investigations and discharges based on retaliatory accusations, but it has not.

The third major reason discharges under the gay policy have escalated is that DOD is not educating or adequately training commanders and their troops about the new policy and what it really means in their everyday lives. Further, DOD and the services only take steps to stop clear violations of the current policy in individual cases when confronted with intense outside pressure from servicemembers' families and their lawyers.

This report details four specific categories of violations. It documents cases where military members have (1) asked servicemembers about their sexual orientation ("Don't Ask"); (2) punished statements of sexual orientation that are permissible under the new policy or expanded the situations where telling is prohibited ("Don't Tell"); (3) pursued, witch hunted or criminally prosecuted suspected homosexuals ("Don't Pursue"); and (4) condoned harassment based on perceived sexual orientation ("Don't Harass").

This report is divided into four sections which describe SLDN's data in more detail. The sections are entitled "Don't Ask," "Don't Tell," "Don't Pursue," and "Don't Harass." Each section explains what constitutes a violation of the current policy according to the letter and spirit of the regulations, summarizes SLDN's findings, provides examples of the violations documented by SLDN, analyzes why many military leaders continue to violate the new policy and recommends how the military can stop the ongoing violations of "Don't Ask, Don't Tell, Don't Pursue."

This report is based on violations of "Don't Ask, Don't Tell, Don't Pursue" documented by SLDN, located in Washington, D.C. SLDN is the sole national legal aid and watchdog organization for those targeted under the military's policy on service by gay men and lesbians, and the only means currently available to document abuses. DOD has instituted no method of identifying, documenting or correcting abuses of the new policy.

SLDN's documented cases capture only a fraction of the servicemembers hurt by the

"Don't Ask, Don't Tell, Don't Pursue" policy. Many servicemembers are discharged by DOD for alleged homosexuality without ever having contacted SLDN, and others are removed from service for homosexuality through ulterior means, such as denial of reenlistment. SLDN's outreach is limited. We are in touch with only a very small percentage of all servicemembers harmed by the current policy.

Servicemembers who contact SLDN are straight, gay and bisexual. The military's "Don't Ask, Don't Tell, Don't Pursue" policy is often used as a means to retaliate against anyone, regardless of their sexual orientation.

SLDN is asked to provide a wide range of assistance from basic information about what the policy says to intensive efforts to stop witch hunts or prevent death threats from being carried out. SLDN carefully tracks those cases where servicemembers need ongoing assistance. From March 1, 1995 - February 27, 1996, the period on which this report is based, SLDN closely tracked 180 cases. Its attorneys work to monitor and document violations of the "Don't Ask, Don't Tell, Don't Pursue" policy in conjunction with Republican and Democratic Congressional aides and lawyers from SLDN's network of more than 250 cooperating attorneys from private law firms around the country.³

SLDN's findings are well-documented. Servicemembers and attorneys who worked on the cases reported are available upon request, except in cases where servicemembers could suffer retaliation from speaking publicly. Due to reasons of confidentiality and to protect servicemembers from potential retaliation, the names of servicemembers and other identifying features of cases are omitted in this report.

³ SLDN would like to thank its cooperating attorneys for their tireless efforts on behalf of lesbian, gay, bisexual and straight servicemembers hurt under the "Don't Ask, Don't Tell, Don't Pursue" policy. SLDN would like to extend

SLDN is headed by two attorneys, C. Dixon Osburn and Michelle M. Benecke. Mr. Osburn holds a J.D. and M.B.A. from Georgetown University and an A.B. from Stanford University. Ms. Benecke is a graduate of Harvard Law School and holds a B.A. from the University of Virginia. Ms. Benecke is also a former Captain and Battery Commander in the U.S. Army. Both have spoken extensively about the military's gay policies, including a speech at the American Bar Association Annual Convention in August 1995. They have also both published respected works about the policies, including articles in *The New York Times*, *The Harvard Women's Law Journal*, *The University of Missouri Kansas City Law Review*, and contributions to several books.

special recognition to Ted Bumer and Kathy Gilbert of the Military Law Task Force in San Diego, and Bridget Wilson, a private attorney in San Diego, for their long-standing leadership in fighting for the rights of servicemembers.

RECOMMENDATIONS

SLDN concludes that many military members continue to ask, pursue and harass lesbian gay, bisexual and straight servicemembers in direct violation of "Don't Ask, Don't Tell, Don't Pursue." Some of the violations result from a deliberate disregard of the policy by commanders, criminal investigators and inquiry officers. Some violations result from top Pentagon officials backtracking from limits imposed by the current policy. And other violations result from poor communication to servicemembers and the American public about what is and is not permitted under the new policy. SLDN recommends that DOD take the following steps to stop the continuing abuses of the current policy:

1. *Designate* an official from the Office of the Secretary of Defense and Office of the Secretary for each service who is charged with the responsibility to resolve problems as they arise and send a clear signal that abuses will not be tolerated.
2. *Discipline* those who disobey the limits of the regulations.
3. *Rescind* the Department of Defense, Air Force and Navy memoranda that gut the original intent of the new policy not to pursue gay servicemembers.
4. *Issue* clear guidance that inquiries and investigations can only be started with good cause. Not all information is credible, such as retaliatory accusations.
5. *Stop* harassment, including death threats and hate crimes, discipline those who harass, and allow servicemembers to report harassment without fear of retribution.
6. *Require* commanders to reveal in writing to the servicemember the specific reason an inquiry or investigation has been initiated against the servicemember.
7. *Provide* servicemembers access to a military attorney at the beginning of an inquiry or investigation to help deter illegitimate efforts, as recommended by a 1995 Advisory Board on

DOD Investigative Capability report.

8. *Require* commanders to not intrude into private conversations between gay servicemembers and their families, doctors and other health care professionals and not use such statements as the basis for retribution, investigation and discharge.

9. *Prevent* selective criminal prosecution of gay, but not straight, servicemembers for adult, consensual sexual relationships, consistent with regulations requiring even-handed treatment.

10. *Exclude* evidence that has been wrongfully obtained from being used at an administrative discharge board against the servicemember, as suggested by a 1995 Advisory Board on DOD Investigative Capability report.

DOD should adopt these recommendations as a first step to bring itself into compliance with the current law and regulations. These recommendations if fully implemented would improve the safety of servicemembers' daily lives under the "Don't Ask, Don't Tell, Don't Pursue" policy. These recommendations would in no way cure the constitutional defects of the policy currently being litigated in federal court.

DON'T ASK

"What is Don't Ask?" The "Don't Ask" regulations state that "servicemembers will not be asked about or required to reveal their sexual orientation." Violations of "Don't Ask" monitored by SLDN include (1) direct questions about sexual orientation, such as "Are you gay?"; (2) surrogate questions about sexual orientation where a servicemember is not asked directly about his or her orientation, but is asked through creative phrasing, as in "Do you find men attractive?"; and (3) inadvertent questions, in which a military member does not realize that the question asked requires disclosure of sexual orientation, such as when a commander, out of concern for someone in his or her unit, asks what is troubling the servicemember, and the answer is that the servicemember is grappling with issues related to sexuality. The question would not pose a problem for a heterosexual servicemember but it does for the homosexual servicemember.

Findings. SLDN documented 77 "Don't Ask" violations. Direct questions and surrogate questions about sexual orientation constituted 99% of those violations. SLDN documented significant violations of "Don't Ask" in each service.

Examples. Violations of "Don't Ask" include asking direct, surrogate, or inadvertent questions about sexual orientation.

Direct Questions. An Air Force Office of Special Investigations (OSI) agent started a witch hunt by directly asking a seaman who was not under investigation if he were gay. In another case, a fellow worker asked an enlisted female airman if she were gay and then turned her in when she answered "yes." One officer in the Southwest confronted a woman under his command with, "I know you're a lesbian," looking to see if she would respond. Similarly, an Army officer asked a fellow officer, "What about these rumors [that you're a lesbian]."

Surrogate Questions. A male officer in the Navy asked a female co-worker, "Do you date men?," after she turned down several offers for a date with him. An Army noncommissioned officer asked an enlisted member whether another soldier was "funny."

Numerous servicemembers report being asked, “Whom are you dating?” and “Why haven’t I seen you with any [people of the opposite sex]?”

Inadvertent Questions. A psychologist asked why a serviceman was having marital difficulties. He replied that he was attracted to other men, not knowing that such a statement would have repercussions. The psychologist ordered him to write a statement to that effect and turned him over to his commander for investigation and discharge.

Analysis. "Don't Ask" is a simple, unambiguous and well-publicized mandate.

Nevertheless, military members continue to ask servicemembers about their sexual orientation.

While a few have done so inadvertently, the overwhelming majority have violated "Don't Ask" through direct questions about sexual orientation and surrogate questions designed to circumvent the letter of the regulations. Many servicemembers also report that they have been baited by anti-gay comments, questions and jokes, and that any response, except joining in the gay-bashing, immediately raises suspicions. Not even silence will protect a servicemember. Gay-baiting should be viewed not only as a form of harassment, but a form of asking.

Asking, however, also occurs in a way that is much more congenial and routine. This form of asking is not fully reflected in this report. Servicemembers report to SLDN that they are asked every day about their sexual orientation and their relationships, or lack thereof. They are asked about dates. They are asked about who joined them at lunch. They are asked about photos of friends, buddies, loved ones and family. They are asked about plans to go to the military ball. They are asked about with whom they will spend Christmas. They are asked about their church membership, neighborhoods where they live, clubs they go to. They are asked to comment about the looks of opposite sex members.

These questions are a natural part of every day conversation, and they pose no problems

for heterosexual servicemembers. For gay servicemembers, however, these questions place them in an untenable position. Silence or avoiding the formation of friendships is noticeable. Lying is against servicemembers' values and integrity, not to mention the services' own codes of conduct. Yet, if gay servicemembers reveal an integral part of their identity and community, the "Don't Ask, Don't Tell, Don't Pursue" policy means an end to their careers. As implemented, the policy will not protect them, even if the questioner is their best friend, mom or doctor.

Recommendations. Clearly, eliminating all questions about sexual orientation is impossible. It is only natural for men and women who work together to be interested in each others' lives. There are, however, some specific steps the military should take to make the "Don't Ask" portion of its policy more meaningful.

Those who ask direct or surrogate questions to determine a servicemember's sexual orientation during an investigation or informal command inquiry, or who turn information over to the command after asking questions about sexual orientation, should be counseled and disciplined for their actions. This does not mean, though, that commanders should police private conversations between troops or erect barriers to the formation of friendships.

A servicemember who offers a truthful answer to a direct, surrogate or inadvertent question about his or her orientation, or speaks out in response to anti-gay harassment, should not be subject to an inquiry, investigation or discharge. Further, no mark should be made in his or her record about the incident, nor should he or she be subject to further retaliation. If a command ignores these guidelines, and nevertheless takes discharge action, such action should be obviated. In short, for the "Don't Ask" portion of the new regulations to have any teeth, those who violate the policy should be disciplined; their victims should be exonerated, not punished.

DON'T TELL

"What is Don't Tell?" The "Don't Tell" provision of the new policy does not prohibit all statements about sexual orientation. Indeed, the new regulations specifically permit statements to lawyers, chaplains, or security clearance personnel, and in announcing the current policy, DOD promised it would protect a “zone of privacy” for all servicemembers. Yet, the Pentagon has expanded "Don't Tell" in ways that most Americans are not aware, to include private statements to family members, close friends, church members, doctors, psychologists and other health professionals. Further, if a chaplain or lawyer violates confidentiality and reveals a servicemember’s sexual orientation to a commander, the military will use that information to discharge the servicemember. Violations of "Don't Tell" include incidents in which statements to any of the above have resulted in discharge or the threat of discharge of lesbian and gay servicemembers.

Findings. SLDN documented 18 violations of “Don’t Tell” which represents a small decrease in total “Don’t Tell” violations from the previous year. Most violations involved statements to family and doctors that were then used to discharge servicemembers. The Air Force accounted for 56% of documented “Don’t Tell” violations. In a marked improvement over the previous year, however, fewer servicemembers reported that security clearance investigators used information about their sexual orientation to deny their clearances or instigate discharge proceedings.

Examples. Violations of "Don't Tell" primarily include using statements from family and doctors for purposes of discharge.

Families. Air Force criminal investigators asked a young child whether her civilian father were gay and involved with a male servicemember. In another case, military officials discharged a servicemember after he revealed his orientation to his brother in a private family conversation.

Doctors. An Army psychologist turned over to the commander a married, male servicemember who admitted to being attracted to other men. In another case, a Navy commander initiated an inquiry after reading through a servicemember's medical records and discovering that the servicemember was treated for a medical condition that the doctor noted occurred primarily in "gay men."

Analysis. Many military leaders fail to understand that the new policy allows some statements regarding sexual orientation and that it recognizes a zone of privacy for all servicemembers. In announcing the new policy, President Clinton charged DOD civilian and military leaders to "carry out this policy with fairness, with balance and with due regard for the privacy of individuals." The new policy further made clear that sexual orientation was to be considered a "personal and private matter." Many military members have wrongly assumed that the "personal and private" language means that servicemembers must keep their sexual orientation a complete secret.

Servicemembers are confused by the conflicting guidance they have been given. They have been told to be fully honest with security clearance investigators about their sexual orientation and conduct for the purposes of national security. They are further encouraged for security purposes to be fully open and honest with their family and friends. In other contexts, they have been told to be fully honest to their doctors, psychologists and other health care professionals to ensure full and adequate treatment. And most assume that they can be fully honest within the sanctity of family and church relationships.

Yet, servicemembers who have been honest about their sexual orientation in these

contexts have suffered. Mothers and fathers have been shocked when Air Force officials have asked them whether their son is gay and whether he has ever had sex with another man. Servicemembers who have revealed their orientation in a private family setting have been discharged after family members disclosed this information.

Some commanders have violated "Don't Tell" as a direct result of guidance from the top levels of the Pentagon. A memo from the Air Force's top uniformed lawyer at the time, Colonel Peterson, to all military prosecutors and military judges, dated November 3, 1994, actually instructs inquiry officers to question parents about the sexual orientation and activities of their children to obtain information for the purpose of discharging their sons and daughters. The memo also instructs officers to interrogate close civilian friends and mentors, such as high school guidance counselors, to determine whether a servicemember has ever discussed his or her orientation. Thus, it is not surprising that the Air Force accounts for 56% of "Don't Tell" violations.

A memorandum authored by DOD General Counsel Judith Miller on August 18, 1995, seems to buttress the Air Force memo by instructing commanders and inquiry officers to investigate not only whether a servicemember has said he or she is gay, but whether he or she has ever been in a sexual relationship with a person of the same gender. The memo greatly expands the scope of investigations beyond the original intent and letter of "Don't Ask, Don't Tell, Don't Pursue" and intrudes on private family relationships in a way never before seen. The DOD memo could make it easier for the Army, Navy and Marine Corps to follow the Air Force's unfortunate lead.

The services have also instructed military psychologists and other health professionals to

turn in servicemembers who discuss, reveal or seek private counseling about their sexual orientation. Last year, we reported the case of Marine Corporal Kevin Blaesing who was turned in by his Naval psychologist merely for asking questions about sexual orientation. The Naval psychologist admits that Corporal Blaesing never revealed his sexual orientation to her, but his mere questions about sexual identity started an entire investigative and discharge process that has effectively killed Corporal Blaesing's career. Corporal Blaesing had been Marine of the Quarter and had a very bright future in the military until this incident.

The attempt to enforce a gag rule in the context of communications with family and professional health care providers is chilling. Most Americans would be appalled to learn that their tax dollars are being spent on such unprecedented invasions into relationships that are widely accepted as private and confidential.

One bright spot in the "Don't Tell" category is in the area of security clearances. Security clearance regulations encourage gay servicemembers to be forthcoming about their sexual orientation and to reveal whether their family and close associates are aware of it. The regulations state that "information about homosexual orientation or conduct obtained during a security clearance investigation will not be used...in separation proceedings." The regulations further state that a servicemember may decline to answer questions about sexual orientation without adverse consequence.

In the first year of the new policy, some security clearance personnel ignored the new regulations and turned servicemembers in for discharge who stated they are gay, or effectively killed their careers by removing or encouraging delays in granting their clearances.

SLDN has received fewer cases involving security clearance violations during the second

year of “Don’t Ask, Don’t Tell, Don’t Pursue.” SLDN believes that the improvement is based, in part, on better understanding by investigators of the limits placed in the security clearance regulations, and in part by President Clinton’s issuance of Executive Order 12968 on August 4, 1995, that prohibits questioning about sexual orientation and sexual activities and makes clear that neither are a bar to issuance of security clearances in both the military and civilian contexts.

Recommendations. The chief step the military must take regarding “Don’t Tell” violations is to make clear that private statements are not prohibited under the new policy. Gay servicemembers should be permitted to discuss their sexual orientation in private settings with family members, doctors and other health care professionals without fear. In the alternative, DOD should also consider extending confidentiality to the same privileged relationships that civilians enjoy today, such as to psychologists. A standard that promotes family integrity is consistent with current security clearance regulations and the original intent of the new policy.

DON'T PURSUE

"What is Don't Pursue?" In the words of General Colin Powell, "Don't Pursue" means that "We won't witch hunt. We won't chase. We will not seek to learn orientation."⁴ The current regulations echo General Powell's words. Witch hunts are prohibited: commanders cannot (1) ask servicemembers to identify suspected gays and lesbians nor can they (2) fish for information about a servicemember to see what they can turn up. The regulations are also clear that commanders cannot start inquiries or investigations without good cause. The policy requires that commanders have "credible information" of a statement, act or marriage before launching an inquiry or investigation. Not all information is deemed credible. Lastly, the regulations are clear that commanders are not to selectively prosecute suspected gay servicemembers for consensual, adult sexual activities when they would not prefer criminal charges against heterosexuals for the same activities.⁵ The clear limits on investigation and criminal prosecution under the new policy were intended to prohibit the far-ranging investigations that have characterized prior policies. These limits have been roundly ignored.

Findings. SLDN documented 141 violations of "Don't Pursue" in the second year of the "Don't Ask, Don't Tell, Don't Pursue" policy. SLDN documented 28 witch hunts, of which the

⁴ Federal News Service, Testimony Before Senate Armed Services Committee, July 21, 1993.

⁵ The military has two systems: administrative and criminal. Administrative separation boards recommend whether a servicemember should be retained in the service or discharged and what the characterization of any discharge should be. The criminal system determines whether a servicemember has committed a crime under military law. A servicemember who has said he or she is gay, has engaged in sexual activity with a person of the same gender, or married someone of the same gender is subject to administrative discharge under the "Don't Ask, Don't Tell, Don't Pursue." Heterosexuals are not subject to administrative discharge for the same statements, acts or marriages. A servicemember who has engaged in sexual acts, such as consensual oral sex, whether heterosexual or homosexual, may also be subject to criminal prosecution under the Uniform Code of Military Justice. The military rarely criminally punishes heterosexuals for consensual sexual activities; the military, however, regularly selects suspected gay servicemembers for criminal prosecution for the same activities.

Air Force accounted for 46% and the Navy 32%. The Navy was responsible for starting 26 of the inquiries without credible information, or 42% of the total. The Air Force threatened with prison eleven suspected gay servicemembers for consensual sexual acts, or 65% of the total.

Examples. Violations of "Don't Pursue" include (1) witch hunts, (2) pursuit without credible information, and (3) selective criminal prosecution.

Witch Hunts. SLDN documented 28 witch hunts in the second year of "Don't Ask, Don't Tell, Don't Pursue." In Korea, Army officials pressured a young private first class to identify other suspected lesbians in her unit. In Hawaii, Air Force criminal agents questioned the friends of an airman under investigation about their sexual orientation. In a massive witch hunt targeting women on a ship in Sardegna, Italy, at least 60 sailors came under investigation for their sexual orientation. Fishing for incriminating evidence, one Army officer asked subordinates to determine if there were any truth to the rumors that a certain servicemember was a lesbian. On several occasions, Air Force officials have attempted to interrogate parents to fish for incriminating information about their children.

Pursuit Without Credible Information. One woman was accused of being a lesbian in retaliation for reporting an attempted rape. Another woman was accused of being a lesbian after she rebuffed a man's persistent requests for a date and reported him for stalking her. In overzealous investigations, agents have seized computer files to search for "evidence" of homosexual conduct. They have seized items that indicate nothing about sexual orientation, such as posters of Melissa Etheridge and k.d. lang, condoms, and books like *Exclusion*, which, ironically, argues in favor of the gay ban, and *Conduct Unbecoming*, which, also ironically, documents the military's long history of witch hunts.

Selective Criminal Prosecution. According to a base paper, one airman was criminally convicted and sentenced to 6 months in prison for engaging in private, consensual, sexual activity with another man. Base personnel refused to let a civilian attorney retained by the airman's parents consult with the airman. In another case, a woman faces criminal charges and the threat of prison for an alleged consensual sexual relationship with another woman.

Analysis. Like "Don't Ask," "Don't Pursue" is a well-publicized mandate. Commanders cannot witch hunt or start inquiries without good cause. Some military commanders and criminal

investigators, however, continue to pursue suspected lesbian and gay servicemembers with as much fervor as before.

Witch Hunts. Witch hunts continue unabated for two reasons. One, top Pentagon officials have legitimized witch hunts by issuing memoranda that gut the original intent of the current policy. As mentioned previously, the top uniformed lawyer for the Air Force and the top lawyer for the Pentagon have issued memoranda that encourage inquiry officers to investigate not only whether a servicemember has ever said he or she is gay, but whether he or she has ever engaged in homosexual sexual activity.

The Air Force memo is very specific, stating that it is permissible to interrogate "parents and siblings," "school counselors," and "roommates and close friends," among others, to fish for information about a servicemember that can be used against him or her. The Air Force memo also unequivocally states that "if...other military members are discovered during the proper course of the investigation...appropriate action may be taken." No proper investigation under "Don't Ask, Don't Tell, Don't Pursue" would ever turn up other people: that is a witch hunt.

The second reason witch hunts continue unabated is that DOD and service officials are unwilling to take action to stop witch hunts. For example, the Pentagon did nothing when apprised by SLDN and its cooperating attorney of a witch hunt in Okinawa, Japan, in the spring of 1994 in which criminal investigators questioned twenty-one marines about their sexual orientation and that of others. As a result of the witch hunt, one marine was criminally prosecuted and confined in the brig for more than one month. One and one-half years later, on August 25, 1995, after constant pressure, DOD released a report by the Navy admitting that a witch hunt took place, but its report provides little solace for the servicemember who went to jail

and lost his career. His private life would have been kept private but for the witch hunt. The Pentagon has not taken any disciplinary action against the criminal investigators involved.

Pentagon officials were again alerted that a witch hunt was taking place in South Korea in late 1994. As the opening anecdote describes, a private first class was investigated for being lesbian after false rumors about her were started by male soldiers whom she had reported for assaulting her. Her officers criminally charged her and threatened her with prison unless she identified other suspected lesbians. She refused. When a military judge dismissed the charges because there was no evidence to substantiate them, her battalion commander, Lieutenant Colonel Treuting, then held her in South Korea beyond her transfer date to initiate discharge proceedings against her based on the same retaliatory, trumped up allegations. During this time she missed out on a promotion due to the allegations. It took ten months of intense effort by this soldier's family, SLDN and its volunteer, cooperating attorney before the Army finally dropped all charges against her and allowed her to transfer to a new command. This soldier's family incurred more than \$8,000 in non-legal expenses on behalf of their daughter.

Currently, SLDN is again asking the Pentagon to intervene to stop a witch hunt of up to sixty female sailors aboard the USS Simon Lake, ported in Sardegna, Italy. There is abundant evidence that Navy personnel asked servicemembers about the sexual orientation of others, and cast a wide net to identify other suspected lesbians on board the ship. When alerted to the witch hunt, however, neither the Office of the Secretary of Navy nor the Office of the Navy General Counsel took steps to investigate this witch hunt or discipline those who ordered and conducted it. One sailor has been forced out of the Navy as a result of the witch hunt, and another has been recommended for discharge. The fate of the other fifty-eight sailors is unclear.

The Pentagon fuels witch hunts by responding slowly to them, if at all. The lack of an exclusionary rule means that inquiry officers and criminal investigators who obtain evidence through illegal witch hunts can still use that evidence to discharge the servicemembers who are their targets. Failing to discipline those who violate the current policy signals that commanders and others can pursue suspected lesbian and gay servicemembers with impunity.

Pursuit Without Credible Information. In addition to witch hunts, some military commanders continue to pursue suspected gay troops by launching inquiries or criminal investigations without good cause. The regulations are clear that commanders should not initiate inquiries unless there is "credible information" that the servicemember has made a prohibited statement that he or she is gay, engaged in sexual acts with a person of the same gender or married or attempted to marry a person of the same gender. The regulations require commanders to be able to explain at all times "clearly and specifically" what grounds for separation they are attempting to verify. Both the Army and Air Force require that commanders write down what they believe the credible information to be prior to initiating an inquiry or investigation.

The current regulations state that commanders must evaluate the "source and surrounding circumstances" of the allegations to determine if credible information exists to start an inquiry or investigation. Credible information does not exist according to current policy when the information is based solely on opinion, rumor, or capricious claims. Credible information also does not exist according to current policy when the only evidence is that a servicemember has attended a gay bar or a gay pride parade or that a servicemember is seen reading a gay news magazine or other gay literature. The regulatory list does not exhaust all the information that is considered not credible.

Most commanders, however, seem to have an extraordinary lack of skepticism when it comes to allegations against suspected gay troops. Rather than review the "source and surrounding circumstances" of the allegations, as required by the regulations, most commanders tend to zealously pursue any allegations made about suspected gay servicemembers. The uncritical pursuit of servicemembers under the gay policy opens the door to retaliation.

Women are particularly vulnerable to false claims as a means of sexual harassment. For example, when a female servicemember rebuffs the sexual advances of men, reprimands a male subordinate for inferior performance, or simply competes against men for a job opening, she often finds herself being accused of "lesbian conduct" in retaliation. This is a form of sexual harassment and should be treated as such. Given the military's troubled history of addressing sexual harassment, it is not surprising that women have borne the brunt of the "Don't Ask, Don't Tell, Don't Pursue" policy, being discharged under it at rates far greater than men.

Men are also subject to false claims of homosexual acts. In one case, for example, a married, male enlisted servicemember with more than twelve years in service, was falsely accused of soliciting another servicemember for sex in front of two hundred servicemembers. No one ever corroborated the allegations. Even so, the commanding officer sent the case to a court-martial. The accused faced the possibility of more than five years in prison simply because someone, out of the blue, decided to falsely accuse him under the "Don't Ask, Don't Tell, Don't Pursue" policy. The servicemember was found not guilty at trial, but his case should have never reached that stage.

It is clear that commanders rarely, if ever, take into account the context of the allegations. Commanders should consider whether the accuser has a history of lying or fraud, is a jilted

heterosexual lover, is attempting to extort money, or is a former friend when a friendship has apparently turned sour. The commander should consider whether the accuser's allegations are coherent and consistent and whether the suspected gay soldier has a plausible explanation.

Without a rational review of allegations made, the gay policy simply becomes a weapon to punish anyone, straight or gay.

Commanders' astounding lack of skepticism regarding allegations about suspected gay troops presents serious problems. First, it means that allegations that should be quickly dismissed instead launch a lengthy and costly criminal investigation or command inquiry. Second, the false allegation provides commanders the opportunity to fish for additional evidence which may reveal that a servicemember is indeed gay, a fact that would have remained otherwise unknown, but for the initial false allegations. Third, given the laxity of the administrative discharge hearing process, circumstantial evidence, false allegations, hearsay and rumor are admissible and often sufficient to permit discharge of the servicemember. And lastly, even if the servicemember is lucky enough to survive the noncredible allegations, the inquiry, investigation and hearing all become part of the servicemember's record, and will likely destroy the chances for the servicemember to advance in the military.

There are two primary reasons why commanders are launching inquiries and criminal investigations without credible information. Despite an attempt in the current policy to define credible information, the standard is still vague and subjective. Thus, many commanders view all allegations about suspected gay troops as credible when they should not.

Second, top Pentagon officials have signaled that commanders have wide discretion to ignore the credible information standard. In June 1994, for example, the Navy's appellate

litigation group issued a memorandum entitled “Homosexual Administrative Discharge Board/Show Cause Hearing.” The memorandum suggested that gay associational activities, such as belonging to a gay men’s chorus, are “inconsistent with good military character,” even though the current policy expressly permits servicemembers to attend gay pride parades, gay bars and engage in other associational activities. The memo further states that the Navy would provide additional legal support for the Navy prosecution in any cases where a servicemember accused under the new policy seeks support from outside organizations, civilian lawyers, the press or members of Congress. The Navy’s attempt to chill freedom of association, access to the free press, the right to counsel and the right to petition members of Congress clearly signals strong antipathy for those even suspected of being gay.

The Navy’s antipathy has surfaced in two prominent cases which have since moved into federal court. At the administrative discharge hearing for Lieutenant Paul Thomasson, who is now challenging the current policy in federal court, the Navy prosecutor presented as evidence of homosexual conduct Lieutenant Thomasson’s involvement in a gay men’s chorus in Washington, D.C. And at the administrative discharge hearing for Lieutenant Tracy Thorne, another federal court litigant, the Navy presented as evidence of homosexual conduct Lieutenant Thorne’s listing of a man as an insurance beneficiary and for associating with known homosexuals.

It does not surprise SLDN that the Navy is pursuing servicemembers without credible information more than the other services. Not only has the vague and ambiguous credible information standard made it difficult to apply it in any consistent or forthright manner, but the 1994 Navy memo, like the Air Force and DOD memoranda discussed previously, clearly signals that all is fair in its war on suspected homosexuals.

Selective Criminal Prosecution. The Uniform Code of Military Justice (UCMJ) criminalizes sodomy, defined as oral or anal sex, and “indecent acts” such as masturbation, for both heterosexuals and homosexuals. The penalty for each act of consensual sodomy is up to fifteen years in prison; the penalty for each count of indecent acts is up to five years in prison. The UCMJ also criminalizes heterosexual acts such as adultery. There is no state that actually imprisons people for violations of similar state statutes. The military almost never imprisons heterosexuals for consensual, adult acts in violation of the UCMJ, though a few heterosexual servicemembers are administratively discharged for such acts.

Under “Don’t Ask, Don’t Tell, Don’t Pursue,” the “preferred method” of handling allegations of consensual, adult homosexual activity is in the administrative system. The criminal system is not to be resorted to casually and, within it, heterosexuals and homosexuals must be treated the same. Contrary to the regulations, however, SLDN has documented a continued effort, especially in the Air Force, to prosecute and imprison servicemembers accused of same-gender, but not opposite gender, consensual adult activities.

Selective criminal prosecution occurs primarily for three reasons. One, commanders have deliberately disregarded the regulations that instruct them to use the administrative system to address allegations of private, consensual adult activities. Two, commanders often rush to judgment when gay sexual conduct is alleged. And three, top officials refuse to intervene to prevent criminal prosecutions.

Some commanders have clearly used the criminal system to punish suspected gay troops. In at least two recent cases, the commanding officers who preferred criminal charges against the servicemember were expressly made aware that the preferred method of handling such allegations

was the administrative system. They deliberately ignored the regulatory guidance either because they did not understand the intent of the new regulations or because they were motivated by anti-gay animus.

Closely related to this dynamic is the second reason for increased prosecution of gay conduct: the rush to judgment. Commanders have demonstrated a decided lack of critical evaluation of gay conduct allegations, being all too willing to believe whatever is alleged in the line of gay conduct, regardless of the credibility of the accuser.

Third, top leaders have refused to intervene when presented with evidence of improper criminal prosecution for allegations of adult, consensual gay conduct. This failure fuels the criminal prosecution of suspected gay and lesbian servicemembers. Commanders in the field get the message that their efforts to single out suspected gay and lesbian servicemembers for criminal prosecution, even though directly opposed to stated DOD policy, will be neither overturned nor punished and is, in fact, condoned at the highest levels of the Pentagon.

Recommendations. The United States military has a long and sordid history of pursuing and purging suspected gay servicemembers. But one of the clearest promises that emerged from the Clinton Administration, Congress and the Pentagon regarding the current gay policy was that the days of relentless pursuit would be over. To make “Don’t Pursue” meaningful, the military will, at a minimum, have to take the following steps.

If any military member initiates or condones a witch hunt, he or she should be severely reprimanded and discharged. The “Don’t Ask, Don’t Tell, Don’t Pursue” policy means nothing without accountability. The victims of witch hunts should have all inquiries, investigations and criminal or administrative proceedings against them obviated, and all information related to the

witch hunt expunged from their records. Alternatively, servicemembers should be allowed to exclude all information obtained through an illegal witch hunt from being used at an administrative discharge board. The 1995 Advisory Board on DOD Investigative Capability report strongly suggested that DOD consider adoption of an exclusionary rule.

DOD should rescind the June 1994 Navy memorandum, November 1994 Air Force memorandum, and August 1995 DOD memorandum that encourage witch hunts that fish for incriminating information about a servicemember and pursuit of servicemembers without credible information. Troops do what they are told. Instructions to violate regulations will lead to violations.

DOD should also issue additional guidance as to what does or what does not constitute credible information. Lesbian-baiting should be considered per se not credible (i.e., instances where women are accused of being lesbian in retaliation for reporting sexual harassment, or for other retaliatory purposes). Furthermore, all allegations that are retaliatory should be considered per se not credible. Accusations made by those with a history of lying and fraud should be considered per se not credible. Anonymous accusations, and those made by parties not known to a commander, should also be per se not credible.

DOD should instruct the Navy to adopt the Army and Air Force practice of stating in writing the specific credible information on which an inquiry is based and DOD should ensure full compliance by all services. Further, DOD should require commanders to divulge the credible information in writing to servicemembers before an inquiry is initiated against them.

Lastly, DOD should make clear that no servicemember should be criminally charged, convicted or incarcerated for allegations of consensual, adult, sexual activities, absent aggravating

circumstances. All such charges should be dropped. All convictions for such charges should be overturned. Further, DOD should instruct commanders and criminal investigators to rationally and critically review accusations of sexual acts prior to pressing charges to weed out false allegations.

DON'T HARASS

"What is Don't Harass?" The "Don't Harass" portion of the new regulations makes explicit that "the Armed Forces do not tolerate harassment or violence against any servicemember, for any reason." Violations of "Don't Harass" include physical abuse and threats of physical harm including death threats, verbal harassment, gay baiting, and hostile command climates. Gay baiting occurs when a person confronts someone with an assertion "Are you gay?" or accuses someone of being gay for retaliatory reasons because they know that a mere allegation that someone is gay is sufficient to cause harm. A hostile command climate is one where leaders tolerate anti-gay slurs, and other forms of harassment, making servicemembers feel that they cannot trust the command to take appropriate steps to remedy the problem of harassment.

Findings. Harassment has skyrocketed, not decreased, contrary to the clear intent of "Don't Ask, Don't Tell, Don't Pursue." The Navy accounted for 46% of the "Don't Harass" violations. The biggest problems in terms of the number of reported incidents include verbal harassment and hostile command climates. The severity of physical abuse and death threats, however, makes even one such incident too many. Three and a half years ago, Seaman Allen Schindler was brutally murdered by shipmates because he was gay. He had told his commanding officer that he thought his life was in danger. The command took no action, and within days Allen had been murdered. Even today, DOD has neither implemented a means for servicemembers to report death threats or other forms of harassment, nor issued guidance to commanders on how to handle such reports to avoid a repeat of the Schindler tragedy.

An ironic exception to the prevalence of anti-gay harassment in the ranks is found in the more than one dozen units where gay men and lesbians are and have been serving openly for one to fourteen

years. In those units, harassment has become almost nonexistent. (Exhibit D) These servicemembers have been serving openly due to pending discharge or federal court proceedings. Many other servicemembers are serving openly within their units simply because their commanders have chosen not to act against them.

Examples. Violations of "Don't Harass" include (1) physical abuse and threats, including death threats based on a servicemember's real or perceived sexual orientation; (2) targeted verbal harassment; (3) gay-baiting and (4) hostile command climates.

Physical Harm. One servicemember found a note in his room that said "Die Fag!" His commander said that no investigation would be launched to determine the source of the threat. A sailor in the South reports being punched more than 100 times and that his command took no action when the attacks were reported. Another soldier reports that a plastic bag was placed over his head, he was beaten, and told "We don't need queers around here." A former civilian roommate threatened to accuse as lesbian a female officer unless she paid her money, which the officer refused to do. The civilian roommate then threatened to kill her, which placed the officer in the quandary of reporting the threats to her commander and risking an investigation into her private life or keeping quiet and risking death. One sailor fled his unit after his command refused to investigate threats against him, such as "We're going to get you." The sailor is now being criminally prosecuted for unauthorized absence.

Verbal Harassment. An airman returned to his room to find anti-gay statements written on his clothing. In another case, rather than squelching rumors about a subordinate's sexual orientation, an officer fueled the rumors by asking others to corroborate them. Having suffered physical abuse, a sailor also endured comments such as "What are you going to do about it, fag?," "Fuck you, fag;" and "I don't like sissies."

Gay Baiting. A senior male officer spread rumors about a woman officer, accusing her of having a lesbian affair after she earned a top job in a prestigious field. The woman filed a complaint with the inspector general, who responded by investigating her professionalism, not the male officer, and by soliciting coworkers to provide further rumors against her. In another case, coworkers started rumors that a male sailor was gay and verbally harassed him because he would not join the group in outings to local heterosexual strip clubs.

Hostile Command Climate. The majority of servicemembers who contacted SLDN last year reported hostile command climates where anti-gay slurs are common and

are tolerated by their commands. Some commanders even refuse to take action against specific death threats and verbal harassment, and respond to complaints of sexual harassment by investigating the victim rather than the perpetrator.

Analysis. Like "Don't Ask," the mandate against harassment is unambiguous. It forbids harassment of any kind against any servicemember. This mandate is not unfamiliar to commanders. In the wake of the Tailhook scandal, it has become a standard order. Nevertheless, SLDN's cases show that harassment and death threats against suspected gay servicemembers are greater than ever.

There are three main reasons for the increased harassment: (1) a lack of leadership, (2) continued witch hunts, and (3) a lack of recourse for victims of anti-gay harassment.

The primary reason for the high incidence of harassment is lack of leadership. Two years into this policy, Pentagon leaders have yet to issue any guidance to the field regarding this provision or otherwise make clear to subordinates that harassment will not be tolerated. Commanders who ignore complaints of death threats or harassment send a terrible message that harassment is condoned. Against the backdrop of the Joint Chiefs' vociferous opposition to acknowledged gay servicemembers during the national debate on lifting the ban, this omission has allowed a negative climate to grow and fester.

The result of such hostile climates is to force increasing numbers of gay and lesbian servicemembers to leave the military, either by choosing not to reenlist or by coming out as a last resort to escape threats to their safety and other harassment. Leaders are, in effect, condoning a system wherein harassment has equaled witch hunts as a means of ferreting out gay and lesbian servicemembers and forcing them from the service.

In stark contrast, there has not been a problem with harassment in those units with openly gay servicemembers. In fact, all documentation shows that these individuals enjoy the wide support of their colleagues for at least two reasons. One, harassment ends when conditions allow gay and lesbian servicemembers to be fully forthright with their colleagues about their sexual orientation. Two, harassment occurs because of a unit's leadership, not despite it.

The second reason that harassment has escalated under the current policy is that witch hunts have continued unabated. SLDN's data show a high correlation between harassment and "Don't Pursue" violations. In units where commanders attempt to ferret out gay and lesbian troops, servicemembers report that they feel great pressure to prove that they are not gay. One way to do so is to make derogatory comments about gays in the company of co-workers and to directly harass other servicemembers who are perceived as gay. Servicemembers report that, if they do not participate in such activities, they are quickly labeled as gay or lesbian and harassed.

Male servicemembers can also "prove" they are not gay, however, by making sexual advances toward women or by joining in sexual harassment of women. Women do not appear to have adopted similar coping tactics. Instead, women report great pressure to comply with men's sexual demands as a means of warding off rumors and speculation about their sexual orientation. In this vicious circle, women who refuse the men's sexual advances or who report sexual harassment then become suspect as lesbians and suffer the consequences of lesbian baiting, including retaliatory accusations and investigation. The dynamic of lesbian baiting explains, in large part, why women continue to be disproportionately targeted and investigated under the "Don't Ask, Don't Tell, Don't Pursue" policy.

These findings also point to at least one reason why efforts to stem sexual harassment of women have proved inadequate, since they do not address the double impact of anti-gay harassment on

women. These efforts have not addressed the role of anti-gay harassment in encouraging unwanted sexual advances against women, nor have they considered the chilling effect of lesbian baiting in deterring women from reporting sexual harassment.

Finally, harassment continues because its victims have no effective recourse. First, military leaders have established no means or guidelines whereby servicemembers may report harassment, meaning those who nonetheless have attempted to report harassment face significant obstacles. The major obstacle is the military's current practice of discharging gay and lesbian servicemembers who report crimes or harassment if information about their sexual orientation is discovered in the process of investigating their report. Thus, it is impossible for gay and lesbian servicemembers to report hate crimes, for example, because such reports require the victim to reveal the basis for the crime, i.e., their sexual orientation.

Information about a victim's sexual orientation can arise in the most well-intentioned of circumstances, such as when a concerned supervisor asks the victim if they know why they were targeted for death threats or harassment. Unknown to most servicemembers, they will face discharge if they answer, "because I am gay." Servicemembers cannot even seek recourse from civilian authorities if their lives or safety are in danger, since civilian police departments routinely transfer records involving military members to the military police at the servicemember's base.

The unfortunate tendency of many commanders to investigate the victims of anti-gay harassment, instead of the perpetrators, further heightens servicemembers' risk of discovery if they report harassment. Even where investigations start out properly to determine the source of threats or harassment, they too often end up focusing instead on the victim's private life. This occurs for a

variety of reasons, including bias, misguided curiosity on the part of the investigating officer or, like lesbian baiting, as the result of retaliatory accusations by the perpetrators.

In addition, servicemembers who report harassment can face greater risk to their lives. The frequency with which commanders ignore servicemembers' reports of threats and harassment is of particular concern. The mere lodging of a report of anti-gay harassment is enough to cause speculation and rumors about a servicemember's sexual orientation. Commanders who do nothing in response to such reports send a message to the entire unit, not only the perpetrators, that anti-gay harassment is condoned. The result is to make the victim a target for all to see, thus further jeopardizing the servicemember's safety.

Even where commands take threats and harassment seriously, and appropriately limit any investigation to the source, servicemembers' safety can be jeopardized. Without knowing better, investigators put the servicemember at risk of further harassment by simply revealing the nature of the threats being investigated and permitting additional speculation about the servicemember to surface.

Because servicemembers face the likelihood of losing their careers and making harassment worse by reporting it, most incidents of death threats and harassment go unreported.

Recommendations. There are three basic, critical steps that military and civilian leaders must take now to stem the tide of harassment and to prevent physical harm and deaths. Even after these three steps are in place, though, DOD and the services will need to take further actions to address this problem.

First, leaders must send instructions to the field making it clear that harassment will not be tolerated and that commanders will be held accountable for their command climates in this regard. By taking this step, DOD will simply be doing what is usually done to implement any new policy.

Second, DOD and the services should issue clear guidelines to servicemembers and commanders regarding how to handle reports of harassment. At a minimum, commanders should be instructed to (1) take threats and harassment seriously, (2) limit the scope of any investigation to the source of the threats and not the victim's private life, and (3) keep private the nature of the threats or harassment so as not to create rumors or speculation. SLDN's experience with concerned commands has shown that sufficient investigations can be conducted without revealing this or other sensitive information.

Finally, commanders should be informed that gay accusations that surface shortly after a man or woman reports harassment are automatically suspect and do not constitute credible information to investigate the victim.

CONCLUSION

Two years into the current policy on gays in the military, it is clear that military and civilian leaders have settled for business as usual. Rather than putting an end to asking, witch hunts or harassment as originally promised, leaders have sent a strong message that they will turn a blind eye to such violations. Gay, lesbian, bisexual and straight servicemembers are caught in the trap. DOD has two choices: it must either be fully forthcoming and honest to the American public that it has no intention of stopping asking, witch hunts or harassment, or it must act in good faith to enforce the original spirit and intent of the current policy. Implementing the recommendations outlined in this report would be a good first step in bringing DOD into compliance with current law and regulations.

**CONDUCT UNBECOMING:
THIRD ANNUAL REPORT ON “DON’T ASK, DON’T TELL, DON’T PURSUE”**

FEBRUARY 28, 1996 - FEBRUARY 26, 1997

EXECUTIVE SUMMARY

“Don’t Ask, Don’t Tell, Don’t Pursue” is evolving into a Machiavellian system where the ends justify the means. In 1996, the armed forces repeatedly excused violations of current law including witch hunts, seizure of personal diaries, and threatening servicemembers with prison unless they accused others as gay -- all in an effort to target and ferret out gay men and women who serve our country. The result is that gay discharges have soared to a five-year high at a cost exceeding \$25 million in 1996.¹ (Exhibit 1)

The findings of the third annual report by Servicemembers Legal Defense Network (SLDN) on “Don’t Ask, Don’t Tell, Don’t Pursue” include:

1. DOD discharged 850 people under “Don’t Ask, Don’t Tell, Don’t Pursue” in fiscal year 1996 -- a five-year high, and the highest rate of discharge since 1987.² (Exhibit 2)
2. SLDN documented 443 specific violations where suspected gay servicemembers were asked, pursued and harassed.³ (Exhibit 3)
3. Women were disproportionately targeted, accounting for 29% of gay discharges, despite making up only 13% of the active force. In the Army, women accounted for 41% of gay discharges, three times their presence in the service. Women are often accused as gay after rebuffing men’s sexual advances or reporting sexual abuse, regardless of their actual orientation. (Exhibit 4)
4. DOD continues to criminally prosecute servicemembers for allegations of gay, but not straight, consensual relationships, contrary to regulations requiring even-handed treatment in the criminal system.
5. The physical torture of suspected gay servicemembers seems to have ended. Tactics under prior policies included forced “neurological testing,” like that endured by former Lieutenant Jay Hatheway, and locking military members in broom closets with no personal breaks until they “confessed” to being gay.⁴

RECOMMENDATIONS

SLDN concludes that many military members continue to ask, pursue and harass servicemembers in direct violation of "Don't Ask, Don't Tell, Don't Pursue." The violations result from a lack of leadership, training and recourse to stop illegal investigations. Some commanders, criminal investigators and inquiry officers blatantly disregard the clear limits on gay investigations. Others simply do not know any better, as the services have failed to implement adequate, ongoing training in the field. Lastly, those accused under "Don't Ask, Don't Tell, Don't Pursue" have no recourse to stop improper investigations before it is too late. SLDN recommends that DOD take the following steps to stop the continuing abuses of the law:

1. Train all military personnel about the letter and intent of "Don't Ask, Don't Tell, Don't Pursue," emphasizing the limits placed on investigations into gay accusations. Most servicemembers report that they have received no training or only cursory, one-time training three years ago, when the law was implemented.
2. Discipline commanders who disobey the limits on investigations and who tolerate harassment. The law and regulations will be respected when commanders know that they will be held accountable for their actions.
3. Allow women to report sexual abuse without fear that they will be accused and discharged as lesbians in retaliation. Officials should adopt, as a first step, the 1989 recommendation of the Defense Advisory Committee on Women in the Services⁵ to train commanders on the potential misuse of gay accusations.
4. Provide servicemembers with a way to report anti-gay harassment, including death threats and hate crimes, without fear of retribution and discharge.
5. Exclude evidence that has been wrongfully obtained from being used at an administrative discharge board, as suggested by a 1995 report by the Advisory Board on DOD Investigative Capability.⁶
6. Stop selective criminal prosecution of servicemembers for allegations of adult, consensual gay relationships in circumstances where heterosexuals would not be prosecuted, as required by the regulations.
7. Revise and replace obsolete recruiting forms written in January 1989 (DD Form 1966/1) with ones that do not ask recruits about their sexual orientation or

conduct.

8. Require commanders to reveal in writing to the servicemember the specific reason an inquiry or investigation has been initiated against the servicemember so that (s)he knows what the allegations are and can provide commanders an appropriate response to expeditiously resolve and end unwarranted investigations.
9. Require commanders to not intrude into private conversations between gay servicemembers and their families, doctors and other health care professionals and not use such statements as the basis for retribution, investigation and discharge.
10. Make clear to commands that, under current law, inquiries and investigations can only be started with credible information. Not all information is credible, such as rumors or retaliatory accusations. Commanders cannot start inquiries on the theory that they will discover credible information if they investigate.
11. Discharge expeditiously individuals who come out as gay to commanders rather than launch costly, wide-ranging investigations to establish bases for criminal charges or reduced benefits against the servicemember.
12. Rescind the Department of Defense, Air Force and Navy memoranda that provide confusing and contradictory guidance to military personnel regarding the original letter and intent of the law not to pursue suspected gay servicemembers.

DOD should adopt these recommendations as a first step to bring itself into compliance with the current law and regulations. These recommendations, if fully implemented, would marginally improve the safety of servicemembers' daily lives. They would not eliminate or alter "Don't Ask, Don't Tell, Don't Pursue," which requires administrative separation of servicemembers who say that they are gay, engage in affectional or sexual conduct with someone of the same gender, or attempt to marry a person of the same gender. These recommendations would in no way cure the constitutional defects of the law, which punishes gay servicemembers for saying and doing the same things permitted to their straight counterparts.

OVERVIEW

Four years ago, President Clinton assumed office and announced that he would issue an Executive Order to prohibit the mandatory discharge of gay personnel honorably serving their country. Congress opposed President Clinton's efforts and codified into law the same rules that had been in effect since 1981 -- that servicemembers would be discharged from military service if they stated that they were gay, engaged in handholding, hugging or other affectional or sexual conduct with a person of the same gender, or attempted to marry someone of the same gender.

President Clinton, Congress and the Pentagon, however, agreed to end the affirmative efforts to ferret out suspected gay members. They agreed to stop asking servicemembers about their sexual orientation, end witch hunts and prevent anti-gay harassment. They agreed to implement the law with due regard for the privacy of servicemembers. They agreed to treat servicemembers in an even-handed manner in the criminal system, by stopping the criminal investigation and prosecution of servicemembers for allegations of gay consensual relationships when the services would not normally proceed in the same fashion regarding allegations of heterosexual conduct. The law became known as "Don't Ask, Don't Tell, Don't Pursue" to signify the new limits on gay investigations. While the law did not mark an end to treating lesbian, gay and bisexual servicemembers differently than their heterosexual counterparts for saying and doing the same things, it did mark what was to be a more humane policy of co-existence. The Department of Defense promulgated regulations implementing the current law on February 28, 1994.

For the past three years, the reality of "Don't Ask, Don't Tell, Don't Pursue" has been anything but humane as many commanders have continued to ask, pursue and harass suspected

gay servicemembers with impunity. One result is that, according to the Department of Defense's own figures, gay discharges have soared to 850 in fiscal year 1996, a five-year high, and up 42% since 1994. The rate of gay discharges is at its highest level since 1987.⁷

This report details the violations of current law documented by Servicemembers Legal Defense Network (SLDN) from February 28, 1996 to February 26, 1997. Located in Washington, D.C., SLDN is the sole national legal aid and watchdog organization for those targeted under "Don't Ask, Don't Tell, Don't Pursue," and the only means currently available to document abuses. DOD has instituted no method of identifying, documenting or correcting command violations.

In the past year, SLDN has documented 443 violations of current law and regulations in 256 cases. SLDN has detected the same types of basic violations in each of the past three years, raising serious concerns about the good faith of the Department of Defense in ensuring command compliance with "Don't Ask, Don't Tell, Don't Pursue." Examples of the violations SLDN has detected are given throughout this report and the accompanying exhibits. SLDN records only those violations in cases handled and verified by SLDN and its network of more than 250 cooperating attorneys from private firms nationwide. The servicemembers and attorneys who have assisted SLDN on the cases reported here are available to speak upon request, except in cases where servicemembers could suffer retaliation from speaking publicly. Attorney/client confidentiality and protecting servicemembers from potential reprisal requires SLDN to omit the names of some servicemembers in this report.

DON'T ASK

The "Don't Ask" regulations state that servicemembers will not be asked about or required to reveal their sexual orientation.⁸ As recently as January 27, 1997, Secretary of Defense William Cohen stated on the *Larry King Live* show that asking "is a clear violation of law."⁹ And yet, SLDN documented 89 "Don't Ask" violations in the past year where servicemembers were asked about their sexual orientation. (Exhibit 5)

SLDN has found, for example, that the armed forces continue to use a January 1989 recruiting form which asks recruits:¹⁰ "(a) Are you a homosexual or a bisexual? and (b) Do you intend to engage in homosexual acts?" While recruiters are supposed to line through this section, some do not. One recruiter even circled the forbidden questions as ones that had to be answered. (Exhibit 6) The complaints SLDN has received to date on this issue focus primarily on the East Coast Coast Guard recruiting stations. SLDN noted similar complaints at last year's press conference regarding the Coast Guard and no steps appear to have been taken by either the Department of Transportation¹¹ or the Department of Defense to remedy the situation. In general, we are concerned that the Department of Defense, which is responsible for promulgating the recruiting form, has yet to take the very simple step of redesigning the form to ensure that no unintentional or intentional questioning of recruits occurs in any service.

SLDN also remains gravely concerned that some military commanders continue to ask servicemembers about their sexual orientation despite clear and unambiguous regulations prohibiting such questions. In Spring 1996, Lieutenant Colonel Abraham Turner at the United States Military Academy at West Point confronted Cadet Nicole Galvan about her sexual orientation in front of four cadet eyewitnesses.¹² She refused to answer his questions. At the

suggestion of a faculty member, Galvan submitted a memorandum complaining about Lieutenant Colonel Turner's harassing actions. Within weeks, Lieutenant Colonel Turner ordered the seizure of Galvan's personal diary under the ruse of investigating a reported fight between Galvan and another cadet. Grief counselors at West Point had suggested that Galvan keep the diary to help her deal with the death of her mother. Facing investigation into her sexual orientation and private life based on information contained in her diary and disillusioned by Turner's actions, Galvan resigned from West Point.

In a case this past summer, Captain Howell of the *USCGS Coutwell* reportedly asked SS3 Kelli Sprague, "Have you ever told anyone on the ship that you are gay? Have you ever been confused about the way you are? Have you ever acted on the confusion?" Captain Howell reportedly threatened SS3 Sprague with criminal prosecution for making a false official statement if she did not answer his questions and answer them truthfully. Under great pressure, she admitted to being a lesbian. In a contemporaneous memorandum for record, she stated, "When your Commanding Officer asks you a question and informs you that lying is against the UCMJ, what choice do you have, but to tell the truth." (Exhibit 7) SS3 Sprague has been discharged based on her response to Captain Howell's questioning. She plans to file a complaint with the Inspector General.

In a disturbing case discussed more fully in the "Don't Pursue" section of this report, Airman Sean Fucci was asked by his supervisor if he were gay after he reported receiving a death threat – a note placed in his room that read "DIE FAG!" (Exhibit 8) Questioning servicemembers about their sexual orientation when they report death threats could force some servicemembers to have to choose between their lives and their careers, because any acknowledgment that one is

indeed gay leads to mandatory discharge processing.

SLDN is also concerned about a growing trend involving coworkers who intimidate servicemembers into revealing their sexual orientation and then turn them over to the command for discharge. At Lackland Air Force Base in San Antonio, for example, an airman was hounded by unit members who asked him at least ten times if he were gay during the course of a week. Not knowing how to stop the harassment, he finally answered truthfully that he is gay. The airman's command at Lackland subsequently discharged him based on his response to his coworkers.

"Don't Ask" violations increased 16% over last year's figures reported by SLDN. The Coast Guard, which had no "Don't Ask" violations in 1995, contributed to the increase with six violations this year. SLDN documented comparable levels of "Don't Ask" violations for the other services for both 1995 and 1996. (See Exhibit 5)

DON'T TELL

"Don't Tell" requires gay, though not heterosexual, servicemembers to keep their sexual orientation a "personal and private" matter. "Don't Tell," however, does not prohibit all statements about sexual orientation. Indeed, the current regulations specifically permit statements to lawyers, chaplains, and security clearance personnel.

During the national debate in 1993, some politicians conjured up images of servicemembers standing on the mess hall tables, shouting out their sexual orientation. The reality is that gay and lesbian servicemembers are far more concerned about maintaining their privacy than broadcasting their sexual orientation. Decision-makers called "Don't Ask, Don't Tell, Don't

Pursue” a compromise and promised that servicemembers would be left alone if they didn’t “flaunt” their orientation by engaging in such public declarations. As the law has come to be implemented, however, there is no privacy for gay servicemembers as promised in 1993.

In their zealous pursuit of suspected gay military members Pentagon officials have expanded "Don't Tell" in ways that most Americans are not aware, to include private statements to family members, close friends, doctors and psychologists. Servicemembers must keep their sexual orientation an absolute secret, hidden even from their families, or risk investigation and discharge. Unlike “Don’t Ask” and “Don’t Pursue,” which limit command activities, this misguided interpretation of “Don’t Tell” is being enforced with vigor against servicemembers. This is contrary to common sense, decency and President Clinton’s charge that the Pentagon “carry out this policy with fairness, with balance and with due regard for the privacy of individuals.”¹³

The services, for example, have reportedly instituted the disturbing practice of requiring health care providers in the military and those contracted to the military to turn in gay servicemembers who seek their help in private counseling sessions. An airman who contacted SLDN for assistance this year received a letter of notification informing him that he was being considered for discharge solely because “...the evidence suggests you made statements to a civilian clinical psychologist that you had engaged in homosexual acts, had enjoyed a homosexual relationship, and had a ‘basic’ homosexual attraction.” (Exhibit 9) The airman was ultimately retained because he had never actually made such statements to his psychologist, not because he could invoke any sort of confidentiality regarding his conversations with the psychologist and not because the regulations recognize that certain statements are supposed to be private and off-limits.

In another case, an airman stationed in California sought counseling at the mental health clinic on base due to considerable stress he was facing from verbal harassment and a hostile command climate, which tolerated anti-gay slurs and gay-baiting comments directed against him. The airman was unable to respond in a way that would diffuse the rumors about his sexual orientation or cease the intimidation he faced, so he sought advice on how to deal with the situation. The psychologist reportedly did not tell the airman that he would not protect his confidences, and indeed, turned the airman in to the command after he revealed that he is gay. In addition, the psychologist reportedly asked the airman to reveal information concerning whether he had engaged in any sexual conduct, without reading him his rights or advising him of the potentially serious consequences that could befall him, including possible criminal charges under the Uniform Code of Military Justice. The airman has been discharged as a result of this counseling session.

One positive note under “Don’t Tell” is the apparent decreased use of parents as witnesses against their children. Last year, SLDN reported on an Air Force memorandum by Colonel Richard A. Peterson, a top Air Force lawyer, that instructed inquiry officers to interrogate parents about the sexual orientation and private lives of their children to obtain information against the servicemembers for the purpose of discharge or other punishment. (Exhibit 10) The Air Force has issued a modified memorandum stating that the questioning of parents is now optional rather than mandatory. (Exhibit 11) While SLDN is encouraged that its cases reflect a decrease in incidents where military officials have interfered with private family conversations, we remain concerned that, without further clarification, some military officials will continue to police family relationships.

SLDN documented 31 “Don’t Tell” violations in the past year, up 72% from the previous year. The Navy accounted for the sharp rise in overall violations this year. Navy “Don’t Tell” violations jumped from 4 in 1995 to 17 in 1996, a 325% increase. Mental health care providers, who reportedly have been ordered to turn in gay servicemembers who seek their help, are partially responsible for this sharp increase. (Exhibit 12)

DON’T PURSUE

In the words of General Colin Powell, “Don’t Pursue” means that “We won’t witch hunt. We won’t chase. We will not seek to learn orientation.”¹⁴ The current regulations and guidelines echo General Powell’s words. Witch hunts are prohibited: commanders cannot expand investigations beyond the instant allegations¹⁵ by (1) asking servicemembers to identify suspected gays and lesbians or (2) fishing for information about a servicemember to see what they can turn up. Commanders must have “credible information”¹⁶ of a statement, act or marriage before launching an inquiry or investigation. Not all information is deemed credible, including rumors, speculation and reports from unreliable individuals.¹⁷ Lastly, commanders are not to use the criminal system against suspected gay servicemembers for consensual, adult sexual activities when they would not investigate or prefer criminal charges against heterosexuals for the same activities.¹⁸ These clear limits on investigations and criminal prosecutions were intended to prohibit the far-ranging, punitive and heavy-handed investigations that have characterized prior policies. These limits have been roundly ignored.

Last year, for example, we reported the case of Seaman Amy Barnes, one of up to sixty women reportedly targeted in a witch hunt onboard the *USS Simon Lake* in Sardinia, Italy. Since

our report last year, there have been several disturbing developments that the Navy and Department of Defense have not addressed. First, two servicemembers filed sworn affidavits in federal court alleging that the command's investigators threatened them with prison unless they confessed to being lesbian or accused Seaman Amy Barnes as lesbian. In an affidavit dated March 26, 1996, Heather Hilbun states under oath that she was told by an investigator, TM1 Sleeman, "If you do not tell the truth, you will go to jail for 10-15 years." He then proceeded to interrogate her about her own sexual orientation and that "of at least six other women by name." (Exhibit 13)

Another sailor who remains on active duty also filed a sworn affidavit dated April 27, 1996 stating, "Command Investigators threatened and intimidated me into giving involuntary statements by telling me I would be violating Article 78 of the Uniform Code of Military Justice [Accessory After the Fact] and would go to jail if I did not answer their questions and cooperate.... Being forced into giving statements which had the potential to be used against RMSN Barnes, who is my friend, was extremely upsetting." (Exhibit 14) Threatening servicemembers with prison unless they accuse others or confess as gay to being gay themselves is patently offensive and in direct conflict with the spirit and letter of the law.

The second noteworthy development in the Barnes case is that the Navy, without ever conceding that a witch hunt transpired onboard the *USS Simon Lake*, argued before a district court that a servicemember has no right to challenge a witch hunt or other violations of "Don't Pursue." The government argued that "regardless of whether the record contains evidence showing the Navy's reason for commencement of the investigation, or the manner in which the investigation was conducted, plaintiff has no legal basis upon which to challenge those events

here.”¹⁹ The government further argued that the “Don’t Ask, Don’t Tell, Don’t Pursue” guidelines “create no enforceable rights”²⁰ for servicemembers targeted in a witch hunt or by other improper command actions. The government has essentially argued that the services can do whatever they want to hunt down, discharge or imprison suspected gay servicemembers. The ends justify the means.

The same remarkable disregard for servicemembers’ rights of due process is reflected in the Air Force’s actions at Hickam Air Force Base in Honolulu, Hawaii. On January 25, 1996, Air Force officials entered into a pre-trial agreement with Airman Bryan Harris. (Exhibit 15) Airman Harris was facing life in prison for an alleged rape of another man and other charges. Air Force prosecutors agreed to reduce his sentence to twenty months on the condition that he turn over the names of all military men with whom he had allegedly engaged in consensual sex.²¹ Airman Harris served only eleven months of his sentence. To our knowledge, the Air Force has never entered a similar pre-trial agreement with a man charged with raping a woman for the sole purpose of discharging or criminally prosecuting his consensual female partners.

According to the Report of Investigation, Airman Harris accused seventeen men, five of whom were in the Air Force. (Exhibit 16) The Air Force has discharged the four enlisted men accused. The fifth man, an officer, faces a general court-martial on March 5, 1997 and up to thirty years in prison based on the allegations of consensual sex made as part of the pre-trial agreement.

On January 10, 1997, the Air Force Inspector General concluded that the pre-trial agreement in which the Air Force effectively purchased the names of seventeen men did not constitute a witch hunt.²² (Exhibit 17) The Air Force Inspector General report also concluded

that the following questions asked by an Air Force prosecutor of the co-workers of one of the accused airmen, Technical Sergeant Daryl Gandy, did not constitute questions about sexual orientation²³:

- (1) Do you have any reason to believe that TSgt Gandy doesn't like girls?
- (2) Have you ever had the feeling that Tsgt Gandy is interested in men?
- (3) Have you ever seen TSgt Gandy hug, kiss, or hold hands with another man in a way that was more than just a means of saying hello?
- (4) Would you be surprised to find out that TSgt Gandy is gay?
- (5) What is it like to work in a unit with so many homosexuals?
- (6) Has TSgt Gandy ever talked about women to you, you know, the way men talk about women?
- (7) Where does TSgt Gandy hang out? With whom?
- (8) Has TSgt Gandy ever had a girlfriend?
- (9) Do you think it is unusual for him not to have a girlfriend?
- (10) Does anyone in your office know that TSgt Gandy is gay?

These are only a few of the glaring command violations in the Hickam witch hunt and it is simply astounding that the Air Force Inspector General would so easily dismiss the actions taken by Air Force officials in this case.

Despite promises by spokespersons for the Army and Navy that their services would not pursue men accused by Airman Harris,²⁴ SLDN has documented that those services have indeed taken action against some of the accused and that there are others whose liberty remains at risk. Additionally, the Marine Corps specifically pulled Sergeant Bryan Clark off of terminal leave in Texas, where he had moved to start his civilian life, to potentially press criminal charges against him. The Marine Corps interrogated Clark and questioned his coworkers about Clark's sexual orientation and private life. After Clark retained a civilian attorney, the Marine Corps backed off, allowing him to leave the service. Marine Corps officials, however, placed derogatory comments in his file and a bar to future reenlistment in his records..

Senator Sam Nunn, former Chairman of the Senate Armed Services Committee, stated in 1993 that “I do not believe we should have sex squads looking for ways to investigate servicemembers’ private, consensual behavior.”²⁵ And then Senator Cohen, now Secretary of Defense, in questioning then DOD General Counsel Jamie Gorelick, asked whether the “Don’t Ask, Don’t Tell, Don’t Pursue” policy would “prevent the military from prying into private life?” Gorelick’s response: “Yes.”²⁶

The word that “Don’t Ask, Don’t Tell, Don’t Pursue” placed limits on gay investigations apparently did not reach prosecutors at Hickam Air Force Base or the other bases that have initiated action against those accused by Airman Harris. Even Professor Charles Moskos, one of the architects of the “Don’t Ask, Don’t Tell, Don’t Pursue” policy, stated on *Nightline* on September 11, 1996 that the pre-trial agreement entered into by the Air Force in this case violated the spirit of the policy he helped create.²⁷ SLDN will ask the DOD Inspector General to conduct its own investigation into this matter.

SLDN will also ask the Department of Defense Inspector General to investigate a witch hunt that occurred in Spring 1996 targeting up to thirty women at the United States Military Academy at West Point, mentioned briefly in the “Don’t Ask” section of this report. The witch hunt started when Master Sergeant Stoneking, at the direction of Lieutenant Colonel Abraham Turner, seized the personal diary of Cadet Nicole Galvan. In a letter notifying Galvan of a hearing to determine whether she had violated any regulations, Lieutenant Colonel Kerry Pierce confirms that Galvan was pursued based on her personal diary. In Paragraph 7, Lieutenant Colonel Pierce states that “Cadet Nicole Galvan...did...violate...regulations...by making various statements *in her diary* indicating a propensity or intent to engage in homosexual acts or

conduct....” (emphasis added) (Exhibit 18) The allegations in all other paragraphs contained in the notification letter stemmed from her personal diary that had been seized by her commander.

Air Force Major Debra Meeks made headlines this past year in her fight against allegations that she had been in a consensual lesbian relationship. The Air Force specifically held Major Meeks beyond her retirement date in order to criminally prosecute her and potentially imprison her for eight years based on the allegations. SLDN knows of no case where a servicemember has been charged with consensual heterosexual sodomy under similar circumstances, though the regulations require evenhanded treatment. Major Meeks was acquitted at court-martial and allowed to retire, but only after risking her very liberty.

Air Force Major Terry Nilson was not so lucky. He was pursued on charges of sodomy when an employee of a MotoPhoto franchise [made an extra set of the Major's photographs and turned them into](#) the Office of Special Investigations (OSI), the criminal investigative service of the Air Force. The photos showed the Major with his arm around another man, not sex or any other activity that could justify a sodomy charge. Nevertheless, the OSI launched a full-scale investigation [against](#) the Major. Having lost his career and pension, Major Nilson has filed suit against MotoPhoto, its franchisee and the employee who turned over the photos. To date, MotoPhoto has denied liability.

The government’s all-out effort to identify lesbian and gay servicemembers sometimes reaches the absurd. In the case of one Marine Corps Corporal, the inquiry officer determined, among other findings, that attending the Dinah Shore golf tournament and giving popular Anne Rice vampire novels to a friend constituted homosexual conduct. (Exhibit 19) The corporal has since been discharged.

A Navy training slide presented to commanders in the Atlantic Fleet sums up the desire of military leaders to seek out suspected lesbian, gay and bisexual servicemembers. (Exhibit 20) The slide states “Don’t Ask, Don’t Tell, Does Not Mean Don’t Investigate.” The slide further instructs that the “member must be interrogated.” “Questions you can ask,” according to the slide, include “(a) Has member engaged in homosexual acts or marriages?” or “(b) Attempted to engage in homosexual acts or marriages?” Imagine a different slide -- one that reads “Don’t Ask, Don’t Tell, Don’t Pursue’ Places Limits On Investigations.” The slide would then set forth the investigative limits. The tone of the message would be entirely different and would signal to commanders that they should, as President Clinton ordered, “carry out this policy with fairness and with due regard to the privacy of servicemembers.”²⁸

The push to launch gay investigations even infects simple coming out cases. Servicemembers who state that they are gay to their commanders face mandatory processing. Many commands, however, order intense and unnecessary investigations against these members to fish for additional information to subject these men and women to further pain and punishment, including criminal penalties, recoupment and loss of benefits. This goes way beyond the bounds of what was contemplated under “Don’t Ask, Don’t Tell, Don’t Pursue.” As then DOD General Counsel Jamie Gorelick said in explaining the parameters of “Don’t Ask, Don’t Tell, Don’t Pursue,” “Once you establish the elements of the offense or basis for discharge, you go no further.”²⁹

When Navy cryptologist David Compton came out to his command at Ft. Meade, Maryland, for example, the inquiry officer appointed to his case immediately told him that it was his job to “prove that the servicemember was lying.” Further, the inquiry officer stated that, if

Compton was lying, he would be imprisoned for making a false official statement. The inquiry officer then demanded that Compton give him the phone numbers for his parents, siblings, friends and clergy so that he could verify Compton's sexual orientation. He also demanded that Compton "prove" that he is gay. What the inquiry officer did not tell Compton is that the Navy could use any conversation with his family members and other confidants against him, to justify punishment beyond being discharged. The inquiry officer also did not inform Compton that the Navy could press criminal charges against him if the inquiry officer found that Compton had engaged in any sexual or affectional conduct with another man.

An Army Captain faced a similar experience. After she came out to her command, the appointed inquiry officer asked her questions fishing for additional information that could be used to harm her. The inquiry officer asked in writing: "(16) How do you know that you are gay? (21) Do you have a propensity to engage in homosexual acts? (22) Who else knows that you are gay? (23) What evidence or witnesses, if any, can you provide to support your statement that you are gay?" (Exhibit 21) These now appear to be standard questions asked of gay personnel who come out in all branches of service.

Gay servicemembers who are honest with their leaders are in a lose-lose situation. They often are told to "prove" they are gay or else face criminal charges for a false official statement. If, however, they "prove" they are gay by admitting to a gay relationship, they face the risk of criminal charges for consensual sexual conduct and other punishment.

A final piece of correspondence from the field provides a window on the prevailing climate regarding "Don't Pursue." A self-identified marine recently summed up his intent to ferret out gay military members in a posting on America Online on January 31, 1997. JarheadDoc stated, "My

marines and myself have weeded out every known faggot in our unit – we are doing our part.”

(Exhibit 22)

SLDN documented 191 “Don’t Pursue” violations in 1996, up 35% over last year’s numbers. As we reported last year, the Air Force and the Navy are the worst abusers of the “Don’t Pursue” provision. (Exhibit 23) In 1996, Air Force “Don’t Pursue” violations jumped from 61 to 77, a 26% increase. Navy violations of “Don’t Pursue” jumped from 38 to 58, a 53% increase. Both Air Force and Navy commanders are guilty of launching investigations and inquiries without credible information, and initiating far-reaching investigations to fish for information against servicemembers in an attempt to dig up information that can subsequently be used to justify discharge or court-martial.

DON’T HARASS

The “Don’t Harass” portion of the new regulations makes explicit that “the Armed Forces do not tolerate harassment or violence against any servicemember, for any reason.”³⁰ Violations of “Don’t Harass” include physical abuse and threats (including death threats), verbal harassment, and hostile command climates marked by constant anti-gay slurs. Violations also include sexual harassment of women through lesbian-baiting, the practice of pressuring and harassing women by calling, or threatening to call them, lesbians. Women frequently are accused as lesbians in retaliation for rebuffing sexual advances by men or reporting sexual abuse.

SLDN is pleased to report that, in 1996, the Department of Defense restated its commitment to end anti-gay harassment. In a letter dated April 18, 1996, Lieutenant General Samuel E. Ebbesen stated on behalf of the Department of Defense, “We oppose harassment – of any kind – to any of our

military personnel. And we will investigate carefully any such complaint...[and] take strong disciplinary action.” (Exhibit 24) General Ebbeson wrote this letter in response to inquiries made by Representative Barney Frank (D-MA) after last year’s report by SLDN on “Don’t Ask, Don’t Tell, Don’t Pursue.”

In another positive development, the Naval Justice School highlighted the need to protect the safety of sailors potentially threatened by anti-gay harassment in *A Commander’s Quick Reference Manual For Legal Issues*, dated May 1996. (Exhibit 25)

The problem remains, however, that servicemembers have no guarantees from the Pentagon that reporting harassment will not lead to their own investigation and discharge. In addition, many commanders simply do not take allegations of anti-gay harassment seriously.

The case of Airman Sean Fucci demonstrates the difficulties and dangers facing a servicemember threatened because of perceptions regarding his sexual orientation. Airman Fucci’s story begins in early 1995, when, while stationed in Panama, Fucci confided to his commander his realization that he is gay. Airman Fucci wanted to remain in the Air Force. After successfully rebutting the regulations’ presumption that he engaged in gay conduct, he was retained by a discharge board. Airman Fucci is one of only eight servicemembers in three years to be retained under this provision.

Airman Fucci spoke privately with his commander and never intended for his sexual orientation to become a matter of public record. His commander, however, responded by launching an extensive inquiry into Airman Fucci’s sexual orientation, fishing for information that could be used against him. There was none. In the process, however, the inquiry officer “outed”

Airman Fucci to his entire unit by questioning his friends and coworkers about his sexual orientation and whether he had ever discussed the matter with them.

In October 1995, Airman Fucci was transferred to Ft. Meade, Maryland. He never mentioned his sexual orientation or the discharge board to anyone at his new duty assignment. In mid-December, Airman Fucci found the annotation “Smiley (sic) Fag” on a pad of paper in his room. Though he was concerned about this incident, he shrugged it off as a one-time event and did not report it to his command. Two days before Christmas, however, Airman Fucci awoke from an afternoon nap to find a note on his desk. It read “DIE FAG.”

Airman Fucci reported the threat to his commander, who took no action either to determine who had made the threat or to guarantee Airman Fucci’s safety. In a memorandum for record, the commander wrote, “I contacted OSI and learned that they had no interest in investigating the incidents. [. . .] It is an issue of anonymous intimidation for which there is not much that can be done” (Exhibit 26) Subsequently, Airman Fucci faced direct questioning from his supervisor about his sexual orientation, an entirely inappropriate response to his complaint of the death threat. Airman Fucci resorted to living off base at his own expense, though he lacked financial resources, out of fear for his safety.

Airman Fucci next reported the death threat higher in the chain of command. Though Fucci’s First Sergeant berated him for going over his commander’s head, higher officials took appropriate steps to protect Airman Fucci’s safety. An inquiry was opened by the Air Force into the death threat. The inquiry officer performed his duties in a professional manner, focusing on the source of the threats rather than Airman Fucci’s sexual orientation. It is unfortunate, however, that “Don’t Ask, Don’t Tell, Don’t Pursue,” as implemented, barred Airman Fucci and

the inquiry officer from fully discussing matters related to his orientation that might have been relevant to the inquiry. Despite an honest, diligent effort, the inquiry did not identify the source of the threats.

Airman Fucci moved back onto the base after the conclusion of the inquiry. Within weeks, he received yet another written threat, stating “You can’t hide, fag.” Because Fort Meade is an Army base, the Air Force turned this matter over to the Army’s military police to conduct a criminal investigation into the continued threats. To SLDN’s knowledge, Investigator Carlos V. Arrieta, who was assigned this case, failed to investigate the threats against Airman Fucci despite repeated prompting by SLDN. Airman Fucci subsequently left the Air Force in January 1997 at the end of his enlistment.

Four and a half years ago, Seaman Allen Schindler told his commanding officer that he was gay and thought his life was in danger, but the command took no action. Within days, two fellow sailors had beaten Schindler to death, rupturing every organ in his body and obliterating every identifying feature except a tattoo on his torso. By now, authorities should understand that dismissing anti-gay death threats is counterproductive and downright dangerous.

Seaman Schindler’s shocking murder seems to have had no effect on the command of his ship, the *USS Belleau Woods*. Last year, a twenty-one year old enlisted man assigned to the ship reports he was told by his Chief Master at Arms that he would face the same fate as Seaman Schindler if he exercised his right to a discharge board to fight allegations of gay conduct that had been made against him. “The same thing will happen to you,” the Chief Master at Arms is reported to have told this sailor, “you will be killed.” The sailor did not fight the allegations and was discharged.

In yet another frightening example of anti-gay harassment, an Army drill instructor at Fort Benning in Columbus, Georgia reportedly informed his recruits at formation, “You should know that there are homosexuals here. I hate homosexuals. If you find one, you should beat the shit out of him.” The Inspector General of the Army is investigating this incident upon SLDN’s request and officers there are to be commended for their rapid response to the complaint. SLDN is withholding the name of the drill instructor pending the Inspector General’s review. (Exhibit 27)

In the summer of 1996, Airman Jennifer Dorsey, also in the Air Force at Fort Meade like Airman Fucci, saw her report of anti-gay harassment turn into a potential investigation against herself. Airman Dorsey filed a written complaint with Master Sergeant Robert L. Thomas, her First Sergeant, alleging that she had been harassed by two enlisted women in her dorm who were spreading rumors that Dorsey was gay. (Exhibit 28) Though Master Sergeant Thomas promised to speak with the women, the abuse continued. In a subsequent memorandum for record, Airman Dorsey details how the women attacked her in the latrine, repeatedly striking her in the stomach and chest while telling her, “You sick fucking dyke!” (Exhibit 29)

Airman Dorsey next went to her commander, Major Richard C. Roche, to no avail. Airman Dorsey then filed a formal complaint with the social actions office. Subsequently, her command lectured her unit about harassment in general terms, but failed to take disciplinary action against the two women who were the subject of Airman Dorsey’s complaint. Instead, Major Roche reportedly threatened Airman Dorsey with an investigation, stating “If that’s your lifestyle, you need to cease and desist. I’m sure there will be an investigation.” After much soul-searching, continued harassment and an unresponsive command, Airman Dorsey came to the

realization that she must come out as a lesbian and leave the Air Force for her well-being and safety. As a next step, Ms. Dorsey will file an Inspector General complaint regarding her case.

Many servicemembers who would otherwise serve quietly for years come out specifically to escape hostile environments or threats to their safety. Air Force Major Robert L. Kittyle is an example. Though the inquiry officer appointed in Major Kittyle's case initially tried to prove that Kittyle was not gay, he finally concluded that, "It appears Major Kittyle made this announcement after he could not tolerate derogatory comments concerning homosexuals." Nothing was done to end the derogatory comments. (Exhibit 30)

In the Coast Guard, a young man endured daily verbal harassment, such as being called "faggot," "homosexual" and "----sucker." One of his coworkers told him, "If I ever find out for sure you're a fag, I'll kick your ass." The Coast Guard member had also frequently found pictures of underwear clad men taped to his rack. Finally, his car was vandalized after the rumors about his sexual orientation spread from his cutter to the local civilian population.

Derogatory comments appear commonplace even among the "cream of the crop." At a Naval War College conference this past fall, a Marine Major said to considerable applause. "I can't imagine a more basic violation of the natural law than homosexuality. They are not worthy of our trust. It's intolerable."³¹

Violations of "Don't Harass" also include lesbian-baiting, a form of sexual harassment. Women, straight and gay, are accused as lesbians when they rebuff advances by men or report sexual abuse. Women who are top performers in nontraditional fields also face perpetual speculation and rumors that they are lesbians. Too often, commanders respond by investigating the women under the guise of enforcing "Don't Ask, Don't Tell, Don't Pursue," rather than

disciplining men who start such rumors or who perpetrate sexual abuse. As a result, many women do not report sexual harassment or assault out of fear that they will be accused as lesbian, investigated and discharged. Other women report that they give in to sexual demands specifically to avoid being rumored to be a lesbian.

The toll lesbian baiting takes on women is evident in DOD's own statistics for 1996. Though women comprise only thirteen percent of the active duty force, they constitute twenty-nine percent of those kicked out under "Don't Ask, Don't Tell, Don't Pursue." In the Army, women comprise forty-one percent of those discharged under the gay policy, an astounding figure that is three times women's presence in this service. (Exhibit 31) While women have been disproportionately targeted under the military's gay policies for years, the 1996 figures reflect a sharp increase from 1995.

Last year, we reported the experience of a Private First Class who was falsely accused of "lesbian activities" in retaliation for reporting an attempted rape. After she refused to accuse other women as suspected lesbians, she was sent to a court-martial and, when that effort failed for lack of evidence, her command attempted to discharge this soldier based on the same false accusations. This occurred notwithstanding an Inspector General report in her favor. Though the attempted rape was undisputed, the soldiers were never disciplined for the attack.

"A Dedicated Army Warrant Officer" describes a recent incident in a letter to Senator Feinstein (Exhibit 32) in which two male junior soldiers planted a gay newspaper in the unit's common area, and then spread rumors that it belonged to the warrant officer. "These troops knew as well as I did that, if I formally addressed their slanderous 'joke,' I ran the risk of triggering a gay investigation." The unit's leaders actually advised this warrant officer not to

report this incident, under the threat that her report would, indeed, result in an investigation into her sexual orientation. Thus, the warrant officer was forced to choose between enduring this harassment or risking her career by demanding that it stop.

Like most women, as revealed by DOD's own surveys,³² the warrant officer chose not to press a sexual harassment complaint for fear of reprisal. "The ever-present threat of an investigation into our private lives that is designed to keep us quiet is doing just that," writes this warrant officer. "Very few women will publicly address these issues for fear of the repercussions. I regret that I am unable to identify myself, for fear of setting off a new round of rumors and speculation that I am a lesbian, with a high likelihood of my command carrying through on the threat to investigate me under "Don't Ask, Don't Tell."

Chief Warrant Officer Virginia Bueno, a recently retired Marine, best sums up the insidious effect of lesbian-baiting in a letter sent to Senator Robb in the wake of the recent Senate hearings on the Aberdeen scandal. "To be the victim of sexual harassment is, in its own right, one of the most degrading and emotionally injurious positions one can be placed in, especially in the military. But to be blackmailed for supposedly being a lesbian so that the sexual harassment can continue goes beyond the pale." (Exhibit 33)

The use of lesbian-baiting to harass women is not a new phenomenon, dating back to World War II according to the official history of the Women's Army Corps and other established sources.³³ More recently, in 1989, the Defense Advisory Committee on Women in the Services (DACOWITS) heard testimony from military women who had been accused as lesbian and faced discharge in retaliation for reporting sexual abuse. The DACOWITS members, appointees of Presidents Reagan and Bush, were so disturbed by this testimony that they recommended training

for all commanders on the potential misuse of such allegations.³⁴ The armed forces have never implemented the DACOWITS recommendation.

One of the women who testified before DACOWITS, former Navy Petty Officer Mary Beth Harrison, finally won her case this year on appeal to the Board for Correction of Naval Records, which ordered her reinstated with back pay. Nevertheless, after more than five years, too much time has elapsed for Harrison to salvage her Naval career, showing how the mere accusation of homosexuality can harm a woman's career beyond repair.

As SLDN has urged the past two years, the armed forces will only be able to address the issue of sexual harassment adequately when leaders confront the underlying factors that foster sexual harassment. One major factor is that women risk being accused as lesbian and losing their livelihoods when they report sexual abuse. Gay accusations give perpetrators a trump card to divert scrutiny away from their actions and onto their victims. This is wrong. No woman should have to submit to sexual abuse as a condition of serving our country.

An ironic exception to the prevalence of harassment in the ranks is found in the units where known gay men and lesbians are and have been serving. Prior to his retirement this past year, Petty Officer Keith Meinhold served as an openly gay man for 3½ years, during which time his crew was named the most combat ready in the Pacific Fleet. Petty Officer Meinhold's final evaluation stated that "his inspirational leadership has significantly contributed to the efficiency, training and readiness of my squadron." Marine Sergeant Justin Elzie retired on February 18, 1997 after serving for four years as an openly gay man at Camp LeJeune, North Carolina. During that time, Sergeant Elzie was named NCO of the Quarter and a top marksman for the base. His final fitness report stated that Elzie possessed "the leadership abilities to lead the Marine Corps into the twenty-first century." Meinhold and Elzie are just

two of many examples where units thrive with openly gay personnel.

It is clear that anti-gay harassment ends or diminishes when conditions allow gay and lesbian servicemembers to be honest with their colleagues about their sexual orientation, thus countering the myths and stereotypes of what it means to be gay. Likewise, sexual harassment will decrease when men cannot use “Don’t Ask, Don’t Tell, Don’t Pursue” to accuse women as lesbians in retaliation for reporting sexual harassment and abuse. Harassment occurs because of a unit's leadership, not despite it.

SLDN documented 132 “Don’t Harass” violations in 1996 compared with 127 violations the year before. (Exhibit 34) SLDN is encouraged by decreased reports of harassment in the Navy (down 28% from 1995 figures), including the Marine Corps (down 69% from 1995 figures). The reports of harassment in the Army, however, increased 33% in 1996, up from 33 reported violations in 1995 to 48 reported violations in this past year. Verbal abuse and hostile command climates appear to be the primary reasons for the Army’s increased harassment violations. We note that the Army is also currently under fire for sexual harassment scandals at the Army Proving Grounds at Aberdeen and other bases. The level of harassment remains very high in all the services, however, and requires concerted attention from military leaders.

ANALYSIS

Reasons Underlying The Continued Violations of “Don’t Ask, Don’t Tell, Don’t Pursue”

“Don’t Ask, Don’t Tell, Don’t Pursue” was intended to protect servicemembers from anti-gay harassment, selective criminal prosecution and witch hunts. Since its implementation,

however, command violations of the law have run rampant, ranging from continued direct questioning of military personnel about their sexual orientation to witch hunts such as the investigation onboard the *USS Simon Lake*, where sailors were threatened with jail unless they accused others as gay or confessed to being gay themselves. Many commanders have hunted suspected gay servicemembers with as much, if not more, fervor than before, causing gay discharges to soar.

Last year, in response to reporters' questions, then Secretary of Defense Perry promised to investigate the command violations reported by SLDN. Though SLDN offered in writing three times to provide information on command violations, the Department of Defense never contacted SLDN, the affected servicemembers, their military lawyers or, to our knowledge, their commanders.

Command violations of “Don’t Ask, Don’t Tell, Don’t Pursue” have continued because of a lack of leadership by military and civilian authorities. Basic steps, such as training, have been ignored. Blatant abuses have been tolerated and, in fact, justified in an ongoing pattern that has rendered the limits of the law meaningless. Personnel who commit or sanction abuses have not been disciplined. To make matters worse, there is no recourse for servicemembers who are improperly targeted by their commands. The result is a command climate where “anything goes” in the pursuit of suspected gay personnel. The ends have come to justify the means. While many commanders do not sanction inhumane treatment of suspected gay personnel, those who do are supported by the present leadership and command climate.

The outright disdain for the law is clear from the armed forces’ continued use of a form that asks recruits about their sexual orientation. No official could have emerged from the debates

in 1993 and not known that the services were now forbidden by law to ask servicemembers about their sexual orientation. A promise to mark out the questions on existing forms is inadequate, and subject to abuse. The Department of Defense, which promulgates the form, must replace once and for all the recruiting forms that ask recruits if they are gay.

In another glaring omission, the services have yet to institute ongoing training programs to teach commanders and servicemembers the limits under “Don’t Ask, Don’t Tell, Don’t Pursue.”³⁵

Colonel Brown at Hickam Air Force Base, the commander of the 15th Air Base Wing who authorized the pre-trial agreement in the Hickam witch hunt, confirmed during the Air Force Inspector General investigation into this matter that he has not been trained on the law or regulations. Indeed, twenty-seven witnesses interviewed by the Air Force Inspector General in connection with the events at Hickam Air Force Base, from commander to prosecutor to investigator to suspect, stated that they had received no training on the limits into gay investigations. On the other side of the world and in a different service, Lieutenant Colonel Turner at West Point, who ordered the seizure of Cadet Nicole Galvan’s diary to determine if she were lesbian, likewise conceded at Galvan’s administrative hearing that he had not received training on “Don’t Ask, Don’t Tell, Don’t Pursue.” Most, if not all, servicemembers who contact SLDN report that they have had no training whatsoever on “Don’t Ask, Don’t Tell, Don’t Pursue” and its limits.

SLDN has previously expressed concern about the lack of an ongoing, adequate training program. Moving into the fourth year under “Don’t Ask, Don’t Tell, Don’t Pursue,” the absence of training can fairly be characterized as a willful omission on the part of military leaders. Some servicemembers have specifically requested training assistance from the Defense Equal

Opportunity Management Institute (DEOMI). DOD, however, has reportedly forbidden DEOMI from teaching any courses on “Don’t Ask, Don’t Tell, Don’t Pursue.”

In the little guidance that has been provided to the field, officials have been more concerned to skirt the spirit and letter of the law rather than enforce it. The main point of the Navy training slide, mentioned earlier, is to encourage commanders to investigate suspected gay personnel. This slide sends a message contrary to the intent of “Don’t Ask, Don’t Tell, Don’t Pursue,” which is to place limits on investigations, and to make commanders stop and think before launching them.

SLDN has highlighted additional guidance in last year’s report that undercuts the limits on gay investigations. These are primarily legal memoranda written by Pentagon lawyers, upon whom senior military and civilian leaders have relied heavily. In June 1994, for example, the Navy’s appellate litigation group issued a memorandum suggesting that gay associational activities, such as belonging to a gay men’s chorus, are “inconsistent with good military character.” (Exhibit 35) This contradicts “Don’t Ask, Don’t Tell, Don’t Pursue,” which explicitly permits servicemembers to attend gay pride parades, gay bars and engage in other associational activities.

The memo further states that the Navy will provide additional legal support for the prosecution in any cases where a servicemember accused under “Don’t Ask, Don’t Tell, Don’t Pursue” seeks help from outside organizations, civilian lawyers, the press or members of Congress. The Navy’s attempt to chill freedom of association, access to the free press, the right to counsel and the right to petition members of Congress clearly signals strong antipathy for those even suspected of being gay.

Navy cryptologist David Compton experienced the kind of intimidation expressly contemplated in the Navy memo. The inquiry officer, Lieutenant Steve Pearson, appointed to investigate Compton attempted to intimidate him into not seeking legal assistance, persistently questioning him about whether he had sought outside help. Subsequently, Lieutenant Pearson called Servicemembers Legal Defense Network, demanding to know whether Compton had been in touch with us – information that we would never reveal – and showing the lengths to which inquiry officers will go in pursuing gay cases and intimidating those under investigation.

In a memorandum highlighted by SLDN last year, the Air Force instructs inquiry officers to conduct wide-ranging fishing expeditions against servicemembers who state they are gay. (See Exhibits 10 & 11) The November 3, 1994 memorandum and its November 17, 1995 successor are very specific, permitting interrogations of “parents and siblings,” “school counselors,” and “roommates and close friends,” among others. The memoranda provide officers with a laundry list of twenty-five questions to ask to fish for information about servicemembers’ private lives that can be used to press criminal charges and other harsh punishment against them. This is despite explicit prohibitions in “Don’t Ask, Don’t Tell, Don’t Pursue” against expanding the scope of inquiries. The Air Force is using “statements” cases to bootstrap inquiries into servicemembers’ private lives that could never be justified on their own, hoping to turn up something and then justify their actions in retrospect.

The Air Force memorandum also unequivocally states that “if...other military members are discovered during the proper course of the investigation...appropriate action may be taken.” No proper investigation under “Don’t Ask, Don’t Tell, Don’t Pursue” would ever turn up other people: that is a witch hunt. It is not a coincidence, we believe, that Air Force officials at Hickam

Air Force Base, with the blessing of the Air Force Inspector General, have attempted to argue that they did not engage in a witch hunt, but simply identified seventeen other military members during the course of prosecuting another servicemember.

In defending its memo, the Air Force claims it is necessary to protect against “fraud” in cases where servicemembers who have received funded education may state that they are gay to avoid a service obligation. The underlying assumptions of the memo are that the men and women who come out are either lying about being gay or lying about their desire to serve. These assumptions are profoundly offensive. As discussed previously, these assumptions reflect a complete misunderstanding of what it means to be gay, the sacrifice and risk to servicemembers’ safety involved in coming out, and the ethical dilemma created by the present regime, which requires servicemembers to lie even to their parents as a condition of military service.

Furthermore, despite Air Force assertions to the contrary, these memoranda are being used in almost all gay cases, not just those involving questions of funded education. Air Force officials using these memoranda are placing some servicemembers at great risk. Airman Sean Fucci, who received death threats after his command outed him to his entire unit under the pretense of investigating the honesty of his private statement to his commander, is just one example. These memoranda have created a climate of “anything goes” in the Air Force’s pursuit of suspected gay military members.

The Department of Defense, in its own memorandum dated August 18, 1995, seemingly approved the offensive tactics initiated by the Air Force and described above. (Exhibit 36) This memorandum by DOD General Counsel Judith Miller has fueled misguided efforts in all of the services to destroy any safe space whatsoever for gay servicemembers. This development marks

an unprecedented governmental infringement on the privacy of civilians, not only the servicemembers who confide in them, turning even parents into potential witnesses against their children.

SLDN asked that the Department of Defense, Air Force and Navy rescind these memoranda last year, but they have not.

The one exception to officials' efforts to skirt the law is the Navy's guidebook, *A Commander's Quick Reference Manual for Legal Issues*. (See Exhibit 25) In one-and-one-half pages, the "Homosexual Conduct" chapter of this guide accurately conveys some of the major limits on investigations. Our one concern is that the DOD General Counsel's letter described above has infected every service, including the Navy and its guidebook. Nevertheless, we commend the Navy for accurately telling commanders to place some limits on gay investigations in accordance with the spirit and intent of "Don't Ask, Don't Tell, Don't Pursue."

In addition to lack of leadership and lack of training, a final reason that violations continue under "Don't Ask, Don't Tell, Don't Pursue" is that servicemembers accused under the policy have no recourse if improperly targeted. They cannot stop an investigation once it has started. They cannot exclude illegally obtained evidence or hearsay at an administrative hearing that will determine their fate. They cannot effectively object to administrative discharge board members who express bald-faced animus toward them. And military officials have refused in case after case to stop emerging witch hunts, investigations started without credible information or the criminal prosecution of servicemembers accused of gay relationships.

Senior Airman Sonya Harden knows exactly what the obstacles to due process are. While stationed at Eglin AFB in Florida, she was accused by a former roommate of being a lesbian.

That accusation alone was enough to start an investigation that ultimately led to her discharge. It did not matter that Airman Harden was MSS Airman of the Quarter, MSS Airman of the Year in 1992, Personnel Specialist of the Year in 1993 or Hurlbert Field Airman of the Quarter in 1995. It did not matter that there was evidence that the accuser had threatened to accuse Airman Harden as a lesbian if she did not pay the accuser money. It did not matter that the accuser retracted her statement in a sworn affidavit prior to the discharge board and testified at the board that the accusations were false. It did not matter that Airman Harden produced witnesses that testified as to her heterosexual relationships. And it did not matter that Airman Harden objected to one of the board members who made a “thumbs-up” gesture to the Assistant Recorder during the administrative discharge hearing. Harden had no effective recourse to stop an investigation that was improper from beginning to end. Airman Harden has been discharged and is now contemplating whether she will file a complaint with the Air Force Inspector General. (Exhibit 37)

Another SLDN case highlights the same disregard when gay accusations are involved. In this case, Colonels who had been called to sit on a board of inquiry were asked questions to determine if they could render an impartial opinion. (Exhibit 38) The first Colonel stated, “I think homosexuals are immoral.” The second Colonel stated, “...I feel that they [gays] have either a physiological or psychological problem as deviant from society.” The third offered, “My religious beliefs are against homosexuality.” The defendant’s lawyer objected to all three members sitting on the panel and asked that they be removed. The Legal Advisor, a Lieutenant Colonel, ruled: “I think it would be hard to find three board members that would have an opinion different from

those already expressed.” This case is not unusual. Kangaroo courts such as this have no place in the United States military.

Commanders and troops know how to follow orders. Commanders and troops also know when to ignore certain guidelines that are not supported by the top. Congress and the Commander-in-Chief have given military leaders their marching orders to end asking, witch hunts and anti-gay harassment. It is incumbent upon military leaders in our democracy, which is based upon civilian authority and respect for the rule of law, to comply.

We are aware that some leaders view any issue remotely connected to “Don’t Ask, Don’t Tell, Don’t Pursue” as a thorny proposition. For these leaders, the Pentagon’s vast army of lawyers has provided a convenient dumping ground for these issues, resulting in repeated justifications of command abuses. Leadership is required. Sticking one’s head in the sand regarding the inhumane treatment of servicemembers, including those who are perceived as gay but who share with their colleagues a profound dedication to mission and country, will only result in further scandal. The interests of the military and our nation depend on leaders of courage who will step forward at this time and set things right.

A good first step would be to train all military commanders and servicemembers on the requirements and limits of current law and regulations. Commanders, in particular, must be trained to treat more critically evidence of gay accusations so that they do not start inquiries without credible information. As suggested by DACOWITS, commanders should be wary of gay accusations lodged against women who rebuff men’s sexual advances or report sexual abuse, and should not initiate inquiries based upon them. Instead, servicemembers who start such rumors or accusations should be disciplined.

Servicemembers need to have a way to object to improperly initiated investigations before the investigations go too far. Servicemembers should be able to obtain representation by military defense counsel at the onset of any investigation. We are highly concerned, however, that, among other reasons, the already heavy workload experienced by the sparse number of defense counsel typically found at any one base renders this mechanism ineffective as a means of stopping command abuses. A procedural way to deter command abuses is through the adoption of an exclusionary rule for administrative hearings, as suggested in a 1995 report by the Advisory Board on DOD Investigative Capability. In addition, commanders should be required to provide servicemembers written notice of the specific reason for any investigation under “Don’t Ask, Don’t Tell, Don’t Pursue.”

The exercise of leadership is the most important step that must be taken, however. When immediate commanders make mistakes in other areas, their superiors do not hesitate to correct those mistakes. The same should apply here. Asking, witch hunts and harassment will only stop when subordinate commanders understand that their leaders take these issues seriously, and will hold them accountable for abuses.

Our scarce tax dollars should be spent on purchasing the best equipment, providing the best training to our troops, and recruiting the most talented individuals to serve in the military. Spending time and resources to ferret out hardworking men and women who might be gay takes away from mission readiness and reveals a misguided set of priorities. We owe a lot to those who put their lives on the line for our country. A halt to asking, witch hunts and harassment of those who are or are perceived to be gay is the least to ask for them in return. As Secretary William

Cohen recently told Sam Donaldson on ABC's *This Week*, the limits of "Don't Ask, Don't Tell, Don't Pursue" "ought to be adhered to."³⁶ We agree.

CONCLUSION

Three years into "Don't Ask, Don't Tell, Don't Pursue," it is clear that military and civilian leaders have settled for business as usual. Rather than putting an end to asking, witch hunts or harassment as originally promised, leaders have sent a strong message that they will turn a blind eye to such violations. Servicemembers are caught in the trap. Military leaders have two choices: they must either be fully forthcoming and honest to the American public that they have no intention of putting an end to asking, witch hunts or harassment, or they must act in good faith to comply with the intent of the law. Implementing the recommendations outlined in this report is a necessary first step in bringing DOD into compliance with current law and regulations.

END NOTES

¹ See Exhibit 1. The cost of training replacements for those discharged in 1996 exceeded \$25 million, bringing the cost under the current policy to more than \$63.5 million, and the cost since 1980 to more than one-half billion dollars. These cost estimates do not include the substantial costs of investigating servicemembers, holding administrative discharge hearings or defending the new policy in federal court, which DOD has never provided. Costs are based on figures and percentages reported in a General Accounting Office study, Defense Force Management: Statistics Related to DOD's Policy on Homosexuality (June 1992).

² The numbers reported are based on Department of Defense discharge figures. The figures do not include discharges from the US Coast Guard.

³ See Exhibit 3. SLDN had documented 703 violations in the policy's first two years of operation, bringing the total now to 1121 documented violations since the policy started. The documented violations do not include violations that fall outside "Don't Ask, Don't Tell, Don't Pursue" but are nevertheless serious breaches of military regulations, such as denial of or ineffective assistance of counsel and violation of the servicemembers' rights under the Privacy Act.

⁴ Randy Shilts, Conduct Unbecoming (St. Martin's Press) 231-232, 570. Airman Steve Ward testified that he was placed in a broom closet until he confessed to being gay.

⁵ DACOWITS 1989 Spring Conference Recommendation 12, "Harassment. DACOWITS recommends DOD expand existing leadership training to include dealing with unfounded accusations of homosexuality against servicemembers."

⁶ "The Secretary's Board on Investigations and the Services should consider appropriate disincentives for abuse of subjects' rights during informal investigations. The Secretary of Defense should take a fresh look at the issue of imposing an exclusionary rule on administrative separation proceedings or nonjudicial punishment proceedings." Report of the Advisory Board on the Investigative Capability of the Department of Defense, Charles F.C. Ruff, Chairman, volume I, p. 103.

⁷ The Air Force claimed last year that it had instituted a new accounting mechanism to count gay discharges at basic training camps that it had not counted before FY 1995. We would welcome efforts by the Air Force to disclose accurate numbers for gay discharges in years prior to FY 1995.

⁸ "Guidelines for Fact-Finding Inquiries into Homosexual Conduct," DoDD 1332.14 [enlisted], Enclosure 4 and DoDD 1332.30 [officers], Enclosure 8, ¶ D(3).

⁹ "Larry King Live," CNN, 21:00 EST, January 27, 1997, Transcript # 97012700V22.

¹⁰ DD Form 1966/1, Jan 89, Question 27.

¹¹ The Coast Guard is part of the Department of Transportation in peacetime, but falls under DOD during wartime. All Coast Guard members are bound by DOD regulations, including the "Don't Ask, Don't Tell, Don't Pursue" policy.

¹² One of these cadets testified under oath at Galvan's administrative hearing that she heard Turner ask Galvan about her sexual orientation.

¹³ Martin Kasindorf, "Compromise; Gay military policy focuses on conduct," Newsday, July 20, 1993, Tuesday, at 7.

¹⁴ Federal News Service, Testimony Before Senate Armed Services Committee, July 21, 1993.

¹⁵ "Guidelines for Fact-Finding Inquiries into Homosexual Conduct," DoDD 1332.14 [enlisted], Enclosure 4 and DoDD 1332.30 [officers], Enclosure 8, ¶ A(3). In fact, the Guidelines require that (1) inquiries must be limited to the "factual circumstances surrounding the allegation," and (2) "At any given point, the commander or appointed inquiry officer must be able clearly and specifically to explain which grounds for separation he or she is attempting to verify and how the information being collected related to those specific separation grounds." *Id.*, ¶ D(4).

¹⁶ *Id.*, ¶ A(1). "Commanders shall exercise sound discretion regarding when credible information exists." *Id.*, ¶ D(2). Credible information is defined in the negative. See note 17.

¹⁷ *Id.*, ¶ E. A nonexhaustive list of examples where credible information does not exist is included in the regulations. Credible information does not exist where the only information is the opinions of others, the inquiry would be based on rumor, suspicion or capricious claims, or the only information is an associational activity such as going to a gay bar.

¹⁸ The military has two systems: administrative and criminal. Administrative separation boards recommend whether a servicemember should be retained in the service or discharged and what the characterization of any discharge should be. The criminal system determines whether a servicemember has committed a crime under military law. A servicemember who has said he or she is gay, has engaged in sexual activity with a person of the same gender, or married someone of

the same gender is subject to administrative discharge under the “Don’t Ask, Don’t Tell, Don’t Pursue.” Heterosexuals are not subject to administrative discharge for the same statements, acts or marriages. A servicemember who has engaged in sexual acts, such as consensual oral sex, whether heterosexual or homosexual, may also be subject to criminal prosecution under the Uniform Code of Military Justice. The military rarely criminally punishes heterosexuals for consensual sexual activities; the military, however, regularly selects suspected gay servicemembers for criminal prosecution for the same activities.

¹⁹ Defendants’ Opposition to Plaintiff’s Motion for Preliminary Injunction, *Barnes v. Perry*, Civil Action No. 96-591-ES, at 11.

²⁰ Defendants’ Response to Plaintiff’s Application for a Temporary Restraining Order, *Barnes v. Perry*, Civil Action No. 96-591-ES, at 16.

²¹ Exhibit 15, Pre-trial agreement, and Exhibit [Air Force Inspector General Report of Investigation, 11 September 1996, pp 7-9.

²² IG Report, p.26, para. 2.

²³ *Id.*, p. 27, para. 3.

²⁴ Lou Chibarro, Jr., “Witch Hunt Under Way in Hawaii,” The Washington Blade, September 20, 1996.

²⁵ Quoted in St. Louis Post-Dispatch editorial, “Powell at Harvard: Political Phenomenon,” June 17, 1993, 3C.

²⁶ S. Hrg. 103-845, “Policy Concerning Homosexuality in the Armed Forces,” p. 788.

²⁷ ABC News, Nightline, September 11, 1996.

²⁸ Martin Kasindorf, *supra*, note 12.

²⁹ S. Hrg. 103-845, “Policy Concerning Homosexuality in the Armed Forces,” p. 789.

³⁰ “Applicant Briefing Item on Separation Policy” issued with DoDD 1304.26.

³¹ Linda Borg, “Naval College Students Talk Ethics With Brass,” Providence Journal-Bulletin, November 14, 1996.

³² Norman Kempster, “Pentagon Survey Finds Much Sex Harassment,” Los Angeles Times, July 3, 1996, at A1. The 1995 DOD survey reported that 78% percent of the military women surveyed had been the object of some form of sexual harassment or abuse, however only 40% of those women had filed complaints regarding the harassment they faced.

³³ Christine L. Williams, *Gender Differences at Work: Women and Men in Nontraditional Occupations* 31 (1989). Mattie E. Treadwell devotes an entire chapter, Chapter 11, to the “Slander Campaign” in the official history of the Women’s Army Corps, available through the Office of the Chief of Military History, United States Army Special Studies. See also, Leisa D. Meyer, *Creating G.I. Jane: Sexuality and Power in the Women’s Army Corps During World War II* (1996); Lorry M. Fenner, *Ideology and Amnesia: The Public Debate on Women in the American Military 1940-1973* (forthcoming).

³⁴ DACOWITS, note 5, *supra*.

³⁵ At the outset of “Don’t Ask, Don’t Tell, Don’t Pursue,” the Army designed and distributed a noteworthy training program. However, this turned out to be a one-time event, as commanders in the field have not conducted training on this issue since that time.

³⁶ ABC News, This Week, January 26, 1997.

FINDINGS

- ★ **“Don’t Ask” Violations Surge By 39%.** SLDN documented 124 “Don’t Ask” violations in 1997, up from 89 reported violations in 1996. The Navy led the services with 46 “Don’t Ask” violations.
- ★ **“Don’t Pursue” Violations Rank As Worst Problem.** SLDN documented 235 “Don’t Pursue” violations, up 23% from last year’s figure of 191. The Air Force led the services with 90 “Don’t Pursue” violations.
- ★ **“Don’t Harass” Violations Show Violent Increase.** Incidents of anti-gay harassment increased 38% from 132 reported incidents in 1996 to 182 incidents in 1997, including death threats and physical assaults.
- ★ **Total Command Violations Climb For Fourth Straight Year.** For the fourth year in a row, command violations of “Don’t Ask, Don’t Tell, Don’t Pursue” climbed, from 443 in 1996 to 563 in 1997, up 27%.
- ★ **Navy Commits Most Violations.** The Navy committed 193 violations of current rules. The Navy was worst in anti-gay harassment and asking.
- ★ **Commands Use Heavy-Handed Tactics To Pursue Gays.** SLDN documented frequent use of threats during gay investigations to extract confessions, including threats of criminal charges, confinement, non-judicial punishment and “outing.”
- ★ **Commands Need Training on Limits To Gay Investigations.** SLDN documented only one case this year where military members had been trained on the limits to investigations under “Don’t Ask, Don’t Tell, Don’t Pursue.”
- ★ **Commands Need Written Guidance on Limits To Gay Investigations.** Four years into “Don’t Ask, Don’t Tell, Don’t Pursue,” most leaders have not received or read a copy of the current regulations and guidelines, and most do not know what the limits are to gay investigations.
- ★ **DoD Orders Recruiters To Stop Asking.** Secretary Cohen ordered replacement of a 1989 recruiting form that asked recruits if they were gay.
- ★ **DoD Orders End To Anti-Gay Harassment and Lesbian-Baiting.** Former Under Secretary of Defense Edwin Dorn issued a ground-breaking memorandum clarifying that commanders should investigate perpetrators of anti-gay harassment and lesbian-baiting, not their victims. No one in the field, however, is aware of this guidance.

RECOMMENDATIONS

- ★ **Issue Guidance on Limits To Gay Investigations.** DoD should issue guidance stating the limits to investigations under “Don’t Ask, Don’t Tell, Don’t Pursue” and the intent of the policy to stop prying into service members’ private lives.
- ★ **Distribute Memo On Anti-Gay Harassment and Lesbian-Baiting.** The Dorn memo on anti-gay harassment and lesbian-baiting has yet to reach the field. The services should move swiftly to get this guidance to everyone.
- ★ **Train All Service Members on Limits To Gay Investigations.** DoD has not trained most service members on the policy’s limits or the intent.
- ★ **Discipline Commanders Who Disobey Limits.** No one in the past two years has been disciplined for violating the limits to gay investigations. There must be disincentives to deter violations and incentives to do the right thing.
- ★ **Provide Recourse To Service Members To Stop Improper Investigations.** Local commanders do not know the rules. Superiors refuse to correct their mistakes. Thus, service members have nowhere to turn to stop illegal witch hunts or other violations.
- ★ **Require Commanders To State In Writing Reasons For Investigation.** DoD should instruct local commanders to articulate the reasons for starting an inquiry in writing to prevent investigations where the ends justify the means.
- ★ **Cease Use of Heavy-Handed Tactics in Gay Investigations.** DoD should train inquiry officers and criminal agents in proper investigative techniques that avoid heavy-handed tactics such as threats of imprisonment.
- ★ **Adopt Exclusionary Rule.** DoD should adopt an exclusionary rule so that evidence obtained illegally, as in a witch hunt, can be excluded at administrative discharge boards.
- ★ **Adopt Rule of Privacy for Psychotherapist/Patient Confidentiality.** DoD should adopt a rule of confidentiality for psychotherapist/patient conversations or adopt a rule that such conversations are private communications and protected under “Don’t Ask, Don’t Tell, Don’t Pursue.”
- ★ **Appoint Panel of Experts To Review Administrative Separation Process.** An expert panel including representation from outside the military should review the administrative separation process and make recommendations for improvement.

EXECUTIVE SUMMARY

Command violations of “Don’t Ask, Don’t Tell, Don’t Pursue” increased for the fourth year in a row. Command violations include instances where commands asked, pursued and harassed service members in direct violation of the limits to gay investigations under current policy. Servicemembers Legal Defense Network (SLDN) documented 563 command violations in 1997, up from 443 reported violations in 1996 (Exhibit 1). SLDN documented increased asking, increased pursuits and increased harassment in 1997. The Navy was the worst in “Don’t Ask, Don’t Tell, Don’t Pursue” compliance; the Air Force was a close second.

The reason underlying continued violations of “Don’t Ask, Don’t Tell, Don’t Pursue” is a lack of commitment from top military and civilian authorities. Military leaders have not communicated to the field the policy’s limits to gay investigations or its intent to end prying into service members’ private lives. The lack of commitment is reflected by: (1) The absence of clear and thorough guidance or training on investigative limits; (2) heavy-handed and increasingly intrusive investigative tactics against suspected gays, including coercion and fishing expeditions; (3) no recourse or redress for service members asked, pursued or harassed; and (4) a lack of accountability for those who violate current policy.

The result is a climate in many commands where “anything goes” in the pursuit of suspected gay personnel. Commanders who want to do the right thing must swim against the tide.

There are glimmers of hope. This past year marked the first time the Department of Defense has ordered replacement of old recruiting forms that asked prospective

recruits if they are gay, a problem noted in SLDN's *Third Annual Report*. In 1997, DoD also issued its first policy clarifying that commanders should investigate those who threaten or harass service members, not those who report anti-gay harassment or lesbian-baiting. Last year also marked the first time SLDN has documented more than one or two cases where commands complied with the mandates "Don't Ask," "Don't Pursue," and "Don't Harass."

As we move into the fifth year under "Don't Ask, Don't Tell, Don't Pursue," however, DoD and the services need to issue guidance stating the current limits to investigations and the intent of the policy not to pry into service members' private lives. DoD then needs to train all service members thoroughly on those limits and the policy's intent. The promises to stop asking, pursuits and harassment in 1993 were clear. General Colin Powell stated in 1993: "We will not witch hunt. We will not chase. We will not seek to learn orientation."¹ Senator Sam Nunn, former Chairman of the Senate Armed Services Committee, said, "I do not believe we should have sex squads prying into the private lives of our service members."² President William J. Clinton pledged that the policy would provide for "a decent regard for the legitimate privacy and associational rights of all service members."³ Then Senator, now Secretary of Defense, William Cohen, expressed a similar understanding of the policy when he asked then DoD General Counsel Jamie Gorelick whether the "small amount of privacy under the current policy was intended to prevent the military from prying into people's private lives." Gorelick

¹ *Policy Concerning Homosexuality in the Armed Forces: Hearings Before the Senate Comm. On Armed Services*, 103rd Cong., 2d Sess. (1993) at 709 (statement of General Colin Powell).

² Former Senator and Chairman of the Senate Armed Services Committee, Sam Nunn, THE RECORD A10 (May 31, 1993).

³ President William J. Clinton, *Text of Remarks Announcing the New Policy*, THE WASHINGTON POST A12 (July 20, 1993).

answered with a resounding “yes.”⁴

Last February, Secretary Cohen again reiterated his commitment to fair enforcement of “Don’t Ask, Don’t Tell, Don’t Pursue” when he stated on *ABC World News Tonight* that he would stop any “continued pursuits and prosecutions” under the policy.⁵ Shortly, thereafter, Secretary Cohen asked an internal review group to examine the implementation of “Don’t Ask, Don’t Tell, Don’t Pursue,” a process that is underway as this report goes to publication. SLDN looks forward to any substantive recommendations the review group may have to stop the continued asking, pursuit and harassment of service members.

This is the *Fourth Annual Report* on “Don’t Ask, Don’t Tell, Don’t Pursue” by SLDN. This report details command violations of current law documented by SLDN from February 26, 1997 to February 19, 1998. Located in Washington, D.C., SLDN is an independent legal aid and watchdog organization for those harmed by “Don’t Ask, Don’t Tell, Don’t Pursue,” and the only means currently available to document abuses. DoD has instituted no method of identifying, documenting or correcting command violations. Indeed, last May, in a *Washington Post* story, DoD conceded that it relies on SLDN’s annual reports to know what is happening in the field under its policy.⁶

⁴*Policy Concerning Homosexuality in the Armed Forces: Hearings Before the Senate Comm. On Armed Services*, 103rd Cong. 2d Sess. (1993) at 788 (statement of Jamie Gorelick).

⁵ *World News Tonight* (ABC news broadcast, Transcript # 97022604-J04, February 26, 1997).

⁶ Bradley Graham, *Military Reviews Allegations of Harassment Against Gays*, THE WASHINGTON POST A1 (May 14, 1997).

DON'T ASK

The "Don't Ask" regulations state that “commanders or appointed inquiry officials shall not ask, and members shall not be required, to reveal their sexual orientation.”⁷ Secretary of Defense William Cohen reaffirmed the rule last year, stating on *Larry King Live* that asking “is a clear violation of law.”⁸ SLDN documented 124 “Don’t Ask” violations in the past year. That is up 39% from 1996 when SLDN reported 89 “Don’t Ask” violations.

The Homosexual/Bisexual Questionnaire

A Naval inquiry officer flagrantly violated “Don’t Ask” this past year when he asked a sailor a series of questions from a form entitled “Homosexual/ Bisexual Questionnaire” (Exhibit 2). The questionnaire asked:

1. Do you engage in homosexual/bisexual activity?
If so, when was the last time?
If so, with whom?
If so, is he/she in the military?
2. Have you attempted to engage in homosexual/bisexual activity?
If so, when?
If so, with whom?
If so, is he/she in the military?
3. Do you have a propensity to engage in homosexual/bisexual acts?
If so, when?
If so, with whom?
If so, is he/she in the military?
4. Do you intend to engage in homosexual/bisexual acts?
If so, when?

⁷ DoDD 1332.30, Enclosure 8(D)(3) (1994) and DoDD. 1332.14, Enclosure 4(D)(3) (1994) [Hereinafter “Inquiry Guidelines”]; *See also* Comments by former DoD General Counsel Jamie Gorelick, *Policy Concerning Homosexuality in the Armed Forces: Hearings Before the Senate Comm. On Armed Services*, 103rd Cong., 2d Sess. (1993), p. 789 (“...[W]e do not ask about orientation not only at accession but at any time.”)

⁸ *Larry King Live*, (CNN television broadcast, Transcript # 97012700V22, January 27, 1997).

If so, with whom?
If so, is he/she in the military?

5. Are you engaged in a homosexual/bisexual marriage?
If so, when did you?
If so, with whom?
If so, is he/she in the military?

Supplementing the “Homosexual/ Bisexual Questionnaire,” the inquiry officer then asked the sailor an additional twenty-nine questions (Exhibit 3), including:

1. Have you in the past engaged in homosexual behavior?
2. Are you having a homosexual relationship currently?
3. Is your partner in the military?
4. Are you monogamous?
5. Who is your current partner?
6. Have you ever had homosexual relations with [A]?
7. Have you had intercourse with anyone else since you’ve been in the Navy?
8. Were they in the military?
9. Do you remember their names?
10. Are you currently involved in a homosexual relationship with anyone in the Navy or military?
11. Are you having a fling with anyone?
12. Have you propositioned (sic) anyone to engage in a homosexual relationship with you who is in the military?
13. So no one in the military is involved with you?

Fifty questions! In the face of the clear mandates “Don’t Ask” and “Don’t Pursue,” a Navy inquiry officer asked one sailor fifty questions about his sexual orientation and private life.

We cannot think of any situation in which such a questionnaire could be justified under existing law. The rules are clear. An inquiry officer cannot ask about one’s sexual orientation or ask questions designed to elicit information about one’s sexual orientation.⁹ Even where commands have the credible evidence of homosexual conduct necessary to

⁹ Inquiry Guidelines, ¶ D(3) (“Commanders or appointed inquiry officials shall not ask, and members shall not be required to reveal, their sexual orientation.”)

initiate an inquiry, inquiry officers cannot expand the scope of their investigation beyond the specific allegation at issue.¹⁰ An inquiry officer cannot go on a fishing expedition to see what information he can net.¹¹

In this case, the command never specified in writing the credible information necessary to initiate an inquiry.¹² Instead, according to a “Voluntary Statement” filed by the sailor concerning the events leading to his interrogation, his Master at Arms started “asking some personal questions about [the sailor’s] sexual orientation (Exhibit 4). The sailor was distraught, because he did not think anyone would find out about him, and he did not want them to find out. In his statement, the sailor writes, “When I heard [that the Master at Arms was asking personal questions about my sexual orientation], I became very upset and even more scared [sic] the last thing I wanted was for this to become known about me.” The Navy, however, forced him out of the closet, costing him his career.

The Air Force Asks Civilians If They Are Gay

An Air Force Staff Sergeant with a stellar record found herself in a similar situation when an Air Force inquiry officer interrogated her roommates, one a military member and two civilians. Astoundingly, the inquiry officer questioned the roommates about their own sexual orientation as well as that of the Staff Sergeant. The inquiry officer asked the military roommate (Exhibit 5):

¹⁰ Inquiry Guidelines, ¶ A(3) (“Inquiries shall be limited to the factual circumstances directly relevant to the specific allegations.”).

¹¹ See “Don’t Pursue” section *infra*.

¹² Inquiry Guidelines, ¶ B(3) (“Credible information exists when the information, considering its source and the surrounding circumstances, supports a reasonable belief that a Service member has engaged in homosexual conduct. It requires a determination based on articulable facts, not just a belief or suspicion.”); see also Inquiry Guidelines ¶ D(4) (“At any given point of the inquiry, the commander or appointed inquiry

1. Did [A] ever tell you that she is gay?
2. Has [A] ever been to a gay bar?
3. How did you meet [A]?
4. Has [A] ever confided in you that she is a homosexual?
5. Are you a Homosexual?
6. Have you ever been to a gay establishment?
7. Were you aware that your roommates were lesbians?

The inquiry officer then questioned the Staff Sergeant's two civilian roommates.

The inquiry officer called one roommate at work, and reportedly asked (Exhibit 6):

1. How long have you known [A]?
2. Have you ever seen or heard [A] engage in homosexual activity?
3. Has [A] ever told you that she is gay?
4. Are you homosexual?

The inquiry officer then spoke with the next civilian roommate, placed her under oath, and reportedly asked (Exhibit 7):

1. Is [the military roommate] gay?
2. Have you ever seen [A] engage in homosexual activity?
3. How do you know [A]?
3. Has [A] ever stated that she is gay?

The current regulations unequivocally prohibit asking.¹³ That an Air Force inquiry officer would question civilians as well as a military member about their sexual orientation demonstrates an utter lack of propriety and complete disregard for the rules.

Additionally, the inquiry officer violated the regulations that prohibit expanding the scope of inquiries when he questioned the military roommate, who was not supposed to be under investigation, about herself and when he attempted to dredge up additional allegations against the Staff Sergeant. Inquiry officers cannot ask about any sexual or

official must be able clearly and specifically to explain which grounds for separation he or she is attempting to verify and how the information being collected relates to those specific separation grounds.”).

affectional acts engaged in by a service member absent a specific, credible allegation made about an act. The same is true for statements of sexual orientation. The regulations are clear that going to a gay bar is permitted¹⁴ and associating with gay people is allowed.¹⁵ The sort of wide-ranging fishing expedition that occurred in this case is strictly forbidden under current rules.

Asking Leads To Harassment

The most disturbing set of asking cases that SLDN has documented is when asking is linked to anti-gay harassment or becomes harassment itself. Two cases illustrate the point.

AN Barry Waldrop faced repeated questions about his sexual orientation from other sailors on the *USS Eisenhower* this year. The questioning escalated to the point that AN Waldrop became concerned for his safety. “I was concerned that if people were talking about me, someone might take the next step and try to hurt me,” he wrote in a memorandum for record (Exhibit 8). AN Waldrop decided the only way to ensure his safety was to tell his supervisor he is gay and be discharged from the Navy. “Because so many people were asking me if I was gay, I decided that I did not want to remain trapped in this situation and have to continue denying who I am but still be afraid that someone might find out anyway” Waldrop wrote.

AN Waldrop slept in the common area so that he would never be alone, out of fear he would be attacked in his rack. He told his command he feared for his safety.

¹³ Inquiry Guidelines, ¶ D(3).

¹⁴ Inquiry Guidelines, ¶ E(4) (“Credible information does not exist ... when 4. The only information known is an associational activity such as going to a gay bar, possessing or reading homosexual publications, associating with known homosexuals, or marching in a gay rights rally in civilian clothes.”).

¹⁵ *Id.*

Less than two weeks later, AN Waldrop returned to his berthing area and found “You’re a dead faggot” scrawled in magic marker on his rack. Another sailor who witnessed AN Waldrop reading the note immediately asked, “Are you gay?” Displaying a keen sense of self-preservation, he said “no,” in an effort to “avoid exactly the kind of danger threatened on my rack.”

As discussed further in the “Don’t Harass” section, the command initially refused to discharge AN Waldrop because, without apparent basis, it did not believe him. The ship’s command placed AN Waldrop in an untenable and dangerous bind by not taking measures to protect his safety when he first reported harassment. The command on the *USS Eisenhower* created exactly the scenario that Seaman Allen Schindler faced in 1992 when he was murdered for being gay by fellow shipmates. Navy officials should learn from past mistakes so that history does not repeat itself.

In another case, a Lance Corporal in the Marine Corps reports that he faced constant harassment and constant questioning about his sexual orientation. Ultimately, the climate grew more and more hostile until he received a death threat. The Lance Corporal reports that other marines “would drop their pants,” taunt him, and ask him if he wanted to engage in fellatio. To our knowledge, the command took no action to stop the asking or the harassment, sending the message that such behavior is acceptable in the Marine Corps.

The circumstances faced by Waldrop and the Lance Corporal cannot be tolerated. Asking cannot become a form of harassment. Harassment cannot lead to asking. Today, the Pentagon fails on both equations.

Inadvertent Questioning

The last series of “Don’t Ask” cases highlighted in this report can best be described as inadvertent questioning. These are cases where well-meaning commanders and others ask questions that, on their face, are not designed to ask about sexual orientation, but the consequence is that they do elicit such information. The problem is that some commands are acting on the information inadvertently discovered and discharging service members rather than treating the information as “personal and private” and taking no action.

In one case, a commander ordered a sailor and his wife to attend counseling in an effort to repair their marriage and forestall divorce. The service member attempted to tell his commander that counseling would not be an effective and productive route. The commander insisted. Finally, the sailor closed the door to the commander’s office and told the commander that the counseling would not be productive because he and his wife had come to accept that he is gay and had determined that it was in both of their interests to seek a divorce. The commander then discharged the sailor for his statement.

Army recruit Robin Chatelle found herself facing a moral dilemma this year during basic training. Like any good drill instructor, Chatelle’s drill instructor tried to scare the daylights out of his fresh crop of eager recruits. The drill instructor told the recruits that they had to come forward with any and all “skeletons” in their past. The drill instructor warned the recruits that if they did not comply, and security clearance investigators later discovered those skeletons, the Army would harshly punish, even court-martial, recruits who had failed to disclose every detail of their past. Chatelle experienced her moment of truth. She told her drill instructor that she had confided in a

high school counselor about a private matter and asked whether she should disclose that confidence to him. The drill instructor insisted she had to tell him everything. She told him she discussed that she was struggling with her sexual identity. His response: “You shouldn’t have told me that.” Her commander then processed her for discharge.

SLDN notes one area where there has been some improvement this year: recruiting forms. This year Secretary Cohen instructed the services to replace old recruiting forms with a new form that does not question prospective recruits about their sexual orientation (Exhibit 9). In our report last year, SLDN reported that the old forms, from 1989, had not been replaced and that prospective recruits, especially in the Coast Guard, were being “asked” in violation of current policy.¹⁶

SLDN recently conducted a random survey of 26 Army, Navy, Air Force, Marine Corps and Coast Guard recruiting stations around the country to determine if Secretary Cohen’s instructions were being followed. Of those stations surveyed, SLDN found two, or 7.6 percent, that continue to use the 1989 forms, a Coast Guard recruiting station in Miami, Florida and a Marine Corps recruiting station in Sioux City, Iowa. SLDN is pleased to report that, in 1997, no prospective recruits reported being asked about their sexual orientation during the recruiting process. SLDN urges all services to ensure full compliance with Secretary Cohen’s instructions to immediately replace the old recruiting forms.

¹⁶ C. DIXON OSBURN ET AL., *SERVICEMEMBERS LEGAL DEFENSE NETWORK, CONDUCT UNBECOMING: THE THIRD ANNUAL REPORT ON “DON’T ASK, DON’T TELL, DON’T PURSUE”* (1997).

DON'T TELL

The “Don’t Tell” regulations are commonly viewed as a restriction on gay service members from publicly declaring their sexual orientation. Sexual orientation, however, is a “personal and private” matter according to the regulations. SLDN believes that lawmakers did not intend the military to pry into “personal and private communications,” such as those to parents, siblings, doctors, psycho-therapists and close personal friends. Indeed, the current regulations specifically permit gay military members to “tell”

- lawyers;¹⁷
- chaplains;¹⁸ and
- security clearance personnel.¹⁹

SLDN is happy to report that the number of “Don’t Tell” violations this year dropped significantly. In both the Army and Navy, the violations have dropped by approximately fifty percent, while Air Force violations have dropped approximately twenty percent. SLDN documented 22 “Don’t Tell” violations in the past year, down 29% from 31 in the previous year.

In another potentially good development, SLDN has been told that the Navy General Counsel’s office may have taken the position that service members may discuss their sexual orientation with mental health counselors, but if that is the case, the guidance has not reached the field.

Despite these developments, “Don’t Tell” violations continue to be a problem, especially given the intrusive nature of these violations. Psychotherapists and other

¹⁷ Military Rule of Evidence 502.

¹⁸ Military Rule of Evidence 503.

¹⁹ DOD Policy Guidelines on Homosexual Conduct in the Armed Forces, July 19, 1993. See also, Defense Investigative Service Manual “Manual for Personnel Security Investigations” DIS-20-1-M (Encl. 18), January 1993.

health providers continue to report to SLDN that they have been ordered to turn in gay service members who confide in them during private counseling sessions. Service members continue to report that their military psychotherapists have violated their trust, usually resulting in the service members' discharge.

Private Conversations With Psychotherapists

One case involves an Air Force cryptologist who was outed by his military psychologist. Though he was promised confidentiality, the airman learned that, instead, the psychologist had revealed their counseling sessions to his First Sergeant. In a memorandum for record dated September 17, 1997, the airman writes, "The [First Sergeant] told me that [the psychologist] had gone to her, told her that I was gay, and asked for advice on what to do about it (Exhibit 10)." The next week, according to the Air Force member, "a friend told me that he heard that I had mentioned to the psychologist...that I was gay." Concerned that the information had spread throughout his squadron, the airman saw no real option but to be honest with his commander. He was discharged as a result.

The psychologist's actions in this case are reprehensible, but under current policy, service members have no recourse. There is no rule of confidentiality. And while such conversations are supposed to be treated as "personal and private," they sometimes are not. As a result, gay service members find that there is absolutely no safe space to discuss their sexual orientation and related issues without risk of discharge.

SLDN is aware of at least three other cases where psychotherapists outed service members or where inquiry officers obtained service members' mental health records to look for information about their sexual orientation. One Air Force inquiry officer, in

concluding that a service member was gay, made special note of the fact that the mental health records indicated that the service member declined to discuss one “problem” (Exhibit 11). It is astounding that an inquiry officer could place any significance on the absence of information in a medical file.

Seeking Out Family and Friends

In other cases, SLDN remains concerned that inquiry officers and investigators are seeking out family members and close personal friends to solicit information that can be used against their loved ones. One Air Force inquiry officer required an officer to answer more than 150 questions about her sexual orientation and private life, including numerous questions seeking information on how to contact family members and friends. The officer was very clear in stating that her orientation was a personal and private matter about which she did not want the Air Force questioning her friends and family. The transcript of this interview shows, however, that the inquiry officer persisted in hounding her for this information (Exhibit 12).

61Q For instance, have you talked about this with family members?

61A. I’ve talked about it with a few and basically told them about my feelings.

62Q Would there be people I could contact?

62A. There – I guess I feel that this is a personal matter and that I would prefer that if you do need a statement, that that could be a written statement and I’m willing to provide that, but I guess I don’t feel that it’s necessary for you to actually talk to those people yourself and I would be happy to provide a written statement from a family member for you. But I guess I just don’t feel comfortable having you talk with them directly because it is a personal issue with me.

- 63Q. Okay. Are there people, other than family members, that you discussed this with?
- 63A. [Conversations with a few friends about what it means to be gay.]
- 65Q. Are there any of those people that you could give me their names and phone numbers that I could talk with?
- 65A. Again, I guess I'll answer that the same way as my family, I could also provide you with a letter from a friend just telling you, you know, what I've told her. But I would rather that you didn't speak with her personally.
- 66Q. Why is that? Why would you rather I not talk to these people personally?
- 66A. I guess it's just I feel this all has to do with me and my personal feelings and – I mean it's a sensitive issue and I guess I would just like to deal with this myself instead of getting a lot of other people involved. . . . I don't know, it's just a personal issue.
- 123Q. If I were to call one or both of your parents and just identify myself and explain what this is all about are they going to be just dumbfounded in having heard nothing about this or are they going to be....
- 123A. Basically, my father knows nothing about it. . . .

We wish we could say that this heavy-handed inquiry officer was the exception, not the rule. We cannot. Interviews like the one above have become standard practice, particularly in the Air Force, and increasingly in the Army. When inquiry officers are successful in locating family members and friends, they have been aggressive in pressuring these individuals to provide damaging information against service members.

Numerous family members and friends have contacted SLDN. All have viewed the military's tactics as highly offensive. In the above case, for example, the officer's relative and friend only reluctantly provided written statements confirming that the officer is a lesbian. The officer's aunt made it a point to state, "I do not want to discuss

anything about my niece's personal life, and I hope that you will direct any further questions to her" (Exhibit 13). In a similarly firm tone, the friend confirmed that the officer had recently begun to question her orientation, and concluded, "Other than this, I do not wish to make any further comment on such a private and personal matter" (Exhibit 14). Military leaders should end these intrusive tactics.

In some cases, inquiry officers have even delved into civilians' sexual orientation and private lives. The case of the Air Force Sergeant discussed in the "Don't Ask" section is just one example. She was forced out of the military based on information solicited by the Air Force inquiry officer from her three roommates. Two of the roommates were civilian; one was in the military. All were asked about their private lives. In the face of military authority, all believed that they were required to answer the questions put to them. The larger issue, however, is that the inquiry officer should not have pried into conversations between a military member and her close personal friends.

Similarly, an Air Force Office of Special Investigations (OSI) agent instructed a civilian friend of a service member who was under investigation to tell him everything, falsely maintaining that (1) he "already knew" that the service member was gay, and (2) the "Don't Ask, Don't Tell, Don't Pursue" policy prohibited the Air Force from prosecuting her friend for his sexual orientation. Thinking that she was not revealing any new information, the friend confirmed the OSI agent's suspicions. The service member's discharge is pending as a result.

Privacy Not Assured with Chaplains

One final issue deserves mention. SLDN continues to be concerned about the confidentiality of conversations between service members and their military chaplains,

which are covered by limited privilege under military law. A Navy officer reports this year that his military chaplain, upon being questioned by an inquiry officer, divulged the contents of conversations spanning more than two years in which the officer had sought spiritual counseling because he was struggling with a tension he felt between his sexual orientation and his faith.

In other cases, chaplains have advised gay service members to turn themselves in to their commands, without ensuring that service members are fully informed about the legal consequences and the possible risks to their safety of such a course of action. Some chaplains have given service members legal information that was just plain wrong. Service members who have relied on this erroneous information have experienced great harm.

SLDN finds it outrageous that an inquiry officer would question a chaplain about his discussions with a service member, and we are equally concerned that chaplains would divulge this information. Furthermore, we are concerned that some chaplains have attempted to provide legal counseling to service members rather than sending them to a defense attorney to obtain accurate legal advice.

While SLDN does not record a large number of cases where chaplains break confidentiality or give bad legal counseling, the fact that these cases occur at all forces SLDN to warn service members that it is risky to confide in military chaplains. This is a tragedy. Chaplains, and the ability of service members to safely confide in them, have always been thought to be essential to service members' well-being and in the best interests of the command. Under "Don't Ask, Don't Tell, Don't Pursue," however, nothing is sacred.

As reported above, “Don’t Tell” violations decreased by 29% in 1997. We think that the result is significant. There are two possible reasons why “Don’t Tell” violations decreased in 1997. One possibility is that, after three years of witnessing military policing of private conversations, gay service members have learned that, in practice, the “zone of privacy” means nothing and survival under “Don’t Tell” requires absolute secrecy.

The other possibility is that the services have reduced efforts to question doctors, psychotherapists, parents, siblings and close personal friends of service members under inquiry. SLDN notes, however, that neither DoD nor the services has published any guidance clarifying that these private conversations will be off-limits to inquiry officers. SLDN urges DoD and the services to issue guidance this year.

SLDN is also pleased to report the first advance in the area of psychotherapist confidentiality. On May 6, 1997, the Joint Service Committee issued a recommendation to amend the Manual for Courts Martial to provide for a limited psychotherapist confidentiality for military retirees and military dependents.²⁰ The Department of Defense has yet to adopt this recommendation. SLDN also urges DoD and the services to consider adopting a rule of full confidentiality for psychotherapist/patient conversations, bringing them into compliance with the 1996 United States Supreme Court opinion, *Jaffee v. Redmond*.²¹

²⁰ 62 Fed. Reg. 24640 (1997).

²¹ 518 U.S. 1 (1996).

DON'T PURSUE

The “Don’t Pursue” regulations contain express limits on gay investigations.

These include, but are not limited to, the following:

- Only a service member’s commander may initiate an inquiry into homosexual conduct.²²
- Commanders may initiate inquiries only upon receipt of credible information of homosexual conduct.²³
- Credible information exists when information, considering its source and the surrounding circumstances, supports a reasonable belief that a service member has engaged in homosexual conduct.²⁴
- Credible information requires a determination based on articulable facts, not just belief or suspicion.²⁵
- Not all accusations of homosexual conduct constitute credible information as a basis for inquiry or discharge.²⁶
- Credible information does not exist when the source of the accusation is not credible or reliable.²⁷
- Credible information does not exist when the accusation concerns an associational activity, such as going to a gay bar, associating with known homosexuals, or marching in a gay rights rally in civilian clothes.²⁸

²² Inquiry Guidelines, ¶ A(1) (“Only the member’s commander is authorized to initiate fact-finding inquiries involving homosexual conduct.”).

²³ Inquiry Guidelines, ¶ A(1) (“A commander may initiate a fact-finding inquiry only when he or she has received credible information that there is a basis for discharge.”).

²⁴ Inquiry Guidelines, ¶ B(3) (“Credible information exists when information, considering its source and the surrounding circumstances, supports a reasonable belief that a service member has engaged in homosexual conduct.”)

²⁵ Inquiry Guidelines, ¶ B(3) (Credible information “requires a determination based on articulable facts, not just belief or suspicion.”)

²⁶ *Id.*

²⁷ Inquiry Guidelines, ¶ F(1) (Credible information requires an accusation by “a reliable person.”).

²⁸ Inquiry Guidelines, ¶ E(4) (“Credible information does not exist when the accusation concerns an associational activity, such as going to a gay bar...associating with known homosexuals, membership or participation in gay organizations or marching in a gay rights rally in civilian clothes.”).

- Credible information does not exist when the information concerns possessing or reading homosexual publications.²⁹
- Credible information does not exist when the information concerns listing by a service member of someone of the same gender as the person to be contacted in the case of an emergency, as an insurance beneficiary, or in a similar context.³⁰
- Credible information does not exist when the information concerns an allegation by another that a service member is homosexual.³¹
- Credible information does not exist when the inquiry would be based on rumor, suspicion, or capricious claims concerning a member's sexual orientation.³²
- Credible information does not exist when a service member reports being threatened because he or she is said or perceived to be a homosexual.³³
- Inquiries shall be limited to the factual circumstances directly relevant to the specific allegations.³⁴

²⁹ Inquiry Guidelines, ¶ E(4) (“Credible information does not exist when the information concerns...possessing or reading homosexual publications...”).

³⁰ DoD Policy Guidelines on Homosexual Conduct in the Armed Forces, July 19, 1993 (“The listing by a service member of someone of the same gender as the person to be contacted in the case of an emergency, as an insurance beneficiary, or in a similar context, does not provide a basis for separation or further investigation.”).

³¹ Inquiry Guidelines, ¶ E(2) (“Credible information does not exist when...the only information is the opinions of others that a member is homosexual...”).

³² Inquiry Guidelines, ¶ E(3) (“Credible information does not exist when the inquiry would be based on rumor, suspicion, or capricious claims concerning a member's sexual orientation.”).

³³ Memorandum of Under Secretary of Defense Edwin Dorn, *Guidelines for Investigating Threats Against Service Members Based on Alleged Homosexuality*, (March 24, 1997) (Credible information does not exist when “a service member reports being threatened because he or she is said or perceived to be a homosexual.”).

³⁴ Inquiry Guidelines, ¶ A(3) (“Inquiries shall be limited to the factual circumstances directly relevant to the specific allegations.) See also DoD Instruction 5505.8, “Investigations of Sexual Misconduct by the Defense Criminal Investigative Organizations and Other DoD Law Enforcement Organizations,” December 21, 1993 [Hereinafter, “Guidelines for DCIOs”] (“Investigations shall be limited to the factual circumstances directly relevant to the specific allegations.”) See also *Policy Concerning Homosexuality in the Armed Forces: Hearings Before the Senate Comm. On Armed Services*, 103rd Cong., 2d Sess. (1993) p. 789 (comments by then DoD General Counsel Jamie Gorelick: “Once you establish the elements of the offense or basis for discharge, you go no further.”).

- Commanders shall exercise sound discretion regarding when credible information exists.³⁵
- Commanders shall examine the information and decide whether an inquiry is warranted or no action should be taken.³⁶
- Commanders will consider, in allocating scarce investigative resources,³⁷ that sexual orientation is a personal and private matter, and that under current policy, there is a decent regard to the legitimate privacy and associational rights of all service members.³⁸

What do these limits on gay investigations mean? In the words of General Powell, “no witch hunts.”³⁹ In the words of Senator Sam Nunn, “no sex squads.”⁴⁰ In the words of President Clinton, “a decent regard to the legitimate privacy and associational rights of all service members.”⁴¹ In the words of Secretary of Defense William Cohen, “no pursuits.”⁴²

The limits set forth under “Don’t Ask, Don’t Tell, Don’t Pursue” were intended to stop the far-ranging, punitive and heavy-handed investigations that characterized the military’s treatment of its gay members under prior policies. These limits have been roundly ignored. Investigative excesses have been routinely justified.

³⁵ Inquiry Guidelines, ¶ D(2) (“Commanders shall exercise sound discretion regarding when credible information exists.”).

³⁶ *Id.* (“They shall examine the information and decide whether an inquiry is warranted or no action should be taken.”).

³⁷ Guidelines for DCIOs, (“...as a matter of investigative priorities and resource limitations, Defense Criminal Investigative Organizations (DCIOs) and other DoD law enforcement organizations will normally refer allegations involving only adult private consensual sexual misconduct to the service member’s commander for appropriate disposition.”).

³⁸ DoDD 1304.26, Enclosure 2(8)(a) (1994), DoDD 1332.30, Enclosure 2-2(C) (1994), and DoDD 1332.14, Enclosure 4(H)(1) (1994) (“Sexual orientation is considered a personal and private matter.”).

³⁹ *Policy Concerning Homosexuality in the Armed Forces: Hearings Before the Senate Comm. On Armed Services*, 103rd Cong., 2d Sess. (1993) at 709 (statement of General Colin Powell).

⁴⁰ Former Senator and Chairman of the Senate Armed Services Committee, Sam Nunn, THE RECORD A10 (May 31, 1993).

⁴¹ President William J. Clinton, *Text of Remarks Announcing the New Policy*, THE WASHINGTON POST A12 (July 20, 1993).

McVeigh Case: The Navy “Goes Too Far”

A salient example of the continued pursuit of suspected gay service members is the recent, highly-publicized case of Senior Chief Petty Officer Timothy R. McVeigh (who, as noted by the press, is “no relation to the Oklahoma City bomber”). Senior Chief Petty Officer McVeigh is a seventeen-year career sailor with an impeccable record. At age 36, he had risen to become the senior enlisted man (Chief of Boat) aboard a nuclear submarine, the *USS Chicago*. The Navy attempted to discharge him, however, based on information the Navy surreptitiously obtained about McVeigh’s identity from the internet service provider America Online (AOL).

On January 29, 1998, Judge Stanley Sporkin, a Reagan appointee, granted a permanent injunction in Senior Chief Petty Officer McVeigh’s favor preventing the Navy from discharging him. Judge Sporkin ruled that the “Navy went too far”⁴³ and the Navy “violated the very essence of ‘Don’t Ask, Don’t Pursue’ by launching a search and destroy mission”⁴⁴ (Exhibit 15). Judge Sporkin also ruled that the Navy violated the Electronic Communications Privacy Act by failing to obtain the required warrant or court order before seeking this information from AOL.⁴⁵

On January 21, 1998, prior to Judge Sporkin’s decision, America Online issued a statement reporting the company’s finding, based on an internal investigation into the matter, that the Navy had “deliberately violated federal law” (Exhibit 16). AOL also admitted that its employee had made a mistake in releasing any information about Senior Chief Petty Officer McVeigh.

⁴² *World News Tonight* (ABC news broadcast, Transcript # 97022604-J04, February 26, 1997).

⁴³ *McVeigh v. Cohen*, (D.C.D.C.) Civ. Action No. 98-116, Memorandum Opinion Supporting Preliminary Injunction Order, Jan. 26, 1998, at 9.

⁴⁴ *Id.* at 7.

On the same day, Professor Charles Moskos, the architect of “Don’t Ask, Don’t Tell, Don’t Pursue,” submitted a declaration in federal court concluding that the Navy had violated the policy’s limits on investigations (Exhibit 17).

In a move that has become typical, Navy leaders persist in their denials of wrongdoing.⁴⁶ The Navy insists, for example, that it could investigate Senior Chief Petty Officer McVeigh based on a suspicion that the online profile was his. That conclusion flies in the face of the regulations, which state that “credible information does not exist when the inquiry would be based on rumor, suspicion, or capricious claims....”⁴⁷ The Navy prosecutor who acted as the inquiry officer in this case claimed at Senior Chief Petty Officer McVeigh’s administrative discharge board that “I was not on a witch hunt.... I was permitted to ask questions that may lead him to volunteer information regarding homosexual conduct.” (Exhibit 18) That, however, is the very definition of a witch hunt and is expressly forbidden under current regulations. Even where inquiries are legitimate, inquiry officers are not permitted to fish for information to see what they can dig up.⁴⁸

The Navy argued in federal court that, even if Judge Sporkin found wrongdoing on the part of Navy officials, Senior Chief Petty Officer McVeigh should still be discharged. The Navy argued that Senior Chief Petty Officer McVeigh had no recourse because “Don’t Ask, Don’t Tell, Don’t Pursue” creates “no substantive or procedural rights” for service members. Basically, the Navy’s position is that the end justifies the means in a gay investigation.

⁴⁵ *Id.* at 8.

⁴⁶ Treva Jones, *Navy Secretary Boosts Scouting*, THE NEWS OBSERVER (RALEIGH, N.C.) B3 (Jan. 31, 1998). (When asked about Judge Sporkin’s ruling in McVeigh’s favor, Secretary Dalton responded, “We are confident we did comply with the law and Department of Defense regulations.”)

We look forward to the day when government officials stop attempting to excuse and justify the actions of their agents and instead put their energy into training investigators to comply with the law in the first place. America Online admitted wrongdoing and has pledged to take steps to ensure that the mistake is not repeated. The Navy should do the same.

The Army Stops A Witch Hunt

SLDN cannot help but contrast the Navy's actions in the *McVeigh* case with those taken by the Army this year to stop a witch hunt that was in progress at an Army installation in the Southeast. The record in the case shows the lack of discipline typical for those investigating suspected gay service members. The record also provides a good example of what officials at higher headquarters should do when they learn of witch hunts by their commands.

In this case, Army investigators interrogated a soldier who was alleged to have been a male prostitute, stripper in a gay nightclub, porn star and drug dealer. Rather than charge him for all of his alleged crimes, however, Army investigators brokered a deal and turned him into an informant in order to identify gay soldiers.

According to the record in this case, Army investigators obtained photos of the informant at a gay bar and asked him to identify the patrons of the bar (Exhibit 19). The questions asked included the following:

1. I'm showing you photograph #1, can you identify this individual?
2. I'm showing you photograph #2, can you identify this individual?

⁴⁷ Inquiry Guidelines, ¶ E(3).

⁴⁸ Inquiry Guidelines, ¶ A(3).

3. I'm showing you photograph #3, can you identify this individual?
4. I'm showing you photograph #4, can you identify this individual?
5. I'm showing you photograph #5, can you identify this individual?
6. I'm showing you photograph #6, can you identify this individual?
7. I'm showing you photograph #7, can you identify this individual?

The investigators then asked questions about specific individuals the informant identified from the photos.

8. Tell me everything you know about [A]?
9. How many times did you and [A] have sex and where?
10. Describe the different sexual acts you and [A] would perform?
11. Describe...the locations in the house where you had sex?
12. Tell me everything you know about [B]?
13. Tell me everything you know about [C]?
14. Tell me everything you know about [D]?
15. How many other men have you had sex with that are in the military at [base]?
16. Tell me everything you know about [E]?

The Army's refreshing response when apprised of the witch hunt was to review the case, not automatically rush to justify the command's actions. SLDN applauds the Assistant Staff Judge Advocate who reviewed the case for stopping the witch hunt before it destroyed the lives and careers of possibly dozens of soldiers. In a letter to the command dated April 7, 1997 (Exhibit 20), the Assistant Staff Judge Advocate concludes the following:

- DoD Instruction 5505.8 not only prohibits this command from conducting investigations solely to determine a service member's sexual orientation, it limits investigations into adult private consensual sexual misconduct *to the factual circumstances directly relevant to the specific allegations.*

- Specialist [A]’s statements are rife with questions and areas of investigation which, although not illegal, suggest a goal of the investigation is identifying the sexual orientation of the soldiers among this group.
- Broad, cryptic questions such as ‘Do you understand why you are here?’ are easily interpreted as a veiled hint that the subsequent interview is about sexual orientation.
- Attempting to identify soldiers who associate with [B] and asking witnesses to identify soldiers in photographs is easily portrayed as a ‘witch-hunt’ based upon sexual orientation....
- Broad questions such as ‘Tell me everything you know about SGT X’ or ‘Tell me everything you know about Y’ are easily interpreted as improper questions about sexual orientation.

The Army did the right thing in this case and should be commended. The Army’s actions in this case sharply contrast with the Navy’s insistence that it behaved properly in the McVeigh case.

The Army’s good actions also stand in sharp contrast to the Air Force’s response last year to a witch hunt at Hickam Air Force Base in Honolulu, Hawaii. The witch hunt targeted seventeen servicemen, the “Hawaii 17,” in all branches of the military except the Coast Guard. Air Force officials entered into a pre-trial agreement with Airman Bryan Harris, an admitted felon, who was facing life in prison for the rape of another man and other charges (Exhibit 21). Similar to the Army case discussed above, Air Force prosecutors cut a deal. The Air Force agreed to reduce Harris’ sentence from life to twenty months on the condition that he turn over the names of all military men with whom he had allegedly engaged in consensual sex. Harris accused seventeen men. All of the accused Air Force members have been discharged. Airman Harris served only

eleven months of his sentence.

The Air Force continues to justify its actions in this case despite the overwhelming record of command improprieties. The Air Force Inspector General (IG) concluded that, although prosecutors pressured Airman Harris to name names, the Hickam investigation was not a witch hunt. The IG also verified that inquiry officers asked the following questions about one of the men accused by Airman Harris, yet has concluded that they did not constitute questions about sexual orientation (Exhibit 22):

1. Do you have any reason to believe that TSgt Gandy doesn't like girls?
2. Have you ever had the feeling that TSgt Gandy is interested in men?
3. Have you ever seen TSgt Gandy hug, kiss, or hold hands with another man in a way that was more than just a means of saying hello?
4. Would you be surprised to find out that TSgt Gandy is gay?
5. What is it like to work in a unit with so many homosexuals?
6. Has TSgt Gandy ever talked about women to you, you know, the way men talk about women?
7. Where does TSgt Gandy hang out? With whom?
8. Has TSgt Gandy ever had a girlfriend?
9. Do you think it is unusual for him not to have a girlfriend?
10. Does anyone in your office know that TSgt Gandy is gay?

The Department of Defense Inspector General and the Department of Defense General Counsel's office have declined to reopen the Air Force Inspector General's investigation in 1997.

McVeigh Is Not Alone: Services Take Witch Hunts Online

The McVeigh case is only one of several SLDN has documented in which military officials have taken witch hunt tactics online in the past year. Coast Guard Petty

Officer Tim Bauer reports that investigators told him they had monitored his online activities for six months before moving to discharge him. His Notification of Administrative Separation, dated September 8, 1997, states that the only reason for discharge is that from July 2, 1997 to August 28, 1997, Petty Officer Bauer “used a government computer to access an internet ‘chat room’ for gay men” (Exhibit 23). Other military members in Bauer’s workplace, however, are reported to routinely access the internet from government computers for personal use. The unit’s unofficial policy reportedly permits this as long as it does not interfere with work requirements. The command, however, took adverse action against Bauer solely because the internet activity indicated interest in gay issues, notwithstanding “Don’t Ask, Don’t Tell, Don’t Pursue” guidelines that expressly protect associational activities.⁴⁹

SLDN does not take the position that there should be no computer use policies. Rather, where such policies exist, they should be applied in an even-handed manner, not selectively enforced as a ruse to skirt the limits to investigations under “Don’t Ask, Don’t Tell, Don’t Pursue.”

An Air Force inquiry involving online privacy ultimately led one service member to leave the Air Force rather than face continued prying into his private life and discharge proceedings. The record in the case is instructive in showing just how far the services are going to pursue suspected gay personnel.

According to the Report of Investigation, this case started based “on an anonymous phone call” about an Air Force member, alleging that he used government computers to access the internet and that his internet home page contained “homosexual images” (Exhibit 24). The commander investigated the allegation of misuse of

⁴⁹ Inquiry Guidelines, ¶ E(4).

government property and disciplined the member. The commander, however, also initiated an inquiry into the service member's sexual orientation based on this same anonymous tip.

At this juncture, the rules and regulations are clear that commanders cannot initiate an inquiry under "Don't Ask, Don't Tell, Don't Pursue" based on anonymous tips.⁵⁰ According to the Report of Investigation, however, the command initiated an inquiry "to explore the issue of [A's] homosexuality." The inquiry officer was tasked to conduct a "review of all aspects of the computer Internet web site home page allegedly produced and maintained by [A], and available e-mail documents associated with that web site and pertinent to this inquiry...."

Accordingly, the inquiry officer extracted 565 pages of computer code, web pages and electronic mail detailing the history of internet use by the servicemember. The inquiry officer's efforts were so wide-ranging that he also pulled the service member's medical and mental health records.

In addition, the inquiry officer interviewed twenty-three coworkers, friends, supervisors and others, attempting to solicit information about the service member's sexual orientation and private life. He asked twenty-one of the interviewees the following overly-broad questions:

1. Have you seen a web site home page relating to [A]?
2. Have you observed any on or off duty actions by [A] relating to the nature of this investigation?
3. Do you have any additional comments relating to the nature of this investigation?

⁵⁰ Inquiry Guidelines, ¶ B(3); E(3) (By definition, credible information requires a source whose credibility can be assessed. An anonymous phone call cannot be assessed and deemed credible in the same way that "rumor, suspicion, or capricious claims" are not deemed credible.).

4. Can you suggest any individuals that would have information relating to the nature of this investigation?

Occasionally, the inquiry officer would elicit some irrelevant speculation from the interviewees. One witness noted that she knew that the “beneficiary that [A] named for his...Life Insurance was a male Captain that he described as a friend” (Exhibit 25).

Current rules specifically state that the listing of a same gender beneficiary is not credible information.⁵¹ Another interviewee responded, “The only comment that I could relate was that [A’s] roommate appeared somewhat effeminate” (Exhibit 26). Such comments are, at best, stereotypical, after-the-fact speculation. “Don’t Ask, Don’t Tell, Don’t Pursue” specifically protects associational rights⁵² and states that speculation⁵³ about a service member and his or her friends is not credible information.

One of the twenty-three witnesses, however, finally provided one of the two items that the command eventually used to recommend discharge. That interviewee said, “During the conversation that I had with [A] that evening he confided in me that he was ‘gay.’” A statement of sexual orientation can be a basis for discharge under “Don’t Ask, Don’t Tell, Don’t Pursue,” but this purported statement was made in a private context.⁵⁴ Furthermore, the statement made by this witness was not the original allegation against

⁵¹ DoD Policy Guidelines on Homosexual Conduct in the Armed Forces, July 19, 1993 (“The listing by a service member of someone of the same gender as the person to be contacted in the case of an emergency, as an insurance beneficiary, or in a similar context, does not provide a basis for separation or further investigation.”).

⁵² Inquiry Guidelines, ¶ E(4).

⁵³ Inquiry Guidelines, ¶ E(1-3) (“Credible information does not exist ... when: 1. The individual is suspected of engaging in homosexual conduct, but there is no credible information ... to support that suspicion; or 2. The only information is the opinions of others that a member is homosexual; or 3. The inquiry would be based on rumor, suspicion, or capricious claims concerning a member’s sexual orientation ...”).

⁵⁴ Inquiry Guidelines, ¶ C(2) (“A basis for discharge exists if: ... The member has said that he or she is a homosexual or bisexual, or made some other statement that indicates a propensity or intent to engage in homosexual acts ...”).

the service member, and “Don’t Ask, Don’t Tell, Don’t Pursue” prohibits inquiry officers from fishing for additional grounds for discharge.⁵⁵

The only other piece of information that this service member’s command found and used to recommend discharge was one e-mail message recovered using several on-line search engines. In the electronic message, the service member allegedly admits that he is gay (Exhibit 27). In the notice of administrative separation, the service member’s commander writes:

You did on or about September 16, 1996, make a homosexual statement, in that you sent an e-mail from your government owned computer to ‘John’ in which you stated, ‘I really don’t consider my sexual orientation an aberration; although, I suppose some people definitely do. As you know, the reality is that there are quite a few lesbian and gay folks in the USAF and other branches. We’re just trying to live our lives as best we can given the current circumstances. I see...my web-page as a means to express my sexuality, as well as other interests in a somewhat low exposure environment,’ or words to that effect.

This e-mail was not the original allegation against the servicemember. It was uncovered only in the course of a fishing expedition. Time and time again, SLDN has documented cases where properly limited inquiries and investigations under “Don’t Ask, Don’t Tell, Don’t Pursue” would not have resulted in adverse action against a suspected service member. Inquiry officers who are given free reign to conduct fishing expeditions, however, may well turn up something if they dig long enough. How many of the same commanders and inquiry officers could withstand government agents searching every nook and cranny of their lives to dredge up confidences shared with friends, or any other information against them, however slight?

⁵⁵ Inquiry Guidelines, ¶ A(3).

The Navy, Coast Guard and Air Force are not the only services that have pursued suspected gay personnel online. SLDN has handled such cases in every service this year, raising serious concerns about online privacy and service members' associational rights. In issuing his opinion in *McVeigh v. Perry*, Judge Sporkin warns that, "In these days of 'big brother,' where through technology and otherwise the privacy interests of individuals from all walks of life are being marginalized, it is imperative that statutes explicitly protecting these rights be strictly observed." We believe most Americans view their online activities as private. It is clear that the Air Force member discussed above did. Even if online communications somehow do not inhere a reasonable expectation of privacy, they certainly are of the same caliber of associational activities purportedly protected under "Don't Ask, Don't Tell, Don't Pursue," such as going to a gay bar, marching in a gay rights parade or reading gay magazines such as *OUT Magazine*, a cultural magazine for the gay community, and *The Advocate*, a news magazine.⁵⁶

The "Prove You're Gay" Fishing Expedition

Another growing and disturbing trend among all services is the "prove you're gay" phenomenon. In the "prove you're gay" cases, inquiry officers conduct wide-ranging fishing expeditions in violation of "Don't Ask, Don't Tell, Don't Pursue" in an effort to dig up additional information about a service member who has already made a statement that he or she is gay. The trend started in the Air Force in 1994⁵⁷ and is spreading now to the other services. These "prove you're gay" fishing expeditions are placing service members lives and liberty at risk.

⁵⁶ Inquiry Guidelines, ¶ E(4).

⁵⁷ C. DIXON OSBURN ET. AL., SERVICEMEMBERS LEGAL DEFENSE NETWORK, CONDUCT UNBECOMING: THE THIRD ANNUAL REPORT ON "DON'T ASK, DON'T TELL, DON'T PURSUE" (1997).

In the “Don’t Ask” section, for example, we described the serious consequences of the “prove you’re gay” approach in the case of AN Barry Waldrop. AN Waldrop is the sailor who came out to his command in response to anti-gay harassment and who subsequently received a death threat. Rather than discharge him expeditiously, AN Waldrop’s command specifically told him he must “prove” that he is gay in order to be discharged. The command then launched an inquiry to determine whether AN Waldrop had engaged in gay acts.

By conducting a fishing expedition into AN Waldrop’s private life, rather than investigating those who had threatened him, the command exposed AN Waldrop to further danger and sent a terrible message to the crew: harassment will be tolerated and gay service members who report it will be punished.

The “prove you’re gay” fishing expedition also threatened AN Waldrop with additional adverse consequences, including imprisonment. The command, for example, threatened AN Waldrop with criminal charges if he did not admit to prior gay relationships, under the theory that he was lying about his sexual orientation and therefore making a false official statement. Under the Uniform Code of Military Justice (UCMJ), however, AN Waldrop could have been criminally charged and imprisoned for five years per charge if he had confirmed engaging in sodomy, which includes oral sex, or indecent acts, which includes almost anything in the context of a gay relationship, including hand-holding. How could AN Waldrop in good faith comply with his command’s demand to provide information about gay relationships knowing that any such information, if it indeed existed, could have landed him in jail? The “prove you’re gay” investigative tactic places service members in an untenable, lose-lose situation and

demonstrates a complete lack of good faith on the part of commanders and inquiry officers in following the limits to investigations under “Don’t Ask, Don’t Tell, Don’t Pursue.”

In another case, a highly-trained Navy officer was ordered to stay on duty and proceed to his next assignment by the Bureau of Navy Personnel (BUPERS) although he had made a statement of his sexual orientation in response to anti-gay comments in his unit and because of ethical concerns. In a letter to the officer, a BUPERS official explained his decision, stating, "Nothing in your statements indicates you engage in homosexual acts, or that you will engage in homosexual acts." BUPERS even went so far as to accuse the officer of lying about his orientation, a conclusion that is flat out wrong (Exhibit 28).

If the Navy has adopted the position that statements of homosexual or bisexual orientation are no longer grounds for discharge, that would be a major development that SLDN would welcome. SLDN asks Navy officials to confirm whether this is, indeed, their position. If it is not, this situation raises serious concerns about whether the intent of BUPERS is simply to punish service members who “come out” in the face of harassment, the threat of being “outed,” or due to ethical concerns by setting them up for even harsher punishment than discharge.

In numerous Air Force cases, SLDN has documented that investigators have asked or have attempted to ask the following standard questions with the purpose of forcing service members to “prove they are gay” (Exhibit 29):

1. What was your intent in making the statement?
2. What was your purpose for stating that you are a homosexual?
3. Do your parents and siblings know?

4. How can they be contacted?
5. How did you discover that you are a homosexual?
6. When did you discover that you are a homosexual?
7. Where do you live and do you have any roommates?
8. How do you know you have a homosexual orientation?
9. When did you realize this?
10. Who (sic) have you told?
11. When did you tell them?
12. Why did you tell them?
13. Have you been dating anyone?
14. Opposite or same sex?
15. How frequently have you dated?
16. How recently?
17. How can these persons be contacted?
18. Do you belong to any homosexual organizations?
19. Who are your close friends?
20. How can they be contacted?
21. Are there any other witnesses or documents that could verify that you are a homosexual?
22. Is there any further information, statements or evidence concerning this matter?

The Air Force has been quite forceful in attempting to justify its actions, claiming that “prove you’re gay” tactics are used only in a limited number of cases involving service members who come out and who have received educational funding, special pay or bonuses in exchange for a further service obligation. The Air Force asserts that this punitive approach is necessary to prevent fraud by heterosexual service members or gay “slackards” who might claim to be gay in order to avoid part of their service obligation. The service has provided no facts to support its assertion.

The Air Force position does not stand up to scrutiny. First, the Air Force has bad facts. In the past four years, SLDN has assisted 1,300 men and women harmed by “Don’t Ask, Don’t Tell, Don’t Pursue” and not once have we received any evidence to support the Air Force’s contention that the service is plagued by heterosexual frauds or

gay slackards. We agree with *The Washington Post's* editorial on May 15, 1997: "We would like to see the evidence on that one."⁵⁸

Second, the Air Force is using these memoranda in numerous cases, such as that of former Senior Airman Wendy Wilkins, where service members have not received any educational assistance or enlistment bonuses.

Third, the Air Force memoranda are based on completely inaccurate assumptions about what it means to be gay. Air Force officials do not acknowledge the sacrifice and risk to service members' safety involved in coming out. Nor do they comprehend the ethical dilemma created by the present regime, which requires service members to lie, even to their parents, as a condition of military service. This result is diametrically opposed to the professed Core Values of the Air Force. The ethical dilemma imposed on service members by this policy has only intensified in a year during which all of the services have placed renewed emphasis on Core Values, an otherwise laudable effort.

In a letter to Secretary Cohen dated September 25, 1997, S. Michael Yongue states that the reason he had to be honest about his sexual orientation had everything to do with the list of Air Force Core Values which he recited in his letter (Exhibit 30):

- **Courage.** "...a person of integrity, for example, is capable of acting on conviction."
- **Honesty.** "Honesty is the hallmark of the military professional because in the military, our word must be our bond. The bottom line is we don't lie, and we can't justify any deviation."
- **Responsibility.** "No person of integrity is irresponsible; a person of true integrity acknowledges his or her duties and acts accordingly."

⁵⁸ *The Washington Post*, "A Good Time to Review Gay Policy," May 15, 1997, A22.

- **Self-Respect.** “To have integrity also is to respect oneself as a professional and a human being...”
- **Mutual Respect.** “Genuine respect involves viewing another person as an individual of fundamental worth.”

Contrary to the Air Force’s own Core Values, its instructions to inquiry officers to treat service members who come out as heterosexual frauds or gay “slackards” has produced a climate where honesty is harshly punished and mutual respect is discarded. “Anything goes” is the rule in gay cases. The hypocrisy is clear to heterosexual and homosexual service members alike, undermining the service’s best intentions to inculcate strong values into our military members.

In addition to the ethical concerns which motivate some service members, many others who would otherwise serve quietly for years come out specifically to escape hostile environments or threats to their safety. Air Force Major Robert L. Kittyle is an example. Though the inquiry officer appointed in Major Kittyle’s case initially tried to prove that Kittyle was not gay, he finally concluded that, “It appears Major Kittyle made this announcement after he could not tolerate derogatory comments concerning homosexuals.” Nothing was done to end the derogatory comments (Exhibit 31).

“Don’t Ask, Don’t Tell, Don’t Pursue” is clearly not a zero discharge policy. Those who make public declarations of a homosexual or bisexual orientation will be discharged and the services will lose the valuable contributions of these members. Military leaders insisted on this policy in 1993, and they won. In light of this, it is rather disingenuous for Air Force leaders to complain now that they are not happy with all the results of their policy, namely that they are losing highly-skilled personnel such as doctors, pilots, physicists, and senior enlisted members.

As the Air Force has adopted more and more punitive measures to target the tiny subset of skilled members who have received government funding, the tail has come to wag the dog. The intrusive tactics required by the Air Force memoranda, offensive enough under any circumstances, have “bled over” to become the norm in all gay cases, even spreading to the other services. The effect is to unnecessarily “ratchet up” the pain threshold of gay cases as well as the cost, which often exceeds the amount of funding received by the service member. Ever more intrusive tactics and prolonged discharge proceedings are being used in simple cases where statements of sexual orientation should, under current policy, result in expeditious discharges. Investigations are launched and discharges initiated even in cases where no inquiry or discharge should be at issue because the service member has not violated the policy.

This approach is pouring fuel onto the flames of an already explosive situation in cases where service members come out as their only real recourse to protect their safety, such as those involving death threats and other harassment. This serves no purpose but to further jeopardize service members’ safety. The practice of asking overly-broad, intrusive questions is not limited to coming out cases, but is indicative of the witch hunt mindset that continues to exist in the services.

Good Command Actions

The news is not all bad. SLDN has documented some isolated cases where commands did not pursue suspected gay service members, correctly complying with the letter and intent of “Don’t Ask, Don’t Tell, Don’t Pursue.” These cases, like the Army’s response to the witch hunt described earlier, should serve as a compass to point the way to a “Don’t Ask, Don’t Tell, Don’t Pursue” policy that is properly implemented.

In the Air Force, a command launched an inquiry against a ten-year service member based on false allegations that he was gay. The command eventually closed the inquiry, however, after the inquiry officer determined that there was no credible information of homosexual conduct. “All of the circumstances taken together suggest that the allegations... are not credible,” concluded the inquiry officer in the Report of Inquiry. He continued, “The individual who alleges them has a motive to lie that would render him difficult to believe in a discharge board.” Further, after hearing from witnesses who stated that the service member ‘fit the stereotype’ of a homosexual, the inquiry officer correctly concluded, “It is specifically noted that homosexual mannerisms, such as those cited by the witnesses, are not homosexual statements” (Exhibit 32).

SLDN lauds the result of this inquiry. However, we note that the inquiry should not have been initiated. Credible information is required before launching an inquiry; commands may not investigate to try to find credible information. The danger in allowing inquiries to proceed is that inquiry officers who are less conscientious or informed than the inquiry officer in this case often fish for information that is not at issue, as in the online cases described earlier.

Another example of a good command action involves a career member of the military who faced a discharge board based on a letter to his partner that had been inadvertently discovered by a co-worker. The discharge board recommended retention, stating that “the release of the letter was entirely inadvertent. It was intended as a private communication for one person only.” SLDN agrees with the board’s conclusion that private, inadvertently discovered information was not intended to be policed under “Don’t Ask, Don’t Tell, Don’t Pursue.”

A Ft. Sill, Oklahoma, commander refused to initiate an inquiry when a soldier turned in a gay-related video belonging to a barracks roommate. While the Army commander “chewed out” the soldier for having the video, he also stated that the soldier’s private life was private, which is exactly what “Don’t Ask, Don’t Tell, Don’t Pursue” provides. The commander’s actions also reflected a correct understanding that neither gay-related videos nor inadvertent discoveries are credible information.

In a similar situation at Charleston Air Force Base, an airman discovered a gay adult magazine left behind by a Senior Airman when he moved out of his on-base housing. The airman’s commander properly declined to initiate an inquiry given the current rules protecting associational rights, including the possession of gay-related publications.

One final case involves a Navy Petty Officer who was suspected of being gay. The suspicions started when a civilian nurse who treated him for injuries from an automobile accident at a hospital emergency room searched his belongings and discovered items that led her to believe he might be gay. The nurse told her husband, who was a Navy officer, about what she had found and the husband relayed the information to the Petty Officer’s commander. The commander correctly determined that the service member had not made any public statements of his sexual orientation and that suspicions about his sexual orientation were an insufficient basis for an inquiry.

The most significant improvement in “Don’t Pursue” compliance is that SLDN did not document a single instance in 1997 where commands court-martialed service members on allegations of consensual gay sexual conduct. Air Force Major Debra Meeks made headlines two years ago when she fought allegations that she had been in a

consensual lesbian relationship and was acquitted at court-martial.⁵⁹ The Air Force had specifically held Major Meeks beyond her twenty-year retirement date in order to criminally prosecute and potentially imprison her for eight years based on the allegations.⁶⁰ SLDN remains concerned, however, that investigators and inquiry officers continue to threaten service members with criminal charges, often forcing them to accept discharge characterizations that are lower than their records merit.

In the previous three years, SLDN documented a dozen cases where commanders had attempted to criminally prosecute gay service members for consensual sexual conduct.⁶¹ Each year, SLDN noted that the current regulations instruct commanders to pursue administrative rather than criminal remedies in such cases,⁶² and to ensure even-handed enforcement in the criminal system regardless of sexual orientation.⁶³ We also noted that we knew of no case in those years where heterosexual service members were criminally prosecuted for consensual sexual conduct in similar circumstances.

SLDN commends the apparent ceasefire on criminal prosecutions of gay people. DoD and the services should take the next step and ensure that no commander, investigator or inquiry officer uses the threat of criminal charges in cases arising under “Don’t Ask, Don’t Tell, Don’t Pursue.”

The bottom line: despite some bright spots, “Don’t Pursue” enforcement continues to not meet standards. “Don’t Pursue” violations surged from 191 in 1996 to 235 in 1997, a 23% increase. The Air Force and Navy continue to lead the pack in

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Inquiry Guidelines, ¶ D(1) (“Informal fact-finding inquiries and administrative separation procedures are the preferred method of addressing homosexual conduct. This does not prevent disciplinary action or trial by courts-martial when appropriate.”).

⁶³ Guidelines for DCIOs, ¶ (D)(3).

documented “Don’t Pursue” violations. Both Air Force and Navy commanders are guilty of launching investigations and inquiries without credible information, and initiating far-reaching investigations to fish for information against service members in an attempt to dig up information that can subsequently be used to justify discharges or court-martials. Higher commands typically respond by justifying, not stopping, violations. Some commands, however, are beginning to do the right thing. Criminal prosecutions of service members for consensual gay conduct have waned this year. A few commands have correctly refused to initiate inquiries based on private communications or inadvertent discoveries. DoD and the services should examine the real-life scenarios where commanders did the right thing and use them to train other commanders on the fact that the current policy contains limits on investigations.

DON'T HARASS

The “Don’t Harass” regulations state clearly that “the Armed Forces do not tolerate harassment or violence against any servicemember for any reason.”⁶⁴ In a major development in 1997, the Department of Defense issued guidance clarifying that commanders should respond to anti-gay harassment and lesbian-baiting by investigating the harassment itself, not service members who report it (the “Dorn memo”) (Exhibit 33).⁶⁵ The memorandum states:

- This guidance is issued because of information we have received that some service members have been threatened with being homosexual after they rebuffed sexual advances....
- The fact that a service member reports being threatened because he or she is said or is perceived to be a homosexual shall not by itself constitute credible information justifying the initiation of an investigation of the threatened service member.
- The report of a threat should result in the prompt investigation of the threat itself.
- Investigators should not solicit allegations concerning the sexual orientation or homosexual conduct of the threatened person.
- Service members should be able to report crimes free from fear of harm, reprisal or inappropriate or inadequate governmental response.
- Please ensure that commanders take appropriate actions in such instances, with due consideration being given to the safety of persons who report threats, and see that commanders hold fully accountable persons found to have made threats or engaged in threatening conduct.

⁶⁴ “Applicant Briefing Item on Separation Policy” issued with DoDD 1304.26.

⁶⁵ Memorandum of Under Secretary of Defense Edwin Dorn, *Guidelines for Investigating Threats Against Service Members Based on Alleged Homosexuality*, (March 24, 1997)

The services, however, have failed to distribute the Dorn memo to the field. No commander, attorney, inquiry officer, investigator or other service member asked by SLDN in the course of assisting service members last year had ever heard of the Dorn memo, much less read it.

One result of the lack of guidance on anti-gay harassment and lesbian-baiting in the field is that “Don’t Harass” violations surged in 1997. SLDN documented 182 “Don’t Harass” violations in 1997, up 38% from the 132 “Don’t Harass” violations reported last year. The Navy led the services with 66 “Don’t Harass” violations, though this serious problem cuts across every service.

Anti-Gay Threats Aboard the USS Eisenhower

In one of the most harrowing sets of cases this year, SLDN received reports of anti-gay threats, including death threats, against four sailors onboard the *USS Eisenhower* within a two-month period. One of the sailors targeted was AN Barry Waldrop.

As described in the “Don’t Ask” section of this report, AN Waldrop had faced repeated questions about his sexual orientation that gave rise to concerns for his safety. In the middle of September, 1997 he returned to his berthing area one day to find the warning “You’re a dead faggot” scrawled in magic marker on his rack. A sailor in the next rack, who had seen the threat, asked AN Waldrop point blank if it were true that he is gay (Exhibit 8).

AN Waldrop reported the threat to his chain-of-command. Previously, he had informed his superior officer of the harassment he was experiencing and his concern for his safety. To SLDN’s knowledge, the chain-of-command did nothing to investigate the threat or to protect Waldrop. Only after Waldrop sought help from SLDN and, at our

urging, a military defense attorney, did the ship's security office even send personnel to photograph the threat. In a memorandum for record dated January 21, 1998, AN Waldrop writes, "This was two weeks later, and the magic marker was still there."

AN Waldrop was the second of four sailors on the *USS Eisenhower* who were targeted within a three-month period. In August, the first sailor received the written threat, "Leave or Die Fag," tacked to his rack.

In September 1997, a third sailor was knocked unconscious by an unknown assailant who called him "faggot" in an off-base assault. The assault occurred just days after his car tires had been slashed while the car was parked on base. The threats followed endless haranguing by fellow sailors that went undisciplined by the command. This sailor, for example, reports that groups numbering up to ten sailors yelled "faggot" at him, in full view and hearing of noncommissioned officers when he was on the ship's deck. These incidents occurred no less than twice a week, according to the sailor.

A fourth sailor found "Leave Fag" written in blood-like ketchup on his rack in October 1997. This sailor reports that twice he was awakened at night when someone had opened the curtains on his rack.

These three sailors also reported the threats and harassment they received to the ship's security personnel, among others. To SLDN's knowledge, the security personnel made no serious effort to investigate the threats. In fact, security personnel told the sailor who found "Leave Fag" written in ketchup that it was not a threat.

At one point after SLDN learned of the threats on the *USS Eisenhower*, the ship's senior officers appeared to take the threats against the fourth sailor seriously, agreeing to remove the sailor from the ship before it got underway. Seven days later, however, the

command reneged on this understanding and helicoptered the sailor out to the ship at sea, with no notice. When he reached the ship, the sailor was reportedly placed on restriction, questioned about his sexual orientation and pressured to drop his report of the threats. The legal office then accused him of vandalizing his own rack.

Like AN Waldrop, the other threatened sailors independently came to the conclusion that the only way to protect their safety was to “come out” to the military and be discharged. The first sailor to be threatened was discharged expeditiously. The other sailors were not.

At the behest of the ship’s legal office, the command refused to expeditiously discharge the remaining three sailors, and by all appearances, it refused to take the death threats seriously. Instead, the command required the sailors to “prove” that they are gay by demanding evidence they had engaged in homosexual acts. This information was unnecessary for discharge and could have subjected the sailors to criminal charges. The sailors were also told that, if they did not “prove” that they were gay, they would be criminally charged for making false official statements, placing them in an untenable Catch-22.

The command’s decision to investigate the threatened sailors’ private lives served only to fuel the ship’s rumor mill and increase the sailors’ vulnerability. AN Waldrop, who had already taken to sleeping in the common area because of fear for his safety, became afraid to sleep at all after learning of a new round of threats to “whip his faggot ass” (Exhibit 8). At this point, nearly two months after he reported the first threat, Waldrop’s worried parents made a written appeal to the ship’s Captain to protect their son’s safety and revealed their private family conversations about his sexual orientation

in an effort to satisfy the command that he is indeed gay and clear the way for his discharge.

In a nutshell, when an apparent pattern of targeting perceived gay men emerged on the *USS Eisenhower*, the ship's command did little to attempt to track down the perpetrators and instead investigated the private lives of the threatened sailors and questioned their veracity.

The command's actions violated the clear mandates of "Don't Ask, Don't Tell, Don't Pursue" and the Dorn memo. "Don't Ask, Don't Tell, Don't Pursue" prohibits commands from asking service members to provide information about their sexual activities in cases involving statements of sexual orientation. This is a fishing expedition.⁶⁶ A statement of sexual orientation alone is a sufficient basis for discharge.⁶⁷

The Dorn memo is also very clear. The Dorn memo states that "The report of a threat should result in the prompt investigation of the threat itself."⁶⁸ This did not occur on the *USS Eisenhower*. The Dorn memo states that "Investigators should not solicit allegations concerning the sexual orientation or homosexual conduct of the threatened person."⁶⁹ Yet, in the *Eisenhower* cases, the command asked the sailors to prove that that are gay by providing details of their sexual lives, if any. And the Dorn memo states that "Service members should be able to report crimes free from fear of harm, reprisal or inappropriate or inadequate governmental response."⁷⁰ The *Eisenhower's* response was not only inappropriate and inadequate, it potentially jeopardized the sailors' lives.

⁶⁶ Inquiry Guidelines, ¶ A(3).

⁶⁷ Inquiry Guidelines, ¶ C(2).

⁶⁸ Memorandum of Under Secretary of Defense Edwin Dorn, *Guidelines for Investigating Threats Against Service Members Based on Alleged Homosexuality*, (March 24, 1997)

⁶⁹ *Id.*

⁷⁰ *Id.*

Ultimately, all of the *Eisenhower* sailors who received anti-gay threats were discharged after intervention by the sailor's families, top Navy officials and members of Congress. It is an unfortunate result that these sailors had to choose between their careers and their safety, but that is the predicament in which "Don't Ask, Don't Tell, Don't Pursue" and their command's misguided actions placed them. SLDN notes with gratitude the response of top Navy officials when alerted to this situation. SLDN, however, urges the Navy to hold accountable those responsible for both the threats and command violations in this matter.

Gay Bashing Against A Marine

Former Marine Lance Corporal Kevin Smith can also testify to the double-edged sword of anti-gay harassment when commands do not know the rules or do not take appropriate steps to ensure the safety of their troops. On September 26, 1997, Smith was assaulted by two men outside of a gay bar in San Angelo, Texas. His injuries were severe enough to prompt witnesses to call an ambulance. Smith made the difficult decision not to press assault charges against his assailant, because, as he detailed in a subsequent letter to his commander, dated October 9, 1997, "I did not want the military to learn about the attack. I feared that the circumstances surrounding the attack would be used as an excuse to initiate an investigation into my sexual orientation" (Exhibit 34).

Even though he did not press charges, Smith's platoon sergeant somehow learned of the assault and questioned him about it three days later. The platoon sergeant's response confirmed Lance Corporal Smith's fears. As stated by Lance Corporal Smith in a letter to his commander, "[The Platoon Sergeant]...asked me if I knew what kind of a bar I was at (sic)." "He also questioned me as to if there was anything that I wanted to tell

him and whether or not I wanted to get out of the military,” Smith reports. The platoon sergeant warned Smith that a Naval Criminal Investigative Service (NCIS) investigation into the assault would be “very thorough.”

Because of the command’s misguided focus on his suspected sexual orientation rather than the assault, Lance Corporal Smith reluctantly decided that his only real option, like the sailors onboard the *USS Eisenhower*, was to come out and be discharged from the military. In the letter to his commander, Lance Corporal Smith explains, “I enjoy my service in the Marines and am distressed at the position in which the DoD’s antigay policy has placed me. However, the price of serving my country is too high if the military puts more of a premium on investigating my private life than in assisting me with bringing those who assaulted me to justice” (Exhibit 34). Lance Corporal Smith has filed an IG complaint about this incident. The IG has released no results of the review to date.

Investigators Threaten Soldier With Death

In the Army, a noncommissioned officer (NCO) reports that he received a death threat at the hands of agents for the Criminal Investigation Command (CID). The threat occurred in the Army witch hunt mentioned in the “Don’t Pursue” section. The NCO who was threatened reports that he was questioned about gay allegations in his workplace. When he said that he did not want to discuss the allegations and invoked his right to consult with an attorney, the agents reportedly handcuffed him in front of his subordinates, telling him he was “not cooperating,” and hauled him down to their headquarters. Once there, one of the agents reportedly threatened him, stating, “There are accidents in divisions. Sometimes people die. When word gets out, you may be one

of those.” The NCO did not officially report the threats. In his view, such a report would only invite further investigation on trumped up charges. Although the NCO was cleared on the false allegations, he reports lasting consequences of the CID agents’ outrageous behavior. These include lingering suspicions that he is gay and diminished standing in the eyes of his command, despite his stellar professional record.

Additional Incidents Of Anti-Gay Harassment

Other incidents of anti-gay harassment recorded by SLDN in 1997 include, but are not limited to, the following:

- A soldier reports that he received the following message on his answering machine: “I better not find you up on the second floor, you faggot. If I do, I'm going to kick your ass. I'll kick your f---ing teeth out of the back of your head.” While the command did not investigate the soldier’s sexual orientation when he reported the threat -- a good development -- neither did the command or military police take steps actually to investigate the source of the threat. The threatened soldier lived in fear until the suspect was transferred at the end of his tour several months later.
- Shortly after an airman was questioned by his supervisor and coworkers about his sexual orientation, questions which he evaded, a coworker said to him, “If I ever saw two guys kissing, I'd beat them with a baseball bat.” The airman is very much afraid of coming forward with these facts for fear of his safety and his career.
- A marine reports that his car was vandalized after he was placed under investigation for allegedly dancing with two men in a crowded mixed-gender bar. The car was keyed in several places, holes were punched in the trunk and someone had kicked dents in it. An acquaintance of this marine reportedly received two phone calls saying, “Die fag” and “If I catch you around town, I'm going to kill you.”

Hostile Command Climate Tolerated

Many service members who contact SLDN report enduring hostile climates characterized by endless anti-gay epithets, comments and jokes. “Queer,” “Faggot” and “Dyke” are standard fare. Some of the many examples recorded in 1997 include the following:

- At the Marine Corps Recruiting Training Depot in San Diego, it is reported that drill instructors call recruits “butt f---ing c---suckers” and reprimand recruits who underperform by stating, in the case of marching, “show us how queers march.”
- In the Army, a physician reports hearing a supervisor say, “If I had a gay son, I’d kill him.”
- In Italy, a marine first sergeant reportedly greets new unit members with, “There are three things I hate: liars, thieves and faggots.”

There is no room in today’s military for comments such as these. Especially given the risk that service members face in reporting these incidents to their commands, it is incumbent on leaders to fulfill their responsibilities in setting the command climate. To date, that has not happened.

Hostile command climates erode unit cohesion. Morale dips whenever unit members, gay and straight, perceive that the command is not fair or evenhanded. Commands that condone, or at least tolerate, harassment risk the very real perception that they do not follow the rules and do not respect the work of members in the unit. Commands that permit anti-gay harassment send the terrible signal that anti-gay violence is okay and that those who harass need not fear consequences.

Lesbian-Baiting As A Weapon of Sexual Harassment

In addition to anti-gay harassment, violations of “Don’t Harass” also include lesbian-baiting, a form of sexual harassment. Women – straight, gay, and bisexual – often are accused of being lesbians when they rebuff sexual advances by men or report sexual abuse. Women who are top performers in nontraditional fields are also subject to lesbian accusations, rumors and speculation designed to undermine their professional standing. Too often, commanders respond by investigating military women under the guise of enforcing “Don’t Ask, Don’t Tell, Don’t Pursue,” rather than disciplining the individuals who start such rumors or who perpetrate sexual abuse. As a result, many women do not report sexual assault or harassment because they realistically fear that they will be accused as lesbians, investigated and even discharged. Others backtrack from the assertive leadership styles that have made them competent military leaders – and vulnerable targets for lesbian accusations.

The good news in 1997 is that this form of sexual harassment finally began to receive the high-level attention it deserves. The previously mentioned Dorn memo marks the first time in history that DoD has acknowledged that lesbian-baiting exists and has taken steps to address it, though DoD advisory bodies have addressed the issue previously.⁷¹

In May 1997, the Senate Armed Services Committee also addressed this form of harassment for the first time, in Senate Report 105-29 supporting the DoD Authorization Bill (Exhibit 35):

⁷¹ Defense Advisory Committee on Women in the Services (DACOWITS) 1989 Spring Conference, Recommendation #12 (1989) (“The DACOWITS recommends DoD expand existing leadership training to include dealing with unfounded accusations of homosexuality against Service members.”).

The committee is concerned by an increasing number of reports that service members who refuse to participate in improper sexual activities or who report improper sexual activities by others are being labeled as being homosexual as a form of retaliation. Such labeling is especially insidious in its secondary effects which frequently include additional harassment, humiliation, ostracism, and, in extreme cases, improper investigation for homosexuality.

The committee report “urges the Department of Defense and leaders at all levels” to “ensure that no individual experience [sic] the need to submit to unwanted sexual advances or harassment for any reason” and to permit individuals to report inappropriate activities without fear of retaliation.⁷² The report further states the committee’s concern that “the right to investigate individual conduct is not used as a threat or abused in any manner.”⁷³

Though lesbian-baiting is prevalent in all of the services, the Army is the only service that has explicitly addressed the issue. The *Senior Review Panel Report on Sexual Harassment*, released in September 1997, notes that “[f]emale soldiers who refuse the sexual advances of male soldiers may be accused of being lesbians and subjected to investigation for homosexual conduct...”⁷⁴ (Exhibit 36). Further, the report continues, “Women accused of lesbianism believe that the mere allegation harms their careers and reputations irreparably.”⁷⁵ Given the serious risks involved in reporting lesbian-baiting, it is significant that soldiers raised this issue on their own initiative in focus groups, as well as other venues, during the Panel’s visits to Army bases. The Panel itself did not specifically survey or question soldiers about lesbian-baiting.

⁷² Senate Report #105-29 (1997) at 281.

⁷³ *Id.*

⁷⁴ THE SECRETARY OF THE ARMY’S SENIOR REVIEW PANEL REPORT ON SEXUAL HARASSMENT, VOLUME 1 (July 1997) at 66.

⁷⁵ *Id.*

SLDN commends the Army for its courage in conducting this review and appreciates the Panel's acknowledgment of soldiers' concerns regarding lesbian-baiting, placing the Army a step ahead of the other services. SLDN is concerned, however, that the process for implementing the Panel's recommendations appears to have stalled.

An independent Inspector General survey of the Army's 91st Division (Training) conducted in 1992 and obtained this year by SLDN foreshadowed the results of the Army Senior Review Panel (Exhibit 37). According to this Inspector General, "[T]he prohibition against homosexuals in the Army results in a subtle 'billy club' for anyone to use against single women in the Army. When they turn down a 'date' with another soldier, it is often whispered unjustifiably, that she is 'lesbian.'"⁷⁶

Despite these official landmarks, lesbian-baiting kept turning up in high profile cases in 1997. When retired Sergeant Major Brenda Hoster accused the Army's top enlisted man, Sergeant Major of the Army Gene McKinney, of sexual misconduct, anonymous allegations that Hoster is a lesbian surfaced almost immediately in the *Los Angeles Times* and other publications.⁷⁷ Shortly thereafter, McKinney's attorney began openly to accuse Hoster of being a lesbian and to question her friendships with female Army colleagues.

Perhaps the most ironic case of lesbian-baiting involved Air Force Lieutenant Kelly Flinn. Under investigation for adultery with a man, among other charges, Lieutenant Flinn was questioned out-of-the-blue by Air Force investigators about whether

⁷⁶ SURVEY RESULTS, DEP'T OF THE ARMY 91ST DIVISION (TRAINING), *Sexual Harassment and Sexual Discrimination* (October 20, 1992) at 6.

⁷⁷ Casper Zeuthen, *Accuser's Story Dispute in Army Sex Case*, THE LOS ANGELES TIMES A10 (July 30, 1997).

she was involved in a lesbian relationship.⁷⁸ In response to a reporter's question about the interrogation, Flinn remarked on the lesbian-baiting dynamic at work: "The fact that I wasn't dating openly sparked rumors that I was homosexual You can't win."⁷⁹ Though invited to do so by SLDN, the Air Force has not disputed this published account of Flinn's interrogation (Exhibit 38). To SLDN's knowledge, no one has been held accountable for the blatant violation of "Don't Ask, Don't Tell, Don't Pursue" that occurred in this incident.

That investigators would, during a heterosexual adultery investigation, question Lieutenant Flinn about her sexual orientation and the nature of her friendships with other military women underscores the prevalence of long-held stereotypes that fuel lesbian-baiting. Retired Air Force Colonel Barbara Wilson characterized the perception of military women on a recent CNN television special: "When women first went in service, the adage was that only queers or prostitutes went in service . . . And I think that has just carried down from generation to generation."⁸⁰ Colonel Wilson continued, "But it's not just lesbians that are baited, it's women, generally speaking [who do not give in to sexual overtures]."⁸¹

SLDN's cases in 1997 reflected the continued problem of lesbian-baiting in the ranks. Former Army Sergeant Victoria Casper reports that she was forced out of the Army due to lesbian-baiting. In a complaint filed with the Department of Defense Inspector General, Sergeant Casper states that a male coworker constantly made degrading remarks about her, including Casper is "a f---ing lesbian," Casper is "a f---ing

⁷⁸ Tamara Jones, *The Pilot's Cloudy Future*, THE WASHINGTON POST D1 (April 29, 1997).

⁷⁹ Elaine Sciolino, *From a Love Affair to a Court-Martial*, NEW YORK TIMES, Section 1, page 1, Column 5, National Desk (May 11, 1997).

⁸⁰ *Sexual Bias in the Military* (CNN Impact broadcast, Transcript # 98020100V55 February 1, 1998).

woman.” Sergeant Casper reports that the coworker routinely accused her of being a “carpet muncher,” “faggot,” “queer” and “dyke” in front of witnesses, and of advancing professionally by giving sexual favors.

Sergeant Casper filed a sexual harassment complaint against the coworker with the base Equal Opportunity office. Shortly thereafter, allegations were lodged against Sergeant Casper by a close personal friend of the coworker, accusing Sergeant Casper of engaging in a homosexual marriage. Sergeant Casper vigorously denied the allegations. The allegations, constant harassment and lack of an appropriate command response took their toll. Ultimately, she came to the difficult conclusion that fighting the allegations would jeopardize the honorable discharge she had been offered and she decided to leave the military. The Department of Defense Inspector General has yet to conclude a review of this matter.

In a Marine Corps case, a female marine reports that her husband accused her as a lesbian after she filed for divorce proceedings. The female marine has a stellar record, while her husband has a record of disciplinary problems, including sexual harassment, and a history of domestic violence. Despite the husband’s clear motives for retaliation, the female marine’s command initially asked her if she were gay and threatened her with unspecified criminal charges. While this situation ultimately dissipated when the wife moved to a new command, she fears that her ex-husband will soon try again to derail her career through false allegations. SLDN is not aware of any action taken against the husband by his command.

In one last example of lesbian-baiting, a senior officer writes that, even after twenty years of stellar service, she is still baited as a lesbian (Exhibit 39). She recounts

⁸¹ *Id.*

that twenty years ago “I was propositioned daily and when I questioned their behavior and refused to ‘play’ the game I was called names, labeled as a ‘dyke.’ Obviously there was something wrong with me if I did not want to be with them!” She has endured repeated investigations, threats, rumors and false allegations during her career.

Recently, her commander received a series of anonymous allegations that she is a lesbian. She is in a good command that recognizes that anonymous allegations are not a sufficient basis to start an inquiry and that good leaders may have accusations of one sort or another thrown at them by detractors. She remains worried that one day a commander will take the allegations and run with them, though they are unfounded. She has witnessed countless episodes herself when women’s careers have been derailed by false allegations of lesbianism.

A Freedom of Information Act (FOIA) request submitted in the early 1990s produced a redacted file with documents alleging that she is a lesbian. After reading the file, she knew that those who had made prior allegations against her were men whom she had outperformed in her career. In a letter dated January 28, 1998, she writes, “The people I had passed by with early promotions and plum assignments continue to name call me today!”

As we have in past years, SLDN urges DoD and the services to address lesbian-baiting as an integral part of their sexual harassment programs. The military’s best efforts will not halt sexual harassment as long as perpetrators can use gay accusations as a trump card to silence their victims, derail sexual abuse investigations and punish women who excel in the military. Sexual extortion and smear campaigns impose an

unnecessary burden on women in the military and are an unjust return for their dedicated service to our nation.

Good Command Actions To Stop Harassment

SLDN documented some cases where commanders took appropriate steps to protect service members from anti-gay harassment or lesbian-baiting. The high-ranking woman officer mentioned above reports that her current command is supportive in her efforts to combat ongoing lesbian-baiting threats. The woman whose ex-husband has retaliated against her by accusing her as a lesbian reports that her new command is supportive and aware of his retaliatory motives. In another case, an Air Force commander appropriately dropped an inquiry started when a soldier reported anti-gay harassment after SLDN alerted him to the standards set forth in the Dorn memo. A sailor reports that his command took immediate steps to stop anti-gay slurs and graffiti directed at him when the command was alerted to the situation. SLDN is happy to report that all of these service members continue to serve.

SLDN also commends the Marine Corps for holding accountable five marines who detonated a stolen military tear gas canister in Remington's, a local gay bar in Washington, D.C. More than a dozen Remington's customers suffered severe burning of the eyes and throat after breathing the fumes released by the tear gas grenade.⁸² A Marine Corps investigation revealed that five marines had deliberately planned the July 1997 attack against the gay bar and carried it out. The Marines included Lance Corporals Carl Richard Bennett, Jr., Sean Falsey, Richard Todd Nance and Ryan Barrett. The Marine Corps court-martialed all five accused of the attack. All five have been

convicted. Four have been sentenced to confinement from four weeks to four months, reduced in rank and fined. Three of those four will receive bad conduct discharges. One will be allowed to serve out his term of enlistment. One marine awaits sentencing, and has not been identified.⁸³

SLDN is also happy to report that on May 6, 1997, the Joint Service Committee issued a recommendation to amend the Manual for Courts Martial to provide for sentence enhancement in cases of hate crimes involving sexual orientation, among other factors.⁸⁴ The Department of Defense has not acted on the recommendation to date.

SLDN urges the Department of Defense and the services to fully distribute the Dorn memo on anti-gay harassment and lesbian-baiting to the field. SLDN also urges DoD and the services to take affirmative measures to prevent anti-gay harassment and lesbian-baiting in the first place. Mission effectiveness depends on cohesion, not the sort of division created by threats, harassment, extortion and hostile command climates.

⁸² Jennifer Ordonez, *Police Criticized for Response To Tear Gas Attack at D.C. Bar*, THE WASHINGTON POST A16 (July 17, 1997).

⁸³ Lou Chibbarro, Jr., *Marines Demoted, Sent to Brig*, THE WASHINGTON BLADE (February 13, 1998).

⁸⁴ 62 Fed. Reg. 24640 (1997).

ANALYSIS

Reasons Underlying The Continued Violations of “Don’t Ask, Don’t Tell, Don’t Pursue”

Why do commands continue to ask, pursue and harass in direct violation of “Don’t Ask, Don’t Tell, Don’t Pursue?” The reason is simple: a lack of commitment from top military and civilian authorities to ensure that the limits on gay investigations are followed. Military leaders have forgotten the intent of the policy to “provide a decent regard for the legitimate privacy and associational rights of all service members”⁸⁵ and to “prevent the military from prying into people’s private lives.”⁸⁶ Just one example of this problem involves former Air Force Secretary Sheila Widnall who, in response to a reporter’s questions, could not explain what the “zone of privacy” was for service members under “Don’t Ask, Don’t Tell, Don’t Pursue.” Secretary Widnall’s response: “Never heard of it.”⁸⁷

Three areas illustrate leaders’ current lack of commitment in following the rules and guidelines under “Don’t Ask, Don’t Tell, Don’t Pursue.” One, military leaders have done little to communicate the intent and letter of the policy or to train all service members to ensure that the limits on gay investigations are followed in the field.

Two, investigators and inquiry officers have run rough-shod over service members’ legal rights, using heavy-handed investigative tactics to coerce and intimidate suspected gay members.

Three, no effective recourse currently exists for service members to challenge command violations of “Don’t Ask, Don’t Tell, Don’t Pursue,” and there is no

⁸⁵ President William J. Clinton, *Text of Remarks Announcing the New Policy*, THE WASHINGTON POST A12 (July 20, 1993).

⁸⁶ *World News Tonight*, (ABC news broadcast, Transcript number 97022604-J04, Feb. 26, 1997).

accountability. Commands do not know what the rules are. Administrative discharge boards too often rubber stamp command actions. And Inspectors General have proven consistently ineffective in addressing allegations of command violations in any meaningful way.

There are no incentives to do the right thing, and there are no disincentives not to do the wrong thing. The result is a climate where “anything goes” in the pursuit of suspected gay people. Commanders who want to do the right thing have little support.

The Absence of Guidance and Training

The Department of Defense and the services have provided no real guidance to the field on the intent of “Don’t Ask, Don’t Tell, Don’t Pursue” to afford a zone of privacy for service members and to limit gay investigations.

SLDN, for example, continues to be required to send copies of the “Don’t Ask, Don’t Tell, Don’t Pursue” policy and service regulations to a significant number of military attorneys and service members, including leaders in the chain-of-command. These are basic documents, without which it is impossible to correctly handle gay cases, and yet they are not available in many units in the field. This is a problem in all the services.

The regulations and guidelines under “Don’t Ask, Don’t Tell, Don’t Pursue” also remain unwieldy. The DoD implementing regulations are one hundred pages long and are written in legalese. The express limits to gay investigations are scattered throughout the regulations such that even many of the most experienced military attorneys do not know that limits on investigations exist. Four years into the current policy, the

⁸⁷ *Don’t Ask, Don’t Tell*, (ABC news broadcast, November 1997).

Department of Defense has, with one exception, not issued any concise guidance on the limits to gay investigations and the intent to stop prying.

The one exception is the Dorn memorandum, which states that reports of anti-gay harassment and lesbian-baiting are not to be used as a basis for investigating those who report the harassment. A full eleven months after it was issued, however, the memo has not been distributed to the field. Of the hundreds of commanders, service members and attorneys SLDN has had contact with this year, not one had even heard of the Dorn memorandum. Service members who suffered harassment this year did not benefit from this guidance. Commanders who were concerned about anti-gay harassment and lesbian-baiting did not know they had the backing of the Pentagon to take appropriate steps. The result is that, in a year when we hoped to see a dramatic decrease in harassment, we saw harassment surge.

When guidance is provided, it often focuses attention on how to “get” gay people instead of how to limit investigations. Three memoranda in particular, as discussed in last year’s report, are fueling inappropriate fishing expeditions against suspected gay personnel.

The first is a Navy memorandum issued in June 1994 by the Navy’s appellate litigation group. The memorandum suggests that gay associational activities, such as belonging to a gay men’s chorus, are “inconsistent with good military character” (Exhibit 40). This contradicts “Don’t Ask, Don’t Tell, Don’t Pursue,” which explicitly permits service members to attend gay pride parades, gay bars and engage in other associational activities.⁸⁸

The second memorandum, from the Air Force, instructs inquiry officers to

conduct wide-ranging fishing expeditions against service members who state they are gay. The November 3, 1994 memorandum (Exhibit 41) and its November 17, 1995 (Exhibit 42) successor are very specific, encouraging inquiry officers to interrogate “parents and siblings,” “school counselors” and “roommates and close friends,” among others.⁸⁹ The memoranda provide officers with a laundry list of twenty-five questions to fish for information about service members’ private lives that can be used to press criminal charges and other harsh punishment against them.⁹⁰ The guidance contradicts explicit prohibitions in “Don’t Ask, Don’t Tell, Don’t Pursue” against expanding the scope of inquiries beyond the instant factual allegations in a case.⁹¹ The Air Force is using “statements” cases to bootstrap inquiries into service members’ private lives that could never be justified on their own, hoping to turn up something and then justify their actions in retrospect.

The Air Force memorandum of November 3, 1996 also unequivocally states that “if...other military members are discovered during the proper course of the investigation...appropriate action may be taken.”⁹² No proper investigation under “Don’t Ask, Don’t Tell, Don’t Pursue” would ever turn up other people: that is a witch hunt.

As explained in the “Don’t Pursue” section, the Air Force has defended its memoranda as necessary to protect against “fraud” in cases where service members who have received funded education may state that they are gay to avoid a service obligation. There is, however, no evidence that backs up the Air Force’s claims. Furthermore, the

⁸⁸ Inquiry Guidelines, ¶ E(4).

⁸⁹ Memorandum for all Staff Judge Advocates, *Commander Inquiries on members stating they are homosexual*, Harlan G. Wilder, Chief, General Law Division, Office of the Staff Judge Advocate, Department of the Air Force, November 17, 1995.

⁹⁰ *Id.*

⁹¹ Inquiry Guidelines, ¶ A(3).

⁹² Air Force memorandum, note 89.

Air Force's argument does not explain why the Air Force is using the fishing expedition tactics described in its memoranda in many cases that do not involve funded education or bonuses. Thus, the Air Force has justified over-the-top, "prove you're gay" investigations to purportedly snag the hypothetical heterosexual frauds or slackers who want to avoid military service.

The Department of Defense, in its own memorandum dated August 18, 1995, seemingly approved the offensive tactics initiated by the Air Force and described above. (Exhibit 43) This memorandum by DoD General Counsel Judith Miller has fueled misguided efforts in all of the services to destroy any safe space whatsoever for gay service members. This development marks an unprecedented governmental infringement on the privacy of civilians, not only the service members who confide in them, turning even parents into potential witnesses against their children.

SLDN has asked that the Department of Defense, Air Force and Navy rescind these memoranda or issue new guidance to supercede these policies in each of the past two years, but, to date, they have not.

The lack of training or incorrect training mirrors the lack of guidance and wrong guidance covering the limits to investigations under "Don't Ask, Don't Tell, Don't Pursue."

Last year, SLDN highlighted a Navy training slide presented to commanders in the Atlantic Fleet that encourages commands to seek out suspected lesbian, gay and bisexual service members (Exhibit 44). The slide states "Don't Ask, Don't Tell, Does Not Mean Don't Investigate." The slide further instructs that the "member must be interrogated." "Questions you can ask," according to the slide, include "(a) Has member

engaged in homosexual acts or marriages?” or “(b) Attempted to engage in homosexual acts or marriages?”

Imagine a different slide -- one that reads “Don’t Ask, Don’t Tell, Don’t Pursue’ Places Limits On Investigations.” The slide would then set forth the investigative limits. The tone of the message would be entirely different and would signal to commanders that they should, as President Clinton ordered, “carry out this policy with fairness and with due regard to the privacy of service members.”⁹³ To our knowledge, there has been no change in Navy training.

Also, last year, SLDN reported that some Equal Opportunity officers and NCO’s had specifically requested guidance and training from the Defense Equal Opportunity Management Institute (DEOMI), but DoD reportedly ordered DEOMI not to teach any courses on “Don’t Ask, Don’t Tell, Don’t Pursue.” To our knowledge, the situation has not changed.

Heavy-Handed Investigative Tactics

The second reason that service members continue to face witch hunts and other violations of “Don’t Ask, Don’t Tell, Don’t Pursue” is that commanders and investigators have free rein to run rough-shod over service members’ legal rights. On one level, this is a systemic problem about which concern has been expressed by many entities, both civilian and military, besides SLDN. On the other hand, the use of heavy-handed tactics in gay cases is a more specific concern that is directly related to the punitive guidance that has been issued to the field and the lack of adequate training on “Don’t Ask, Don’t Tell, Don’t Pursue,” discussed above.

“Don’t Ask, Don’t Tell, Don’t Pursue” explicitly requires commanders and others to inform service members of the policy and to read service members their legal rights prior to any questioning.⁹⁴ SLDN, however, documented twenty-one separate incidents in 1997 where inquiry officers and investigators failed to inform service members of their legal rights to remain silent and consult with an attorney under Article 31 of the Uniform Code of Military Justice. In an additional seven cases, inquiry officers or investigators failed to end their questioning, in violation of military law, once a servicemember had invoked his or her rights.

In thirty-four cases documented by SLDN this year, inquiry officers and investigators threatened adverse action against service members if they failed to “cooperate” by admitting that they are gay, confessing to gay conduct or accusing others as gay. Threats used in this context included threats of criminal charges, confinement, forced polygraphs, non-judicial punishment, retaliatory personnel actions, outing service members to family and friends and unwarranted Other Than Honorable discharge characterizations. Such threats are precisely the kind of activities that this policy was supposed to stop. That they continue underscores the “business as usual” climate that exists in the field.

Finally, in eight cases, inquiry officers and investigators conducted illegal searches and seizures in violation of military law and the Fourth Amendment to the United States Constitution.

Some examples illustrate the problem. In one case described in the “Don’t Pursue” section, a senior enlisted Air Force member came under investigation based on

⁹³ President William J. Clinton, *Text of Remarks Announcing the New Policy*, THE WASHINGTON POST A12 (July 20, 1993).

false allegations that he had made a statement of gay orientation and made advances to a male coworker. The inquiry was conducted by a prosecutor who, of all people, failed to read the servicemember his rights and who refused to halt the questioning after the Air Force member, on his own initiative, invoked his right to remain silent and consult with a defense attorney.

The prosecutor took the Air Force member into an empty courtroom, directed him to the witness box and made him raise his right hand to be “sworn in.” The Air Force member was told he had no choice but to respond to the allegations against him. The prosecutor began his questioning by stating, “[The purpose of] my inquiry is to develop evidence prejudicial to you.” He then insisted again that the Air Force member could not refuse to answer his questions, while proceeding to pose questions that were potentially incriminating.

A later legal review of the officer’s actions substantiated many of these investigative abuses, but excused them as inconsequential, basically harmless errors, because the command ultimately concluded that the accuser was not credible and dropped the investigation (Exhibit 45). This gets the standard backward, however. Credible information is required *before* commanders may initiate investigations. Commanders may not fish for information in an effort to justify, *post hoc*, the inquiries they launch. This prosecutor was never held accountable, sending the message that leaders will wink at blatantly illegal actions in gay cases.

Another Navy enlisted man was physically assaulted on base because of suspicions that he might be gay. In questioning him, base police interrogated the service member about his sexual orientation, rather than the assault. The service member was

⁹⁴ Inquiry Guidelines, ¶ D(3).

not read his rights until after he had already been duped into confirming the suspicions regarding his sexual orientation.

During almost three hours of questioning, investigators threatened to make him take a polygraph, falsely told him that he would not lose his right to an attorney if he signed a rights waiver form, and threatened to visit local gay bars with his photograph to obtain confirmation that he had patronized those establishments.

Separately, and prior to the interrogation of this sailor, the investigators also questioned one of his friends. During this interview, investigators falsely told the friend that the service member had already confessed to being gay, in an attempt to pressure her to make a written statement confirming his orientation.

A last example involves the sailor who was asked fifty questions about his private life in the “Homosexual/Bisexual Questionnaire” and supplemental questions as discussed in the “Don’t Ask” section. The sailor was not read his rights before being questioned. He and another sailor questioned were, between the two of them, threatened with criminal prosecution for sodomy, indecent acts, and making false official statements, non-judicial punishment and unwarranted Other Than Honorable (OTH) discharges. Even more disturbing, they were told to stop reporting the anti-gay harassment they were experiencing. According to one of the sailors, a senior military attorney on their ship threatened them as follows (Exhibit 4):

You are going to Mast, it’s just that the Captain doesn’t have time for you and your problems right now; you are not a priority. You are not at risk. I don’t believe you’re scared, so stop telling people that you are. Now, if you want to stay in the Navy, tell the truth now that you lied and I’ll charge you with false official statements or keep on lying and stick with your original statement and I’ll see you

get an OTH.⁹⁵ Did [the paralegal] and [the chaplain] tell you that you would be discharged without mast if you turned yourself in? Well, that's the way we have always done it but this is different, you work in security, and we have to start to punish you people so you won't come forward whenever you want an honorable discharge.

The attorney's reported statement demonstrates the punitive trend that has emerged under "Don't Ask, Don't Tell, Don't Pursue." Service members who report anti-gay harassment are viewed as the problem and the response is to threaten and punish them into silence. Once a servicemember is suspected of being gay, his or her legal rights and the already weak guarantees of due process in the military are trampled. Numerous other examples have been mentioned throughout this report.

The Department of Defense has been criticized in the past for not reining in the heavy-handed tactics of inquiry officers and military investigators. In a 1995 report, a blue-ribbon panel reviewing the investigative capabilities of the Department of Defense criticized reported incidents of criminal investigators failing to advise subjects of the crimes of which they were suspected, as required by military law, and coercing confessions through abusive interview techniques.⁹⁶ The panel also noted reports of subjects' rights being violated in command directed inquiries, including the failure of inquiry officers to inform subjects of the reason for investigation or of their rights, and improper seizure or collection of evidence.⁹⁷

In its report, the Advisory Board on DoD Investigative Capability stated, "Actual protection of an individual's rights during an investigation hinges on the conduct of the

⁹⁵ DoDD 1332.30, Enclosure 7, Character of Discharge, ¶ B(1) (Under current regulations, a statement of gay orientation cannot be a *per se* basis for lowering a servicemember's discharge characterization.).

⁹⁶ REPORT OF THE ADVISORY BOARD ON THE INVESTIGATIVE CAPABILITY OF THE DEPARTMENT OF DEFENSE, Charles F.C. Ruff, Chairman at 34.

⁹⁷ *Id.* at 93.

agent pursuing the investigation and the suppression of any evidence, real or testimonial, gained in violation of those rights.”⁹⁸ To further the goal of responsibility by those conducting investigations, the panel recommended increased training and guidance, particularly in command directed inquiries.⁹⁹ The panel also recommended that the military increase accountability for investigative abuses committed by inquiry officers, suggesting accountability within the evaluation and promotion process as well as consideration of an exclusionary rule that would prohibit improperly obtained information from being used in administrative proceedings.¹⁰⁰

The recommendations of the Advisory Board on DoD Investigative Capability mirror recommendations made by SLDN in our previous annual reports. The continuing lack of guidance, training and proper investigative tactics significantly contribute to the investigative abuses described above and should be addressed by the military leadership.

Lack of Recourse and Accountability

The last significant reason why commands continue to ask, pursue and harass in direct violation of “Don’t Ask, Don’t Tell, Don’t Pursue” is that there are no incentives not to. In the past two years, SLDN is not aware of a single commander who has been disciplined for violating the limits to gay investigations. Too often, as in the case of the Air Force member described above who was taken into the jury room, placed under oath, not read his rights and denied an attorney, those reviewing the matter conclude that the command actions constitute “harmless error.” In the case of Senior Chief Petty Officer Timothy R. McVeigh, the Navy asserts that, even if investigators violated the limits to

⁹⁸ *Id.* at 42.

⁹⁹ *Id.* at 59, 62, 102.

¹⁰⁰ *Id.* at 103.

investigations under “Don’t Ask, Don’t Tell, Don’t Pursue,” Senior Chief McVeigh had no basis to challenge those violations.

So where can a service member turn when he or she is the subject of an improper inquiry or investigation under “Don’t Ask, Don’t Tell, Don’t Pursue?” Commands do not know what the rules are. There are no procedural means that enable military defense attorneys to challenge and stop fishing expeditions. Service members cannot exclude evidence obtained during the course of improper inquiries at administrative discharge boards because there is no exclusionary rule. Rumor, innuendo and speculation are permissible evidence. The lack of evidentiary safeguards results in administrative discharge boards that often rubber stamp command actions. The chain-of-command has failed time and time again to exert leadership and correct command mistakes. Thus, the administrative system serves to encourage command violations of “Don’t Ask, Don’t Tell, Don’t Pursue,” not curb them.

Previously, the General Counsel’s office of the Department of Defense instructed SLDN to direct service members who are being discharged as a result of command violations of “Don’t Ask, Don’t Tell, Don’t Pursue” to their Inspector General. We have done so. In our experience, however, Inspectors General consistently fail to offer effective redress, or take so long to review the matter that the delay effectively derails a service member’s career.

In three cases reported last year, for example, neither the service nor Department of Defense Inspectors General have reviewed the complaints in a meaningful way. One case was that of Senior Airman Sonya Harden. Harden was discharged despite there being no evidence of homosexual conduct before the discharge board.

While Senior Airman Harden was stationed at Eglin Air Force Base in Florida, a former roommate accused her of being a lesbian. The woman later retracted the accusation and testified at the discharge board that the accusation was false. At the board, Senior Airman Harden presented evidence that her accuser had previously threatened to accuse her of being a lesbian if she did not pay the accuser money. Senior Airman Harden produced witnesses that testified about her heterosexual relationships. The original false allegation, however, was enough to end Senior Airman Harden's career.

Senior Airman Harden had been MSS Airman of the Quarter, MSS Airman of the Year in 1992, Personnel Specialist of the Year in 1993 and Hurlbert Field Airman of the Quarter in 1995.

Senior Airman Harden filed a complaint with the Air Force Inspector General prior to her discharge (Exhibit 46). The Inspector General refused to review the case while discharge proceedings were pending against Senior Airman Harden. On Senior Airman Harden's behalf, SLDN then filed a complaint with the Department of Defense (DoD) Inspector General's (IG) office subsequent to her discharge. In April 1997, the DoD IG refused to review the matter, erroneously interpreting the purpose of the complaint. On April 30, 1997, SLDN requested that the DoD IG reconsider this decision, pointing out that the purpose of the complaint was to seek review of the command's improper actions, a request that is within the IG's authority. On June 3, 1997, the DoD IG agreed to task the Air Force Inspector General to review the case. On December 23, 1997, the Air Force Inspector General concluded that the inquiry against Senior Airman Harden "was fair and impartial and consistent with policy." The Air Force Inspector

General never contacted Senior Airman Harden nor SLDN during the review. Nor did the Air Force Inspector General address any of the specific allegations by Senior Airman Harden that her command failed to follow the limits on investigations under “Don’t Ask, Don’t Tell, Don’t Pursue.”

The Inspector General has also failed, to date, to address the complaint filed by former Airman Jennifer Dorsey (Exhibit 47). Airman Dorsey reported that she had been attacked in the latrine by two women coworkers who repeatedly hit her in the stomach while telling her, “You sick f---king dyke!” This attack occurred after Airman Dorsey had already brought prior incidents of harassment to the attention of her First Sergeant. When apprised of the harassment incidents, Airman Dorsey’s commander, according to her complaint, failed to discipline the women who attacked her and instead threatened Airman Dorsey with a gay investigation (Exhibit 48 and Exhibit 49).

The Department of Defense Inspector General agreed to review Airman Dorsey’s complaint on April 24, 1997. On November 21, 1997, the DoD IG responded to a status inquiry that they had tasked the Air Force Inspector General to review the matter and did not know any results yet. SLDN has inquired into Airman Dorsey’s complaint six times since June 1997. To date, however, no representative from the Air Force Inspector General’s office has contacted Airman Dorsey, her military attorney or SLDN.

SS3 Kelli Sprague’s complaint has also not been resolved. SS3 Sprague reported that her commander directly questioned her about her sexual orientation, threatening her with criminal prosecution for making a false official statement if she did not answer his questions and do so truthfully (Exhibit 50). Under great pressure, she admitted to being a lesbian. Based solely on this coerced admission, she was discharged. Six months after

filing the complaint with the Department of Defense Inspector General, no representative has contacted SS3 Sprague or SLDN.

In a case highlighted two years ago, the Navy Inspector General has only recently completed a review of allegations by Seaman Amy Barnes, substantiating many of her claims. Barnes reported that she was one of up to fifty women targeted in a witch hunt onboard the *USS Simon Lake*. Two shipmates filed affidavits in federal court in this case, stating that they had been threatened with prison unless they accused Seaman Barnes of being a lesbian or confessed to being lesbians themselves (Exhibit 51 and Exhibit 52).

The Inspector General report in this case concludes that Navy officials failed to read Seaman Barnes her Article 31 rights to remain silent and consult with an attorney and improperly expanded the scope of the investigation beyond the original allegations against Seaman Barnes. SLDN welcomes these conclusions. However, the Inspector General excused the violations as “not intentional” and the Navy has declined to hold any of those who committed violations of the rules accountable. Whether or not intentional, the effect of the violations is the same: Seaman Barnes lost her Navy career. Even more disturbing, the Navy does not appear to be taking steps to prevent future “unintentional” violations that will have the same result for other sailors.

As shown above, there is currently no effective way for service members to address violations when they occur. Even if the overworked Inspectors General offices had the resources they need to fully address the many complaints they receive, it would not cure the deficiencies pointed out in this report. The bottom line is that the kind of basic violation documented by SLDN should not be occurring in the first place at this point, nearly five years into “Don’t Ask, Don’t Tell, Don’t Pursue.” This responsibility

rests squarely on the chain-of-command. The energy spent by military leaders to justify command abuses when they occur would be better spent training their subordinates to follow the limits on investigations.

The vigor with which commands have pursued suspected gay personnel stands in stark contrast to the lackadaisical attitude of top uniformed leaders regarding training, accountability and other issues necessary to stop violations. The lack of interest at the top of the chain-of-command regarding the limits on gay investigations signals to local commands that the hunt is still on.

CONCLUSION

It is time for military leaders to obey the law. Command violations of “Don’t Ask, Don’t Tell, Don’t Pursue” surged for the fourth year in a row. Commanders asked. Commanders pursued. Commanders harassed. These violations must stop. They cannot and should not be justified by uniformed leaders or senior officials of any service.

The path is clear. The Department of Defense and the services need to issue written guidance to all service members about the limits on investigations under “Don’t Ask, Don’t Tell, Don’t Pursue.” Leaders must train everyone so that the intent of the policy, as articulated by General Colin Powell, Senator Sam Nunn, Secretary of Defense William Cohen and the Commander-in-Chief, President William J. Clinton, is perfectly clear: Stop prying.

Last year, in response to SLDN’s *Third Annual Report* on “Don’t Ask, Don’t Tell, Don’t Pursue,” Secretary Cohen ordered a review of the implementation of the current policy. He promised an end to the “pursuits and prosecutions.” We look forward to the results of DoD’s review and hope that the Pentagon will begin to address the problems shown in the implementation of “Don’t Ask, Don’t Tell, Don’t Pursue” over the past four years.

It should be a wake-up call to military leaders that Professor Charles Moskos, the architect of “Don’t Ask, Don’t Tell, Don’t Pursue,” has criticized the heavy-handed enforcement of current regulations. In the words of Professor Moskos: “heavy-handed ‘enforcement’ will inadvertently undermine the ‘Don’t Ask, Don’t Tell’ policy by eroding confidence among servicemen that the [military] will not ‘ask’ if they do not ‘tell.’ It is these kinds of actions by the military...that pose the greatest threat to the

efficacy of the policy...” (Exhibit 17). While we do not agree with Professor Moskos about the efficacy of the policy, we do agree that the military must obey its own rules. Continued command violations of the basic limits on investigations under “Don’t Ask, Don’t Tell, Don’t Pursue” will not only erode confidence within the military, it will erode the confidence of the American people. Americans cannot view military officials as acting in good faith in light of reports that commanders are interrogating parents and psychologists and conducting intrusive fishing expeditions in their endless pursuit of suspected gays in the ranks.

**CONDUCT UNBECOMING:
THE FIFTH ANNUAL REPORT ON
“DON’T ASK, DON’T TELL, DON’T PURSUE”**

EXECUTIVE SUMMARY

Living in forced isolation, in constant fear of investigation and inadvertent disclosure is harmful to gay service personnel. Each day I am witness to...anti-gay comments and attitudes. The Navy takes no action to stop this improper and outrageous behavior on the part of its best and brightest officers. My witness to this unfortunate anti-gay climate, and the direct harm that it causes me, forces me to disclose to you that I am gay. — Navy Officer

The Pentagon’s implementation of “Don’t Ask, Don’t Tell, Don’t Pursue” is a failure. Anti-gay harassment, asking and pursuits have surged to record levels since Congress enacted this law five years ago. Last year alone, reports of anti-gay harassment more than doubled. Reports of asking and pursuits increased 42%. These violations are due to lack of leadership. Military leaders have refused to send guidance to the field explaining the explicit investigative limits under “Don’t Ask, Don’t Tell, Don’t Pursue” and its intent to respect service members’ privacy. Military leaders have held no one accountable for asking, pursuits or harassment. As a result, many commanders and investigators do not know the intent or letter of “Don’t Ask, Don’t Tell, Don’t Pursue.” Others deliberately violate the policy, knowing their leaders do not take it seriously.

Service members have no way to protect themselves from harassment or to stop improper investigations. There is nowhere they can turn for help without fear of reprisal. Military leaders have wrongly required service members to keep their sexual orientation a total secret, forcing them to lie about who they are, even to their families, best friends and health care providers.

The result is that discharges under “Don’t Ask, Don’t Tell, Don’t Pursue” have soared. The Pentagon is firing three to four people every day for being lesbian, gay or bisexual—a total of 1,149 discharges last year alone (Exhibit 1). Gay discharges last year were the highest in a decade, and represent an 86% increase since “Don’t Ask, Don’t Tell, Don’t Pursue” was first implemented.¹ The pink slips the past five years have cost American taxpayers \$130 million (Exhibit 2).² Many more dedicated, competent service members have left at the end of their terms, fed up with constant fear, dissembling and harassment.

The news under “Don’t Ask, Don’t Tell, Don’t Pursue” is not all bad. Physical abuse by investigators has declined.³ Mass investigations have waned. Criminal prosecutions of lesbian, gay and bisexual service members have decreased as more are administratively discharged. While welcome, these steps forward reflect the low baseline used to measure success.

Not all officers and enlisted leaders engage in verbal gay-bashing or snoop on their service members. The current climate, however, supports those who do. Service members experience daily harassment. Comments such as the following are routine in many units: “You’d better not be queer because in the Navy we kill our fags;” “That dyke is going to fry;” “You’re a dead faggot;” “There’s nothing wrong with killing a few fags;” “That fag (Matthew Shepard) deserved to die;” and “There’s nothing to do in Sasebo unless you are a homo killer, “ a chilling reference to the murder of gay sailor Allen Schindler in 1992 by shipmates in Sasebo,

¹ These numbers are based on Department of Defense figures which do not include 14 Coast Guard discharges in 1998 or discharges in previous years. The Coast Guard is part of the Department of Transportation in peacetime, but joins the Navy during war.

² This does not include the costs of investigation, discharge or litigation.

³ See RANDY SHILTS, CONDUCT UNBECOMING, 231-232 (citing former Army Lieutenant Jay Hatheway’s testimony that he was forced to undergo “neurological testing” that included a psychiatrist’s puncturing his scalp with pins to attach sensors); 570 (citing Steve Ward’s testimony that he was placed into a broom closet without personal breaks until he confessed to being gay).

Japan. These are just a fraction of examples from the cases handled by Servicemembers Legal Defense Network (SLDN) in the past year.⁴

Leadership from the top down is required to change the incentives, and to support those leaders in the field who try to do the right thing. Military leaders should, as recommended by an April 1998 Department of Defense report on “Don’t Ask, Don’t Tell, Don’t Pursue,”⁵ issue the two-year-old guidance on anti-gay harassment that is pending at the Pentagon.⁶ Other recommendations in the April 1998 Pentagon report, while welcome, do not address other core issues: privacy, investigative limits, accountability and recourse. Military leaders should send guidance to the field about the policy’s intent to respect service members’ privacy and its explicit limits to investigations (Exhibit 3). Military leaders should hold those who ask, pursue and harass accountable, and provide recourse to service members who are improperly targeted. Were these steps taken, command violations of “Don’t Ask, Don’t Tell, Don’t Pursue” would fall.

SLDN’s Fifth Annual Report on “Don’t Ask, Don’t Tell, Don’t Pursue,” *Conduct Unbecoming*, reviews what the policy says, and recaps major developments in the past five years.⁷ The report then zeroes in on what happened in the past year, examining the military’s failure to implement the core parts of “Don’t Ask, Don’t Tell, Don’t Pursue” and how that has impacted military readiness. The report also recognizes instances where individual leaders have

⁴ Servicemembers Legal Defense Network is an independent legal aid and watchdog organization.

⁵ OFFICE OF THE UNDER SECRETARY OF DEFENSE (PERSONNEL AND READINESS, DEP’T OF DEFENSE, REPORT TO THE SECRETARY OF DEFENSE: REVIEW OF THE EFFECTIVENESS OF THE APPLICATION AND ENFORCEMENT OF THE DEPARTMENT’S POLICY ON HOMOSEXUAL CONDUCT IN THE MILITARY (Apr. 1998), hereinafter cited as DEP’T OF DEFENSE APRIL 1998 REPORT.

⁶ *Memorandum of Under Secretary of Defense Edwin Dorn, Guidelines for Investigating Threats Against Service Members Based on Alleged Homosexuality*, DEP’T OF DEFENSE (Mar. 24, 1997). This guidance instructs commanders to investigate those who threaten service members, not those who report anti-gay threats (Exhibit 4). The service chiefs failed to distribute the guidance. In April 1998, the Pentagon recommended that the instructions be expanded to include a prohibition on harassment, and finally be sent to the field. No guidance has been sent to the field yet. In the meantime, the Navy sent the original “Dorn memo” to the field via message traffic.

⁷ SLDN has assisted more than 1,600 service members in the past five years who have been harmed by “Don’t Ask, Don’t Tell, Don’t Pursue.”

taken appropriate action on behalf of their service members. The report concludes that, as military leaders struggle with critical retention and recruiting shortfalls,⁸ they can ill-afford to violate the letter and intent of the policy, or continue to let the valuable contributions of lesbian, gay and bisexual service members be frittered away by indifference or outright hostility.

⁸ Dana Priest, *Military Lags in Filling Ranks: Army Chief Wants Change in Education Requirements*, THE WASH. POST, Feb. 17, 1999 at A1 (citing Army Secretary Louis Caldera's statement asking the Department of Defense to change current recruitment policy to allow more than 10% of new recruits to be high school dropouts with equivalency diplomas in order to solve a shortage problem that will only get worse).

WHAT IS “DON’T ASK, DON’T TELL, DON’T PURSUE?”

When President Clinton assumed office and pledged to sign an Executive Order lifting the ban on military service by lesbian, gay and bisexual Americans, he stirred up a hornet’s nest in Congress and the military. Ultimately, Congress took matters into its own hands, and wrote into law the same grounds for discharge that had existed in policy since 1981.⁹ Today, as in past years, lesbian, gay and bisexual service members are fired from the military for stating their sexual orientation or being in a committed adult relationship with someone of the same gender.¹⁰ Heterosexual service members are not subject to the same restrictions.

In two respects, however, this law is significantly different. Congressional and military leaders acknowledged, for the first time, that lesbians, gay men and bisexuals serve our nation and do so honorably¹¹ and that sexual orientation is no longer a bar to military service.¹² Second, President Clinton, Congress and military leaders agreed to end intrusive questions about service members’ sexual orientation and to stop the military’s infamous investigations to ferret out suspected lesbian, gay and bisexual service members.¹³ They agreed to take steps to prevent

⁹ 10 U.S.C. § 654.

¹⁰ DEP’T OF DEFENSE DIRECTIVE NO. 1332.14, encl. 3 H.1.a. (1994); *Id.* NO. 1332.30, encl. 2 C. (Dec. 22, 1993), “Homosexual conduct includes homosexual acts, a statement by a member that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage.” DoD has broadly defined “homosexual act” to include hugging, kissing or hand-holding with someone of the same gender.

¹¹ *Policy Concerning Homosexuality in the Armed Forces: Hearings Before the Senate Comm. On the Armed Services*, S. Hrg. 103-845, 103rd Cong., at 707 (1993). “[H]omosexuals have privately served well in the past and are continuing to serve well today.” (Testimony of General Colin Powell).

¹² DEP’T OF DEFENSE DIRECTIVE NO. 1332.14, encl. 3 H.1.a.; *Id.* NO. 1332.30, encl. 2 C. “Sexual orientation is considered a personal and private matter, and homosexual orientation is not a bar to continued service unless manifested by homosexual conduct.”

¹³ *Policy Concerning Homosexuality in the Armed Forces: Hearings Before the Senate Comm. On Armed Services*, 103rd Cong., 2d Sess. (1993) at 709 (statement of General Colin Powell). “We will not witch hunt. We will not chase. We will not seek to learn orientation.” These include the investigation of women onboard the *USS Norton Sound* in 1980, which resulted in the discharge of eight women sailors; investigations on the hospital ship *Sanctuary* and on the *USS Dixon*; the Army’s ouster of eight military police officers at West Point in 1986; the 1988 investigation of thirty women, including every African American woman, onboard the destroyer-tender *USS Yellowstone*, which resulted in the discharge of eight women; the 1988 investigation of five of the thirteen female crew members onboard the *USS Grapple*; and the 1986-1988 investigation at the Marine Corps Recruit Training Depot at Parris Island, South Carolina, where 246 women were questioned, at least twenty-seven women were discharged, and three were jailed. See SHILTS, *supra* note 3.

anti-gay harassment.¹⁴ They agreed to treat lesbian, gay and bisexual service members even-handedly in the criminal system, instead of criminally prosecuting them in circumstances where they would not prosecute heterosexual service members.¹⁵ They agreed to implement the law with due regard for the privacy and associations of service members.¹⁶ The law became known as “Don’t Ask, Don’t Tell, Don’t Pursue” to signify the new limits to investigations and the intent to respect service members’ privacy.

¹⁴ DEP’T OF DEFENSE DIRECTIVE NO. 1304.26. “The Armed Forces do not tolerate harassment or violence against any servicemember, for any reason.”

¹⁵ *Directives Implementing the New DoD Policy on Homosexual Conduct in the Armed Forces*, OVERVIEW, III. Criminal Investigations. “[T]he new directive provides that investigations into sexual misconduct will be conducted in an evenhanded manner.”

¹⁶ President Clinton pledged that the policy would provide for “a decent regard for the legitimate privacy and associational rights of all service members.” President William J. Clinton, *Text of Remarks Announcing the New Policy*, THE WASH. POST A12 (July 20, 1993). Then Senator, now Secretary of Defense, William Cohen understood that the “small amount of privacy under the current policy was intended to prevent the military from prying into people’s private lives.” *Policy Concerning Homosexuality in the Armed Forces: Hearings Before the Senate Comm. On Armed Services*, S. Hrg. 103-845, 103rd Cong., at 788 (1993).

LOOKING BACK ON FIVE YEARS OF ASKING, PURSUIT AND HARASSMENT

The Pentagon's record the past five years is one of nonfeasance. Military leaders have failed to distribute guidance against anti-gay harassment,¹⁷ on the policy's investigative limits¹⁸ and on its intent to protect service members' privacy.¹⁹ The result is that lesbian, gay and bisexual service members increasingly are asked, pursued and harassed.

SLDN clients from the past five years report daily, even hourly, verbal gay-bashing and threats. Just a few examples of derogatory comments reported in SLDN's cases include:

- Die Fag.
- Kill all fags.
- You're going to die.
- You can't hide, fag.
- You will be killed.
- We're going to kill you.
- We're going to get you.
- You sick fucking dyke!
- That dyke is going to fry.
- That fag (Matthew Shepard) deserved to die.
- We don't need queers around here.
- What are you going to do about it, fag?
- You're dead, you dick-sucking faggot.
- There's nothing wrong with beating up gays.
- If I find a gay guy on this ship, I would (sic) throw him overboard.
- There's nothing to do in Sasebo unless you are a homo killer.
- You'd better not be queer because in the Navy we kill our fags.
- If I ever saw two guys kissing, I'd beat them with a baseball bat.
- We can't wait to get out to sea so that we can throw you overboard.
- I hate homosexuals. If you find one...beat the shit out of him.
- If I ever find out for sure you're a fag, I'll kick your ass.
- There are three things I hate: liars, thieves and faggots.
- If I catch you around town, I'm going to kill you.
- There are accidents in divisions. Sometimes people die. When word gets out, you may be one of those.
- You're a dead faggot.
- Whip his faggot ass.
- Leave or Die Fag.

¹⁷ See *supra* note 6, at 3.

¹⁸ SLDN has asked DoD to distribute understandable guidance because commanders, investigators and attorneys who advise them do not know the rules.

¹⁹ See *supra* note 16, at 5.

These threats and comments provide insight into the overt anti-gay climate that exists in many military units. This climate serves as a backdrop for many of the cases SLDN has handled in the past five years. A few examples follow.

- ***Supervisor Threatens Marine Who Was Gay-Bashed with Criminal Investigation.*** When Marine Lance Corporal Kevin Smith was gay-bashed by civilians in San Angelo, Texas, his supervisor threatened him with an investigation into his private life rather than helping him bring his assailants to justice (Exhibit 5).
- ***Commander Fails to Help Airman Who Received Death Threat.*** Former Airman Sean Fucci woke up two days before Christmas to find the note, “Die Fag!” next to his bed. This was the second threat Fucci had received. When Fucci reported the threats, his commander responded with a written memorandum telling him there was nothing he could do to protect Fucci (Exhibit 6).
- ***Sailors Threatened with Death or Assault.*** Four sailors aboard the *USS Eisenhower* reported being assaulted or threatened with their lives because they were perceived as being gay. Their supervisors did nothing to protect them. When they came out and sought discharge due to the threats, their supervisors instead accused them of trying to avoid their military duties and launched an investigation into their private lives (Exhibit 7).
- ***Federal Judge Says Navy Launched “Search and ‘Outing’ Mission.”*** The Navy pursued Master Chief Petty Officer Timothy McVeigh based on an anonymous America Online profile containing the word “gay.” A federal judge ruled in McVeigh’s favor, stating, “Although Officer (sic) McVeigh did not publicly announce his sexual orientation, the Navy nonetheless impermissibly embarked on a search and ‘outing’ mission.”²⁰ Ultimately, the Navy dropped its appeal under pressure, and permitted McVeigh to retire at the rank he had earned. Navy leaders maintain they did nothing wrong in pursuing McVeigh.
- ***Air Force Cuts Deal with Felon to Get Names of Suspected Gay Men.*** Prosecutors at Hickam Air Force Base in Hawaii reduced the sentence of a convicted felon from life to twenty months on the condition that he accuse others of being in gay relationships. He named seventeen men in all services. The Navy jailed one sailor. The Air Force pursued and discharged all Air Force members fingered by

²⁰ *McVeigh v. Cohen*, 983 F. Supp. 215 (D.D.C. Jan. 26, 1998).

the felon, including Senior Airman Andre Taylor and Technical Sergeant Daryl Gandy. Investigators also questioned dozens of Gandy's coworkers in an effort to dig up additional allegations and to find other suspected gay service members.²¹

- ***The Okinawa Witch Hunt.*** Corporal Craig Haack and ten other marines were questioned at length about their sexual orientation during a witch hunt in Okinawa (Exhibit 8). A criminal investigator, Agent Jose Abrante, banged on Haack's door and loudly announced that he was under investigation for being gay so that the entire barracks could hear. Agent Abrante overturned Haack's bed, ransacked his belongings and seized his computer, computer disks and address book, looking for any indication of Haack's sexual orientation. As the result of outside pressure, the Marine Corps released Haack. The Marine Corps jailed another marine, however, for thirty days.
- ***Career Officer Court-Martialed After Witch Hunt.*** The Air Force criminally prosecuted Major Debra Meeks based on allegations that she was in a relationship with a civilian woman, just as the Major approached retirement. Air Force criminal investigators at Lackland Air Force Base solicited the allegations against her in the course of a witch hunt against Meeks and eleven other women named in the Report of Investigation (Exhibit 9). Meeks, who faced up to eight years in prison and forfeiture of her entire pension, was acquitted at trial in a widely publicized case.²²
- ***Airman of the Year Discharged Although Accuser Recants.*** The Air Force discharged former Airman Sonya Harden based solely on an allegation later recanted by her accuser. The accuser admitted she lied about Airman Harden being in a lesbian relationship in retaliation for a financial dispute between the two women (Exhibit 10). Airman Harden had presented ex-boyfriends to testify on her behalf at the discharge board, to no avail.
- ***Soldier Accused of Being a Lesbian After Reporting Attempted Rape.*** A young Private First Class, away from home for the first time, was attacked and nearly raped in her barracks hallway in Korea. When she reported the attack, the perpetrators retaliated by falsely accusing her of being involved in a lesbian relationship. The unit commander pressured her to accuse other women of being lesbians and when she refused sent her to a court-martial based on the false allegations.

²¹ Two years after the witch hunt, a Pentagon review weighed in against the use of pretrial agreements to obtain information about consensual sexual conduct. DEP'T OF DEFENSE APRIL 1998 REPORT at 13. No action has been taken to make amends to the former service members who were targeted in this witch hunt or to discipline the errant prosecutors.

²² *Jury Acquits Air Force Major Accused of Lesbian Affair*, N.Y. TIMES, Aug. 17, 1996 at L7.

When a military judge threw out the charges for lack of evidence, the commander tried instead to discharge her. The commander dropped the charges only after substantial outside intervention. This soldier remains anonymous because she serves on active duty.

- ***Psychiatrist Turns in Marine Who Asks About Homosexuality.*** A Navy psychiatrist turned in former Marine Corporal Kevin Blaesing for merely asking what it meant to be gay (Exhibit 11). The psychiatrist testified at his discharge board that Blaesing never, in fact, revealed his sexual orientation. Blaesing's commander, Lieutenant Colonel Martinson, nevertheless, pursued his discharge.²³ When Blaesing successfully sought, with outside help, to overturn his discharge, his commander retaliated by foreclosing his opportunity to reenlist.
- ***West Point Seizes Cadet's Diary.*** The Army pursued and disenrolled Cadet Nikki Galvan of West Point based on statements she made in her personal diary (Exhibit 12). Galvan's commander, Lieutenant Colonel Abraham Turner, seized her diary and three years' worth of email messages after Galvan filed a complaint against him for questioning her about her sexual orientation and private life. Galvan had started keeping her diary at the suggestion of West Point counselors, who felt it would help her deal with the grief of her mother's death.
- ***Women Threatened with Prison During Witch Hunt.*** Investigators onboard the *USS Simon Lake* directly questioned former Seaman Amy Barnes and other women about their sexual orientation. Investigators threatened them with prison if they did not "confess" or accuse others of being lesbians, according to sworn affidavits the women later submitted in federal court (Exhibit 13). The Navy forced Seaman Barnes into court when Navy officials, apprised of the illegal investigation, refused to intervene to stop it. The Navy ultimately settled this case, although Seaman Barnes lost her career.
- ***Navy Uses "Homosexual/Bisexual Questionnaire" to Ferret out Gay Sailors.*** The Navy discharged two sailors after asking them fifty questions about their sexual orientation and activities, in part from a document titled "The Homosexual/Bisexual Questionnaire." The questionnaire appears to be a standard form used on the sailors' ship to investigate suspected gay personnel (Exhibit 14).

²³ Lincoln Caplan, "Don't Ask, Don't Tell" – *Marine Style*, NEWSWEEK, June 13, 1994, at 28.

THE REASONS FOR COMMAND VIOLATIONS

Command violations of “Don’t Ask, Don’t Tell, Don’t Pursue,” like the ones described above, continued through the fifth year of this policy primarily because of a lack of leadership on the part of senior military leaders. Military leaders have not implemented the privacy protections promised under this policy or enforced its limits to investigations. Leaders have held no one accountable for violations and have provided no means of recourse for service members who are harassed or improperly investigated.

Military Leaders Ignore Privacy Protections

When “Don’t Ask, Don’t Tell, Don’t Pursue” was adopted, great emphasis was placed on respecting service members’ privacy. It was widely understood at the time that lesbian, gay and bisexual service members would be left alone.

Military leaders have failed, however, to implement the intent of this policy to respect service members’ privacy. In five years, not one instruction, memorandum, regulation or policy letter has been sent to the field informing personnel of the policy’s intent to respect service members’ privacy. When asked by a reporter about the promise to create a “zone of privacy” under this policy, then Secretary of the Air Force Sheila Widnall professed ignorance, responding, “Never heard of it.”²⁴ As new leaders have taken the helm, pledges made by their predecessors have been forgotten.

In place of privacy, military leaders have imposed a rule of total secrecy on lesbian, gay and bisexual service members. Military leaders are discharging service members who confide in their parents, best friends and psychologists. Psychologists have been instructed to turn in gay

²⁴ *ABC News*, Santa Barbara, November 1997.

service members who seek their help in private counseling sessions.²⁵ These private conversations are a far cry from the kind of public statements, such as those made on television or in front of a military formation, that lawmakers expressed concern about during the 1993 debate on gays in the military. That military leaders would even think of discharging service members who confide in their families or health care providers is an indication that the policy's intent to respect service members' privacy has been ignored.

Military Leaders Refuse to Send Investigative Limits to the Field

Military leaders have failed to distribute any guidance in the past five years explaining the limits to investigations in an understandable, accessible way. The result is that most leaders and service members in the field do not know the limits to investigations established by "Don't Ask, Don't Tell, Don't Pursue."

The "Don't Ask, Don't Tell, Don't Pursue" directives are an unwieldy 100 pages long, with important investigative limits scattered throughout. In the services, the relevant regulations are typically broken down into a number of manuals, not all of which are kept on hand by unit commanders. The directives and service regulations are written in "legalese," making them even more inaccessible. Most commanders, attorneys and inquiry officers have never read them, much less understood them.

In the absence of Pentagon leadership, SLDN distributed more than 1,000 copies of our own three-page memorandum on the limits to investigations in late 1998 and early 1999 (Exhibit 3). The memorandum sets forth the investigative limits, using exact quotes from the Department of Defense directives. SLDN sent the memorandum to every major command in each of the services and to every Navy ship, at a cost of a mere \$1,130. One SLDN client has already

²⁵ See the "Don't Tell" section of this report, *infra* at 34-35, for documented examples.

reported that his commander dropped an inquiry against him days after SLDN sent the commander a copy of the memorandum on investigative limits. SLDN believes, if the rules were distributed and properly enforced, many commanders and inquiry officers would try to comply with them and, as a result, command violations of “Don’t Ask, Don’t Tell, Don’t Pursue” would decline.

Service Members Have No Recourse to Stop Asking, Pursuits and Harassment

In every one of the case examples described above, service members tried to resolve the command violations against them within the military. In every case, their chain-of-command failed them. In every case, military leaders dug in their heels and attempted to justify the command violations, rather than stopping them. In five years, the Services officially have held no one accountable for asking, pursuing or harassing service members in violation of the law.

Inspector General (IG) complaints have proved no better. Invariably, service members receive only a cursory reply, rubber-stamping the command’s violations, arriving months and even years after they have already been discharged.²⁶ In a case where an Inspector General provided more than a cursory reply, the “Hawaii 17” witch hunt described above, the IG justified the prosecutors’ decision to significantly reduce the sentence of a convicted felon in exchange for the names of suspected gay men. The Pentagon’s April 1998 review of “Don’t Ask, Don’t Tell, Don’t Pursue” later repudiated this sort of agreement but the targeted service members had long since lost their careers.

²⁶ Airman Sonya Harden, mentioned above, is one example. She filed an IG complaint more than three years ago. Two years later, after she had been discharged, she finally received a reply. Without explaining the basis of his actions and without speaking to Harden or her attorney, the IG found the command did nothing wrong. The five sentence reply the IG sent former Air Force Major James Strader, who was wrongly pursued based on an anonymous accusation, is another example of the cursory treatment Inspectors General give these cases (Exhibit 15).

There is no way within the military for a service member to stop harassment or runaway investigations. Instead, service members have been forced to seek outside help from SLDN, our private cooperating attorneys and their Congressional Members, even in cases involving the most obvious of command violations. A few, like Master Chief Petty Officer Timothy McVeigh, have successfully gone into federal court as a last resort to make the Pentagon follow its own rules. Service members should not have to seek outside help, however, to have their leaders—the people charged with their welfare—enforce the military’s own rules against asking, pursuits and harassment. Unfortunately, they have no other option at present.

GAY DISCHARGES SOAR TO HIGHEST LEVEL IN A DECADE

Military leaders are now paying the price for the intolerable climate that has flourished on their watch. Discharges have increased 86% under “Don’t Ask, Don’t Tell, Don’t Pursue.” The Pentagon has fired 4,378²⁷ dedicated, hard-working Americans at a time when shortfalls in recruiting and retention have reached crisis proportions. Hundreds, if not thousands, more have left at the end of their service terms. Service members are fed up with constant asking, pursuits and harassment and the misguided requirement that they lie about who they are to their parents, best friends and doctors as a condition of military service.

Pentagon officials say that most discharges involve service members who “voluntarily” state their sexual orientation. Pentagon officials have been less than forthcoming, however, in telling the American public that they define *any* disclosure of sexual orientation as “voluntary.” As seen in the case examples above, “statements” include disclosures made to psychotherapists; in personal diaries; in response to direct questions about their sexual orientation; in anonymous online profiles; and those coerced out of service members due to fear, intimidation, assaults, death threats and threats of criminal prosecution. Service members outed by the military in the these circumstances certainly do not experience being forced out of the closet as “voluntary.”

Some military officials have also suggested that service members who disclose their sexual orientation are simply looking for an easy way out of the military, particularly where such disclosures are made to superiors.²⁸ Officials have offered no support for this assertion, which flies in the face of the harsh consequences imposed on service members who come out. These

²⁷ The Coast Guard, which is part of the Department of Transportation (DoT), has fired an additional 51 service members from 1995-1998; 1994 figures were not available. Total DoD and DoT discharges are 4,429.

²⁸ Steven Lee Myers, *Despite ‘Don’t Ask’ Policy, Gay Ousters Rose in ‘98*, NEW YORK TIMES, Jan. 23, 1999, at A13; Sig Christenson, *Military: Rising number of gays kicked out of the military*, SAN ANTONIO EXPRESS NEWS, Jan. 22, 1999, at 1.

include potential criminal prosecution,²⁹ reprimand,³⁰ recoupment,³¹ lower discharge characterizations,³² loss of educational,³³ unemployment³⁴ and pension benefits,³⁵ civilian employment discrimination,³⁶ and, of course, loss of employment and livelihood.

In reality, Pentagon officials do not know the facts behind these cases. The Pentagon's own April 1998 report on the implementation of "Don't Ask, Don't Tell, Don't Pursue" candidly admits "the reasons for this increase [in statements discharges] are not known and would be difficult to ascertain."³⁷ The Pentagon report included the first public mention of anomalous discharge figures at Lackland Air Force Base, the service's basic training center, which accounted for 65% of Air Force discharges last year. These figures far exceed those for basic training discharges in the other services.³⁸ To date, no one has spoken with trainees discharged in the past to learn their experiences, or conducted a comprehensive review to determine the

²⁹ See threats of criminal prosecution in "Don't Pursue" section, *infra* at 55-58.

³⁰ An Air Force commander issued an airman a "Letter of Reprimand" for coming out to friends on the base. Discharge authorities review a service member's overall record to determine characterization of discharge. Commanders may lower a discharge characterization based on a letter of reprimand in an airman's record (Exhibit 16).

³¹ Former West Point cadet Jincy Pace currently faces recoupment of \$80,000 in scholarship funds because she came out while serving on active duty, including Operation Uphold Democracy in Haiti. The Internal Revenue Service has seized her tax refunds and placed a bad mark on her credit rating, preventing her from obtaining a car loan or credit card.

³² Former Marine Lance Corporal David Raleigh's commander recommended an Other Than Honorable (OTH) discharge simply because Lance Corporal Raleigh admitted to being gay. Had he received an OTH, Raleigh could have faced substantial prejudice in civilian employment. SLDN intervened on his behalf and he received the Honorable discharge he deserved based on his record. Raleigh's case is not uncommon.

³³ An Army Specialist in Monterrey, California faced losing his GI Bill benefits, including \$1200 he paid into the program out of his own pocket, when his commander recommended a "General" discharge service characterization just for coming out. In order to qualify for GI Bill benefits, service members need an "Honorable" discharge. SLDN intervened to protect his benefits so that he could go on to college. All GI Bill benefits are lost unless service members serve the minimum time required, usually 2-3 years.

³⁴ Service members discharged under "Don't Ask, Don't Tell, Don't Pursue" may face difficulties in obtaining unemployment benefits in some states, regardless of the characterization of their discharge. Many jurisdictions will not give unemployment benefits to those separated for being lesbian, gay or bisexual.

³⁵ Both Major Debra Meeks, *supra* at 8, and Master Chief Petty Officer Timothy McVeigh, *supra* at 7, faced the prospect of losing their pension benefits if discharged.

³⁶ Former service members report civilian employment discrimination because their discharge paperwork (DD Form 214), which many employers require prior to hiring, contains the reason for discharge, usually stating "homosexual conduct" or "homosexual admission."

³⁷ DEP'T OF DEFENSE APRIL 1998 REPORT at 5.

³⁸ Richard Parker, *Confusion Reigns From "Don't Ask, Don't Tell,"* KNIGHT RIDDER, Jan. 26, 1999.

reasons for these discharges. Press accounts cite reasons ranging from harassment to the isolation experienced by lesbian, gay and bisexual recruits as reasons for these discharges.³⁹

SLDN keeps an open mind, having had few cases from Air Force basic training. Air Force recruits, unlike those in the other services, are being discharged only days after arriving at basic training, before they learn of SLDN's existence.

In cases handled by SLDN, anti-gay harassment is the primary reason why service members disclose their sexual orientation to their superiors. Lesbian, gay and bisexual service members are prepared to face the enemy and walk into the jaws of death in service to our nation. Lesbian, gay and bisexual service members are not, however, prepared to risk their lives and physical safety at the hands of bigots in the ranks. While SLDN believes that service members generally are becoming more tolerant of lesbians, gays and bisexuals,⁴⁰ SLDN has also documented a group of people in the military who feel free to express anti-gay sentiments and threaten their coworkers. The sad fact of today's military climate is that bigots are given free rein.

A second reason service members come out is that they face an ethical dilemma not of their own making. Military leaders have wrongly required service members to keep their orientation a total secret, even from their families. Military leaders are forcing service members to lie and dissemble, contrary to their own values and to the military's "Core Values" of honesty and integrity. This misguided approach also denies service members the guidance they often

³⁹ See *Id.*; Sig Christenson, *Recruits Deny Lackland Harassment*, SAN ANTONIO EXPRESS NEWS, Jan. 22, 1999.

⁴⁰ In a recent poll taken by Northwestern University Professor Charles Moskos, the architect of "Don't Ask, Don't Tell, Don't Pursue," the number of Army males who registered "strongly disagree" to the question of whether gays should be allowed to serve openly in the armed forces dropped to 36% from its 1993 level of 63%. See MILLER/MOSKOS NONRANDOM SURVEYS OF ARMY PERSONNEL, Professor Charles Moskos, Northwestern University, Sep. 1998.

need from their parents, close friends and health care professionals in dealing with their sexual orientation.

Service members tell SLDN they want to serve our country, but they see no recourse in the face of daily harassment and the untenable ethical dilemma military leaders have imposed upon them.

Military leaders have done little to stop anti-gay harassment and enforce the investigative limits under “Don’t Ask, Don’t Tell, Don’t Pursue.” Military leaders should take responsibility for the current hostile climate and for continued command violations, rather than scapegoating lesbian, gay and bisexual service members for increased discharges, which only serves to inflame further hostility against them.

DON'T ASK

“Don’t Ask” states that “commanders or appointed inquiry officials shall not ask, and members shall not be required to reveal their sexual orientation.”⁴¹ In 1997, Secretary of Defense William Cohen reaffirmed the rule, stating on “Larry King Live” that asking “is a clear violation of law.”⁴² The Pentagon reaffirmed that asking is wrong in its April 1998 report on the effectiveness of the implementation of “Don’t Ask, Don’t Tell, Don’t Pursue.”⁴³

SLDN documented 161 “Don’t Ask” violations in 1998. That is up 30% from 1997, when SLDN reported 124 “Don’t Ask” violations. The Navy led all the Services with 67 “Don’t Ask” violations; the Air Force had the second most violations with 45. “Don’t Ask” violations are up almost 335% over five years under this policy.

Violations of “Don’t Ask” continue to rise, as hostile supervisors, coworkers and investigators question service members about their sexual orientation. Service members’ silence in the face of hostile questioning, in an effort to comply with “Don’t Tell,” only fuels speculation about their sexual orientation, and invites anti-gay harassment in the current military environment.

This section addresses four common “Don’t Ask” scenarios: (1) questions asked by supervisors and coworkers as a means of harassment or intimidation; (2) questions from investigators; (3) questions from well-meaning friends; and (4) inadvertent questions. Regardless of who asks, service members risk losing everything if they answer truthfully or not at all.

⁴¹ DEP’T OF DEFENSE DIRECTIVE NO. 1332.14, Encl. 4 D.3.; *Id.* NO. 1332.30, Encl. 8 D.3. *See also, Policy Concerning Homosexuality in the Armed Forces: Hearings Before the Senate Comm. On the Armed Services, S. Hrg. 103-845, 103rd Cong., at 789 (1993). Comments by then DoD General Counsel Jamie Gorelick, “[W]e do not ask about orientation not only at accession but at any time.”*

⁴² *Larry King Live*, (CNN television broadcast, Transcript # 97012700V22, January 27, 1997).

⁴³ DEP’T OF DEFENSE APRIL 1998 REPORT at 1.

Asking as Anti-Gay Harassment

The most disturbing trend documented by SLDN is the growing link between asking and anti-gay harassment. Hostile commanders, supervisors, colleagues and investigators hound service members with constant questions about their sexual orientation and conduct. Sometimes they question the individual directly. Many times, they question service members in front of their peers. Lesbians, gays and bisexuals experience the questioning not only as asking, but harassment, intimidation and hostility. In five years under “Don’t Ask, Don’t Tell, Don’t Pursue,” the Pentagon has officially held no one accountable for asking or harassing a service member in violation of the policy. As a result, more service members are disclosing their sexual orientation in response to the asking and harassment as the only means to protect themselves. This trend will likely continue in the absence of military leadership to stop command violations, ensure accountability and provide recourse for service members who are questioned or harassed.

Officer Asks Midshipman About His Sexual Orientation

Former Midshipman Robert Gaige reported last year that he had been asked on at least four separate occasions whether he is gay (Exhibit 17). In one incident, Marine Major Richard Stickel, Gaige’s Navy Reserve Officers Training Corps (NROTC) instructor at Cornell University, asked about the significance of a red ribbon worn by Gaige. When Midshipman Gaige responded that the red ribbon signified hope for a cure for AIDS, Major Stickel asked derisively, “What are you, some kind of fucking homo?”

Midshipman Gaige was considered a “gung-ho” NROTC student. Among other activities, he was the Operations Officer of “Semper Fi,” an organization for aspiring Marine Corps officers led by Major Stickel. Midshipman Gaige’s dedication, however, did little to ward

off Major Stickel's questions about his sexual orientation. According to other midshipmen, Major Stickel routinely asked them about the sexual orientation of Gaige and another NROTC student, Mark Navin.

On one occasion, Major Stickel reportedly asked about Gaige's and Navin's sexual orientation in front of the entire battalion, as all of the midshipmen sat together after completing a physical fitness test. With Gaige and Navin present, Major Stickel stated, "Sometimes its helpful to find a workout partner. Look at Gaige and Navin . . . They're always working out together. I don't know what else they do together, but we're not allowed to talk about it anyway." The midshipmen reportedly greeted Major Stickel's comments with prolonged, raucous laughter; many harassed Gaige and Navin for the remainder of the day. This was only one of numerous incidents, described further in the "Don't Harass" section of this report.

Midshipman Gaige's experience onboard Navy ships during summer training cruises indicate that asking is the norm in today's Navy, not the exception. On one cruise, shipmates asked Gaige about his sexual orientation because he refused to join them in visiting prostitutes at brothels when the ship was in port. Enlisted men who had been charged with making sure that Gaige had a "good time" began to question Gaige after he would not take the pool of money they had collected to buy a prostitute's services for him. When Gaige begged off, inventing a girlfriend at home as a reason not to visit prostitutes, one of the enlisted men allegedly said, "Don't tell me you play for the other team, kid?" The sailor reportedly continued, "I think we got a midshipman fag aboard, boys." After more questions about his sexual orientation, Midshipman Gaige finally went into a room with a prostitute. Unknown to the enlisted men however, he did not avail himself of the prostitute's services. Gaige felt that this was his only recourse to ward off further questions about his sexual orientation (Exhibit 18).

Midshipman Gaige remained silent in the face of questions about his sexual orientation in an attempt to comply with “Don’t Tell.” This only led to increased speculation about his sexual orientation and further anti-gay harassment. Ultimately, Midshipman Gaige concluded he had no way of stopping the questions and harassment. As a result, he came out as bisexual to his commander in the course of reporting the harassment he had experienced. Despite his strong desire to serve, he was separated from NROTC. To our knowledge, no action has been taken against Major Stickel or others who questioned and harassed Midshipman Gaige.

Officers and Enlisted Sailors Ask Midshipman If He Is Gay

Midshipman Mark Navin, mentioned above, reports that fellow midshipmen and supervisors questioned him on no less than six separate occasions about his sexual orientation. Major Stickel and other midshipmen in Cornell University’s NROTC program asked Navin about his sexual orientation before he even knew or accepted that he is bisexual. During a freshman year trip to Quantico Marine Corps Base, in Virginia, with the NROTC pistol team, Major Stickel and other midshipmen invented a running joke about a supposed relationship between Navin and Midshipman Gaige. Common questions included, “So Navin, what’s up with you and Gaige?” and “Yeah, are you two together?”. Other NROTC students called Navin “fag” and “homo” (Exhibit 19).

Sailors also questioned Midshipman Navin about his sexual orientation during his summer cruises onboard Navy ships. During a late night bridge watch onboard the *USS Boone*, for example, two sailors threatened Midshipman Navin, telling him, “You’d better not be queer because in the Navy we kill our fags.” During a second summer cruise on the *USS Rodriguez*,

both his midshipman running mate and a junior officer with whom he shared a stateroom asked him directly whether he were gay (Exhibit 20).

Midshipman Navin independently came to the conclusion that he had no recourse against questions about his sexual orientation or anti-gay harassment. Like Midshipman Gaige, Midshipman Navin came out in a letter to his commander recounting the questions he had faced in his young career. Despite his desire to serve, the Navy disenrolled him as well.

Sergeant Asks New Marine About Sexual Orientation

A Marine noncommissioned officer, Sergeant Dewey, reportedly questioned former Private First Class Gabrielle Butler about her sexual orientation last May, during her advanced Military Occupation Specialty training. Sergeant Dewey surprised Butler one day, asking her, “Do you plan on marrying a female?” Fearful that her sergeant had figured out that she is a lesbian, Butler made the mistake of going UA (unauthorized absence). Butler, who returned to training and took responsibility for going UA, explained her fear in a subsequent letter to her commander:

During the second week of May, I was approached, unprovoked, by Sgt. Dewey and asked, “Do you plan on marrying a female?” Since then, I’ve dreaded the possibility of an intrusive investigation, it getting back to my peers, or having punitive actions taken against me. The incident with Sgt. Dewey made me aware of the reality of serving as a closeted lesbian in the United States Marine Corps; I would live in constant fear of being “found out” no matter how discreet my private behavior. It was this realization that led to my becoming afraid and confused. My decision to go UA was driven by my fear . . . I truly fear for my safety if word of my sexual orientation becomes common knowledge (Exhibit 21).

Unfortunately, Butler’s fears were well-founded. Word spread rapidly through her unit that she is a lesbian. She has since been discharged.

Recruiter and Drill Instructor Question Marine

Lance Corporal David Raleigh was asked about his sexual orientation from the time he signed up to serve in the Marine Corps. Raleigh's recruiter, a Master Gunnery Sergeant, said to him, "Because of President Clinton's new policy, I can't ask you if you're a fag. So I'll just ask if you suck cock."

During boot camp at the Marine Corps Recruiting Depot in San Diego, Raleigh's Drill Instructor repeatedly told him in front of his squad that he was "timid, clumsy and weak." Raleigh responded to each charge with a vehement "No, sir." Finally, the Drill Sergeant asked, "You're a fag aren't you, Raleigh?" Raleigh was petrified. He remained silent out of fear that any type of response would ruin his young career.

Officers Ask Ensign About His Sexual Orientation

A Naval Academy graduate with prior experience as an enlisted sailor recently faced direct questions about his sexual orientation from classmates in a prestigious Navy program. Classmates reportedly asked the Ensign, "Would you sleep with a girl?" and questioned his friendships with other military officers. The Ensign reports that fellow officers engaged in verbal gay-bashing daily. The Ensign described his experience in a letter to his commander disclosing his sexual orientation and explaining why he came out:

Living in forced isolation, in constant fear of investigation and inadvertent disclosure is harmful to gay service personnel. Each day I am witness to unprofessional, anti-gay comments and attitudes. The Navy takes no action to stop this improper and outrageous behavior on the part of its best and brightest officers. My witness to this unfortunate anti-gay climate, and the direct harm that it causes me, forces me to disclose to you that I am gay. When classmates, who are supposed to be professionals upholding

the high values of the Naval officer corps frequently ask me questions designed to determine whether or not I am gay, I can only conclude that their intrusive questions are calculated to cause me harm. I evade their questions for fear of how they would react if they knew the truth. It is simply difficult to believe that in 1999 such antiquated un-American attitudes are flourishing in our nation's Navy (Exhibit 22).

The Ensign's letter speaks eloquently to the dilemma facing lesbian, gay and bisexual service members in today's military. While enforcing "Don't Tell" with a vengeance, senior uniformed leaders have demonstrated 100% tolerance for asking and anti-gay harassment. The entire burden is on gay service members to evade and dissemble when questioned about their sexual orientation.

Master Chief Asks Subordinate About His Sexual Orientation

A Navy Master Chief Petty Officer confronted a Petty Officer Second Class, about his sexual orientation. The Master Chief crudely asked the Petty Officer if he would like to see his penile implant because he thought the Petty Officer was "into that." Though the Petty Officer, a nine-year career sailor with a stellar record, warned him that he considered the comment to be sexual harassment, the Master Chief confronted him again the next day.

This time, seeking a reaction from the Petty Officer, the Master Chief pointed to the word "homosexual" contained in Navy regulations governing discharges and stated, "That's you." After turning a few more pages, the Master Chief went back to the same page, pointed again to the word "homosexual" and stated, "See, right there '[Petty Officer's name]'." In a third incident, this Master Chief and a coworker speculated about the Petty Officer's sexual orientation while standing right in front of him.

The Petty Officer's military experience provided him no more means to defend against questions about his sexual orientation than the young military members mentioned above. In a letter to his commander, in which the Petty Officer documented these incidents, he wrote, "I feel unable to defend myself from these attacks without raising even more suspicion" (Exhibit 23). As a result, he reluctantly came out to his commander, stating in part, "The only means I see to . . . avoid becoming a victim of harassment is by making this disclosure to you."

Fortunately for this Petty Officer, his commander took his report of harassment seriously and placed a letter of counseling in the Master Chief's personnel file describing his harassment and ordering him to cease and desist. The commander is retaining the Petty Officer in his position and has promised that he will not investigate his sexual orientation. SLDN applauds this commander for setting the right priorities in his unit, and for his common sense approach to resolving this situation. If "Don't Ask, Don't Tell, Don't Pursue" were properly enforced, the leadership this commander demonstrated by holding the Master Chief accountable for his harassment would be the rule, not the exception.

Service Members Are Asked Every Day About Their Sexual Orientation

Service members are asked about their sexual orientation every day by hostile supervisors and coworkers. This affects anyone who is perceived as gay, regardless of the service member's actual sexual orientation. Asking, when it is against the law and when answers can be punished with loss of livelihood, sows fear and distrust among coworkers. "Don't Ask" hurts unit cohesion. As Marine Lance Corporal David Raleigh told SLDN, in reference to coworkers who had harassed him, "If I were in combat with them, I would not trust them."

Asking has become a routine occurrence. The following are just a few additional examples that are typical of SLDN's cases:

- A young sailor reports being asked, "What's up, lesbian?" and told by coworkers that she must be gay because she never talks about a boyfriend when everyone else is talking about their husbands or wives (Exhibit 24).
- A military firefighter recently filed a sexual harassment complaint after enduring repeated questions and a physical assault based on a perception that he is gay. His supervisor and several coworkers have asked: "Are you gay?" "Are you coming out of the closet?" and "Yes, I'm asking; are you homosexual?" (Exhibit 25).
- A sailor in an aviation unit on an aircraft carrier reports being asked more than twenty times by shipmates about his sexual orientation. Recent questions include: "Are you gay?" "Are you a flaming faggot?" and "I heard that you are gay." Because of these hostile questions, the sailor fears for his safety while at sea.
- An Army Captain came out to his commander after being asked about his own sexual orientation and hearing degrading comments about soldiers thought to be gay, including frequent anti-gay jokes, at each of the three bases where he had been stationed in his career (Exhibit 26).
- An Army Corporal reports being asked, "Are you gay?" by a former roommate whom the Corporal subsequently learned had stolen his diary. Later, the former roommate asked the Corporal, in front of his coworkers, "Do you like women?"
- A sailor on the submarine *USS Houston* reports being asked numerous questions about his sexual orientation by coworkers, including: "What are you, a fag?" and "Well, we already know you're a fag, so what kind are you, an art fag or a regular fag?" (Exhibit 27).

Investigators Ask About Sexual Orientation

Navy Investigators Ask About Sexual Orientation

Agents from the Naval Criminal Investigative Services (NCIS) blatantly violated “Don’t Ask, Don’t Tell, Don’t Pursue” last year when they questioned a Navy Petty Officer and his coworkers. In this case, NCIS agents repeated a series of questions with several witnesses following the pattern below, as set forth in a letter from the Petty Officer’s attorney to his commander (Exhibit 28):

- The witness is questioned concerning whether or not he knows about the ‘lifestyle’ of [A];
- And what [A] ‘does for fun;’
- And where he goes socially (i.e. types of bars, social gathering places, etc.);
- And what he’s ‘like in public;’
- And whether he has been ‘buddy buddy’ with male friends and roommates.

According to the attorney, the sailor under investigation was questioned personally along these same lines, giving rise to the “Don’t Ask” violations in this case. The questions asked by the NCIS agents led witnesses and the sailor’s commander to conclude that the agents were engaged in a witch hunt for gay personnel, as described more fully in the “Don’t Pursue” section. Despite repeated requests, NCIS never informed the sailor of the allegations against him. When pressed by his command for the reason behind the investigation, the agents suggested that the sailor’s marriage was not valid and that his wife therefore fraudulently obtained medical benefits. The agents offered no support for this offensive theory. As noted by the sailor’s military attorney, the NCIS agents’ questions exceeded what is needed to investigate a medical fraud case.

Air Force Investigators Ask About Sexual Orientation

An Air Force investigator violated “Don’t Ask” when he asked a Lieutenant the following wide-ranging questions about his sexual orientation, as set forth in the investigator’s Report of Inquiry (ROI) (Exhibit 29). The investigator asked the Lieutenant:

- when [was] the last time he had had a girlfriend and what her name was;
- what he thought of homosexuals;
- if he thought homosexuals belonged in the military;
- if he had ever had any kind of homosexual contact with anybody at anytime in his life; and
- if he had ever thought about it or otherwise had any desire to ever engage in homosexual acts.

The investigator also questioned a coworker about whether this Lieutenant “had ever mentioned anything about former girlfriends” or “his private life,” questions that are forbidden under “Don’t Pursue” (Exhibit 30).

In another Air Force case, investigators questioned a senior noncommissioned officer last year about his sexual orientation in the course of investigating a civilian employee of the Air Force whom the noncommissioned officer knew. The allegations against the civilian employee had nothing to do with homosexual conduct. That did not deter the investigators, who asked the noncommissioned officer: “Are you gay?” “Are you married?” “What kind of bars do you go to?” “What kind of restaurants do you go to?” and “What kind of magazines do you read?” In every way, these questions violate “Don’t Ask, Don’t Tell, Don’t Pursue.”

Friends Ask Service Members About Their Sexual Orientation

Increasingly, superiors and coworkers ask service members about their sexual orientation out of friendship or concern, not as a means of harassment. The problem is that the military discharges service members based on their responses. This misguided application of the policy makes service members vulnerable to any leak of information about their identity, requiring

service members to avoid friendships and to be wary of trusting anyone. It also hurts the military by making it more difficult for leaders to look after their subordinates and by creating distrust among coworkers.

In one good example illustrating how things should work under this policy, a marine reports that his First Sergeant agreed to help him after a Gunnery Sergeant questioned him four times about his sexual orientation. The First Sergeant stated: "I know about you. My brother is that way. If you have a problem, come to me and I'll try to help you. I know you're a good marine. I love my brother and I support you." This First Sergeant should be commended for taking the marine's complaint of "Don't Ask" violations seriously and for not turning him in to be discharged.

In a number of cases, coworkers have gone out of their way to affirm suspected gay service members. In one Navy case, for example, a sailor faced repeated questions about his sexual orientation. When another coworker asked him directly, "Are you gay?" he feared the worst. The coworker, however, hastened to add, "I know you're gay and I've never had a problem with it." The coworker did not start rumors or turn in the gay sailor and the sailor continues to serve on active duty.

Other service members have not been so fortunate. The story of one airman is representative of many cases SLDN has handled. When a friend privately questioned this airman about his sexual orientation, he responded truthfully that he is gay. The friend made the naïve mistake of mentioning this conversation to three other friends, one of whom informed a superior. The command started an investigation, and questioned the friend. According to the Report of Investigation, the investigating officer "observed [the friend] to be honest, although somewhat uncomfortable. He briefly expressed concern about 'burning' a fellow [coworker]" (Exhibit 31).

The Air Force discharged the gay airman in this case based solely on the friend's statements to the investigating officer, made as a direct result of the investigator's prompting.

Inadvertent Questioning

The final group of "Don't Ask" cases highlighted in this report is best described as inadvertent questioning. These are cases where commanders and others ask questions that, on their face, are not designed to ask about sexual orientation, but, in fact, do. The problem is that some commanders are acting on the information inadvertently discovered and discharging service members, rather than treating the information as "personal and private"⁴⁴ and taking no action.

In a recent case, investigators from an Inspector General (IG) office questioned a sailor whose top-notch record includes being selected as "Sailor of the Quarter" on numerous occasions. The sailor says that the investigators never explained who, what or why they were investigating. Investigators questioned the sailor at length on several occasions. During the last interrogation, investigators insisted they "knew the truth" and told the sailor that her statements to them "conflict with the truth." When the sailor asked why the investigators were questioning her, they replied, "To let you tell the truth." After hours of questioning, the sailor finally blurted out, "How much more humiliation can I take? You know I'm gay." The sailor thought they wanted to elicit her sexual orientation; they did not. She now faces a possible discharge for her "statement" under "Don't Ask, Don't Tell, Don't Pursue."

An observer unfamiliar with life as a gay service member might be tempted to view this response as somewhat paranoid. Under "Don't Ask, Don't Tell, Don't Pursue," however, service members live every day in fear of events that cause little concern for their straight colleagues.

The policy requires lesbian, gay and bisexual service members to dissemble at every turn, even in the most mundane daily conversations. For gay service members, facing questions such as “What church do you go to?” “What basketball team do you play on?” “What did you do this weekend?” and “Do you have a boyfriend/girlfriend back home?” is like standing on the edge of a mine field. Heterosexual colleagues do not intend to elicit information about a coworker’s sexual orientation with these common questions, which they experience as innocuous. Lesbian, gay and bisexual service members who answer these questions truthfully, however, could reveal their sexual orientation. Avoiding or providing vague answers could also raise suspicions. One slip up could end their careers.

The military’s long history of witch hunts to ferret out lesbians, gays and bisexuals in the ranks reinforces service members’ anxiety, distrust and suspicion. They work in constant fear that every time their First Sergeant or Commander unexpectedly calls them into their office, it may signal that they have been discovered and their career is over.

In trying to stamp out any hint of homosexuality, military leaders have ironically created a situation where lesbian, gay and bisexual service members must be profoundly self-conscious about their sexual orientation at every turn. Not only must they learn to mask any sign that might betray their sexual orientation, they are also required to affirmatively project an image of someone they are not—a heterosexual. Under these circumstances, it is no wonder that the woman sailor in the above example concluded that the Navy investigators, in stating they wanted the “full truth,” had unmasked her true identity.

⁴⁴ See *supra* note 16, at 5.

Conclusion

The current military climate sends a direct message to commanders and service members that it is permissible to ask questions about a person's sexual orientation. Without a means to punish those who violate the rules, asking will continue unchecked and incidents of asking will increase. Furthermore, until the real intent of the policy is enforced, those friends, family members and health care providers who ask out of concern or support for service members will be placed in an untenable position where investigators could elicit information that hurts the ones they care about. This climate only fosters fear in service members—whether they are gay, straight or bisexual—and it perpetuates a lack of trust and unity among our troops. Service members should be protected from illegal and intrusive questions about their sexual orientation and should have adequate recourse to stop asking without fear of reprisal.

DON'T TELL

“Don’t Tell” requires lesbian, gay and bisexual service members to keep their sexual orientation a “personal and private” matter. “Don’t Tell,” however, does not prohibit all disclosures of sexual orientation. Service members may disclose their sexual orientation to defense attorneys,⁴⁵ chaplains,⁴⁶ security clearance personnel,⁴⁷ and, in limited circumstances, doctors who are treating patients for HIV.⁴⁸ The policy protects service members’ freedom of association with friends and extracurricular organizations.⁴⁹ The policy’s intent is to afford service members some private, safe space in which they can have private conversations without fear of investigation or discharge. As former Secretary of Defense Les Aspin explained to Senator Bingaman during the 1993 Senate hearings on the policy, “If I came to the commander and said that you told me that you are gay, if that was the only thing going, my expectation would be the commander would not do anything.”⁵⁰

SLDN documented 23 “Don’t Tell” violations this year. These are incidents in which commands investigated or discharged service members based on private conversations that were intended to be off-limits under “Don’t Ask, Don’t Tell, Don’t Pursue.” The Air Force, which traditionally has the worst “Don’t Tell” record, led the other services again this year with 11 violations. The 1998 figures are consistent with those in past years. For the purposes of this report, SLDN counts only command violations of “Don’t Tell” rather than instances where

⁴⁵ MILITARY R. EVID. 502.

⁴⁶ MILITARY R. EVID. 503.

⁴⁷ DEP’T OF DEFENSE DIRECTIVE 5200.2-R 10-100. *See also*, DEFENSE INVESTIGATIVE SERVICE MANUAL, DIS-20-1-M, encl. 18, Jan. 1993.

⁴⁸ DEP’T OF DEFENSE DIRECTIVE NO. 6485.1, encl. 3.2 (Mar. 19, 1991). “Information obtained from a Service member during, or as a result of, an epidemiological assessment interview may not be used against the Service member (in adverse criminal or administrative actions).”

⁴⁹ DEP’T OF DEFENSE DIRECTIVE NO. 1332.14, encl. 4 E.4.; *Id.* NO. 1332.30, encl. 8 E.4.. “[Credible information does not exist when] the only information known is an associational activity such as going to a gay bar, possessing or reading homosexual publications, associating with known homosexuals”

lesbian, gay and bisexual service members face possible discharge for “statements” of sexual orientation.

There is no safe space for service members as “Don’t Ask, Don’t Tell, Don’t Pursue” is being implemented. Contrary to the intent of the policy, service members cannot seek guidance from their psychotherapists, chaplains, family or closest friends for fear of being outed and losing their livelihoods. This contrasts sharply with the military’s treatment of heterosexual service members, who are encouraged to seek guidance from these sources in recognition that they are important pressure valves for service members dealing with the stresses of military life.

Psychotherapists and Doctors Ordered to Turn in Gays

Health care providers have been ordered to turn in lesbian, gay and bisexual service members who seek their help, in violation of “Don’t Tell.” SLDN has identified this problem in past reports. Last year, Department of Defense officials disputed SLDN’s findings based on representations made to them by the Services and stated that health care providers were not required to turn in their patients.⁵¹ Evidence obtained by SLDN shows, however, that the Pentagon’s assertions are incorrect.

The Navy’s *General Medical Officer Manual*, obtained by SLDN this year, for example, specifically instructs health care providers to turn in lesbian, gay and bisexual service members.⁵² Updated in May 1996, the *Manual* is given to doctors who have completed their internship, prior to beginning their residency. The *Manual* dispenses advice on everything from angina to phobias. One chapter focuses specifically on homosexuality, urging medical officers to turn in gay service members. The *Manual* states:

⁵⁰ *Policy Concerning Homosexuality in the Armed Forces: Hearings Before the Senate Comm. On Armed Services*, S. Hrg. 103-845, 103rd Cong. at 721 (Testimony of then Secretary of Defense Les Aspin).

Homosexuals should not be referred to psychiatry. This is not a medical matter, but a legal matter. The referral should be made to the command legal officer or judge advocate general. . . . [T]hose who seek out the GMO to disclose homosexual conduct or the idea that they are being over-stimulated by members of the same sex are asking to be discharged. One way of looking at homosexuals in the military is to distinguish between those who adapt to the military environment and those who do not. The adapters are invisible and do not seek to disclose their homosexuality. The nonadapters realize they made a mistake in joining the military, and they need to get out. When a nonadapter goes to the physician, the physician will be most helpful by facilitating the legal process. . . .⁵³

The *Manual*'s lack of medical bearing is striking. It does not discuss lesbian, gay and bisexual health concerns. It does not recognize that disclosure of one's sexual orientation may be a necessary part of the patient's health care. It does not recognize that sexual orientation is not a bar to service under "Don't Ask, Don't Tell, Don't Pursue."⁵⁴ Instead, the text suggests that doctors should deny health care to lesbian, gay and bisexual service members if they reveal their sexual orientation. That is bad medicine. Instructing health care officials to turn in lesbian, gay and bisexual service members is also bad policy, against even the Pentagon's position on the subject.

Pentagon officials removed the section on "homosexuality" from the online version of the *General Medical Officer Manual* in February 1999, after SLDN brought the *Manual* to their attention. The fact that the guidance existed in the first place, however, underscores SLDN's concern that military leaders do not know, or have chosen to ignore, the intent of "Don't Ask, Don't Tell, Don't Pursue" to respect service members' privacy.

In the Air Force, a psychiatrist tells SLDN that she has been specifically directed by her

⁵¹ DEP'T OF DEFENSE APRIL 1998 REPORT at 10.

⁵² DEP'T OF THE NAVY, NAVMED P-5134, GENERAL MEDICAL OFFICER (GMO) MANUAL (May 1996).

⁵³ *Id.*

⁵⁴ *See supra* note 12, at 5.

superior not to provide mental health counseling on issues of sexual orientation and conduct. She also reports that her fellow doctors frequently use anti-gay epithets and engage in verbal gay-bashing at work. Yet another Air Force psychiatrist reports that it is not uncommon for commanders to search medical notes to snoop on their airmen and ferret out lesbian, gay and bisexual service members. According to the health care providers, these problems prevent them from adequately treating their patients.

Military health care providers have, in fact, turned in lesbian, gay and bisexual service members. A Navy psychologist turned in Marine Corporal Kevin Blaesing merely for asking questions about homosexuality, as described in the introduction. Last year, an Air Force psychologist outed Staff Sergeant Victor Peralta, a Russian language cryptologist, to his First Sergeant and to his unit. Both Blaesing and Peralta ultimately lost their careers. These are just two of many examples.

There is a clear need for Pentagon officials to inform health care providers that they are not required to turn in lesbian, gay and bisexual service members who seek their help.⁵⁵ Pentagon officials should further clarify that disclosures of sexual orientation or conduct in the course of medical treatment are not a basis for investigation or discharge under “Don’t Ask, Don’t Tell, Don’t Pursue.” The Pentagon’s current proposal to adopt a limited psychotherapist privilege does not address the problem of health care providers turning in their gay patients, as it is limited to criminal proceedings.⁵⁶ Under “Don’t Ask, Don’t Tell, Don’t Pursue,” most gay cases are now handled in the administrative system. Military readiness depends on service

⁵⁵ DEP’T OF DEFENSE APRIL 1998 REPORT at 10.

⁵⁶ There is no psychotherapist privilege in the military. The Pentagon has recommended adoption of a limited psychotherapist privilege in light of the United States Supreme Court’s holding in *Jaffee v. Redmond*, 116 S. Ct. 1923 (1996).

members receiving adequate health care, which is impossible if they are not able to speak with health care providers without fear of reprisal.

Military Chaplains Improperly Give Legal Advice

Some military chaplains are telling lesbian, gay and bisexual service members who seek their guidance to turn themselves in. Other chaplains encourage friends to become turncoats and report lesbian, gay and bisexual service members to their commanders.⁵⁷

An Air Force chaplain, for example, threatened to out an Air Force officer stationed in Florida. The officer had confided in a friend, another officer in the unit, that she is a lesbian and involved in a relationship. Afterward, when the friend sought guidance from the unit's chaplain, he encouraged her to turn in the officer. The chaplain convened a meeting with the friend and the officer in which he gave the officer an ultimatum: turn herself in by the end of the week or the friend would out the officer to her commander. The chaplain reportedly threatened to testify against the officer at an administrative separation hearing if she did not turn herself in and leave the military. The chaplain reportedly told the lesbian officer she should not be surprised about what was happening to her based upon the "choices" she made in life. When, by the end of the week, the officer had not outed herself, the "friend" followed through with the ultimatum and turned her in. An investigation against the officer ensued.

At the time of this incident, doctors had diagnosed the lesbian officer with a serious degenerative disease. As a result, she was eligible for a medical separation including benefits for her care. Had the Air Force discharged her under "Don't Ask, Don't Tell, Don't Pursue," she would have lost all eligibility for medical benefits. Fortunately, her commander was sympathetic and, despite pressure from his superiors, he permitted the medical separation to go forward,

instead of discharging her under “Don’t Ask, Don’t Tell, Don’t Pursue.” The chaplain’s actions, however, and the resulting investigation caused significant emotional stress, negatively affecting the service member’s health at a critical time.

In another case, described in more detail in the “Don’t Pursue” section, the Air Force fired a Senior Airman at Offutt Air Force Base with three-and-a-half years of service after a friend, on the advice of a military chaplain, turned him in for confiding in him that he is gay. The Senior Airman had thought he could trust his friend who had talked about his lesbian sister, stating that he loved her. He was wrong. The friend was a turncoat. The command started an inquiry ultimately leading to the service member’s discharge.

While SLDN does not record a large number of cases where chaplains participate in outing lesbian, gay and bisexual service members, the fact that these cases occur at all is troubling. The Pentagon should ensure that chaplains know sexual orientation is no longer a bar to military service and is a personal and private matter. Chaplains should not pressure service members to out themselves or encourage others to rat on their friends.

Military Officials Seek out Family and Friends

SLDN remains concerned that inquiry officers and investigators are seeking out family members and close friends to solicit information that can be used against their loved ones, contrary to “Don’t Ask, Don’t Tell, Don’t Pursue.”

In a case described more fully in the “Don’t Pursue” section, a Navy prosecutor threatened a service member’s mother and sister-in-law with subpoenas if they did not provide her with incriminating information about the service member (Exhibit 32). An administrative

⁵⁷ See *infra* at 49.

separation board retained the service member despite the evidence against the service member garnered by the prosecutor's misconduct.

In the Air Force, top lawyers have actually instructed inquiry officers, in writing, to seek out service members' parents, brothers and sisters, close friends and even high school guidance counselors for questioning (Exhibit 33). The following excerpt from an Air Force Report of Inquiry conducted in a pending case is typical (Exhibit 34):

- Have you told any of your family members that you are homosexual? When? How can I contact them?
- Who are some of your closest friends? How can I contact them?
- Do you belong to any homosexual organizations? Which? When did you become a member? Can I verify by talking to other members who know? Whom?

The inquiry officer asked this Air Force officer twenty-three questions about his sexual orientation, private life, associates, close friends and family members. Interviews like this one have become standard practice. When inquiry officers are successful in locating family members and friends, they have pressured them to provide damaging information against service members.

The Air Force has attempted to justify its intrusive tactics by claiming that inquiry officers use them only in a limited number of cases involving service members who come out and who have received educational funding, special pay or bonuses in exchange for further service obligations. First, "Don't Ask, Don't Tell, Don't Pursue" does not authorize expanded inquiries in recoupment cases. Second, the Air Force has expanded such intrusive tactics to cases not involving recoupment of monetary benefits. In the above case, for example, the Air Force officer had not received any funding that would cause him to incur a further service obligation. While these violations are not limited to the Air Force, the Air Force has been the worst violator of "Don't Tell" every year for the past five years.

Conclusion

Service members have no safe space or privacy, contrary to the intent of “Don’t Tell.” Psychotherapists have been ordered to turn in lesbian, gay and bisexual service members. Some chaplains are forcing service members to out themselves, and encouraging their friends to become turncoats. Investigators are pursuing close friends and family members in an effort to dig up allegations against suspected gay service members. To clean up the “Don’t Tell” violations, military leaders need to make it clear that private conversations—to family, health care providers and best friends—should not be used as a basis for inquiry or discharge.

DON'T PURSUE

“Don’t Pursue” is intended to get commanders and investigators to back off and to respect service members’ privacy. More than a dozen specific investigative limits comprise “Don’t Pursue” (Exhibit 3). These limits establish a minimum threshold to start an inquiry and restrict the scope of an inquiry even if properly initiated. The investigative limits would help, if followed, but they have not been. Commanders and investigators continue to snoop, pry, search and dig in violation of “Don’t Ask, Don’t Tell, Don’t Pursue.”

SLDN documented 350 “Don’t Pursue” violations in 1998 compared to 235 in 1997. Reports of “Don’t Pursue” violations in the Army and Marine Corps more than doubled from last year to 101 and 45 violations respectively. Air Force violations increased 29% from 90 to 116 violations while Navy violations increased 20% from 71 to 85 violations.

The most common “Don’t Pursue” violations are (1) starting inquiries without credible information, and (2) witch hunts, where inquiries are expanded beyond the original allegation to seek out additional allegations against the service member or others who are suspected of being lesbian, gay or bisexual. In some cases, commanders and investigators are expanding inquiries to seek out possible criminal charges against service members.⁵⁸

In a development highlighted last year, military leaders are still attempting to force known lesbian, gay and bisexual service members to “prove” they are gay by providing information that could lead to criminal prosecution.⁵⁹ What is new this year is military leaders have refused to discharge some lesbian, gay and bisexual service members who come out and decline to provide any information that could cause them further legal harm. Of great concern,

⁵⁸ This is contrary to the stated preference in “Don’t Ask, Don’t Tell, Don’t Pursue” of handling gay cases in the administrative system.

⁵⁹ Unlike recoupment cases, where this tactic originated, these service members have not received educational funding, bonuses or special pay and do not owe any resulting service obligation to the military.

as described in the “Don’t Harass” section, military leaders have taken no steps to stop the anti-gay harassment that forced these service members to come out in the first place, nor have they given assurances that these service members will not be kicked out later, as they approach retirement.

Inquiries That Should Have Never Been Started

Army Pursues Women Despite False Accusation

At an Army training base in the Southeast last summer, a commander launched a wide-ranging inquiry threatening the budding careers of several women soldiers. This case illustrates common violations of “Don’t Pursue” and service members’ legal rights.

First, this commander rushed to judgment by launching an inquiry, rather than evaluating whether there was credible information to start one.⁶⁰ This commander started an inquiry after one soldier claimed she saw two women lying together on a bunk in the barracks, partly beneath a blanket. There was an eye-witness who directly contradicted her. Furthermore, the credibility of the accuser was in serious doubt.⁶¹ It appears the accuser had a history of making spurious gay accusations against her colleagues, according to a sworn statement by the eyewitness:

- Q. Could it have been possible for PVT [A] and PVT [B] to be under the covers together when PVT [C] walked in?
- A. Absolutely not. Besides the fact that I was sitting on the bed at the time that PVT [C] walked in....
- Q. Did there appear to be any suspicious behavior between PVT [A] and PVT [B] that evening?
- A. Absolutely not.

⁶⁰ DEP’T OF DEFENSE DIRECTIVE NO. 1332.14, encl. 4 A.1.; *Id.* NO. 1332.30, encl. 8 A.1. “A commander may initiate a fact-finding inquiry only when he or she has received *credible information* (emphasis added) that there is a basis for discharge.”

⁶¹ DEP’T OF DEFENSE DIRECTIVE 1332.14, encl. 4 F.1.; *Id.* 1332.30, encl. 8 F.1. “Credible information exists, for example, when a *reliable person* (emphasis added) states that he or she observed or heard a Service member engaging in homosexual acts, or saying that he or she is a homosexual or bisexual or ie married to a member of the same sex.”

- Q. Do you have any opinion as to PVT [C's] reputation for truthfulness?
- A. Any reputation she might have would be that of an untruthful person.... PVT [C] would constantly refer to others as 'homos' or 'lesbians' and would constantly accuse others of being 'gay.'
- Q If you were told that PVT [C] alleged that PVT [A] and PVT [B] were engaged in sexual activity on 21 March 1998, what would be your response?
- A. PVT [C] is lying once again. I was there and I know that nothing was going on (Exhibit 35).

The bottom line is that the accused soldiers had done nothing. Yet, the command forced one of them to go to a discharge board to fight for her career because her commander improperly started an inquiry based on a false accusation. The other soldier waived her board, and the Army discharged her for alleged homosexual conduct, even though she denied the two women were lesbians and she testified at Private [A's] discharge board that the two women did not have a physical or sexual relationship.

Second, even if the inquiry had been proper, the company commander did not limit his inquiry to the allegation at hand. Instead, he expanded the inquiry and used it as a platform to pursue other women. As noted by the military attorney for Private [A] in a letter to the President of her discharge board: "the company commander" strayed into asking questions about the sexual activity between different individuals in his company. Such activity constitutes the exact type of 'witch hunt' that is specifically forbidden by the 'Don't Ask, Don't Tell, Don't Pursue' policy" (Exhibit 36).

Third, the commander actively prevented Private [A] from obtaining adequate legal counsel to defend against the false allegations. The Army defense attorney described the commander's efforts to interfere with this soldier's legal rights in his letter to the President of the discharge board, stating, "Private [A] has suffered from continual harassment from her chain of

command in not allowing her time to talk to me.... Neither my client nor I have been given an opportunity to meet face to face to prepare for this matter.... I have been unable to interview any of the witnesses in this case.”

After attempts to resolve these problems with Private [A’s] commander and the military prosecutor proved unsuccessful, the Army defense attorney appealed to the base Commanding General, writing, “Such intentional obstruction of the Attorney-Client relationship is in direct violation of Private [A’s] constitutional right to counsel, as well as a potential ethical problem for the attorneys who are facilitating said obstruction” (Exhibit 37). The soldier’s father, an Army officer, eventually was forced to seek help from his United States Senator before the Commanding General heeded the pleas of this soldier’s attorney and permitted the soldier to meet with her attorney unfettered.

This soldier was “fortunate.” Ultimately, the discharge board decided to retain her, given the false accusation. The commander, however, should never have subjected this soldier to an inquiry. The commander should never have harassed her because she attempted to exercise her legal rights. The commander should have never discharged the other soldier who was falsely accused. The commander should not have investigated the other women in the unit. There is no indication that the Army has held accountable the commander for his actions.

This soldier is anonymous because she remains on active duty. Although she is heterosexual, she fears that the false allegations could lead to suspicion and harassment if coworkers at her new unit learn of them.

*Navy Prosecutor Interrogates Family,
Circuit City Employees to Find Out If Sailor Is Gay*

In preparing for an administrative separation board last year, a Navy prosecutor launched her own inquiry into a sailor's pre-service life to dig up additional information that could be used to bolster a weak case against him for alleged gay acts. "Don't Ask, Don't Tell, Don't Pursue," however, does not authorize prosecutors to start inquiries. Under the policy, only a service member's commander may initiate an inquiry. Furthermore, even where inquiries are properly started, inquiry officers must limit the scope of their inquiry to the original allegations, contrary to the prosecutor's actions in this case.

In a letter to the Commanding Officer of the ship dated September 3, 1998, the military defense attorney describes the prosecutor's misconduct (Exhibit 38):

[The prosecutor] went so far as to question members of the respondent's pre-service place of employment. This is particularly noteworthy in light of the fact that respondent enlisted in the United States Navy nearly *four years* prior to the initiation of this investigation. In addition, and perhaps even more egregious, [she] contacted members of the respondent's family, threatening to subpoena such family members if they refused to provide information.

That a Navy prosecutor would badger a sailor's family and employees from his pre-service place of employment to provide information against him demonstrates an utter lack of propriety and complete disregard for the limits to investigation. This case shows just how far some officers will go to pursue suspected gay personnel. Fortunately, she did not succeed in her crusade, and the sailor serves today.

Air Force Colonel Pursues Anonymous Allegation

The Air Force pursued Captain Ron Falcon last year based on an anonymous email

message, contrary to “Don’t Ask, Don’t Tell, Don’t Pursue.”⁶² Anonymous allegations are not sufficient to begin an inquiry, because a commander cannot assess the credibility of the accuser.

A person known only by the screen name “jammer” accused Captain Falcon of being gay in an email to his chain of command. The Record of Investigation in this case states “An email was sent to Major Goven...by a person using the alias ‘jammer.’ Jammer identifies himself as a Captain in the Army National Guard. Jammer’s email alleges homosexual conduct and manipulation by a medical officer.... Lt Col Clement...requested via email that jammer provide additional details” (Exhibit 39).

Lieutenant Colonel Clement’s own email of August 28, 1998 confirmed that he pursued anonymous allegations. He wrote (Exhibit 40):

Hello, I direct physician assignments for the Air Force.... I am interested in what you had to say but it is difficult to *pursue* (emphasis added) your leads without knowing who you are talking about. Any additional details you wish to share will be taken into consideration. Thanks for contacting our assignments division. I look forward to hearing from you soon.

“Jammer” fulfilled Lieutenant Colonel Clement’s request and turned over Captain Falcon’s name.

Captain Falcon’s discharge is pending based on “jammer’s” accusations as well as an independent statement made by Falcon to his commander admitting that he is indeed gay. Falcon’s statement was made independently of Lieutenant Colonel Clement’s actions in the case. An administrative separation board recommended Falcon’s separation, despite his arguments to the Board that he wants to serve.

⁶² DEP’T OF DEFENSE DIRECTIVE NO. 1332.14, encl. 4 E.2-3.; *Id.* NO. 1332.30, encl. 8 E.2-3. “Credible information does not exist, for example, when: . . . the only information is the opinions of others that a member is homosexual or the inquiry would be based on *rumor, suspicion, or capricious claims* (emphasis added) concerning a member’s sexual orientation.”

Sergeant Snoops Through Soldier's Personal Belongings

The Army discharged Specialist Christopher Albritton because First Sergeant Joseph Shinskie snooped through his personal belongings, in violation of “Don’t Pursue” and discovered private photographs inside Albritton’s day planner. Although the photographs did not depict any sexual acts, they led First Sergeant Shinskie to believe that Albritton is gay.

As First Sergeant Shinskie stated for the official record:

While in the room I noticed a day planner, black in color sitting on a night table.... I flipped open the planner and noticed several pictures.... Unsure as to the legality of the viewing of these photographs, I...advised the commander, CPT Dewitt, of my findings. After coordination with the SJA, CPT Bowers, the commander initiated an inquiry into...Albritton *and* the unidentified male in the photographs (emphasis added) (Exhibit 41).

Sergeants may inspect their subordinates’ rooms to ensure their health, welfare and safety, which is the type of inspection First Sergeant Shinskie said he was conducting in this case. First Sergeant Shinskie’s actions, however, went beyond this type of inspection. In health, welfare and safety inspections, sergeants are usually concerned about items directly connected to mission accomplishment, building maintenance, and individual well-being. These include ensuring soldiers have all of their uniforms and gear in proper condition and that their rooms are clean. In this case, First Sergeant Shinskie had already concluded that Specialist Albritton’s room was “adequate and presented no safety hazards” prior to opening Albritton’s day planner. Curious about Albritton’s private life, however, he went further. At this point, First Sergeant Shinskie stepped over the line from an inspection to effectively starting his own inquiry into Albritton’s private life.

More disturbing is the reaction of First Sergeant Shinskie’s commander, Captain

Christopher Dewitt. When he learned of First Sergeant Shinskie's snooping, he started an official inquiry based upon the ill-gotten pictures. Captain Dewitt's action turns the credible information standard on its head. Commanders must have credible information before beginning an inquiry. Commanders may not skirt this rule by allowing their noncommissioned officers to snoop on suspected gay service members, and then using whatever they dredge up as the basis for an official inquiry.

Captain Dewitt sought to identify the other man in the photograph, according to First Sergeant Shinskie's official statement. This apparently occurred with the blessing of legal advisors in the Staff Judge Advocate's office. Even if an inquiry could be justified in this case, both Captain Dewitt and the Staff Judge Advocate overstepped their bounds by trying to identify this man, who turned out to be a civilian.

SLDN has handled many cases like that of Specialist Albritton. We have also handled, however, a dozen cases over the past five years where commanders responded appropriately, by not initiating inquiries based on personal letters, photos, videos, diaries and journals. Service members in these cases are reluctant to be public, even to applaud their commanders, for fear that senior leaders might dredge up these old incidents as grounds for discharge.

Commander with No Authority over Marine Starts Inquiry Based on Stolen Journal

A commander investigated another enlisted marine after her former roommate stole a private poetry journal and accused her of being a "dyke" in retaliation for the marine's testimony against her in a nonjudicial proceeding for adultery. The marine, who was in a different unit, had reluctantly testified on the order of her commander. At the hearing, the former roommate alleged the marine was a lesbian in an attempt to discredit her. The former roommate was told that her commander was "not going to address that issue" at the hearing, but she was not

dissuaded from raising it later.

After the hearing, the former roommate turned over the journal and letters tucked inside of it to her commander and accused the marine of being a lesbian. At the time, she remarked to a friend, “That dyke is going to fry,” in reference to the marine.

The former roommate’s commander responded by initiating an inquiry against the marine. Under “Don’t Ask, Don’t Tell, Don’t Pursue,” however, only a service members’ own commander may initiate an inquiry.⁶³

The inquiry was also improper because the accusation was not credible. “Don’t Ask, Don’t Tell, Don’t Pursue” requires commanders to assess if accusers are reliable and to take into account the surrounding circumstances in determining whether to initiate an inquiry.⁶⁴ The policy charges commanders to take into account that sexual orientation is a personal and private matter. These rules were intended to prevent people with retaliatory motives from being able to use official military channels to perform their dirty work.⁶⁵

In this case, the accuser’s undisputed motive was retaliation. Further, it is hard to imagine a more personal and private context than a person’s journal. An appropriate response for the former roommate’s commander would have been to return the journal to the marine without reading it. The former roommate should have been held accountable for making a retaliatory accusation and for stealing the journal.

This marine now faces possible discharge under “Don’t Ask, Don’t Tell, Don’t Pursue,” based solely on her poetry journal and the letters. By starting an inquiry that he was not

⁶³ DEP’T OF DEFENSE DIRECTIVE NO. 1332.14, encl. 4 A.1.; *Id.* NO. 1332.30, encl. 8 A.1. “Only the member’s commander is authorized to initiate fact-finding inquiries involving homosexual conduct.”

⁶⁴ DEP’T OF DEFENSE DIRECTIVE NO. 1332.14, encl. 4 B.3.; *Id.* NO. 1332.30, encl. 8 B.3. “Credible information exists when the information, considering its source and the surrounding circumstances, supports a reasonable belief that the Service member has engaged in homosexual conduct. It requires a determination based on articulable facts, not just a belief or suspicion.”

⁶⁵ *See supra* note 50, at 32.

permitted to start under this policy, the roommate's commander signaled just how far some leaders will go to pursue suspected gay service members. His actions give a green light to anyone with an ax to grind by encouraging retaliatory accusations.

Witch Hunts

Air Force Uses AOL "Buddy List" to Launch Witch Hunt

The Air Force kicked out a twenty-two year old Senior Airman at Offutt Air Force Base with three-and-a-half years of service as the result of a wide-ranging inquiry. The inquiry started after a friend, on the advice of a military chaplain, turned him in for confiding his sexual orientation in a private conversation. During this conversation, the friend had talked about his lesbian sister, stating that he loved her. This led the Senior Airman to believe he could safely confide in his friend. He was wrong. The friend was a turncoat.

After this conversation, the friend told a military chaplain about the Senior Airman's sexual orientation. According to the Report of Investigation (ROI), the friend:

felt his religious convictions could not allow him to support [the Senior Airman's] lifestyle. [The friend] felt by remaining silent it would send a message to [the Senior Airman] that he supported the life choice. [The friend] stated he gave the chaplain permission to divulge the information to whomever could [remove the Senior Airman from the workplace] (Exhibit 42).

The chaplain reported the Senior Airman to his commander. The commander sought advice from his superior, who summoned the base security police. In a fit of overkill, the commander appointed a criminal investigator from the security police to investigate whether the airman had said he is gay. Typically, in coming out cases, the commander assigns an officer from the base to conduct an administrative inquiry as an additional duty.

Under “Don’t Ask, Don’t Tell, Don’t Pursue,” the commander should never have initiated an inquiry. The policy was not designed to police private statements to friends.⁶⁶ The senior airman did not shout out his sexual orientation in the mess hall. He did not run to *The Omaha World Herald* to proclaim that he is gay. He confided in a friend whom he thought he could trust because the friend had a lesbian sister.

The investigator also expanded the inquiry’s scope in violation of the investigative limits. Even if the commander had credible information to start the inquiry, the only appropriate inquiry in this case was whether the Senior Airman confided in his friend. The investigator established this fact almost immediately in his interviews with the friend and Senior Airman. At that point, he should have closed the inquiry and submitted his findings to the commander.

Instead, the investigator sought out additional allegations against the Senior Airman. He questioned another friend about private conversations with the Senior Airman, which were not in issue. Under questioning, this friend revealed that the Senior Airman had confided in him and another coworker at a time when “he was under a lot of pressure and stress to keep it a secret and felt he could tell them, hoping he wouldn’t lose their friendship” (Exhibit 42). This friend stated that, in fact, this information “never changed their friendship.”

The investigator also violated the investigative limits by asking this friend wide-ranging questions about the Senior Airman’s off-duty activities, which were unrelated to the allegation in this case. According to the ROI, the investigator asked the following improper questions (Exhibit 43):

- Q. While attending [an off base dance club] with [the Senior Airman and friends], did you notice [the Senior Airman] dancing with any other male companions?
- A. No, I did not.

⁶⁶ *Id.*

- Q. Did you notice same-sex (male/male or female/female) relations occurring, i.e. their kissing, hugging or dancing together as a couple?
- A. No, I did not.
- Q. Has [the Senior Airman] or [a civilian woman] ever confided in [the Senior Airman's] (sic) sexual relationship with another man?
- A. To me, they have not
- Q. Has [the Senior Airman] ever identified any USAF flyers stationed at [another base] which (sic) he has dated as a homosexual male?
- A. No he has not.

The investigator should never have questioned this friend, let alone questioned him about the Senior Airman's private life. Under no circumstances should he have questioned this friend about the sexual orientation of another military member.

The investigator did not stop there. He obtained a warrant to search the Senior Airman's computer and seized a number of email messages. In an irony lost on the inquiry officer, the messages he seized included a widely distributed call for help from Master Chief Petty Officer Timothy R. McVeigh, sent when the Navy illegally pursued him based on an anonymous America Online profile (Exhibit 44).

Finally, the inquiry officer expanded the inquiry even further to pursue other suspected gay military members. According to the ROI, the inquiry officer downloaded the Senior Airman's America Online "Buddy List" containing twenty-one email screen names, and questioned him about the identities of those listed. The ROI contains a list of the screen names, with notations by each name indicating the listed person's suspected sexual orientation. Notations also indicate whether the holder of each screen name is thought to be a civilian or a military member. It is unclear whether the inquiry officer actually pursued all of the names he dug up, but the record has all the indicia of a classic witch hunt.

Based on the emails and “Buddy List,” the inquiry officer recommended that the Senior Airman be charged for “misuse of government computer systems,” a potential criminal offense. Given the context of this case, this can fairly be called “piling on,” another example of overkill in pursuing this young service member. By this point, the investigator had more than enough to support a discharge under “Don’t Ask, Don’t Tell, Don’t Pursue,” but instead he kept expanding the inquiry in an attempt to turn it into a criminal case.

The command violations in this case are numerous. That a commander and an investigator would go to such great lengths, and expend so many scarce investigative resources, to pursue a young service member because he confided his sexual orientation in a friend reveals seriously misguided priorities.

This case and others like it rebut recent Pentagon claims that gay service members disclose their sexual orientation because they want a so-called “easy way” out of the military. The harsh consequences and high risks of coming out to anyone in the military, including the risk that an investigator will stop at nothing to turn the situation into a criminal case, should cause even the most skeptical reader to disregard this blanket assertion.

Although the Air Force has discharged the service member, he remains anonymous out of concern for the military members listed on his America Online “Buddy List.”

NCIS Starts Witch Hunt

Agents from the Navy Criminal Investigative Service (NCIS) have started an investigation into a sailor’s sexual orientation on the offensive theory that he and his wife are not validly married. Despite numerous requests, the investigators have never told the sailor why they started the investigation or the specific allegations against him.

As described in the “Don’t Ask” section, NCIS agents improperly asked this sailor questions about his sexual orientation and associations. NCIS agents also questioned other people about this sailor’s sexual orientation and associations in violation of “Don’t Pursue.” Finally, the record shows that NCIS is trying to identify acquaintances of this sailor on the suspicion that they might be gay. Coworkers questioned by NCIS about this sailor saw this investigation for what it is: a witch hunt.

A letter from this sailor’s military defense attorney to the commanding officer states the case better than any other document (Exhibit 28):

[A] was asked inexplicably about whether he knew a fireman from Tulare who NCIS has reported going to and from his apartment. His former apartment manager was approached and asked whether he had seen men coming and going from his apartment.... Additionally, NCIS questioned [a retired sailor]. After the interview, [the retired sailor] pointed out to [A] that NCIS was asking ‘lifestyle’ questions about [A]...and that...NCIS repeated the lifestyle questions several times.... [Yet another sailor] was questioned by NCIS. He stated to me that based on the questions asked of him (including the questions above), it was clear that NCIS was on some kind of ‘witch hunt’ for homosexuals.

This sailor’s career remains in jeopardy. In the meantime, he has no recourse to stop this clearly improper investigation.

Platoon Sergeant Tells Marines to Turn in Gays

An active duty marine corporal reports that his platoon sergeant stood in front of a unit formation and said, “Rumors are going around that one of the Marines in our platoon is gay. If anyone has any information, they should come forward or if anyone is questioning their sexual orientation, they should come forward” (Exhibit 45).

“Don’t Ask, Don’t Tell, Don’t Pursue” forbids soliciting gay accusations against service members or instructing lesbian, gay and bisexual service members to out themselves.

Sailor Threatened Unless She Accuses Friend of Being Gay

An active duty sailor reports that her supervisor asked her about the sexual orientation of another sailor who was a friend. In a Memorandum for Record dated January 15, 1999, the sailor states that her supervisor asked (Exhibit 46):

- “Has [Z] ever told you that he is gay?”
- “Are you sure that he has never told you while you were attached to the command or since you have detached?”
- “[He] didn’t tell you he was gay New Years Eve night?”

When the sailor replied “No” to her supervisor’s questions, the supervisor threatened her, stating, “[Sailor], I can see that you’re lieing (sic) in your face. If you are caught lieing (sic) you can be in a lot of trouble.” When the sailor reaffirmed her answers, the supervisor attempted to intimidate her, suggesting that the sailor would have to testify at a court-martial.

A further exchange between the sailor and her supervisor reveals the supervisor’s cynical view of the limits to investigation under “Don’t Ask, Don’t Tell, Don’t Pursue.” When the sailor asked her supervisor, “Why don’t you ask him instead of me?” The supervisor replied, ““Don’t Ask, Don’t Tell Navy,’ remember?” While the Navy supervisor correctly noted that she could not ask the sailor directly about his sexual orientation, the supervisor deliberately attempted to skirt the limits to investigation by pressuring the sailor’s friend to accuse him. This is not allowed under “Don’t Pursue.”

The supervisor further violated “Don’t Pursue” by launching her own fishing expedition to see what she could dig up against this sailor. The supervisor had not been appointed by her

commander to conduct an inquiry, as required.⁶⁷ The supervisor's commander had not made a determination that credible information existed to conduct an inquiry. In fact, there is no evidence that any allegation was lodged against the sailor at all. Instead, the supervisor attempted to dig one up, contrary to "Don't Ask, Don't Tell, Don't Pursue."

Gay or not, the sailor in question is lucky that his friend did not cave in to her supervisor's pressure. As shown in the examples above, even false accusations are enough to potentially ruin a service member's career. This sailor, and the friend who wrote the Memorandum for Record on his behalf, remain anonymous in this report for fear of retaliation by the supervisor.

Army Tries to Criminally Prosecute Soldier Who Comes Out

An Army Specialist almost found himself in prison after coming out to his commander in Korea. Specialist [F]'s case is another example of how dangerous it is for lesbians, gays and bisexuals to come out under "Don't Ask, Don't Tell, Don't Pursue."

Specialist [F] told his company commander, Captain Martha Granger, that he is gay in April 1998. He had become deeply depressed while coping with stress and serving in a hostile anti-gay environment.⁶⁸ Eventually, he decided that his mental and physical health required him to inform his commander that he is gay.

Captain Granger asked Specialist [F] a series of intrusive questions about his private life, in violation of the "Don't Pursue" mandate not to expand the scope of an inquiry. Captain

⁶⁷ DEP'T OF DEFENSE DIRECTIVE NO. 1332.14, encl. 4. A.2.; *Id.* NO. 1332.30, encl. 8 A.2. "A fact finding inquiry may be conducted by the commander personally or by a person he or she appoints."

⁶⁸ Military service in South Korea is particularly demanding of service members. North Korea and South Korea remain in a technical state of war, separated by a heavily defended Demilitarized Zone (DMZ). The Defense Department generally limits the length of assignments to one year and does not allow service members to bring their families with them because of the hazardous nature of the duty. Cultural differences between South Korea and the

Granger asked Specialist [F]

- When was the last time you had sex?
- With whom did you have sex?
- How many times per week did you have sex?

Specialist [F] answered the questions believing his commander was acting in his best interest, even though the questions subjected him to potential criminal charges.

Captain Granger declined to take further action against Specialist [F], which could be construed as a generous application of “Don’t Ask, Don’t Tell, Don’t Pursue” in this case. But Specialist [F] was severely depressed about being in the closet, among other things. Specialist [F]’s depression deepened until one day, in July 1998, he attempted suicide by ingesting a large quantity of motrin.

Rather than help Specialist [F], the commander made matters worse. Captain Granger required Specialist [F] to have his boyfriend write a letter detailing the nature of their intimate relationship. She also asked additional questions about his private life, which he answered. The result was not an administrative separation, but a criminal investigation.

The Army Criminal Investigation Command (CID) took the case. CID investigated Specialist [F] for sodomy and fraudulent marriage (he was married to a female soldier). CID asked his wife questions about the intimate details of their relationship, subjecting both him and his wife to UCMJ liability.

The CID investigation found that Specialist [F] and his wife had not defrauded the government. Specialist [F] faced continued investigation and possible criminal charges of consensual sodomy based on the questions his commander asked him. The sodomy investigation

United States are stark. Young soldiers and airmen assigned to South Korea often have great difficulty adjusting to these stresses.

was dropped only after SLDN wrote to the Commanding General of the Second Infantry Division last September.

The Army has provided two responses to inquiries regarding how it handled Specialist [F]'s situation. An October 1998 letter to SLDN from the Commanding General's Staff Judge Advocate (SJA) makes no mention of the fraud charges and tries to duck the fact that CID initiated a criminal investigation. The letter purports that CID intervened because "the unit requested that the local [CID office] assist in validating Specialist [F]'s claimed orientation." The SJA further maintained that CID's efforts were a "good-faith attempt to assist the unit's fact-finding inquiry" concerning homosexual conduct (Exhibit 47). Even if this were true, it would be contrary to "Don't Ask, Don't Tell, Don't Pursue," which prohibits CID from investigating service members' sexual orientation.⁶⁹

After further SLDN inquiries, the Army admitted, in a January 29, 1999 letter to Senator Feinstein (D-CA) that CID initiated a criminal investigation subsequent to Specialist [F]'s statement that he is gay. The Army admits CID expanded the scope of the investigation to encompass whether "he defrauded the government of housing and subsistence allowances by entering into a 'sham' marriage" (Exhibit 48). It may come as a surprise to Army officials that lesbians, gay men and bisexuals enter into valid, legally recognized marriages with members of the opposite gender for a variety of reasons, including love, companionship and mutual support. In many other cases, service members discover they are lesbian, gay or bisexual only after they are married. In this case, CID floated the false and offensive theory that lesbian, gay and bisexual people are presumptive frauds in order to bootstrap a mere coming out case into the criminal system.

⁶⁹ DEP'T OF DEFENSE DIRECTIVE NO. 5505.8 D.1. "No DCIO or other DoD law enforcement organization shall conduct an investigation solely to determine a Service member's sexual orientation."

The tactics in this case are not unique to the Army. SLDN has handled cases like this in all services. The cases suggest that the services are attempting to criminally punish service members who are, or are perceived to be, lesbian, gay or bisexual.

Soldier Feared Criminal Prosecution After Coming Out

Private Melanie Gonzalez feared that she, too, would face criminal prosecution after she came out. She had told her commander, Captain Paul Pierson, during reenlistment counseling that she did not want to reenlist because “being a lesbian in the U.S. Army is one of the most difficult obstacles I have ever had to overcome.” Later that day or the next day, according to Private Gonzalez, Captain Pierson questioned her about this statement. Under “Don’t Ask, Don’t Tell, Don’t Pursue,” it was appropriate to question Private Gonzalez only about her statement. Captain Pierson, however, questioned Private Gonzalez about her sexual activities and about other military members, contravening the clear rules against witch hunts. According to Captain Pierson’s Memorandum for Record dated November 13, 1998, he asked the following questions (Exhibit 49):

- Have you ever engaged in homosexual activities?
- Did those activities take place while in the military or did they occur previously?
- Where did these activities take place?
- Were you on leave or present for duty when these acts took place?
- With whom did they occur, civilian or soldier?
- Did you intend to engage in homosexual activity?

Answering these questions could have subjected Private Gonzalez to criminal charges. In fact, Captain Pierson showed her a charge sheet listing “sodomy” and “indecent acts,” criminal charges under the Uniform Code of Military Justice. Although Captain Pierson told her that

“...it was generally not the Army’s policy to court-martial soldiers for being homosexual,” she became concerned that she might be the exception, based on the charge sheet.

Private Gonzalez invoked her right to speak with an attorney, but Captain Pierson questioned her nonetheless. When a service member invokes her right to an attorney in cases like this one, questioning is supposed to cease.

Ultimately, the Army honorably discharged Private Gonzalez. However, her case, like Specialist [F]’s case above, shows how soldiers who are unfamiliar with the legal pitfalls of “Don’t Ask, Don’t Tell, Don’t Pursue” can potentially face criminal charges for answering questions about their private lives.

Navy Tells Officer to Prove He Is Gay

Navy Lieutenant (j.g.) Edward Galloway came out last year because of anti-gay harassment onboard the *USS Vandergift*, as described more fully in the “Don’t Harass” section. When Lieutenant Galloway came out, the ship’s Executive Officer asked him the following questions about his private life and associations in a misguided effort to “confirm” that he is gay (Exhibit 50):

- Have you told anyone else about your sexual orientation? Who?
- Are you dating anyone?
- How can these persons be contacted?
- Did you belong to any homosexual student organizations at school?
- Have you told your family members? Who? How can they be contacted?
- Who are your close friends and how can they be contacted?

Lieutenant Galloway was caught between a rock in a hard place. He could tell the Executive Officer what he wanted to hear at risk of triggering a witch hunt or a court-martial,⁷⁰

⁷⁰ Under the Uniform Code of Military Justice (UCMJ), commanders may criminally charge service members who engage in a wide variety of consensual acts with someone of the same gender, including handholding, kissing, and

or he could refuse to answer the intrusive questions and risk his safety aboard the *USS Vandergrift*.

Lieutenant Galloway refused to answer these intrusive questions, whereupon Commander Kusumoto refused to discharge him. In a memorandum to Lieutenant Galloway dated October 8, 1998, Commander Kusumoto writes, "In the absence of information confirming LTJG Galloway's homosexuality and given his strong performance onboard *Vandergrift*, perhaps he would be better served to complete his 18 month tour...." Commander Kusumoto, however, failed to take any steps to stop the harassment and ensure Lieutenant Galloway's safety.

SLDN is aware of eight cases this year in the Army, Air Force and Navy where the services refused to discharge service members who disclosed their sexual orientation because the service members declined to answer questions about their private lives and associations. Ultimately, the Navy recommended Lieutenant Galloway's discharge only after outside intervention in his case. Others continue to serve.

Conclusion

In the past five years, commanders have pursued service members based on any information, however obtained, in direct violation of the investigative limits under "Don't Ask, Don't Tell, Don't Pursue." Commanders have pursued information that is defined as not credible, including anonymous allegations, false charges, rumor and innuendo. Commanders and inquiry officers have expanded inquiries to look for incriminating information when their initial leads run dry or prove untrue so that they can justify their inquiries. Commanders and inquiry officers pursue other service members uncovered in their investigations. The bottom line

sex. Heterosexuals may also be prosecuted for consensual oral or anal sex. Under "Don't Ask, Don't Tell, Don't Pursue," service members are supposed to be treated in an even-handed manner in the criminal system. However, gay service members continue to be prosecuted in circumstances where heterosexuals are not.

is that commanders still work hard to put service members on to the radar screen contrary to the policy's letter and intent.

There are three reasons why "Don't Pursue" violations continue to increase: lack of guidance, accountability and recourse. First, the Pentagon and service chiefs have refused to distribute guidance on the policy's investigative limits or the policy's intent to respect privacy. Second, the Pentagon officially has not held anyone accountable for asking, pursuits or harassment in five years under the policy, signaling that the Pentagon and Services will tolerate abuses. Third, service members have no recourse to stop unwarranted inquiries at any stage of the process.

SLDN urges military leaders to immediately issue guidance regarding the policy's investigative limits and its intent to respect service member's privacy. Military leaders should conduct comprehensive training for all service members. They should hold accountable those who ask, pursue and harass in violation of "Don't Ask, Don't Tell, Don't Pursue." And they should provide some means of recourse for service members who are improperly targeted.

In addition, Commanders should state in writing, at the outset of an inquiry, the credible information on which the inquiry is based. The Pentagon should permit military defense attorneys to represent service members as soon an inquiry commences, rather than instructing them to wait until after the command has completed an inquiry, filed the discharge paperwork or preferred criminal charges.

Further, Pentagon and service officials should review the administrative discharge process to ensure that fundamental rights of due process are upheld. At the very least, the Pentagon should adopt an exclusionary rule, allowing service members to exclude evidence that is the fruit of unlawful inquiries from administrative separation proceedings.

Finally, SLDN would welcome guidance from the Department of Defense or the services regarding the recent trend permitting known lesbian, gay and bisexual personnel to serve, and what steps they will take to ensure service members' safety and the viability of their careers in these cases.

DON'T HARASS

“Don’t Harass” clearly states, “The Armed Forces do not tolerate harassment or violence against any service member for any reason.”⁷¹ The services, however, have failed to uphold this standard. Last year’s reports of anti-gay harassment soared 120% to a record 400 violations, compared with 182 violations the previous year. Violations increased in every service. The Navy led the services with 158 “Don’t Harass” violations, a 140% increase from last year’s figure of 66 violations. The Army was second with 122 violations, an increase of 198% over the previous year.

Reports of harassment, from death threats to verbal gay-bashing, came from nearly every major base and port. Service members report being harassed by officers and enlisted personnel. Men commit most of the harassment, although harassment by women is not unknown. The harassment often begins in basic training and continues throughout a service member’s career.

Service members tell SLDN they endure daily anti-gay epithets and threats such as: “Shut your faggot mouth”; “We’re going to kill you”; “Carpet muncher”; “I have a right to beat your ass”; “There’s that faggot”; “Dyke”; “Queer”; “Die, faggot”; “They deserve to die”; “I hate your kind”; “Shut up, you faggot”; and “That dyke is going to fry.” These statements are just a fraction of the epithets and threats reported to SLDN in the past year.

Lesbian, gay and bisexual service members have no recourse to stop harassment. Service members cannot report it without inviting further harassment and possibly triggering an investigation of their sexual orientation. For many, the only recourse is to come out and face possible discharge.

⁷¹ DEPT OF DEFENSE DIRECTIVE NO. 1304.26, *Applicant Briefing Item on Separation Policy*.

In 1997, the Pentagon issued a memorandum instructing commanders to investigate anti-gay threats and lesbian-baiting, not service members who report it.⁷² In 1998, however, the Pentagon conceded that the Services had not distributed the Dorn Memo. Upon SLDN's urging, Pentagon officials recommended that the memo be clarified to expressly include harassment and distributed fully.⁷³ This has not yet occurred.

This guidance would help, if distributed. Ultimately, however, leaders at every level need to make a visible commitment to stopping anti-gay harassment in the field. Failing that, harassment will continue to flourish, forcing lesbian, gay and bisexual service members to come out to their commands in even higher numbers.

The following examples are representative of SLDN's cases in the past year.

“You’re Dead...You Faggot”

An Ensign faced constant anti-gay harassment, including death threats, while aboard the *USS Platte*. He reports that his Chief called him “a fucking faggot” and a Senior Chief said, “Oh, that’s right, you’re one of those light-footed sailors from Annapolis. There is (sic) a lot of your type down there isn’t there?” Leaders from Chief Petty Officers to Lieutenant Commanders reportedly made repeated derogatory remarks, including, “All this table (in EOS) needs is some stirrups. So, if anyone wants to they can come by and fuck me like a fag” and “[I am not good at] bouncing balls off [my] chin” (Exhibit 51). The Ensign reports sailors threatened his life repeatedly. Someone reportedly yelled: “You’re dead, you dick-sucking faggot.” On another occasion, a sailor told him “You’d better watch yourself out there . . . tonight. It’s mighty slippery. Wouldn’t want to slip and go over the side.” (Exhibit 51, 52).

⁷² See *supra* note 6, at 3.

⁷³ DEP’T OF DEFENSE APRIL 1998 REPORT at 8.

The Ensign came out to his commander and resigned because he feared for his safety. The Ensign's commanding officer initially refused to accept his resignation, reportedly telling him he could "live with the harassment." After he filed a sexual harassment complaint, however, she reluctantly granted the resignation. The commanding officer reportedly stated she would issue an order that anti-gay harassment was inappropriate. There is no indication, however, that she ever issued the order or held the harassers accountable.

"There's Nothing Wrong with Killing a Few Fags"

Former Specialist Carol Melnick faced constant lesbian-baiting and anti-gay harassment from the moment she entered the Army in 1996 until she ultimately came out as a lesbian because of the harassment and was discharged in 1998 (Exhibit 53).

In the first week of basic training, a noncommissioned officer harassed Melnick after seeing her place her hand on another female trainee's shoulder. The Sergeant called the two women over and lectured them in front of the entire platoon stating, "We don't do that in the Army," and threatened that Melnick would be "in a lot of trouble" if he saw her "do anything like that again." Assuming she is a lesbian, he added, "People like her" "disgusted him" and "they shouldn't be allowed in the Army. They don't belong here."

This is a classic lesbian-baiting scenario where common friendship between two women was perceived as something sexual when it was not.⁷⁴ Through the lens of "Don't Ask, Don't Tell, Don't Pursue," however, ordinary actions have extraordinary consequences. A pat on the back, a hug, or a hand on a shoulder can result in women being labeled as lesbians, and lead to

⁷⁴ See Michelle Benecke & Kirsten Dodge, *Military Women in Nontraditional Job Fields: Casualties of the Armed Forces' War on Homosexuals*, 13 HARV. WOMEN'S L.J. 215 (1990).

inquiry, discharge or criminal charges. Melnick was labeled a lesbian from day one and never escaped being asked, hounded or harassed.

Later in basic training, a platoon guide harassed Melnick. The platoon guide reportedly wagged her finger in Melnick's face and began yelling throughout the barracks that Melnick and another female soldier were lesbians. Melnick and the other soldier reported the platoon guide's actions to Sergeant First Class Montgomery, the head Drill Sergeant, who merely smiled and then refused to take appropriate action, according to Melnick.

Melnick's first assignment was at Bravo Company, 9th Psychological Operations Battalion at Fort Bragg, North Carolina. While there, Melnick says she faced pervasive anti-gay harassment. Once, while riding in a truck with several noncommissioned officers and, ironically, an Equal Opportunity representative, a senior member of her unit reportedly told a sexually explicit lesbian joke. Throughout the joke, this individual, Sergeant Parker, reportedly turned to Melnick several times and said, "Now, don't take this personally," implying to all present that Melnick was a lesbian. According to Melnick, all of the noncommissioned officers laughed and looked at her to check her reaction. Sergeant Parker and other noncommissioned officers reportedly made daily jokes and speculated about Melnick's sexual orientation in front of other soldiers.

Melnick also reports that students in her Fort Bragg language class made daily anti-gay jokes and mimicked gays with limp-wristed stereotypes. One student reportedly said "There's nothing wrong with killing a few fags." Several noncommissioned officers also repeatedly pretended to mispronounce a Vietnamese word that sounded like the word "gay." A classmate told Melnick that jokes were made about her sexual orientation when she was not present. The instructor ignored the jokes and never stopped them.

Melnick reports that “lewd comments and jokes about gays were prevalent and appeared to be as much a part of the Army culture as the uniform.” She reports the harassment she experienced made her hesitate to go to public places such as the dining hall, gym or clubs on post. The harassment caused Melnick to become depressed, but she did not seek counseling, fearing it would lead to an investigation. Due to these circumstances, after two years of service, Melnick felt that coming out was her only option to stop the harassment and protect her mental and physical health. After two years of service marred by constant harassment, Melnick wanted to work and live in a healthy, safe and professional environment. The Army could not give this to her, so she came out to ensure her welfare.

“You’d Better Not Be Queer Because in the Navy We Kill Our Fags”

Two midshipmen in Cornell University’s Navy NROTC program also reported physical threats and other anti-gay harassment last year.⁷⁵

Midshipman Mark Navin reports he was repeatedly questioned about his sexual orientation during a summer training cruise onboard a Navy ship. An enlisted crewman reportedly threatened his life during a late-night watch, warning Navin, “You’d better not be queer because in the Navy we kill our fags” (Exhibits 19).

During NROTC activities, Navin was also repeatedly asked and harassed about his perceived sexual orientation (Exhibit 20). As a result of this pervasive harassment, Navin came out to his NROTC command. Navin was disenrolled from the program for disclosing his sexual orientation when reporting the harassment.

After Navin came out, Midshipman Rob Gaige received direct physical threats and comments because he was a friend of Navin’s. Other midshipmen made comments such as, “I’ll

beat the fuck out of you and your boyfriend,” erroneously implying that Gaige and Navin were boyfriends. Major Richard Stickel, Gaige’s instructor, also reportedly made derogatory comments about both Gaige and Navin in front of other midshipmen. Additionally, Gunnery Sergeant Armstrong, a senior enlisted leader, stated during a Naval Science class, “The Major heard your answering machine yesterday, and he says you sound like one big, fat cock-smoker. You better change that faggoty answering machine message.”

Gaige also reports being harassed and asked if he were gay during his summer cruise in Panama City, Panama and in his NROTC unit (Exhibits 17-18). As a result of these experiences, Gaige came out to his commander, citing harassment and fear for his safety as the reasons for his disclosure.

“I Can’t Ask You If You’re a Fag. But I Can Ask You If You Suck Cock.”

Lance Corporal David Raleigh experienced anti-gay harassment from the day he signed up. Raleigh’s recruiter reportedly told him, “Because of President Clinton’s new policy, I can’t ask you if you’re a fag. But I can ask you, do you suck cock?” (Exhibit 54).

Raleigh was also harassed during basic training at the Marine Corps Recruit Training Depot in San Diego, where his Drill Instructor reportedly made repeated comments regarding his perceived sexual orientation in front of other recruits. These comments included “I know what you guys do under water,” referring to Raleigh’s water polo skills, and “You’re a fag, aren’t you Raleigh?” Raleigh reports this questioning continued until his graduation. He gutted it out, hoping the situation would improve at his next assignment.

It did not. Rumors about his sexual orientation spread throughout his unit at Fort Leonard Wood, Missouri, where he attended advanced training. Raleigh reports his roommate

⁷⁵ See *supra* at 18-20 .

called him a “faggot” and said he was “not a normal guy” because he didn’t lock himself in the bathroom with pornography. Raleigh was reportedly teased, taunted and shunned because of the rumors. As a result, he felt he could not respond to the harassment without bringing even more unwanted scrutiny on himself. By the end of his training, all sixty members of his class perceived him to be gay.

Raleigh persevered and reported to Weapons Company, 2d Battalion, 23d Marines, 4th Marine Division, his reserve unit in Port Hueneme, California. Unfortunately, he faced more anti-gay comments at this unit as well. At weapons drill, for example, he heard fellow marines make repeated derogatory remarks about gay people.

Raleigh was particularly disturbed because some of these homophobic comments were reportedly made by Marine police officers stating that “faggots are wrong” and expressing reservations about upholding the rights of gay people. These individuals, who were also members of the Los Angeles and Santa Barbara Police Departments, allegedly described graphic homosexual sex. In addition, Raleigh reports the chaplain’s assistant told Raleigh that God condemned gays.

Raleigh felt he had little choice but to come out to his commander and be discharged rather than face constant anti-gay harassment without recourse. Lance Corporal Raleigh stated about his leaders and coworkers, “If I were in combat with them, I would not trust them.”

“That Fag (Matthew Shepard) Deserved to Die”

A Marine Corporal is currently considering whether to come out in response to the extreme anti-gay harassment he has faced since day one (Exhibit 45). The Corporal reports that one of the most disturbing moments occurred when his advanced training class made derogatory comments about Matthew Shepard, the young man in Wyoming who was murdered last fall

because he was gay. One student reportedly stated, “That fag deserved to die.” No one disagreed with the comment. Worse, the marine reports that his instructors and fellow students then made numerous anti-gay comments related to Shepard’s death and funeral.

During advanced training, the corporal reports hearing constant, anti-gay jokes and epithets. The marine reports his class discussed the perceived sexual orientation of other service members stating, “Just wait till [X] gets here—he’s a real flamer,” and “Have you seen the new guy who is always watching Xena in the lounge,” suggesting that he might also be gay. The Corporal feared that the class speculated about his sexual orientation when he was not around.

The marine also reports that other recruits repeatedly asked about his sexual orientation in basic training. He deflected the questions as best he could, but feared what others might do if they figured out he is gay. His fear was based on other recruits’ constant anti-gay remarks and the fact that Drill Instructors did not attempt to stop them.

At Marine Combat Training at Camp Pendleton, California, another marine reportedly commented that this service member “acts gay.” This caused him great concern when a Staff Sergeant, addressing the platoon, said there was scuttlebutt that a platoon member is gay. The Staff Sergeant then stated, “If anyone has information, they should come forward or if anyone is questioning their orientation they should come forward.”

The Corporal has since moved to a new base. He hopes his new unit will salvage his faith in the Marine Corps and that he will not be forced to come out as his only recourse against harassment.

“I Guess The Sexuality of Everyone in This Office Is Not in Question”

Staff Sergeant Ron Schumann, an Army recruiter, came out after more than thirteen years of dedicated service because he could no longer ignore the anti-gay harassment or stress from living under “Don’t Ask, Don’t Tell, Don’t Pursue.” Schumann reports he endured anti-gay and “faggot” comments by his coworkers. Although he suffered the comments in silence, in an effort to comply with “Don’t Tell,” speculation about his sexual orientation surfaced nonetheless.

One day, in front of a potential recruit’s family, Sergeant First Class Michael Miller told him, “We have not ever seen your girlfriend, you’re gay and you are probably going to hang out at the Gay 90’s,” a local gay bar (Exhibit 55). After Schumann reported Miller’s actions, the command promoted Miller without reprimanding him.

Schumann also reports he was often pressured to engage in sexist charades to divert suspicions about his own sexual orientation. Many afternoons, for example, his coworkers gathered at the office windows and made sexually explicit, derogatory comments about women running on a track across the street. On one such occasion, Schumann’s Company Commander, Captain Davis, said, “I guess the sexuality of everyone in this office is not in question.” Schumann felt that if he did not participate in these activities, he would be labeled as gay and investigated.

As a recruiter, Schumann was one of the Army’s best, selected for this prestigious position because of his stellar performance in the field. He gave up a highly successful career and his retirement pension because he could no longer tolerate the pervasive anti-gay environment in which he served. The Army lost a highly skilled leader as a result.

“There’s Nothing To Do in Sasebo Unless You Are a Homo Killer”

Lieutenant Edward Galloway gave the Navy many opportunities to prove that it would not tolerate the anti-gay harassment he faced, and it failed him. While onboard the *USS Vandegrift*, Galloway witnessed both officers and enlisted personnel engaging in constant and pervasive anti-gay harassment. Petty Officer First Class McGee reportedly said in Galloway's presence, "There better be no flamers in my Navy." Petty Officer First Class Considine allegedly said, "There's nothing to do in Sasebo [Japan] unless you are a homo killer," a chilling reference to the 1992 murder in Sasebo of Seaman Allen Schindler, who was brutally beaten to death by two of his shipmates (Exhibit 56). And an officer reportedly stated, "Galloway needs directions to find his way out of the closet," in front of Galloway's Commander, Neal Kusumoto, and all of the officers in Galloway's section. No one, however, reprimanded this officer for his inappropriate conduct. Instead, everyone reportedly laughed at Galloway.

As a direct result of these anti-gay remarks, Lieutenant Galloway came out to his commander, hoping for support similar to that from his former *USS Bunker Hill* commander, who had promised to protect him. Commander Kusumoto, however, did not stop the harassment, placing Galloway in a precarious situation. Commander Kusumoto's inaction is particularly troubling, given that he admitted in a letter to Galloway, "I acknowledge that many Navy personnel and many VANDEGRIFT crewmembers hold antipathy towards homosexuals." Commander Kusumoto opined, however, "I disagree that you are in any current danger. I encourage you to be cautious in what you say and do." (Exhibit 57).

Commander Kusumoto finally assigned Galloway to shore duty only after outside assistance by SLDN. He now faces discharge. Commander Kusumoto had stated he did not want to lose Galloway because he was an excellent officer. Ironically, he lost Galloway precisely because he took no steps to stop the anti-gay harassment Galloway faced.

Sergeant Gay-Bashed by Soldiers and Then Investigated

Soldiers verbally and physically gay-bashed an Army Sergeant recently while on duty in his unit's barracks. While making his rounds, he discovered two enlisted men drinking heavily. The Sergeant reported this to the Staff Duty Officer who instructed him to monitor the soldiers but take no further action.

Upon a return inspection, the soldiers, who had become even more intoxicated and rambunctious, began questioning the Sergeant about the sexual orientation of others in the unit. Suddenly, one of the soldiers pulled a gun on the Sergeant and called him a "fag." The soldiers hit the Sergeant in the head 10-12 times. Someone called the Criminal Investigative Division (CID) which administered breathalyzer exams to the two soldiers and the Sergeant. The soldiers falsely claimed that the Sergeant had been drinking as well; he had a 0.00 blood alcohol level.

When the Sergeant returned from vacation a few weeks later, he discovered he was under criminal investigation. CID reportedly began an investigation after the two soldiers accused the Sergeant of being gay.

The Sergeant should never have been investigated. According to the Dorn memo, reports of physical harassment should result in the investigation of the harassment, not those who report it. "Don't Ask, Don't Tell, Don't Pursue" is also quite clear that commanders cannot initiate inquiries without credible information.⁷⁶ Unfounded allegations by drunken soldiers with a motive to retaliate do not meet the credible information standard that is required to initiate an inquiry or investigation.

⁷⁶ See *supra* note 59, at 41.

Although the Sergeant repeatedly requested an attorney to assist him, his command denied him counsel for almost a month. Meanwhile, he faces the possible loss of his career because no one followed the rules.

Soldier Assaulted but Still Serves

A bisexual soldier came out to his commander after being assaulted outside of a gay bar and threatened by military personnel on other occasions. The soldier, stationed at Fort Bragg, North Carolina, was speaking with a civilian near a gay bar when two marines reportedly “pushed [him] into a ditch” The service member, a former soldier of the year, did not report the incident initially because he feared becoming the subject of a gay investigation.

Two months later, another service member called the soldier a “faggot.” This service member also warned him that “Korea is not like Bragg,” implying that perceived gay soldiers are in danger in Korea. The soldier, who had orders for duty in Korea, came out to his commander because he feared danger to his safety and possible witch hunts. The service member’s commander understood his concerns and did not discharge him based on the disclosure of his sexual orientation. The commander instead encouraged him to go to his next duty assignment and reassess the situation. The soldier went on to serve in Korea.

Are You “Going to Marry a Woman?”

A Marine Private First Class, Gabrielle Butler, reports that Sergeant Dewey at Fort Leonard Wood, Missouri asked her if “she was going to marry a woman” during her advanced training in vehicle maintenance as reported in the “Don’t Ask” section. Butler, citing Sergeant Dewey’s question and her resulting fear of being investigated, came out to her commander.

Rather than take steps to stop the asking and harassment, Butler's Commanding Officer, Major R.C. Smith, reportedly told her that society wouldn't accept her and "[she] had to accept the consequences of [her] preference." According to Butler, Major Smith also told her, "There has to be a penalty (Other Than Honorable discharge) because then everyone will think they can just write a letter saying they are a homosexual and they'll get out. I'm not saying you're doing that PFC Butler, but there has to be a penalty." When Butler asked if she was being punished for being gay, Smith said, "Yes." (Exhibit 58). With SLDN's assistance, Butler eventually received an Honorable discharge.

"Kill All Fags"

Petty Officer Charles Buchanan reports sailors on the *USS Ponce* repeatedly hurled slurs about "faggots" and "queers" last year. Sailors reportedly said, "Kill all fags," and "I hope they all die of AIDS!" (Exhibit 59). Out of fear for his safety, Buchanan came out to his commander. Fortunately, his commander took Buchanan's concerns seriously. Buchanan's Executive Officer reportedly told him that he "was sorry to see an A-1 sailor go" and that he understood Buchanan's concerns. After discussing the situation, the Executive Officer decided it would be best to place Buchanan off the ship. It is unfortunate, however, that Buchanan could not safely serve.

Soldier Harassed Because He Didn't "Act Straight"

Thomas Theret, an Army Specialist stationed at Fort Bragg, says that he was harassed and accused of being gay on a number of occasions because he did not participate in enough "heterosexual" activities to satisfy his peers. Theret states his sexuality was called into question because he did not go to strip clubs or have a girlfriend. On another occasion, a soldier

reportedly asked Theret if he is gay and then harassed him further, asking him to prove that he is not gay (Exhibit 60). Theret refused to answer the soldier in order to comply with “Don’t Tell.” Specialist Theret never disclosed his sexual orientation, but other soldiers harassed him because he did not “act” the way they thought a straight man should act.

Theret reportedly heard soldiers make anti-gay remarks such as, “Homosexuals are less than fully human,” and statements that they desired to physically hurt gay people. Fearing it was just a matter of time until he became a victim of physical harassment or his command heard the rumors and began an investigation, Theret came out to his commander and was discharged.

Additional Incidents of Anti-Gay Harassment

Other incidents of anti-gay harassment recorded by SLDN in 1998 include, but are by no means limited to, the following:

- In Japan, Airman Ken Heeb feared for his safety when a sailor reportedly yelled down a barracks hallway, “That guy’s a fag”; “He’s as gay as two dogs fucking”; “I don’t like friends of that faggot coming over to my room”; and “Did you know that guy’s a fag?” The sailor then reportedly threatened, “How hard would I have to punch someone to knock them out with the first blow?”
- Joshua Jones, a former Army Private First Class stationed at Fort Hood, Texas, feared for his safety when a dead fish head was nailed to his barracks door, which in his unit signified that the recipient would be beaten up. A note on the door stated, “For you, faggot.”
- An Airman First Class stationed at Edwards Air Force Base, California, reports being told “I’m going to kick your faggoty ass” and “Shut up, you faggot.” When the service member reported the harassment to his First Sergeant, the First Sergeant urged him to come out to avoid the harassment, instead of trying to stop it.
- A sailor on the *USS Truman* faced daily harassment from other service members because of his perceived sexual orientation. A vandal painted a swastika and wrote the word “Faggot” on the sailor’s car in white shoe polish. Harassment from other sailors included “We can’t

wait to get out to sea so that we can throw you overboard.” One service member, who constantly called the service member a “faggot,” sprayed pressurized air in the service member’s eyes and wrapped a rope around the sailor’s neck. Others called him “faggot” and “queer bait.”

- A sailor at Great Lakes Naval Base, Illinois, reports that he was threatened with court-martial if he did not confess to being gay. The sailor asked for legal counsel and was denied. He was told it would be easier on him if he just “cooperated.” The Sailor reports that other service members threatened him, stating, “You need to be careful”; “There’s still hazing in Navy showers”; and “We’re going to kill you.”
- A Navy officer hears anti-gay comments constantly, even from enlisted sailors. One reportedly said, “If I find a gay guy on this ship, I w[ill] throw him overboard.” The officer found “fag” written on his qualification book. His Executive Officer reportedly told him, “Homosexuality is all about self-gratification. It’s not genetic.... It’s in their minds.”
- A Private First Class at Fort Meade, Maryland, says other soldiers harassed him stating, “I don’t want to be friends with that cock sucker”, and “I wonder how much [he] can take up the ass.” Another soldier allegedly wrote “The cum that flows from my mouth” on a notepad attached to his barracks room door.
- While at sea, a Petty Officer Second Class feared being attacked because of threats such as “Die faggot” and “There goes that queer.” He also heard anti-gay comments, including “They deserve to die”, and “Good. No more queers.”
- A bisexual Petty Officer First Class reports that an unknown sailor placed four anonymous notes in the ship’s suggestion box falsely claiming that he was having sex with another male sailor. Other sailors reportedly told him, “Get his faggot ass out of my space”, and “I hate your kind.” He also found a picture of a dildo with the description “ass stuffer” hung in his berthing area.
- Shipmates warned Duane Pauley, a Petty Officer on the *USS Carl Vinson* “about a faggot that was tied, bound and thrown overboard.” The sailors told Pauley that the command registered the rumored disappearance as an accident.
- An Army doctor reports that fellow doctors make disparaging remarks about lesbians, gay men and bisexuals. In one example, another doctor told his students that an HIV patient was “a faggot and they’re not going to learn from this.”

Women Face Lesbian-Baiting

In addition to anti-gay harassment, violations of “Don’t Harass” include lesbian-baiting, a form of sexual harassment. Women—straight, gay and bisexual—often are accused of being lesbians when they rebuff sexual advances by men or report sexual abuse. In other cases, women are harassed because they depart from gender stereotypes in other ways. Women who are top performers in nontraditional fields are also subject to lesbian accusations, rumors and speculation designed to undermine their professional standing.

Too often, commanders respond by investigating military women under the guise of “Don’t Ask, Don’t Tell, Don’t Pursue” rather than disciplining the individuals who start rumors or perpetrate sexual harassment. As a result, many women do not report sexual assault or harassment because they realistically fear being accused as lesbians, investigated and discharged. Others backtrack from the assertive leadership styles that make them competent leaders—and vulnerable targets for lesbian accusations. Sometimes women fear associating together in groups, because they may raise misperceptions that they are lesbians.

The April 1998 Department of Defense Report states, “it is critical that military women feel free to report sexual harassment or threats without fear of reprisal or inappropriate governmental response.... We recommend that the Department reissue guidance to make clear that when sexual harassment is reported, the focus of the investigation must be on the harassment or threat.”⁷⁷ While Congress,⁷⁸ an Army Review Panel⁷⁹ and others⁸⁰ have recognized this problem, the Pentagon has not, to date, distributed guidance to the field on this issue.

⁷⁷ DEP’T OF DEFENSE APRIL 1998 REPORT at 8.

⁷⁸ S. Rep. NO. 105-29 at 281 (1997) Senate Armed Services Committee concerned by increasing numbers of reports that service members refusing to participate in sexual activities or who report others are being labeled as being homosexual in retaliation.

The following are just a few examples of lesbian-baiting from SLDN's cases in the last year.

Party Leads to Lesbian-Baiting and Witch Hunt

The Coast Guard initiated an investigation against a group of women solely because they socialized together at a party (Exhibit 61). The Report of Investigation reports that one woman claimed that the group of women kept to themselves at the party. She says she assumed that they were lesbians based on "comments" they made, though she never specified what those comments were. The command should have never initiated an inquiry because the policy specifically states the rumor and speculation do not constitute credible information. The Coast Guardsman, however, endured a three-month long investigation. Ultimately, the command dropped the inquiry and she continues to serve. The lesbian-baiting she suffered, however, is not uncommon.

Divorced Woman Lesbian-Baited

Another soldier with more than 19 years of service faces constant lesbian-baiting because she has not dated men since her divorce. The woman, who divorced her husband due to documented physical abuse, reports that a junior enlisted soldier asked her, "How come it's been more than two years since you've slept with a man?" Another crudely said to her, "Male and female ends of tools are supposed to go together." Another reportedly embarrassed this soldier in front of a female friend by saying, "What do y'all do in your free time? Masturbate?" In yet

⁷⁹ THE SECRETARY OF THE ARMY'S SENIOR REVIEW PANEL REPORT ON SEXUAL HARASSMENT, VOLUME 1 (July 1997) at 66 (female soldiers refusing male soldiers' sexual advances may be accused as lesbians or investigated for homosexual conduct).

⁸⁰ SURVEY RESULTS, DEP'T OF THE ARMY 91ST DIVISION (TRAINING), Sexual Harassment and Sexual Discrimination (October 20, 1992) at 6.

another incident, a soldier asked, “Have you eaten fish today?” Some coworkers also commented on her physical appearance, calling her “butch, butch, butch.”

This soldier’s goal is to remain in the Army and transfer to another unit that is free of harassment. Her story of lesbian-baiting, however, shows the pressure women face to affirmatively project a very narrow image of what it means to be a heterosexual woman.

Stereotypes Lead to Lesbian-Baiting

A junior enlisted Navy woman reports she is lesbian-baited with constant comments and epithets about her sexual orientation. Other sailors have said that she must be a lesbian because she has short hair and “never talk[s] about a boyfriend when everyone else is talking about their husbands and wives” (Exhibit 24). These comments place the woman in a precarious position. If she remains silent, as required by “Don’t Tell,” she sets herself up for continued harassment. Denying the accusations would be a lie and would violate the Navy’s “core values,” as well as her personal values.

This sailor also reports being called a “dyke-looking bitch,” “butch bitch,” and “lesbian,” and was told, “What do you know about panties? You wear boxers.” When she disclosed her anti-gay experiences during sexual harassment training, the senior woman leading the discussion reportedly inquired if she was harassed because she “would not sleep with the men.” The sailor said, “Yes.” Even though the senior woman and the service member’s superiors know about the harassment, they have never attempted to stop it.

Conclusion

Lesbian, gay and bisexual service members must endure constant anti-gay threats and epithets as a condition of military service. While not all service members harass their

colleagues, bigots have free rein in today's military. These military bigots undermine the good order, discipline and morale of our forces, and adversely affect military readiness. This hurts the military as well as service members, who as competent, dedicated men and women are forced out in increasing numbers or leave at the end of their obligation due to harassment.

The Pentagon has promised to issue new guidance on anti-gay harassment and lesbian-baiting. While SLDN supports the Pentagon's recommendation, support from uniformed military leaders will be key to its effectiveness. Senior leaders must make it clear to commanders in the field that anti-gay harassment in the military will not be tolerated. Military leaders must distribute any new Pentagon guidance, conduct comprehensive training and provide service members facing harassment and violence with adequate recourse.

CONCLUSION TO FIFTH ANNUAL REPORT

The Pentagon is at a critical juncture in implementing “Don’t Ask, Don’t Tell, Don’t Pursue.” In the face of dramatically increasing discharges, military leaders can either address the harassment and forced secrecy that are pushing so many dedicated lesbians, gay men and bisexuals out of the armed forces, or they can continue with business as usual.

The first order of business should be to implement recommendations against anti-gay harassment that have been sitting on the shelf for more than two years. At the same time, military leaders should finally, after five years of ignorance and confusion in the field, send guidance informing everyone, from privates to general officers, of this policy’s investigative limits, and its intent to respect service members’ privacy. This guidance should include a specific prohibition on discharging service members based on private conversations they have with their families, closest friends and health care providers.

After informing their personnel of the limits to investigations, military leaders should hold their subordinates accountable for following them. When mistakes happen, or where commanders knowingly disregard the rules, leaders should also provide recourse or some means of practical accommodation for improperly targeted service members.

Looking further into the future, SLDN is heartened by increasing public support for the service of known gay men, lesbians and bisexuals. The latest Gallup poll in 1998 showed 77% support for gays in the military,⁸¹ and a separate Who’s Who poll registered 75% support.⁸² A majority of Americans have supported gays in the military since 1977, more than two decades ago (Exhibit 62). A poll of soldiers conducted by Professor Charles Moskos, the architect of

⁸¹ CNN-USA TODAY GALLUP POLL, Conducted June 5-7, 1998. Survey responses to question of “If a draft were to become necessary, should gay men be included, or not?” Yes: 77%, No: 21%, No Opinion: 2%.

⁸² WHO’S WHO AMONG AMERICAN HIGH SCHOOL STUDENTS, Press Release: *Nearly Half of Teens Admit Prejudice Against Homosexuals*, Nov. 12, 1998. “Despite their feelings, 75 percent of teens believe homosexuals should be allowed to join the military”

“Don’t Ask, Don’t Tell, Don’t Pursue,” indicated a dramatic decrease in strong opposition to gays in the military from 63% in 1993 to 36% in 1998.⁸³ These poll results stand in marked contrast to the current state of the policy which results in the deliberate firing of people for being lesbian, gay or bisexual.

While neither Congress nor the federal courts seem prepared to overturn “Don’t Ask, Don’t Tell, Don’t Pursue” at this time (Exhibit 63), the Pentagon’s failure to address rampant anti-gay harassment, respect service members’ privacy rights and enforce the policy’s investigative limits will hasten that day.⁸⁴

⁸³ MILLER/MOSKOS NONRANDOM SURVEYS OF ARMY PERSONNEL, Professor Charles Moskos, Northwestern University, Sep. 1998. Survey responses based on question of “How do you feel about the proposal that gays and lesbians should be allowed to enter and remain in the military?”

⁸⁴ See *McVeigh v. Cohen*, DECLARATION BY PROFESSOR CHARLES MOSKOS, Civ. No. 1:98CV00116 (D.D.C. 1997) at 3-4. “In my opinion, this sort of heavy-handed ‘enforcement’ by the Navy will inadvertently undermine the ‘Don’t Ask, Don’t Tell’ policy by eroding confidence among servicemen that the Navy will not ‘ask’ if they do not ‘tell.’ It is these kinds of actions by the military, rather than lobbying by homosexual-rights advocates, that pose the greatest threat to the efficacy of the policy in balancing the military’s concerns about readiness, unit cohesion and morale with what President Clinton called ‘a decent regard to the legitimate privacy and associational rights of all service members.’”

Conduct Unbecoming

THE SIXTH ANNUAL REPORT ON

“DON’T ASK, DON’T TELL,
DON’T PURSUE, DON’T HARASS”

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Servicemembers Legal Defense Network

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Exhibits to *Conduct Unbecoming:*
The Sixth Annual Report on “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass”
are in a separate volume and may be obtained by contacting SLDN.

ACKNOWLEDGMENTS

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**SLDN FINDINGS FROM SIXTH ANNUAL REPORT ON
“DON’T ASK, DON’T TELL, DON’T PURSUE, DON’T HARASS”**

- ★ **Anti-Gay Harassment More than Doubles.** SLDN documented 968 incidents of anti-gay harassment, including a murder, assaults, death threats and verbal gay bashing from February 15, 1999, to February 15, 2000, up 142% from a record 400 violations the preceding year. SLDN documented 495 reports of anti-gay harassment after the Pentagon stated it would not tolerate anti-gay harassment in August 1999. This marks the second consecutive year that anti-gay harassment has more than doubled.
- ★ **Reports of Asking and Pursuing Increase 30%.** SLDN documented 665 incidents in which service members were asked and pursued, up from 511 violations the year before.
- ★ **Military Fails to Hold Anyone Accountable for Asking, Pursuing or Harassing.** In six years, the military has not officially held anyone accountable for violating the current policy.
- ★ **Service Members Come Out to Escape Anti-Gay Harassment.** Service members overwhelmingly come out because of unchecked harassment, contrary to the Pentagon’s claim that gays are leaving the military “voluntarily” because they wanted “an easy way out.” The military does not give members a choice to stay, even if they come out solely because of fear for their safety.
- ★ **Doctors and Psychologists Told to Out Gay Service Members.** Psychologists report they have been instructed to turn in lesbian, gay and bisexual military members who seek their help. Military officials have knowingly permitted erroneous instructions to circulate in the field that tell psychologists and doctors to out gay service members. Officials have failed to inform health care providers not to turn in gay members, but instead to respect their privacy.
- ★ **Service Members Reporting Anti-Gay Harassment Risk Being Outed and Discharged.** Inspectors General believe they are required to turn in service members who are found to be gay in the course of investigating anti-gay harassment complaints. Some Chaplains have berated gay members who have reported harassment, while others have advised service members to turn themselves in and face discharge. Army Equal Opportunity representatives have been told not to help. The Pentagon has failed to make clear that private statements of sexual orientation in these contexts do not constitute grounds for discharge.
- ★ **Air Force Interrogates Family and Friends.** The services, especially the Air Force, continue seeking out parents, siblings and close friends in an effort to dig up “dirt” on gay, lesbian and bisexual service members.
- ★ **Women Discharged at Highest Rate in Two Decades.** Women comprised 31% of gay discharges in 1999, although women represent only 14% of the force. This is the highest percentage of women discharged since at least 1980. The Air Force had the worst record, with 37% of its gay discharges being women, followed by the Army with 35%, the Navy 22% and the Marine Corps 16%. Women are often accused of being lesbians for retaliatory reasons, regardless of their actual sexual orientation.

- ★ **Pentagon Fires Three People Every Day for Being Lesbian, Gay or Bisexual.** The Pentagon discharged 1,034 service members in fiscal year 1999, compared to 1,149 discharges in fiscal year 1998. Discharges still are 73% higher than when the policy went into effect. The Air Force discharged 352 service members, a drop from 414 the previous year, due mainly to revamped procedures at Lackland Air Force Base. The Navy discharged 315 service members, compared to 345 the year before. The Army discharged 271 soldiers, down from 312 the year before. Marine Corps discharges increased to 97, compared to 77 last year.
- ★ **Pentagon Adopts SLDN Recommendation for Training on Investigative Limits; Some Services Fail to Comply.** In August 1999, Secretary Cohen instructed the services to prepare and implement training programs on the investigative limits under “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass.” Only the Army and Navy have complied in part, with the Army doing a better job. The Marine Corps emphasizes how to discharge gays rather than how to comply with the policy’s investigative limits. The Air Force has failed to make any training program public.
- ★ **After Years of Delay, Pentagon Adopts SLDN Recommendations on Anti-Gay Harassment.** In August 1999, Secretary Cohen instructed the Secretary and Chief of each service to distribute a leadership message against anti-gay harassment. The Navy did so in October 1999. Finally, in January 2000, the other services followed. After a three-year delay, the services sent instructions to commanders that a service members’ report of anti-gay harassment does not constitute credible information to begin an investigation. In February 2000 the Army, Navy and Marine Corps began training against anti-gay harassment. All services could use improvement, especially the Marine Corps. The Air Force has not released its training program.
- ★ **Pentagon Conducts Misguided Survey of Anti-Gay Harassment.** In December 1999, Secretary Cohen ordered an Inspector General survey to assess anti-gay harassment. Among other problems, some commands have prevented service members known to have experienced anti-gay harassment from participating in the survey. As long as “Don’t Tell” exists, forcing gay service members to hide, there will be no way to accurately assess anti-gay harassment or to compare the experience of gay and non-gay members.
- ★ **More Commanders Attempt to Retain Openly Gay Service Members.** Increasing numbers of commanders, especially in the Navy, are attempting to keep openly gay service members in the military. The problem is that commanders often will not address the harassment that leads gay service members to come out in the first place, nor can they guarantee that members will not be kicked out later, after investing years in the military.
- ★ **Investigators Inexperienced in Investigating Anti-Gay Hate Crimes.** Criminal investigators and law enforcement personnel, like those involved in Private First Class Barry Winchell’s murder investigation, have no experience investigating anti-gay hate crimes.
- ★ **Commands Use Heavy-Handed Tactics to Pursue Gays.** SLDN documented frequent use of threats to extract confessions about service members’ sexual activities, including threats of criminal charges, confinement and non-judicial punishment.

**SLDN RECOMMENDATIONS FROM SIXTH ANNUAL REPORT ON
“DON’T ASK, DON’T TELL, DON’T PURSUE, DON’T HARASS”**

- ★ **Permit Service Members to Report Anti-Gay Harassment and Crimes Without Fear of Being Outed and Discharged.** Inspectors General, law enforcement personnel, Equal Opportunity representatives, Chaplains, health care providers, commanders and other personnel who deal with harassment-related issues should be given clear instructions not to out service members who seek their help. These individuals should be trained on how to handle reports of anti-gay harassment and crimes appropriately. Service members—straight, gay and bisexual—go to these sources for help, not to make a public statement of their sexual orientation. These are private contexts, and would remain so if officials did not out service members who seek their help.

- ★ **Adopt Rule of Privacy for Conversations with Health Care Providers.** The Pentagon should inform health care providers there is no requirement to turn in lesbian, gay and bisexual patients, and should further clarify that conversations with health care providers are not a basis for investigation or discharge under “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass.” The Executive Order signed by President Clinton, providing for a limited psychotherapist privilege, prevents use of conversations with psychotherapists as incriminating evidence in criminal trials. The rule, however, does not address SLDN’s concern that some psychotherapists continue to turn in gay service members who are then administratively discharged under “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass.”

- ★ **Hold Accountable Those Who Ask, Pursue or Harass.** In six years, military leaders have not publicly held anyone accountable for asking, pursuing or harassing. With the new guidelines on “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass,” the Pentagon should remind commanders there are specific consequences for violations, from letters of counseling to courts-martial, depending on the offense. Senior leaders should set the example by holding those who violate the policy accountable, starting with:
 - Senior leaders at Fort Campbell who failed to train their personnel on “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass,” and who permitted anti-gay harassment to flourish before and, shockingly, after Private First Class Winchell’s murder; the anti-gay harassment continues to the present day;

 - Marine Lieutenant Colonel Edward Melton at Twenty-Nine Palms for calling gays “homos,” “queers” and “backside rangers,” and for mocking the murder of Private First Class Winchell when distributing an e-mail from the Chief of Naval Operations that ordered steps to end anti-gay harassment; and

 - Air Force investigators and others at Monterey’s Defense Language Institute, who have conducted a witch hunt of female student leaders and ignored numerous reports of anti-gay harassment.

- ★ **Require Leaders to Demonstrate Commitment to Stopping Anti-Gay Harassment.** Leaders must show through their own actions they take anti-gay harassment seriously, and they should specifically inform service members that epithets such as “faggot,” “dyke” and “queer” will no longer be tolerated.
- ★ **Ensure Full Distribution and Training on Guidance Against Anti-Gay Harassment.** The services should ensure every service member from recruit to flag officer receives and understands guidelines and leadership messages from the Secretary and Chief of each service against anti-gay harassment.
- ★ **Ensure Full and Appropriate Training on Investigative Limits.** The Pentagon should ensure the services train all personnel on the policy’s investigative limits and intent to respect service members’ privacy, not on how to detect and discharge gay service members, as Marine Corps training currently suggests. Leaders must be involved in the training and set the proper tone for it.
- ★ **Provide Recourse to Service Members to Stop Improper Investigations.** In six years, the Pentagon has failed to provide service members with recourse to stop improper investigations, taking an ends justifies the means approach. While recent guidelines requiring Service Secretary approval for “substantial investigations” and greater legal guidance from higher headquarters may help, they still deprive members of the opportunity to show why an inquiry should not go forward in the first place. Members should be able to obtain a military defense attorney before an inquiry is initiated, and have an opportunity to show that no credible evidence exists.
- ★ **Require Commanders to State in Writing Reasons for Investigations.** This would be a further step to prevent improper investigations.
- ★ **Cease Use of Intrusive Questioning in Gay Investigations.** Military leaders in all services should train inquiry officers and criminal agents in proper investigative tactics, to include instructing personnel not to question parents, siblings and other confidants such as close friends about a service member’s sexual orientation or private life. The Air Force should rescind its written instructions to the contrary.
- ★ **Train Investigators on How to Handle Possible Anti-Gay Hate Crimes.** Criminal investigators and law enforcement personnel need training to recognize and appropriately investigate possible anti-gay hate crimes.
- ★ **Adopt Exclusionary Rule.** The Pentagon should adopt an exclusionary rule so that evidence obtained illegally, as in a witch hunt, can be excluded at administrative discharge boards.

**CONDUCT UNBECOMING:
THE SIXTH ANNUAL REPORT ON
“DON’T ASK, DON’T TELL, DON’T PURSUE, DON’T HARASS”**

EXECUTIVE SUMMARY

*I am satisfied that the policy generally is being
implemented fairly.*

—William Cohen, January 28, 2000

*[T]he data show that the climate remains as hostile to gay
military personnel as ever*

—New York Times Editorial, August 20, 1999

Army Private First Class Barry Winchell’s murder gives the country a heartbreaking insight into the failure of “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass.” On July 5, 1999, Private First Class Barry Winchell was brutally beaten to death with a baseball bat, while he slept on a cot outside his barracks room at Fort Campbell, Kentucky. Private Calvin Glover attacked Winchell after another unit member, Specialist Justin Fisher, goaded him using anti-gay epithets. Soldiers later testified that Private First Class Winchell faced daily anti-gay harassment for more than four months prior to his murder, based on rumors started by Fisher. Winchell confided in two close friends that he was profoundly troubled by the harassment, but he could do nothing for fear he would be kicked out of the Army he loved.

The military failed Winchell. His leaders asked. They pursued. They harassed. The military allowed no safe haven for Winchell to seek help. Psychologists, Inspectors General, law enforcement personnel and commanders have been given the misguided message to turn in gay people who seek their help. Ultimately, the military’s indifference to Winchell’s well-being and its hostility to the presence of people who are perceived to be gay set the stage for his murder.

Congress should repeal the ban on openly gay service members because the policy hurts military readiness, and it kills. Given our current political environment, however, it is unlikely Congress has the will to overturn “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass.” Until that day, our military leaders, both civilian and uniformed, must step up to the plate in ways they have not, thus far. They must stop the rampant asking, pursuing and harassing of service members who are, or are perceived to be, lesbian, gay or bisexual. While there are many heterosexual service members who do not engage in anti-gay harassment, the incentives in today’s military climate support those who do. Military leaders must stop teaching young people entering the military to hate and discriminate against a particular group of people in our society.

In the wake of Barry Winchell’s murder, one thing is clear—“Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass” has reached its highest level of public debate since it was first

implemented in 1993. The Pentagon and President Bill Clinton have scrambled to respond to the policy's failed implementation. Political candidates and the public have called for the policy's repeal. What follows are just a few of the developments from the past year covered in detail in *Conduct Unbecoming: The Sixth Annual Report on "Don't Ask, Don't Tell, Don't Pursue, Don't Harass."*

Asking, Pursuing and Harassing Surge to Record Levels

Instances of asking, pursuing and harassing in direct violation of "Don't Ask, Don't Tell, Don't Pursue, Don't Harass" have surged to record levels since Congress enacted it into law six years ago. Reports of anti-gay harassment in the past year more than doubled, for the second consecutive year. Reports of asking increased 20%. Reports of pursuing increased 34%. Asking, pursuing and harassing continued even after the Pentagon announced new training programs and guidelines on anti-gay harassment six months ago.

Among dozens of examples, this report details the murder of Private First Class Barry Winchell and the anatomy of a witch hunt at the Defense Language Institute in Monterey, California, which, during the course of the past year, ensnared more than fourteen airmen, mostly women. This report also describes the epithets, threats and everyday indignities that service members must silently suffer as a condition of serving our country under "Don't Ask, Don't Tell, Don't Pursue, Don't Harass."

While Department of Defense officials have repeatedly maintained that "proper implementation of the policy has been a priority and the policy has, for the most part, been properly applied and enforced,"¹ events of this past year once again show that assertion to be little more than whitewash.

Pentagon Fires Three Gay People Every Day

Discharges under "Don't Ask, Don't Tell, Don't Pursue, Don't Harass" remain alarmingly high. The Pentagon is firing, on average, three people every day for being gay, lesbian or bisexual—a total of 1,034 last year alone (Exhibit 1). Gay discharges last year increased 73% since "Don't Ask, Don't Tell, Don't Pursue, Don't Harass" was first implemented. Six years of pink slips have cost American taxpayers over \$160 million² (Exhibit 2). Many more dedicated, competent service members have left at the end of their terms, fed up with constant fear, dissembling and anti-gay harassment.

Service Members Come Out Because of Anti-Gay Harassment

The Pentagon claims most gay discharges result from gays voluntarily coming forward to be discharged. Even Major General Robert Clark at Fort Campbell, Kentucky, had the temerity

¹ OFFICE OF THE UNDER SECRETARY OF DEFENSE (PERSONNEL AND READINESS), *Report to the Secretary of Defense: Review of the Effectiveness of the Application and Enforcement of the Department's Policy on Homosexual Conduct in the Military*, Apr. 1998.

² GAO 1993 dollars. This figure represents costs of retraining replacements alone and does not include the significant expense of investigations and separations.

to suggest that the tripling in gay discharges at Fort Campbell in the wake of Private First Class Barry Winchell's murder was the result of gays voluntarily leaving because they wanted a so-called easy way out of the military.³ The reality is gay members often come out under duress as a last resort to protect themselves against constant anti-gay harassment, including verbal gay-bashing, death threats and assaults. Service members contact Servicemembers Legal Defense Network (SLDN)⁴ every day afraid they may be the next Barry Winchell. In addition, some service members conclude that, for reasons of integrity, they can no longer serve under a policy that, as implemented, requires them to lie to their parents, best friends and health care providers as a condition of military service. They want to serve, but Uncle Sam says, "I don't want you." Contrary to what the Pentagon suggests, all gay discharges are involuntary because no service member ensnared by "Don't Ask, Don't Tell, Don't Pursue, Don't Harass" is given the choice to stay.

Military Leadership Missing in Action

The continued asking, pursuing and harassing are due to failed leadership. Military leaders must hold those who ask, pursue and harass accountable, and provide recourse to service members who are improperly targeted. SLDN has repeatedly warned of the dangers of lax leadership in applying this policy. In SLDN's *Conduct Unbecoming Continues: The First Year Under "Don't Ask, Don't Tell, Don't Pursue,"* SLDN warned "that if the Department of Defense does not take corrective actions now, deaths of actual and perceived homosexual service members, like slain sailor Allen Schindler, will occur."⁵ It is shameful that it took Private First Class Winchell's murder before military leaders would begin to take steps to address the problem.

Secretary Cohen Orders Misguided Inspector General Survey of Anti-Gay Harassment While Army Inspector General Promises to Discharge Gays He Discovers

Five months after Winchell's murder, Secretary Cohen ordered a Department of Defense Inspector General investigation into anti-gay harassment.⁶ The Inspector General is surveying 75,000 troops, with survey results due back to Secretary Cohen on March 13, 2000. When announced in December 1999, SLDN questioned the efficacy of the survey, because there is no way to compare the experience of gay service members with non-gay service members. Gay service members are not permitted to be honest with the Inspector General under the current regime. Indeed, as long as a law exists that bans known gay service members, few gays will feel comfortable reporting anything, no matter what steps the Inspector General takes to assure their confidences.

Their fears of being outed and kicked out of the military are well-founded. An officer with the Department of Army Inspector General told SLDN he believed he was required to turn

³ Elizabeth Becker, *Policy on Gays Part of the Drill At Army Base*, N.Y. Times, Feb. 14, 2000, at A1.

⁴ Servicemembers Legal Defense Network is an independent legal aid and watchdog organization.

⁵ C. Dixon Osburn and Michelle M. Benecke, *Conduct Unbecoming Continues: The First Year Under "Don't Ask, Don't Tell, Don't Pursue,"* (Servicemembers Legal Defense Network, Feb. 28, 1995).

⁶ Office of Assistant Secretary of Defense (Public Affairs), *Secretary of Defense Directs Assessment of Extent of Harassment*, Dec. 13, 1999.

in any service member who inadvertently came out or was found to be gay during the course of investigating anti-gay harassment at Fort Campbell. SLDN has received reports that some commands have prevented service members known to have experienced anti-gay harassment from participating in the Inspector General survey, even when all other unit members were ordered to participate. Other service members report that, because of the way the survey is designed, those who report anti-gay harassment draw undue and unwanted attention to themselves. Those who do not report harassment may skip quickly to the end of the survey and leave the survey room. Thus, everyone taking the survey knows who is reporting harassment. This arrangement leaves service members vulnerable to speculation about their own sexual orientation.

In short, the Inspector General processes, despite the best intentions of those actually reviewing anti-gay harassment, are likely to produce a whitewash. Inspector General representatives will hear from commanders, and they will hear from some service members, but they will not hear from the service members who are most affected, because lesbian, gay and bisexual military members must hide.

Jury out on Pentagon Promise to Train Troops on Investigative Limits

Spurred by Private Winchell's murder, Secretary of Defense William S. Cohen ordered—for the first time—mandatory training for all service members on the investigative limits of “Don't Ask, Don't Tell, Don't Pursue, Don't Harass.”⁷ The order partially adopts a six-year SLDN recommendation. To date, however, only the Army has initiated training on the policy's investigative limits, and the reviews of the training are mixed. Some soldiers report the training has been conducted professionally and intelligently. Others, however, report the training is confusing. Disturbingly, some say their leaders have mocked the training, calling it a “fag briefing” and other anti-gay epithets. This sends the immediate and unmistakable signal to those under their command that they do not have to take the training seriously. If this training is to have any good effect, leaders must make a commitment to treat it seriously.

Jury out on Pentagon Promise to End Anti-Gay Harassment

In the aftermath of Winchell's murder, the Pentagon also implemented stronger guidelines on anti-gay harassment, including more explicit language sanctioning anti-gay epithets such as “faggot,” “fag,” “queer” and “dyke.” In response to a longstanding SLDN request, the Secretary and Chief of each service have issued statements denouncing anti-gay harassment. The Department of Defense added “Don't Harass” to its description of the current policy, “Don't Ask, Don't Tell, Don't Pursue, Don't Harass.”⁸ In the Army, soldiers report the training is limited to two slides at the end of training on the overall anti-gay policy. Air Force personnel report no knowledge of the anti-gay harassment training. The Navy has delivered the message against anti-gay harassment to some sailors, with training showing up in at least some weekly commander briefings at the unit level.

⁷ Under Secretary of Defense Rudy de Leon, *Memorandum to Secretaries of the Military, Subject: Guidelines for Investigating Threats Against or Harassment of Service Members Based on Alleged Homosexuality*, Aug. 12, 1999.

⁸ Linda D. Kozaryn and Jim Garamone, *Cohen Adds 'Don't Harass' to Homosexual Policy, Says it Can Work*, American Forces Press Service, Dec. 29, 1999.

One downfall of the current training in all services is that it does not address the problem that psychologists, Inspector Generals, law enforcement personnel, equal opportunity representatives, commanders, and others believe they are required to turn in gay people seeking their help. The Army is telling service members to see Chaplains if they are harassed, but many Chaplains are by and large not prepared to address these situations. Indeed, as discussed further in the “Don’t Tell” section of this report, some Chaplains have berated service members who have sought their help in dealing with anti-gay harassment. Other Chaplains have told service members to turn themselves in to their commands resulting in their discharge. The Army is also directing service members who are harassed to see military defense attorneys, without lifting policies at some bases that preclude military defense attorneys from representing a service member until a discharge action or criminal charges have been filed. The Army has stated it is forbidding its Equal Opportunity representatives from helping service members who are targeted by anti-gay harassment.

Of great concern, the current training in all services fails to specify any consequences for service members who disobey the rules and harass, ask or pursue their colleagues.

President Clinton Signs Important Military Hate Crimes Law

As Commander-in-Chief, President Clinton signed an Executive Order three months after Winchell’s murder, amending the *Manual for Courts-Martial* to provide for sentence enhancement in hate crimes based on race, gender, sexual orientation, and disability. The Joint Service Committee in the Pentagon recommended the change to make military law conform with similar state statutes. While the Executive Order had been on the President’s desk for more than one year, and it did not factor into the prosecution of soldiers at Fort Campbell for the murder of Private First Class Barry Winchell, the Executive Order will aid law enforcement personnel, prosecutors and commanders in addressing hate-motivated violence.

Pentagon Fails to Ensure Privacy of Communications with Mental Health Providers

The same Executive Order also provided, for the first time, a limited psychotherapist privilege that prevents use of conversations with psychotherapists as incriminating evidence in criminal trials. The Executive Order has only limited value for gay service members, however, who, for the most part, face administrative discharge proceedings, rather than criminal prosecutions, under “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass.” Mental health providers continue to turn in gays for discharge. Although Pentagon officials have publicly represented⁹ that health care providers are not required to turn in gay people who seek their help, health care providers tell SLDN otherwise. In fact, SLDN discovered that the Navy had sent written instructions to its health care providers to turn in gay people via its website. Despite SLDN’s protests to top Department of Defense officials, the website was left in commission until July 1999. Service members have been discharged as a result, with the website language showing up verbatim in SLDN’s cases. The Pentagon has failed to take any steps in six years to

⁹ OFFICE OF THE UNDER SECRETARY OF DEFENSE (PERSONNEL AND READINESS), *Report to the Secretary of Defense: Review of the Effectiveness of the Application and Enforcement of the Department’s Policy on Homosexual Conduct in the Military*, Apr. 1998, at 10.

make clear that such conversations are considered “personal and private” under current regulations and do not form the basis for discharge.

Anti-Gay Policy Elevated to Highest Level of Political Debate Since 1993

In the wake of PFC Winchell’s murder, “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass” has erupted on the campaign trail. First Lady Hillary Rodham Clinton,¹⁰ Vice President Albert Gore¹¹ and Senator Bill Bradley¹² all called for repeal of “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass,” making national headlines. Governor George W. Bush¹³ and Senator John McCain¹⁴ called for better implementation of the current policy, a shift toward the center from prior GOP political stands calling for witch hunts. President Clinton also weighed in for the first time in six years, describing “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass” as “out of whack” in a *CBS Radio News* interview.¹⁵

American Public Opinion Supports Gays in the Military

At the same time, public opinion polls and editorial boards expressed overwhelming support for ending discrimination against lesbians, gays and bisexuals in the military. Independent public opinion polls released this past year by Gallup¹⁶ and The Wall Street Journal/NBC¹⁷ found that 70% or more of Americans support gays in the military. Dozens of major national and regional newspapers have called for repeal of “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass.”¹⁸

¹⁰ *Rejecting ‘Don’t Ask, Don’t Tell,’* N. Y. Times, Dec. 10, 1999, at A34: “Hillary Rodham Clinton was exactly right when she told a gay audience at a fund-raiser in SoHo this week that homosexuals ought to be able to serve openly in the United States military.”

¹¹ Ceci Connolly and Bradley Graham, *Gore Vows New Policy On Gays In Military*, Wash. Post, Dec. 14, 1999, at A1.

¹² Sandra Sobieraj, *Bradley Supports Gays in Military*, Assoc. Press, Sept. 16, 1999.

¹³ *Excerpts From the Debate Among G.O.P. Candidates*, N. Y. Times, Jan. 7, 2000, at A15.

¹⁴ James Warren, *McCain Says Gore Wrong on Military Gays Policy*, Chi. Tribune, Dec. 15, 1999, <<<http://chicagotribune.com>>>.

¹⁵ *Transcript: Radio Interview of President Clinton by CBS News*, Distributed by Office of International Information Programs, U. S. Department of State, Dec. 11, 1999.

¹⁶ See Alan S. Yang, *From Wrongs to Rights: Public Opinion on Gay and Lesbian Americans Moves Toward Equality* 12, 13 (National Gay and Lesbian Task Force Policy Institute, 1999).

¹⁷ Ronald G. Shafer, *The Wall Street Journal/NBC News Poll*, The Wall Street Journal, at A1: “DON’T CARE: The public, by 74% to 22%, favors allowing gays to serve in the military.”

¹⁸ They include: Don’t Ask, Don’t Harass: The military is finally facing the flaws in the policy on homosexuals, Albany Times Union, Feb. 7, 2000, at A6; ‘Don’t ask, don’t tell’ Policy doesn’t work, The Arizona Republic, Dec. 15, 1999, at B8; Enforcing ‘Don’t Harass’, Boston Globe, Feb. 7, 2000, at A14; Reviving ‘Don’t Ask, Don’t Tell’, Chicago Tribune, Feb. 4, 2000, at 20; Don’t lie: Clinton admits ‘don’t ask don’t tell’ is a policy failure; the answer is to lift the ban on homosexuals in the military, Cleveland Plain Dealer, Dec. 21, 1999, at 8B; Military’s gay policy: Time to get real, Dayton Daily News, Dec. 15, 1999, at 14A; Gays in military: Clinton admits ‘don’t ask, don’t tell’ is a failure, Houston Chronicle, Dec. 20, 1999, at 34; Verdict Is In For ‘Don’t Ask’, L. A. Times, Feb. 4, 2000, at B10; David P. Sheldon, Don’t Expect a Change in ‘Don’t Ask . . .’, Newsday, Dec. 16, 1999, at A65; Bigotry in the Military, N. Y. Times, Aug. 30, 1999, at A22; They Had to Tell: Presidential Candidates Consider Military Policy on Gays, Pittsburgh Post-Gazette, Jan. 24, 2000, at A12; Rethink ‘don’t ask, don’t tell’, Providence Journal, Dec. 15, 1999, at B6; Deborah Mathis, Anti-homosexual Policy Avoids Reality, Seattle Post-Intelligencer, Aug. 19, 1999, at A11; Gays in military after ‘don’t ask, don’t tell’, Seattle Times, Dec. 14, 1999, at B4; Don’t ask, don’t tell: A not so

Army Investigates Arizona State Representative Steve May

The Army's attempted discharge of openly gay Arizona State Representative Steve May burst onto the scene at the same time as the American public learned of the horrifying tragedy of Private First Class Barry Winchell's murder, underscoring the absurdity of "Don't Ask, Don't Tell, Don't Pursue, Don't Harass," but in a different way.

Shortly after calling First Lieutenant Steve May back to the active reserves, the Army informed him it was initiating a "Don't Ask, Don't Tell, Don't Pursue, Don't Harass" inquiry based upon statements reported in a newspaper article. The article focused on comments May made during a committee hearing against anti-gay legislation, while he was still a member of the Inactive Ready Reserve. First Lieutenant May was outed by opponents during his unsuccessful run for office in 1996. When he ran again, he was honest with voters about being gay and he won. The great irony of May's case is that his constituents voted him into office for his honesty and candor, while the Army seeks to punish him for it.

In spite of the policy, May's fellow officers support his service. May's direct commander said that May's performance "has been nothing less than outstanding . . . [T]he vast majority of personnel in the unit have knowledge of the article; however, such knowledge has in no way affected morale in his PLT or other PLT's. In fact, the HQ section is function[ing] better than it has for (sic) my past tenure as commander" (Exhibit 3). A fellow officer's comments mirrored May's commander and further stated, "I firmly believe that whether LT May's sexual orientation is as suspected by the investigating parties, the fact is and should be considered irrelevant by all concerned parties. It has in no way affected his performance or that of anyone with whom he has had contact in a military matter" (Exhibit 4). Thus, contrary to the stated rationale for this discriminatory policy, the presence of an openly gay man is enhancing military readiness, and the Army's attempts to discharge him is undermining unit cohesion. May's case continues to proceed in the Army's administrative system.

Britain Repeals Ban on Gays in the Military, Isolating United States

On September 27, 1999, the European Court of Human Rights ruled that Great Britain violated the human rights of four service members dismissed from the military for being gay. In ruling against Britain's anti-gay policy, the court said, "Those negative attitudes could not, of themselves, justify the interferences in question any more than similar negative attitudes towards those of a different race, origin or colour."¹⁹ The court's decision leaves the United States and Turkey as the only NATO²⁰ countries banning service by openly gay military members.

benign suppression of reality, St. Paul Pioneer, Dec. 12, 1999, at 12A; Gays in military: A policy sabotaged, Tacoma Morning News Tribune, Dec. 19, 1999, at B16; Don't Ask, Wash. Post, Dec. 15, 1999, at A46.

¹⁹ Judgements in the Cases of *Lustig-Prean and Beckett v. The United Kingdom* and *Smith and Grady v. The United Kingdom*, European Court of Human Rights, (1999) <<<http://www.echr.com>>>

²⁰ North Atlantic Treaty Organization.

The Good News

Some good trends documented in prior years continue. Physical abuse by investigators has declined.²¹ Mass investigations, though not obsolete, have waned. Criminal prosecutions of lesbian, gay and bisexual service members have decreased, as commanders administratively discharge gays. A problem remains, though, in that many inquiry officers continue to threaten criminal prosecution. Finally, not all officers and enlisted leaders engage in verbal gay-bashing or snoop on their service members. The current climate, however, supports those who do. The positive steps forward reflect the low baseline used to measure success.

Conclusion: Military Readiness Suffers from Anti-Gay Bias

SLDN's *Conduct Unbecoming: The Sixth Annual Report on "Don't Ask, Don't Tell, Don't Pursue, Don't Harass"* examines the military's failure to implement the core parts of "Don't Ask, Don't Tell, Don't Pursue, Don't Harass" and how it has impacted military readiness in the past year.²² The report concludes that as military leaders continue to struggle with critical retention and recruiting shortfalls,²³ they can ill afford to continue violating the letter and intent of the policy. Lesbian, gay and bisexual Americans' contributions to our armed forces are valuable. The military's indifference to the well-being of and hostility toward lesbian, gay and bisexual service members must cease. The failure of military leaders to fairly implement the policy's provisions on privacy, investigative limits, accountability and recourse takes its toll on readiness by undercutting respect for rule and order. Forcing lesbian, gay and bisexual service members to hide, lie, evade and deceive their families, friends and colleagues breaks the bonds of trust among service members essential to unit cohesion.²⁴ Command climates poisoned by anti-gay abuses hurt readiness. As Specialist Edgar Rosa testified at Fort Campbell, the murder of Private First Class Barry Winchell has destroyed any illusion that he was part of "a band of brothers."²⁵

²¹ See Randy Shilts, *Conduct Unbecoming*, 231-232 (citing former Army Lieutenant Jay Hatheway's testimony that he was forced to undergo "neurological testing" that included a psychiatrist's puncturing his scalp with pins to attach sensors); 570 (citing Steve Ward's testimony that he was placed into a broom closet without personal breaks until he confessed to being gay), (St. Martin's Press, 1993).

²² SLDN has assisted more than 2,100 service members in the past six years who have been harmed by the policy.

²³ Andrea Stone, *Army opens more to school dropouts*, USA Today, Feb. 4, 2000, at 13A.

²⁴ 10 U.S.C § 654(a)(7), "One of the most critical elements in combat capability is unit cohesion, that is, the bonds of trust among individual service members that make the combat effectiveness of a military unit"

²⁵ Specialist Edgar Rosa, Delta Co., 2nd/502nd, Specialist Justin Fisher Art. 32 Hearing, Sept. 1, 1999.

WHAT IS “DON’T ASK, DON’T TELL, DON’T PURSUE, DON’T HARASS?”

*The American public remembers the 1993 revisions to military anti-gay policy wrong. [P]eople think that the new policy is more lenient toward gay men and lesbians in uniform, less anti-gay and less homophobic than the policy in place when President Clinton took office Wrong, wrong and wrong again.*²⁶

“Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass” contains exactly the same prohibitions on service by lesbians, gays and bisexuals that have been in place for fifty years.²⁷ The Pentagon discharges gays, lesbians and bisexuals for statements, acts and marriage. In other words, the Pentagon fires service members who acknowledge they are lesbian, gay or bisexual, engage in sexual or affectionate conduct (such as handholding) with someone of the same gender, or have a relationship with someone of the same gender.

“Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass” is the only law in the land that authorizes the firing of an American for being gay. There is no other federal, state or local law like it. Indeed, “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass” is the only law that makes it illegal to come out. Many Americans view “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass” as a benign gentlemen’s agreement with discretion as the key to job security. That is simply not the case. An honest statement of one’s sexual orientation to anyone, anywhere, anytime may lead to being fired.

“Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass” is, however, significantly different from prior laws in three respects. First, Congressional and military leaders acknowledged, for the first time in 1993, that lesbians, gay men and bisexuals serve our nation and do so honorably.²⁸ Second, the policy also states sexual orientation is no longer a bar to military service.²⁹ Third, President Clinton, Congress and military leaders agreed to end intrusive questions about service members’ sexual orientation and to stop the military’s infamous investigations to ferret out suspected lesbian, gay and bisexual service members.³⁰ They agreed

²⁶ Janet E. Halley, *DON’T: A Reader’s Guide to the Military’s Anti-Gay Policy*, 1 (Duke University Press, 1999).

²⁷ C. Dixon Osburn, *A Policy in Desperate Search of a Rationale: The Military’s Policy on Lesbians, Gays and Bisexuals*, 64 UMKC L. Rev. 199 (1995).

²⁸ *Policy Concerning Homosexuality in the Armed Forces: Hearings Before the Senate Comm. On the Armed Services*, S. Hrg. 103-845, 103rd Cong., 2nd Sess. (1993) at 707. “[H]omosexuals have privately served well in the past and are continuing to serve well today.” (statement of General Colin Powell).

²⁹ DEP’T OF DEFENSE DIRECTIVE NO. 1332.14, encl. 3 H.1.a (1994), *Enlisted Administrative Separation; Id.* NO. 1332.30, encl. 2.C (1994) *Separation of Regular Commissioned Officers*: “Sexual orientation is considered a personal and private matter, and homosexual orientation is not a bar to continued service unless manifested by homosexual conduct.”

³⁰ *Policy Concerning Homosexuality in the Armed Forces: Hearings Before the Senate Comm. On Armed Services*, 103rd Cong., 2d Sess. (1993) at 709 (statement of General Colin Powell). “We will not witch hunt. We will not chase. We will not seek to learn orientation.” These include the investigation of women onboard the *USS Norton Sound* in 1980, which resulted in the discharge of eight women sailors; investigations on the hospital ship *Sanctuary* and on the *USS Dixon*; the Army’s ouster of eight military police officers at West Point in 1986; the 1988 investigation of thirty women, including every African American woman, onboard the destroyer-tender *USS*

to take steps to prevent anti-gay harassment.³¹ They agreed to treat lesbian, gay and bisexual service members even-handedly in the criminal justice system, instead of criminally prosecuting them in circumstances where they would not prosecute heterosexual service members.³² They agreed to implement the law with due regard for the privacy and associations of service members.³³ The law became known in 1993 as “Don’t Ask, Don’t Tell, Don’t Pursue” to signify the new limits to investigations and the intent to respect service members’ privacy. In February 2000, in the wake of the murder of Private First Class Barry Winchell at Fort Campbell, Kentucky, Pentagon officials added “Don’t Harass” to the title of the policy.

Yellowstone, which resulted in the discharge of eight women; the 1988 investigation of five of the thirteen female crew members onboard the *USS Grapple*; and the 1986-1988 investigation at the Marine Corps Recruit Training Depot at Parris Island, South Carolina, where 246 women were questioned, at least 27 women were discharged, and three were jailed.

³¹ *Applicant Briefing Item on Separation Policy*, Addendum to DEP’T OF DEFENSE DIRECTIVE NO. 1304.26 (1993), *Qualification Standards for Enlistment, Appointment, and Induction*: “The Armed Forces do not tolerate harassment or violence against any service member, for any reason.”

³² Secretary of Defense Les Aspen, *Memorandum for Secretaries of the Military Departments, Subject: Implementation of the DoD Policy on Homosexual Conduct in the Armed Forces*, Dec. 21, 1983; “[The new policy] provides that investigations into sexual misconduct will be conducted in an evenhanded manner, without regard to whether the alleged misconduct involves homosexual or heterosexual conduct.”

³³ President William J. Clinton, *Text of Remarks Announcing the New Policy*, Wash. Post, July 20, 1993, at A12; President Clinton pledged that the policy would provide for “a decent regard for the legitimate privacy and associational rights of all service members.” Then Senator, now Secretary of Defense, William Cohen understood that the “small amount of privacy under the current policy was intended to prevent the military from prying into people’s private lives.” *Policy Concerning Homosexuality in the Armed Forces: Hearings Before the Senate Comm. On Armed Services*, 103rd Cong., 2nd Sess. at 788.

DON'T ASK

“Don't Ask” Prohibits Questioning Service Members About Sexual Orientation

Despite a clear prohibition on “asking,” SLDN continues to document increased questioning of service members about their sexual orientation.

“Don't Ask” states “commanders or appointed inquiry officials shall not ask, and members shall not be required to reveal their sexual orientation.”³⁴ In 1997, Secretary of Defense William Cohen reaffirmed the rule, stating on “Larry King Live” that asking “is a clear violation of law.”³⁵ The Pentagon reaffirmed asking is wrong in its April 1998 report on the effectiveness of the implementation of “Don't Ask, Don't Tell, Don't Pursue, Don't Harass.”³⁶

“Don't Ask” violations are up for the sixth consecutive year. SLDN documented 194 “Don't Ask” violations from February 15, 1999, to February 15, 2000, up 20% from 161 such violations in the preceding year. The Air Force led all Services with 68 “Don't Ask” violations; the Navy followed closely with 65 violations; the Army tallied 44 violations; and the Marine Corps closed out with 17 violations.

Supervisors, coworkers and investigators continue to question service members about their sexual orientation. Service members' silence in the face of questioning, in an effort to comply with “Don't Tell,” only fuels speculation about their sexual orientation and invites anti-gay harassment in the current military environment.

This section discusses common problems with “Don't Ask” implementation: (1) questions asked by supervisors and coworkers as a means of anti-gay harassment or intimidation; (2) inadvertent questions; and (3) questions by security clearance investigators. Past SLDN reports have documented each of these problems, and they continue to pose great concern.

Asking as Anti-Gay Harassment

The most disturbing trend documented by SLDN is the continued link between asking and anti-gay harassment. Hostile commanders, supervisors, colleagues and investigators pepper service members with constant questions about their sexual orientation. The questioning is experienced not only as asking, but as harassment and intimidation. How should a service member respond when asked day after day, sometimes hourly, “Are you a lesbian?” “You're a fag, aren't you?!” “Is it true you're a homo?!”

³⁴ DEP'T OF DEFENSE DIRECTIVE NO. 1332.14, encl. 4.D.3 (1994), *Id.* NO. 1332.30, encl. 8.D.3 (1994); *See also, Policy Concerning Homosexuality in the Armed Forces: Hearings Before the Senate Comm. On Armed Services*, S. Hrg. 108-845, 103rd Cong., 2d Sess. (1993), at 789. “[W]e do not ask about orientation not only at accession but at any time.” (statement by former DoD General Counsel Jamie Gorelick).

³⁵ *Larry King Live*, CNN television broadcast, Transcript # 97012700V22, Jan. 27, 1997.

³⁶ OFFICE OF THE UNDER SECRETARY OF DEFENSE (PERSONNEL AND READINESS), *Report to the Secretary of Defense: Review of the Effectiveness of the Application and Enforcement of the Department's Policy on Homosexual Conduct in the Military*, Apr. 1998, at 2.

In six years under “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass,” the Pentagon has held no one publicly accountable for asking or harassing a service member in violation of the policy. Instead, military leaders have allowed personnel to ask and harass with impunity. At the same time, military leaders have told mental health care providers, Inspectors General and others to turn in gay, lesbian and bisexual service members who are found to be gay while reporting anti-gay harassment, effectively closing down any safe space for service members, contrary to the intent of the policy.

Often, targeted service members have no recourse to protect themselves but to disclose their sexual orientation in response to the asking and anti-gay harassment, resulting in their discharge. This trend will likely continue in the absence of military leadership to ensure accountability and provide recourse for service members who are questioned or harassed.

Fort Campbell: Asking as a Prelude to Murder

Soldiers testified Private First Class Barry Winchell faced questions about his sexual orientation and anti-gay harassment daily for more than four months prior to his murder in July 1999 (Exhibits 5 & 6). While Winchell denied he was gay in an effort to deflect the questions, rumors and harassment, they continued unchecked. According to sworn testimony:

- Staff Sergeants Kleifgen and Dubielak, Private Winchell’s supervisors, testified they asked Winchell directly if he was gay when rumors about him surfaced;
- Private Johanson testified he “asked Winchell if he was gay during [a field training exercise];”
- Specialist Novak testified that he overheard “someone ask Winchell if he was going into a gay club.”

These frank admissions were apparently only a drop in the bucket of what Winchell experienced on a daily basis. Another unit member, Specialist Philip Ruiz, and his wife, Melanie, testified that Winchell confided in them he was gay and was deeply concerned that the rumors would derail his career. Winchell did his best to ignore the daily asking and harassment until one night, goaded by anti-gay taunting, Private Calvin Glover took a baseball bat and killed Winchell while he slept.

USS Abraham Lincoln Sailor Directly Questioned

Seaman Luis Sierra’s case further illustrates the danger of leaders failing to enforce “Don’t Ask.” Onboard the aircraft carrier *USS Abraham Lincoln*, Seaman Sierra reportedly faced direct questions about whether he is gay. The harassment reportedly began when one sailor repeatedly asked him about his sexual orientation. Fearful of being “outed,” Sierra said he was not gay. Seaman Sierra reports that after repeated denials, “I finally told [the shipmate asking] that I am gay in the hopes that he would discontinue his constant harassment and prying into my sexual orientation” (Exhibit 7). This honest response, however, only resulted in

increased harassment. The sailor reportedly began calling Seaman Sierra “faggot” and making other anti-gay remarks.

The questions, fueled by rampant rumors concerning his sexual orientation, continued. Sierra reports that approximately twelve shipmates repeatedly asked him questions about his sexual orientation.

Seaman Sierra feared for his safety because of the constant hounding he faced about his perceived sexual orientation and the anti-gay harassment it spawned. Sierra reports that, one day during muster, he requested permission to speak with his Senior Chief Petty Officer about a “personal matter.” The Petty Officer refused Seaman Sierra’s request.

He then turned to a Navy Chaplain. Seaman Sierra reports:

I tried seeking counsel from the base chaplain. I told him I was being harassed because I am gay and he told me to talk to the Chaplain on board the ship. The ship’s Chaplain condemned my “lifestyle” and told me I was on a “one way path to contracting HIV.” I was then advised to ignore the harassment and “deal with it or get out.” He then told me to go to the ship’s legal³⁷ and tell them everything (Exhibit 7).

Seaman Sierra reports he heard about the murder of Private First Class Winchell that weekend and, fearing for his safety and not knowing where to turn, he went on unauthorized absence. When he returned, Sierra came out to his command, reporting the anti-gay harassment he faced. The command tried to retain him, but he was eventually discharged at his repeated request. There is no indication, however, that the Navy has held accountable anyone for the asking and harassment he faced, or for the failed leadership that permitted it to occur.

Navy Petty Officer Asked by More Than Ten People

Navy Petty Officer Third Class Patricia Esty served at Fort Meade, Maryland, where others repeatedly asked her about her sexual orientation and private life. In a May 1999 letter, Petty Officer Esty recounted her experience to her commander:

[O]ther sailors began directly asking me questions about my sexual orientation and making direct statements to me that they thought I am gay . . . I have been directly asked about my sexual orientation by more than 10 people on base. Some have outright asked me “Are you gay?” and “Do you like girls?” Others have made statements like, “I know about you.” When asked what they meant, the sailor said “I heard you’re gay.” Others have said that

³⁷ “Ship’s legal” refers to the command’s legal advisor, not a military defense attorney. A service member has no right of confidentiality with the legal advisor. The Chaplain gave bad legal advice that could have resulted in serious legal harm to the sailor. The advice was also an inappropriate response to anti-gay harassment. Unfortunately, it is not uncommon for Chaplains to provide bad legal advice. See “Don’t Tell” section.

there are rumors that I am gay and wanted to know if it is true (Exhibit 8).

These questions caused Petty Officer Esty great anguish because “Don’t Tell” prevented her from answering the questions truthfully and defending herself against the anti-gay harassment. “Don’t Tell” required her to remain silent, which only egged on her tormentors and made her vulnerable to being outed. Ultimately, she decided she had no choice but to confront the rumors directly. She further wrote to her commanding officer:

I have been questioned about my sexual orientation repeatedly in the last 7 months . . . I have been living under the very real fear that someone would turn me in because of the rumors about my sexual orientation. . . I will no longer allow others to hold my job, my future, and my life hostage. I am informing you that I am a lesbian (Exhibit 8).

Petty Officer Esty’s command was reluctant to discharge her and lose a good sailor. The command was, however, also reluctant to investigate her complaints about asking and harassment. Having come out, Petty Officer Esty was in a particularly vulnerable position, concerned about her physical safety and career. After SLDN’s intervention, Esty’s command finally initiated an investigation into the anti-gay harassment and discharged her for her safety.

Monterey Leaders “Ask” Female Airman

Airman First Class Deanna Grossi was studying Serbian at the Defense Language Institute (DLI) at Monterey, California. On one weekend off, Airman Grossi traveled to San Francisco to visit friends. Following the weekend break, a civilian class instructor, Mr. Abdolvic, reportedly asked Airman Grossi whether she had spent the weekend with her “girlfriend.”

An Air Force Noncommissioned Officer, Master Sergeant Hamlett, also reportedly questioned Airman Grossi directly as to whether her friendships with other female airmen were “more than simple friendships.” (Exhibit 9). DLI leaders created an environment in which junior enlisted personnel could question Airman Grossi about her sexual orientation free from reprisal.

Airman Grossi is one of a number of service members who have been asked, pursued and harassed while studying at DLI. These cases are discussed further in this report’s “Don’t Pursue” section.

Navy Leaders “Ask” About Sexual Orientation

A Navy noncommissioned officer and instructor repeatedly asked and harassed a Petty Officer who was his student. The noncommissioned officer taunted him with comments such as: “You have a date with [another male sailor] tonight, don’t you [Petty Officer]?” and “Hey [Petty Officer], how’s your girlfriend [another male sailor] doing?”

One day, after weeks of such abuse, the student reports the noncommissioned officer asked the other male sailor, “What are you laughing at . . . ?” We all know you’re a faggot.” The Petty Officer spoke up and correctly pointed out to the noncommissioned officer that such a comment was improper. In response, the noncommissioned officer reportedly replied in a mocking tone: “What’s wrong? I didn’t *ask* him and he didn’t *tell* me! Isn’t that the policy?” (Exhibit 10).

The harassment continued on a daily basis for a few more weeks. Finally, the Petty Officer couldn’t take it anymore. The Petty Officer disclosed his sexual orientation to his command as a last resort to protect himself against further harassment. Silence or denial in the face of such questions would only encourage his harasser. Corroboration that he is gay would make him a confirmed target of anti-gay harassment, further jeopardizing his safety. The command investigated the Petty Officer’s complaint, but it is unclear what, if any, actions were taken against the noncommissioned officer.

Despite stating he is bisexual, the command sent the Petty Officer to his next duty assignment without discharging him. The Petty Officer and many of his classmates were sent to the same ship. Fearing that word of his abuse at his former base would spread onboard, causing rumors about his perceived sexual orientation and anti-gay harassment, the Petty Officer disclosed his fears and his sexual orientation to his new command. The Petty Officer was honorably discharged.

Army Criminal Investigative Command “Asks” About Sexual Orientation

Army Criminal Investigation Division (CID) agents violated “Don’t Ask” by questioning Army Sergeant Matthew Peck in the parking lot of a gay-owned establishment near Fort Bragg, North Carolina. Under “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass,” going to a known gay establishment is permitted. Despite this, Sergeant Peck reports he was pulled over by the CID agents as he was driving through the parking lot. The agents “questioned [me] about why I was there, had I been there before, and did I know what type of place it was. Being questioned by CID that night chilled me to the bone” (Exhibit 11).

Sergeant Peck concluded he and his career were not safe in the Army so long as wrongdoers, such as the errant CID agents, could ignore the policy’s investigative limits and out him at their discretion. Sergeant Peck came out to his command to end the asking, pursuit and harassment that should not have been taking place. In the letter to his command, Peck writes:

I have been directly asked by soldiers under my command if I am gay. I have been forced to deny my sexual orientation. I cannot expect the soldiers that I lead to live up to the Army core values of honesty and integrity when I lie to them on a daily basis (Exhibit 11).

Inadvertent Questioning

“Don’t Ask” violations continue to result from inadvertent questions from commanders and others that, on their face, are not designed to ask about sexual orientation, but, in fact, do. The problem is that some commands are acting on the information inadvertently discovered and discharging service members, rather than treating the information as “personal and private” and taking no action.

Army Captain “Asked” Why He Would Not Accept Command Position

The case of an Army Captain serves as a classic example of an inadvertent “Don’t Ask” violation.

The Captain, who remains on active duty, recently declined to accept the plum assignment of company commander. The Captain informed his command, to their great consternation, that he did not intend to remain in the Army past his five year commitment.

The Captain’s command lobbied hard to retain him. The Captain is a West Point graduate. On his most recent officer evaluation report, his rater wrote, “If I go to war, I want [this Captain] with me.”

The Captain’s Brigade Commander, a Colonel, called the Captain to his office to persuade the officer to accept the command opportunity. The Colonel pressed the Captain to reconsider, telling him that the Army needs qualified leaders like him. The Colonel asked repeatedly why the Captain was resigning. In response to the Colonel’s good-faith question, the Captain reports that he truthfully alluded to the Colonel that he is gay.

In a subsequent letter to the Colonel, the Captain writes:

I am honored by your confidence in me and I am equally honored to serve in your command. My military experience has proven invaluable and I love the Army, as well as our country. I’m saddened that I cannot serve beyond my five year commitment. Were it not for the Army’s anti-gay policy, I believe that I would remain in the military well beyond my five year commitment (Exhibit 12).

The Captain’s service commitment ends in June, 2000. Rather than letting him serve three more months to fulfill his service commitment, however, the Army is discharging the Captain based on his truthful response to the Colonel’s inadvertent questions.

Navy Petty Officer First Class “Asked” Why He Is Not Re-Enlisting

Petty Officer First Class Larry Glover informed his command in San Diego, California, that he decided not to re-enlist after more than 14 outstanding years of service. It is highly unusual for a service member with so many years invested in serving our country not to finish a

twenty-year career. With his departure, Glover gave up the retirement and pension benefits he has worked so hard to earn. Petty Officer Glover's superiors naturally asked him why he was not going to finish the five years needed to complete his Navy career. His decision to leave the Service puzzled his chain of command, and they pressured him to explain "why."

In response to their repeated attempts to persuade him to re-enlist, Petty Officer Glover wrote to his commanding officer:

I have been continually pressured to explain 'why' I am choosing not to re-enlist. I have, repeatedly, declined to discuss my reasons for not re-enlisting, but the pressure for me to 'explain myself' continues unabated I . . . am not re-enlisting because of the Navy's unfair and discriminatory 'Don't Ask, Don't Tell, Don't Pursue' policy" (Exhibit 13).

Petty Officer Glover's letter describes the anguish this policy causes service members every day:

Each day I face an inner struggle of keeping my private life and military career separate. I am not allowed to speak of my friendships and relationships, discuss my weekend activities, or place pictures of important persons in my life on my office desk all because of the great risk posed by the Navy's anti-gay policy. I have had to live my life in fear for these past 14 plus years, constantly looking over my shoulder and wondering whether I'd become the target of an anti-gay investigation or whether my career would be harmed or whether I'd suffer some disciplinary action because of my sexual orientation. This is no way for me to live my life (Exhibit 13).

Petty Officer Glover is being discharged based on his response to the Navy's inadvertent questioning.

Security Clearance Questions Continue to Threaten Gays

Although SLDN's cases indicate that security clearance investigators are generally adhering to President Clinton's 1995 Executive Order³⁸ ending discrimination in the issuance of security clearances, investigators are using miscellaneous psychological profiles and questionnaires that impermissibly ask service members about their sexual orientation and private lives.

Under the Executive Order and resulting policy changes, investigators may not ask questions about sexual orientation or conduct unless relevant to resolving legitimate national security issues. Sexual orientation and conduct are not a *per se* security issue.

³⁸ Executive Order No. 12,968, 60 C.F.R. 151, at 40250 (1995).

In one case this year, Army investigators asked an Army reservist questions about his sexual orientation and conduct in a psychological profile and questionnaire to be completed in advance of taking a polygraph examination. The Army reservist was considering an opportunity that required him to have a higher level of security access.

The Minnesota Multiphasic Personality Inventory (MMPI), used by the Army, asks whether: “[A service member is] very strongly attracted by members of [his/her] own sex.”³⁹ (Exhibit 14). This is a flagrant “Don’t Ask” violation.

The accompanying questionnaire, which is a military survey, also asked questions about sexual conduct in violation of the 1995 Executive Order and “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass:”

- Have you ever engaged in any criminal activity that has gone undetected?
- Engaged in sexual behavior that might be considered to be abnormal, deviant, or perverted? (Exhibit 15).

The soldier told SLDN that he feared his responses to the questions might create a risk of criminal prosecution or administrative separation. The soldier feared criminal prosecution because the Uniform Code of Military Justice (UCMJ) criminalizes certain sexual acts for both straight and gay persons, such as oral sex. Although the criminal provisions are supposed to be applied in an evenhanded manner with respect to heterosexuals and gays, they are not. Without knowing the law or how the facts of his situation might apply, he did not know how to answer the question.

The soldier also reported that he did not know how to respond to the question about sexual conduct that others might consider “perverted.” Subjective questions based on what others might consider abnormal, given that some Americans hold anti-gay views,⁴⁰ leave the soldier guessing as to the intent of the question. Questions such as these function as possible surrogate questions to identify gays without directly asking candidates about their sexual orientation. Whether intended for that purpose or not, their effect is to place gays in a position of having to risk “outing” themselves should they answer.

After considering the context of the security clearance questions, the soldier decided not to pursue the opportunity. The Army, without knowing it, deprived itself of the capabilities of this highly respected soldier.

Additional Examples of “Don’t Ask” Violations

The following are just a few of the many “Don’t Ask” violations reported to SLDN in the past year:

³⁹ While the Army does not draft the questions in the MMPI, its use of this instrument violating “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass” is unacceptable.

⁴⁰ Public opinion polls regularly indicate strong support for gays in the military.

- The Air Force convicted an Airman at General Court-Martial and sentenced him to seven months in prison for fleeing his base out of fear for his safety after other airmen asked him repeatedly if he is gay. The Airman believed “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass” prevented him from reporting anti-gay harassment, so he ruled out that option and he feared criminal prosecution if he told his command he is gay, so he remained silent. SLDN’s experience in the Army, Navy and Marine Corps is that commands administratively discharge AWOL service members in similar circumstances or, at worst, prosecute them at Special Court-Martial, where a conviction is the rough equivalent of a misdemeanor.
- A noncommissioned officer asked a female Airman First Class at Whiteman Air Force Base, Missouri, “I hear you’re dating a girl? . . . Is there anything I need to know?”
- Army Specialist Stacy Lane, stationed at Fort Bliss, Texas, reports he was asked, “Are you and [another male soldier] together?”
- Air Force Senior Airman Jose de Leon, stationed at Andrews AFB, Maryland, reports he was asked whether he is gay by several airmen.
- A Marine Lance Corporal at Cherry Point, North Carolina, reports she was asked whether she was marrying a man or a woman.
- A Navy Petty Officer onboard the *USS Carl Vinson* reports she was asked if she is gay more times than she can remember.
- An Army Private at Fort Sam Houston, Texas reports his Drill Sergeant asked him, “Are you a homosexual?”
- A Fort Campbell, Kentucky Staff Sergeant reportedly questioned a soldier’s sexual orientation by asking whether the soldier was “that way.”

“Don’t Ask” Conclusion

Service Members “Asked” About Whether They Are Gay Have Nowhere to Turn for Help

The “Don’t Ask” rules are not being enforced. As the cases discussed in this section illustrate, superiors, subordinates and peers ask service members about their sexual orientation with impunity and hound service members out of the military.

Private First Class Winchell, prior to his being murdered, suffered in silence as his leaders and peers asked and harassed him about his perceived sexual orientation. Seaman Sierra also had nowhere to turn to stop the anti-gay asking or harassment. He feared his command and Chaplains were indifferent or hostile to his concerns.

Military leaders especially should be held accountable for asking. A superior who asks a service member about his or her sexual orientation sends the signal that anyone may ask, and effectively puts a bulls-eye on the back of the targeted service member. For the lesbian, gay, or bisexual service member who is asked, their physical safety and career hangs in the balance. Silence and dissembling in an effort to comply with “Don’t Tell” only invites more abuse.

In the absence of strict enforcement of “Don’t Ask,” the Pentagon effectively has adopted a rule of one hundred percent tolerance for asking and one hundred percent intolerance for “telling,” even when service members “tell” in the course of reporting anti-gay harassment, asking and other violations of “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass.”

The failure of military leaders to enforce “Don’t Ask” hurts military readiness by destroying trust. Leaders are charged to take care of their service members. Lesbian, gay and bisexual service members are at the total mercy of their leaders to prevent anti-gay harassment and asking, since they are not permitted under “Don’t Tell” to defend themselves. When leaders hound soldiers about their sexual orientation, demonstrating their willingness to break the rules in order to abuse someone in their charge, it sends a message to heterosexual as well as gay service members that they cannot trust their leaders to look out for their welfare.

The policy itself ensures the perpetuation of false stereotypes about a group of people who serve our country by denying heterosexuals the opportunity to know that they, in fact, know gay people. “Don’t Ask” also instills an artificial barrier to friendship, and prevents service members from forming the bonds necessary to have a truly cohesive unit. The policy mistakes homogeneity for cohesion, a premise rejected by even the military’s own experts on unit cohesion. Finally, unit cohesion and military readiness are hurt not only because gay service members must lie, hide, evade and deceive, but because the policy gives every incentive to those who want to snoop, snitch, ask and harass. These are not incentives our government should support.

DON'T TELL

“Don’t Tell” Prohibits Gays from Publicly Stating Their Sexual Orientation to the Military While Allowing for Personal and Private Expressions

“Don’t Tell,” while prohibiting public statements of sexual orientation to the military, allows for “personal and private” communications between gay service members and their families, friends and others. It protects service members’ freedom of association with friends and extracurricular organizations.⁴¹ The policy further allows for disclosure of sexual orientation by gay service members to defense attorneys,⁴² chaplains,⁴³ security clearance personnel⁴⁴ and, in limited circumstances, doctors who are treating patients for HIV.⁴⁵ The policy was intended to create some private, safe space for lesbian, gay and bisexual service members.

Despite the policy’s intent to respect service members’ privacy, SLDN documented 52 “Don’t Tell” violations in the past year, a 126% increase over the previous year’s 23 violations. For the sixth consecutive year, the Air Force led the other services with 16 violations in the past year. These violations are incidents in which commands investigated or discharged service members based on private conversations that were intended to be off-limits under “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass.” For purposes of this report, SLDN counts command violations of “Don’t Tell,” rather than instances where service members face possible discharge for statements of sexual orientation.⁴⁶

This section discusses common problems with “Don’t Tell” implementation: (1) health care providers continue to receive instructions to “tell”—to turn in—gays; (2) military leaders and investigators continue intruding into the private lives of gays, asking family members and friends to “tell;” (3) chaplains provide inappropriate legal advice to gay service members seeking their guidance; (4) Inspectors General report they will turn in service members who are found to be gay when investigating anti-gay harassment; and (5) spouses and ex-spouses “tell” in an effort to harm gay service members. Past SLDN reports have documented these problem areas, and they continue to cause concern.

⁴¹ DEP’T OF DEFENSE DIRECTIVE NO. 1332.14, encl. 4.E.4.; *Id.* NO. 1332.30, encl. 8.E.4. “[Credible information does not exist when] the only information known is an associational activity such as going to a gay bar, possessing or reading homosexual publications, associating with known homosexuals”

⁴² MILITARY R. EVID. 502.

⁴³ MILITARY R. EVID. 503.

⁴⁴ DEP’T OF DEFENSE DIRECTIVE NO. 5200.2 encl. 3.7 (1999), *DoD Personnel Security Program*. See also, DEFENSE INVESTIGATIVE SERVICE MANUAL, DIS-20-1-M, encl. 18.C (1993).

⁴⁵ DEP’T OF DEFENSE DIRECTIVE NO. 6485.1, encl. 3.2.1.9 (1991), *Human Immunodeficiency Virus-1 (HIV-1)*. “Information obtained from a Service member during, or as a result of, an epidemiological assessment interview may not be used against the Service member (in adverse criminal or administrative actions).”

⁴⁶ Service members are sometimes compelled to disclose their sexual orientation to the military for one of two primary reasons: (1) protection from anti-gay harassment; and (2) wanting to live their lives honestly.

Health Care Providers Turn in Gays

Health care providers continue to report to SLDN they have been instructed to turn in lesbian, gay and bisexual service members who seek their help. Indeed, service members have been discharged based on private counseling sessions with military psychologists. In other cases, commanders and inquiry officers have pulled service members' medical records specifically to look for information that a service member is gay. In the past year, SLDN documented continued instances in which health care providers reportedly turned in gay service members who sought their help in dealing with anti-gay harassment or the stresses imposed by "Don't Ask, Don't Tell, Don't Pursue, Don't Harass."

"Don't Tell" hamstrings conscientious health care providers. Issues involving sexual orientation are central to the provision of adequate health care, but health care providers are often reluctant to "ask" out of well-placed concern not to out gay service members. Service members are reluctant to "tell" for fear of being outed.

SLDN appreciates President Clinton's Executive Order providing that communications with mental health professionals cannot be used as evidence in criminal proceedings (Exhibit 16). This Executive Order, however, has only limited value for gay service members who, for the most part, face administrative discharge proceedings, rather than criminal prosecutions, under "Don't Ask, Don't Tell, Don't Pursue, Don't Harass." While the Department of Defense could follow established practice by extending this privilege to the administrative context, as it does with the attorney-client and chaplain-penitent privileges, it has failed to do so to date. The Department of Defense could also address concerns about the privacy of conversations with mental health professionals within the context of "Don't Ask, Don't Tell, Don't Pursue, Don't Harass," by making it clear that private statements to health care providers are not the kind of statements that form a basis for discharge, but it has failed to do so.

SLDN also appreciates the Under Secretary of Defense's clarification in the April 1998 report to Secretary of Defense Cohen that health care providers are not, in fact, required to turn in gay service members. This clarification has not made it to the field. Nor is it adequate to address the problem, as it allows individual therapists to turn in military members, whether required to or not, and deprives service members of the ability to trust therapists.

Virtual Naval Hospital: Doing Gay Patients Harm

Last year SLDN reported that, contrary to Pentagon assertions that the services do not require health providers to turn in their patients,⁴⁷ the Navy's *General Medical Officer Manual* specifically instructed health care providers to turn in gay, lesbian and bisexual service members.⁴⁸ Pentagon officials removed the section on "homosexuality" from the online version

⁴⁷ OFFICE OF THE UNDER SECRETARY OF DEFENSE (PERSONNEL AND READINESS), *Report to the Secretary of Defense: Review of the Effectiveness of the Application and Enforcement of the Department's Policy on Homosexual Conduct in the Military*, Apr. 1998, at 10. "We found that none of the Services require health care professionals to report information provided by their patients . . . [T]he lack of a privilege does not mean that doctors must report information provided by their patients . . ."

⁴⁸ DEP'T OF THE NAVY, NAVMED P-5134, GENERAL MEDICAL OFFICER (GMO) MANUAL (May 1996).

of the *General Medical Officer Manual* in February 1999, after SLDN brought the *Manual* to their attention. The Pentagon, however, let stand additional guidance on the *Virtual Naval Hospital* instructing health care providers to turn in gays until July 1999.

The web site's chapter on "Confidentiality," for example, stated:

Your patients basically have none with you. If the Captain wants to know anything that a patient told you, you must reveal it. Also, if your patient tells you something illegal or dangerous, e.g., . . . homosexuality, . . . you are required to report it to the [executive officer] and [commanding officer]"⁴⁹ (Exhibit 17).

This section is wrong for two reasons. First, under "Don't Ask, Don't Tell, Don't Pursue, Don't Harass," statements of sexual orientation are considered "personal and private," not the basis for disclosure to the command for purposes of discharge. Second, it is inappropriate and medically unfounded to equate homosexuality with something "illegal or dangerous." It is further disingenuous to equate certain acts, such as oral sex, solely with homosexuality, when the Uniform Code of Military Justice prohibits exactly the same acts between heterosexuals, including husbands and wives.⁵⁰ SLDN is unaware of any guidance instructing health care providers to turn in heterosexual service members who discuss their consenting, adult sexual conduct.

In piecemeal fashion, the Pentagon has corrected sites that contain erroneous information, but only after SLDN has brought the materials to their attention. That instructions to turn in gay people exist in the first place, and the Pentagon's failure to take proactive steps to correct this erroneous and harmful information, undermines Department of Defense assertions of sincerity in attempting to better implement "Don't Ask, Don't Tell, Don't Pursue, Don't Harass" correctly.

This continuation of improper guidance to medical personnel appears to be contributing to the increasing "Don't Tell" violations SLDN documented in 1999.

Air Force Psychologist Asserts "Duty" to Turn in Gay Patients

During SLDN's visit to Lackland Air Force Base, Texas, in March 1999, the base psychologist told SLDN he had a duty to report any service member who came out to him during a private treatment session (Exhibit 18). This stance is contrary to current policy as reiterated by the Pentagon's April 1998 review of "Don't Ask, Don't Tell, Don't Pursue, Don't Harass."⁵¹ This places basic trainees in harm's way because the services specifically instruct trainees to see mental health professionals to deal with adjustment issues in basic training. We asked the psychologist to provide the specific guidance ordering him to turn in gays, but he provided none.

⁴⁹ *Id.*

⁵⁰ 10 USCA § 654 (West Supp. 1995).

⁵¹ OFFICE OF THE UNDER SECRETARY OF DEFENSE (PERSONNEL AND READINESS), *Report to the Secretary of Defense: Review of the Effectiveness of the Application and Enforcement of the Department's Policy on Homosexual Conduct in the Military*, Apr. 1998, at 10.

Doctor Directs Lesbian Seaman to Out Herself to Her Command

While Navy Seaman Lesah Pickard was serving on the *USS Bridge* in Bremerton, Washington, a Navy doctor directed her to turn herself in to the ship's Master-at-Arms. Seaman Pickard reports that she asked the doctor for a mental health referral because she wanted guidance on how to manage the stress of living a double life as a lesbian in the Navy. Pickard revealed her sexual orientation because she was seeking a mental health referral. Instead, the doctor told Pickard "that [she] didn't need to go to mental health (sic) that it was not a medical problem that [could] be cured, but did tell [her] to go to the master-arms (sic) office and make a statement" (Exhibit 19). Believing she had no other options, Seaman Pickard told her command she is a lesbian and the Navy discharged her.

**Military Officials Solicit Private Information
from Service Members' Families and Friends**

SLDN remains highly concerned that inquiry officers and investigators are seeking out family members and close friends to solicit information that can be used against their loved ones. SLDN continues to document cases where overzealous military commanders and investigators improperly pry into gay service members' relationships with their families and close personal friends. Military Leaders should be ashamed of themselves for applying "Don't Tell" even to conversations with moms and dads. Communications between gay service members and their parents, siblings and friends should be off-limits in military inquiries relating to "Don't Ask, Don't Tell, Don't Pursue, Don't Harass."

Investigator Questions Parris Island Marine's Mother

A Marine Private's command at Parris Island, South Carolina, contacted his parents seeking information about their son's sexual orientation. Upon learning the Private is gay, the Private's command telephoned the Private's mother, asking whether she and her son had ever discussed his sexual orientation. Additionally, the Private's mother was asked if she knew of her son's sexual activities and if he engaged in homosexual activities. The mother made it clear to her son's command that she considered his sexual orientation to be a personal matter. She also made it clear that she and the Marine Corps should put her son's safety first (Exhibit 20). Asking a young Marine's mother to divulge the contents of private communications with her son concerning his sexual orientation is beyond the boundaries of the policy and common decency.

Air Force Instructs Investigators to Interrogate Families and Friends

As reported in past SLDN reports, senior Air Force lawyers have instructed inquiry officers, in writing, to seek out service members' parents, siblings and close friends for questioning (Exhibit 21). In 1999, SLDN documented the continuation of this intrusive tactic. While many examples are detailed in the "Don't Pursue" section, one example illustrates the point.

After Senior Airman Tommy Jones reportedly told his command he is gay, his command initiated an inquiry that included attempted questioning of his friends. The inquiry officer, Chief

Master Sergeant Michael Wade, asked Airman Jones to identify “friends near Andrews AFB” who could provide information concerning Jones’ sexual orientation. The inquiry officer further requested that Jones provide the names and contact information of friends at “local gay establishments” who could provide information about his sexual orientation and private life (Exhibit 22).

The Air Force’s attempt to seek out a gay service member’s friends in an effort to pry into the member’s private life violates “Don’t Tell.” It is also unnecessary, as the policy is clear that a statement alone is sufficient to discharge a service member.⁵² The intent behind “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass” was to allow service members to have relationships with their family and friends into which the military would not intrude. These types of inquiries undermine that goal.

The Air Force remains the worst offender in instigating intrusive inquiries, as detailed in “Don’t Pursue.” In the past, the Air Force has claimed such inquiries are only initiated in cases involving recoupment of monies received for educational funding, special pay or bonuses. In reality, the Air Force initiates such inquiries in almost all cases. New guidance from the Pentagon now requires Secretarial authority prior to initiating inquiries of this scope. Time will tell whether the Air Force falls into line.

Chaplains Provide Improper Legal Advice

While most chaplains keep the confidences of gay service members, some do not. Others continue to give service members bad legal advice, such as telling service members to turn themselves in, rather than sending service members to a military defense attorney for questions about the policy. Additionally, SLDN documented a number of cases in the past year where Chaplains have berated gay service members, telling them they are sick, going to hell, and so forth. No matter one’s religious beliefs, this is an inappropriate response to a service member’s report of anti-gay harassment that only serves to further victimize the service member.

Chaplains need training on this policy and how to respond to reports of anti-gay harassment. Under the new training regimen announced by the Pentagon on February 1, 2000, the Army is directing service members to see Chaplains if they are harassed or if they have questions about the policy, but Chaplains have not received training to date on how to handle such situations. Chaplains should receive specific instructions not to turn in gay service members who seek their help and to consider these conversations as confidential, per the chaplain-penitent privilege. Under the new training regimen announced by the Pentagon on February 1, 2000, the Army is directing service members to see chaplains if they are harassed or if they have questions about the policy, but Chaplains have not received training to date on how to handle such situations. Proposed guidelines from SLDN are contained in Exhibit 23.

⁵² DEP’T OF DEFENSE DIRECTIVE NO. 1332.14, encl. 3.H.1.a. *Id.* NO. 1332.30 encl. 2.C.1: “Homosexual conduct is grounds for separation from the Military Services. Homosexual conduct includes . . . a statement by a member that demonstrates a propensity or intent to engage in homosexual acts”

USS Abraham Lincoln *Chaplain Condemns Gays*

In a case discussed more fully in the “Don’t Ask” section, the Chaplain at Everett Naval Station, Washington and the chaplain onboard the *USS Abraham Lincoln* reportedly failed to assist Seaman Luis Sierra with reports of anti-gay harassment. Seaman Sierra sought the assistance of the base Chaplain at Everett Naval Station, Washington, who reportedly refused to assist him and referred him to the ship Chaplain. The ship’s Chaplain reportedly lectured Sierra, condemning the “gay lifestyle,” and told Sierra he was on a “one way path to contracting HIV.” The Chaplain then reportedly advised Sierra to ignore the harassment and “deal with it, or get out” (Exhibit 7).

Seaman Sierra, who went to the Chaplain out of fear for his safety, did not know where to turn for help. Seaman Sierra concluded that, if the ship Chaplain failed to provide a safe space for service members, then none must exist. As a last resort out of fear for his safety, Sierra fled, going on Unauthorized Absence (UA).

With SLDN’s assistance, Seaman Sierra safely returned to the Navy, came out and reported the anti-gay harassment. The Navy discharged Sierra for being gay. There is no evidence the Navy has held anyone accountable for the anti-gay harassment or counseled the Chaplains for their lack of assistance.

Inspectors General Say They Will Turn in Gays Who Report Harassment

An Army Inspector General representative who is reviewing anti-gay harassment at Fort Campbell told SLDN he would turn in any soldiers who, in the course of reporting anti-gay harassment or participating in the Army review, revealed information about their sexual orientation. Last year, at Lackland Air Force Base, an Air Force Inspector General took the same misguided stance. As a practical matter, this makes it impossible for gay service members to report harassment to or seek help from the Inspector General if they are being threatened. Any claim by the Department of Defense that it is addressing anti-gay harassment by conducting Inspector General surveys and reviews will not hold up if the service members who are most affected cannot speak candidly for fear of being outed to their units and discharged.

Services Use Retaliatory Accusations by Spouses

SLDN documented increased incidents where the armed forces rewarded retaliatory spouses who outed service members by discharging the service members. These cases usually arise when a couple decides to get divorced after one of the spouses begins to realize that he or she is gay. The armed forces are taking sides in family disputes that are more properly resolved through other channels and should not be played out under “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass.” Here are a few examples:

- An Army Major’s husband reportedly threatened to out her to her command during a custody battle for their children. As a result of this threat, the Major was forced to forgo a custody

battle for fear of losing her livelihood. The Major kept her job, but no longer has custody of her children.

- The wife of Air Force Staff Sergeant Patrick Willis reportedly threatened to out him to his command if he contested child custody during their divorce. Despite having served almost fifteen years, Staff Sergeant Willis voluntarily told his command he is gay so he could maintain his relationship with his children and teach them how to be honest and tolerant people (Exhibit 24).
- A Marine Corps Gunnery Sergeant with 16 years of service was recently outed to his command by his wife during the course of a bitter divorce and custody battle. Although still serving, the Gunnery Sergeant's command has initiated an inquiry into his wife's allegations, and his career is in jeopardy.

Military leaders should be concerned that commands are allowing people with vendettas to take down their best and brightest, using “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass” as the weapon of choice. The services should also be greatly concerned that their efforts to police service members’ personal relationships interfere with other legitimate legal proceedings.

“Personal and private” communications between service members and their families are just that, personal and private. These service members are not making public proclamations of their sexual orientation and such confidences should not form a basis for discharge. Further, retaliatory outings by disgruntled spouses should not be considered credible. Without credible information, no inquiry into a service member’s sexuality should commence.⁵³

“Don’t Tell” Conclusion

Service members have no safe space or privacy, contrary to the intent of “Don’t Tell.” Psychotherapists have been ordered to turn in gay, lesbian and bisexual service members. Investigators are pursuing close friends and family members in an effort to dig up allegations against suspected gay service members. Some Chaplains are telling service members to come out to their commands. And during a time in which the services are seeking information about anti-gay harassment, Inspectors General have stated that they will turn in service members who inadvertently reveal their sexual orientation in the course of reporting harassment. Military leaders need to make clear that private conversations—to family members, health care providers and best friends—should not be used as the basis for inquiry or discharge. Service members must be allowed to report anti-gay harassment without the fear that they will be punished for their efforts to defend themselves. As former Secretary of Defense Les Aspin explained in 1993,

⁵³ DEP’T OF DEFENSE DIRECTIVE NO. 1332.14, encl. 4.A.1.; *Id.* NO. 1332.30, encl. 8.A.1. “A commander may initiate a fact-finding inquiry only when he or she has received *credible information* (emphasis added) that there is a basis for discharge.”

“If I came to the commander and said that you told me that you were gay, if that was the only thing going, my expectation would be that commander would not do anything.”⁵⁴

⁵⁴ *Policy Concerning Homosexuality in the Armed Forces: Hearings Before the Senate Comm. On Armed Services*, 103rd Cong. 2nd Sess. (1993) at 721 (testimony of then Secretary of Defense Les Aspin).

DON'T PURSUE

“Don't Pursue” Places Limits on Gay Investigations

“Don't Pursue” is intended to get commanders and investigators to back off and to respect service members' privacy. More than a dozen specific investigative limits comprise “Don't Pursue” (Exhibit 25). These limits establish a minimum threshold to start an inquiry and restrict the scope of an inquiry even where one is properly initiated. While the investigative limits would help, they are not being followed. Commanders and investigators continue to pry, search and dig in violation of “Don't Ask, Don't Tell, Don't Pursue, Don't Harass.” On February 1, 2000, the Pentagon ordered training on the policy's investigative limits. The jury is still out on whether the training will be effective. Early reviews of the training are mixed.

SLDN documented 470 “Don't Pursue” violations in the past year, compared to 350 the year before, a 34% increase. Almost half of the past year's “Don't Pursue” violations occurred in the Air Force. Air Force “Don't Pursue” violations nearly doubled, with 222 violations compared to 116 the year before. Army violations increased 16% in the past year, with 117 violations compared to 101 the year before. In the Navy, violations increased 8% to 92 violations, compared to 85 violations in the preceding year. The Marine Corps saw a 16% decrease, with 38 violations in the past year compared to 45 violations the year before.

The most common “Don't Pursue” violations are witch hunts and fishing expeditions. Witch hunts occur when commands or peers seek out the sexual orientation of a group of service members. While mass investigations of service members have waned in recent years under “Don't Ask, Don't Tell, Don't Pursue, Don't Harass,” they are not obsolete. This year, a witch hunt at the Defense Language Institute (DLI) at the Presidio of Monterey, California, described in detail below, ensnared at least fourteen airmen, mostly women.

Fishing expeditions are cases where an inquiry is expanded beyond the original allegation to seek out additional grounds for discharge and other potentially harmful information against the service member.⁵⁵ Sometimes fishing expeditions start out with false allegations and turn into attempts to find any damaging information against a service member.

Other times, commands attempt to dig up dirt on a service member who has already come out as gay. These investigations seek to punish gay service members by forcing them to provide information that could lead to criminal prosecution or other adverse legal action beyond being fired and losing their benefits.

The Air Force accounts for almost half of all fishing expedition violations. While there appears to be no pattern to fishing expeditions in the other services, Air Force inquiry officers

⁵⁵ DEP'T OF DEFENSE DIRECTIVE NO. 1332.14, encl. 4.A.3 (1994), *Enlisted Administrative Separations*; *Id.* NO. 1332.30 encl. 8.A.3 (1994), *Separation of Regular Commissioned Officers*: “Inquiries shall be limited to the factual circumstances directly relevant to the specific allegations.”

are being directed to ask wide-ranging questions into service members' private lives.⁵⁶ Air Force inquiry officers often prepare scripted questions expanding the scope of investigations by asking service members and co-workers impermissibly broad questions about the service members' private lives.

Another problem area concerns "prove it" cases, especially in the Navy. In these cases, service members make statements that they are gay, usually in response to anti-gay harassment. Currently, a statement alone is a sufficient basis for discharge. Rather than being kicked out, however, these service members are told they will not be discharged if they do not provide information about their sexual histories. This is an incorrect interpretation of the policy⁵⁷ and in many instances the delay this creates places service members in potential danger from anti-gay harassment. Those who respond truthfully also face the danger of further legal harm.⁵⁸ Ironically, as a result, the Navy and other Services attempted to retain a record number of gay personnel during the past year who admitted to being gay, but who refused to provide additional information. The problem is that, while allowing gay people to serve, the Navy and other Services took no steps to stop the anti-gay harassment that prompted the service members' statements in the first place.

Anatomy of a Witch Hunt: The Case of the Defense Language Institute

During the past year, fourteen service members stationed at the Defense Language Institute (DLI) at the Presidio of Monterey in California reported serious "Don't Ask, Don't Tell, Don't Pursue, Don't Harass" violations. Reported violations included a witch hunt, numerous fishing expeditions, asking and harassment. The primary culprits were Air Force enlisted leaders, inquiry officers and civilian language instructors. Following the example set by their leaders, Air Force students piled on by hounding their peers with anti-gay epithets, threats and questions. The result was a flourishing and potentially dangerous anti-gay climate.

The Witch Hunt Begins: Student Leaders Questioned About Their Sexual Orientation

In March and April 1999, Air Force Master Sergeant Rodney Hamlet and Senior Airman David Vigil launched a witch hunt to determine the sexual orientation of A-Flight female student leaders under their charge. By their own admission, the witch hunt was based on nothing more than rumors. The witch hunt has set off a chain of events consuming DLI for the past year and

⁵⁶ The Air Force has claimed it conducts wide-ranging inquiries only in cases involving recoupment of educational funds. However, the Air Force conducts wide-ranging inquiries in most of its cases. The Defense Department attempted to rein in the Air Force in an April 1998 report calling for an end to such tactics and misconduct. The Pentagon finally released new guidelines on February 1, 2000 requiring Service Secretary approval prior to initiating "substantial investigations." It is too early to tell whether the Air Force will finally heed the original letter and intent of "Don't Ask, Don't Tell, Don't Pursue, Don't Harass."

⁵⁷ DEP'T OF DEFENSE DIRECTIVE NO. 1332.14, encl. 3.H.1.a.; *Id.* NO. 1332.30 encl. 2.C.1. "Homosexual conduct is grounds for separation from the Military Services. Homosexual conduct includes . . . a statement by a member that demonstrates a propensity or intent to engage in homosexual acts . . ."

⁵⁸ First, the Uniform Code of Military Justice criminally punishes heterosexuals and gays for certain sexual conduct, such as oral sex. Second, some commanders downgrade a service member's discharge characterization and threaten benefits to which a service member is entitled by racking up the number of bases for possible discharge. These "prove it" cases are thus punitive in nature.

ruining the promising careers of some of the Air Force's best and brightest young enlisted members.

On March 26, 1999, Senior Airman Vigil called two female Airmen First Class, who will be called [X] and [Y] in this report, into his office. He reportedly read them their Article 31 rights and told them they were being charged with "conduct unbecoming," a criminal offense. Vigil asked [X], "do you and [Y] have a personal relationship? I am not saying it's homosexual. Did the relationship go sour and did you use your [student leader] position to have her removed from the flight?" Both Airmen First Class said "No," and [Y] was excused. Vigil then asked [X] for her "rope," a symbol worn by student leaders, and removed her from her leadership position (Exhibit 26).

Three days later, Master Sergeant Hamlet reportedly asked Airman First Class [X], "Are you aware of the 'family'?" She said, "No, sir. I can't help you." Hamlet reportedly told her there were allegations she had become "a little too friendly on her flight," and said, "Right now, you are not in trouble. I am just trying to get to the bottom of this."

The same week, Vigil and Hamlet questioned other student leaders about their fellow student leaders' sexual orientations. One of them was Airman First Class Deanna Grossi. Master Sergeant Hamlet reportedly questioned Grossi about a rumor concerning "the family" on her flight and asked if she knew about the "propensity" of her fellow student leaders. Grossi told Hamlet she did not understand. Hamlet replied, there are "certain kinds of people," who like the same kind of people, and asked Grossi if she knew of other airmen's "propensity to like the same kind of people." It was clear to Airman First Class Grossi that Master Sergeant Hamlet was asking about the sexual orientation of other A-Flight student leaders (Exhibit 27).

Master Sergeant Hamlet reportedly proceeded to directly question Airman First Class Grossi about Airman First Class [X]'s "relationship" with Airman First Class [Y]. Hamlet told Grossi he called her in because "nasty rumors were flying around DLI." Then, he said that her name was mentioned among the rumors and he asked her if she was involved in the rumors. Airman First Class Grossi told him, "No" (Exhibit 27).

Enlisted leaders apparently felt free to pursue and comment on the sexual orientation of the students. Airman First Class [X] for example, reports that a male student leader told her that Senior Airman Vigil asked him to keep an eye on a male student because Vigil did not want any "fags" in his Air Force. Another DLI student, while walking down Commander's Hallway, reports she overheard a Military Training Leader remark to another Military Training Leader, "You can tell the student leaders on dyke flight because of their short hair."

Master Sergeant Hamlets and Senior Airman Vigil's actions violated "Don't Pursue" in many ways:

- First, only a commander may authorize an inquiry regarding a service member's sexual orientation, not enlisted leaders. No commander authorized a "Don't Ask, Don't Tell, Don't

- Pursue, Don't Harass" inquiry against the student leaders or Airman First Class Grossi.⁵⁹
- Second, there was no credible evidence upon which to begin an inquiry.⁶⁰ Current regulations specifically forbid investigations based on rumor and innuendo.⁶¹
 - Third, the preferred method of handling allegations of consensual homosexual conduct is through administrative channels.⁶² Even though there were never any specific, credible allegations against Airmen First Class [X] and [Y], Vigil said they were suspected of having committed a criminal offense, and he tried to coerce them to reveal their sexual orientation under threat of criminal prosecution.
 - Fourth, even if there had been credible evidence and command authorization, Vigil and Hamlet expanded the scope of their inquiry by questioning other student leaders about their sexual orientation.⁶³ Hamlet and Vigil, for example, should never have questioned Airman First Class Grossi, let alone implicated her based on rumors and innuendo.

The fact these leaders asked and pursued with impunity was not lost on their students. While an anti-gay climate existed at DLI before the witch hunt, reports of anti-gay harassment and fears of investigation increased dramatically afterward.

Witch Hunt Leads to Anti-Gay Harassment

A few weeks after being targeted by Master Sergeant Hamlet and Senior Airman Vigil, Airman First Class Grossi reports that her classmates began questioning her sexual orientation. The anti-gay harassment began after one classmate reportedly referred to Airman First Class [X] as "queen dyke." Grossi told him the comment was inappropriate and the Airman replied, "Oh no, not you too" (Exhibit 27).

⁵⁹ DEP'T OF DEFENSE DIRECTIVE NO. 1332.14, encl. 4.A.1.; *Id.* NO. 1332.30 encl. 4.A.1. "Only the member's commander is authorized to initiate fact-finding inquiries involving homosexual conduct."

⁶⁰ DEP'T OF DEFENSE DIRECTIVE NO. 1332.14, encl. 4.A.1.; *Id.* NO. 1332.30 encl. 4.1. "A commander may initiate a fact-finding inquiry only when he or she has received *credible information* (emphasis added) that there is a basis for discharge."

⁶¹ DEP'T OF DEFENSE DIRECTIVE NO. 1332.14, encl. 4.C.; *Id.* NO. 1332.30 encl. 8.C. "A commander will initiate an inquiry only if he or she has credible information that a basis for discharge exists." Credible information does not exist when "[t]he inquiry would be based on rumor, suspicion, or capricious claims concerning a member's sexual orientation. . . ."

⁶² DEP'T OF DEFENSE INSTRUCTION NO. 5505.8 6.1 (1994), *Investigations of Sexual Misconduct by the Defense Criminal Investigative Organizations and Other DoD Law Enforcement Organizations*. "Allegations of adult private consensual sexual misconduct received by a DCIO or other DoD law enforcement organization shall be referred to the commander(s) of the Service member(s) concerned . . ."

⁶³ DEP'T OF DEFENSE DIRECTIVE NO. 1332.14, encl. 4 A.3. *Id.* NO. 1332.30 encl. 8 A.3. "Inquiries shall be limited to the factual circumstances directly relevant to the specific allegations."

From that day on, Grossi states her classmates harassed her. For example, when someone wanted to know how to say the word rainbow, a symbol of gay pride, in Serbian, a classmate said, "Oh Grossi should know." A classmate, Airman First Class Reyes, reportedly made repeated sexually explicit gestures and comments to her. While sitting in class, Reyes would hold his fingers to his nose as if he was smelling them until Airman First Class Grossi would notice. Then, Reyes would say, "let me smell your hand so I can see if you did the same thing I did last night." Many of these harassing comments were reportedly made in the full hearing of Grossi's civilian instructor, Mr. Abdolvic. Mr. Abdolvic never attempted to stop the harassment. He did, however, comment on her perceived sexual orientation. On one occasion for example, Grossi states, Mr. Abdolvic asked her if she had "fun . . . with her girlfriend. Oh, I mean boyfriend." Airman First Class Grossi reports she felt powerless to do anything about the anti-gay harassment without drawing more attention to the rumors about her sexual orientation (Exhibit 27).

Airman First Class Grossi was not alone in her experiences with anti-gay harassment and the fear of a career-ending investigation, as the following cases illustrate. DLI students from outside the flight knew about the witch hunt. Some of the students were friends of service members who were questioned. Others heard rumors about the pursuit of A-Flight student leaders. Master Sergeant Hamlet and Senior Airman Vigil set the tone for a hostile command climate in which rule-breaking, in an effort to rout out women and suspected gay men, was the order of the day.

Witch Hunt Forces Airmen to Come Out—Inquiry Officer Conducts Intrusive Investigation

In April 1999, Airman First Class Katrina Bandle, whose friends were questioned in the witch hunt, decided she could not silently endure anti-gay harassment and wait for someone to accuse her of being gay. Bandle feared her friendship with pursued student leaders would trigger an investigation or, at the very least, speculation that she might be gay. In May, Airman First Class Bandle wrote a letter to her command disclosing her sexual orientation. The letter described her fear of investigation and the constant anti-gay comments and jokes made in her class. These comments were reportedly made by her classmates and sometimes by the class leader, an officer, and her civilian language instructor (Exhibit 28).

Airman First Class Bandle's disclosure, however, did not protect her from embarrassing and personal questions that violated "Don't Ask" and "Don't Pursue." After handing in the letter, Bandle's superior, Sergeant Thrasher, reportedly asked her if she acted on her sexual orientation. She told him she could not answer the question. The Sergeant proceeded to read Bandle her Article 31 rights and questioned her again. Left with little choice, Airman First Class Bandle told him, "No."

The command appointed an inquiry officer, Captain Nicolle Schippers, who interrogated four DLI airmen about Bandle's personal life. Captain Schippers asked them when they found out Airman First Class Bandle was gay and if she had a girlfriend. All four witnesses testified about the service member's sexual orientation, her civilian girlfriend and the negative effect DLI's anti-gay climate was having on Airman First Class Bandle (Exhibit 29).

The inquiry officer overstepped the boundaries of “Don’t Pursue” by questioning Bandle’s friends about her sexual orientation and private life. Captain Schippers’ interrogation of friends was a blatant effort to dig up dirt on the Airman. These questions also potentially placed the witnesses and other airmen at risk of investigation into their personal lives. Additionally, her intrusive investigation violated their freedom of association, which is permitted under “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass.”⁶⁴

In May, another DLI student, Airman First Class Bill Johnson, came out in direct response to DLI’s anti-gay climate and his knowledge of the earlier witch hunt. In a letter to Master Sergeant Hamlet, he wrote, “[t]he only means by which I can avoid becoming the target of harassment or a witch hunt in the future is by [disclosing my sexual orientation] to you” (Exhibit 30).

Johnson, who had previously experienced an improper security clearance investigation at DLI, feared what might happen to him.⁶⁵ The command appointed the same inquiry officer, Captain Schippers, to investigate his case. Captain Schippers reportedly asked him intrusive and improper questions, including, “Did you have any [homosexual] relations before you came into the military,” and “Who are the airmen on post who know you are gay?” After Johnson refused to respond to the questions, Captain Schippers asked him questions about “former lovers” and repeatedly asked for telephone numbers of people who could verify his sexual orientation. The inquiry officer also reportedly interrogated Johnson’s DLI friends and asked them:

- “Do you know Amn Johnson to have had any sex while in the military?”
 - “Is Amn Johnson currently involved in any relationships?”
 - “Does Amn Johnson’s parents know he is gay?”
 - “Who else on post knows he is gay?”
- (Exhibit 31)

The inquiry officer reportedly hounded one friend about whether Johnson was seeing someone, until the friend finally caved in and gave a name. Captain Schippers should never have asked the Airman’s friends such wide-ranging questions about his personal life. She should never have asked for names of other people.

Captain Schippers’ questions show she either did not know “Don’t Pursue’s” investigative limits or she purposefully ignored them. The only appropriate issue to ascertain in a statement case is whether the service member made a statement of sexual orientation. Despite this, Captain Schippers pursued the intimate details of Bandle and Johnson’s lives. Captain Schippers took no steps to address the anti-gay harassment Bandle and Johnson reported. Nor did DLI and 9th Wing commanders, despite the fact that the witch hunt and anti-gay harassment were reported in the discharge packets they reviewed and signed.

⁶⁴ DEP’T OF DEFENSE DIRECTIVE NO. 1332.14, encl. 4.E.4.; *Id.* NO. 1332.30 encl. 8.E.4. Credible information does not exist when “[t]he only information known is an associational activity such as . . . associating with known homosexuals . . .”

⁶⁵ In 1998, while undergoing a security clearance check at Monterey, Johnson was asked personal questions regarding his sexual orientation, and whether he “ever had relations with gays or drag queens.”

*Mistaken Identity Forces Student to Come Out:
Inquiry Officer Pries into Airman's Private Life*

Airman First Class John Petrozino also faced rumors about his sexual orientation and false allegations about his conduct. On June 18, 1999, a DLI Airman reportedly approached Petrozino and claimed that another student, Airman First Class Antonio Milani, had said he saw Petrozino "making out with a guy" in the parking lot the night before. Petrozino explained to the Airman this was not true—a female friend with short hair, wearing a baseball cap, hugged and kissed him goodnight in her car (Exhibit 32).

Later, Petrozino reports overhearing Airman First Class Shell, his roommate and a senior squad leader, discussing Milani's allegation with other airmen. Petrozino, fearing others would believe the false rumor, asked his female friend to explain to the airmen that she was in the car with him. After she did so, Milani apologized. Shell, however, reportedly indicated he believed he had to report the incident, a belief that was mistaken (Exhibit 32).

A few weeks passed and it appeared the false allegation was forgotten. While Airman First Class Petrozino continued hearing the general anti-gay comments and jokes that permeated DLI, he was not singled out. Then, on July 7, for no apparent reason, Airman First Class Shell reportedly shouted in the barracks hallway, loud enough for everyone to hear, "We still have a faggot on flight." Fearing he could not escape the anti-gay climate and rumors about him, Petrozino informed Master Sergeant Hamlet of the harassment and that he is gay.

The command appointed an inquiry officer, Major Terry O'Brien, to investigate Petrozino's report. After concluding her investigation, Major O'Brien found:

The evidence also suggests that a hostile and intolerant environment existed in [Petrozino's] flight and the squadron. Both A1C Milani and A1C Shell admit to spreading rumors that the subject was gay, and making derogatory comments about homosexuals in general. It is clear that absent the subject's admission there would be insufficient credible evidence to support a finding that he has the propensity to engage in homosexual conduct. The fact that a hostile environment exists, provides the motive for his disclosure (Exhibit 33).

Despite the specific guidance of "Don't Pursue" to limit inquiries to the factual circumstances of the service member's statement, Major O'Brien asked Airman First Class Petrozino invasive personal questions that went well beyond the proper scope of the inquiry. Even though Major O'Brien and Master Sergeant Hamlet found Petrozino's statement credible, Major O'Brien nonetheless pursued details of his private life. Her questions included:

- How do you know you have a "homosexual orientation" and/or "propensity"?
- When did you realize you had a "homosexual orientation" and/or "propensity"?

- Have you told anyone else that you are homosexual? Who? What did you tell them? When? Why? What was their response? How can these people be contacted?
- Have you been dating anyone (opposite or same sex)? How frequently? How recently? How can these people be contacted?
- Have you told any family members? Whom? How can they be contacted?
- Who are your close friends and how can they be contacted? (Exhibit 34)

The violations in this case are numerous. That an inquiry officer would go to such great lengths to get information about a service member's personal life, after the service member disclosed his sexual orientation out of fear for his safety, is outrageous.

Students coming out in fear through the Spring and Summer reported violations of "Don't Ask," "Don't Pursue" and "Don't Harass." SLDN is not aware of any command attempts at the time to investigate or hold accountable those who asked, pursued and harassed. Despite the numerous reports of anti-gay harassment to the leaders of DLI's Air Force contingent, nothing changed. This is particularly disturbing in light of Major O'Brien's specific comments concerning DLI's "hostile and intolerant environment."

Not surprisingly, anti-gay harassment only got worse. By not acting to stop the harassment by leaders, instructors and students, top leaders sent the message that they condoned the abuse. DLI students, particularly women, reported extensive pursuit of gays and a rampant anti-gay climate in the Air Force contingent and classes following the Summer reports of harassment.

Unchecked Anti-Gay Harassment Leads Students to Pursue Peers' Sexual Orientation

During the summer, rumors about another female Airman First Class's perceived sexual orientation began spreading at DLI. The service member reports many airmen directly commented on her sexual orientation, including, "I heard you are a lesbian," and "Do you like girls or what?" (Exhibit 35).

Additionally, a friend reportedly told her that a group of male airmen were talking about her perceived sexual orientation and discussing other Air Force students they suspected were lesbians in one of the flight dayrooms. These questions and comments persisted through October 1999, when a new rumor that she had sex with a male student circulated around DLI. Numerous people then asked her if this new rumor was true or whether she was a lesbian. Her sexual orientation was reportedly discussed in all DLI Air Force flights (Exhibit 35).

The Airman First Class, aware of the earlier witch hunt, wrote her supervisor, Sergeant Schowl, that she feared that the command would investigate her sexual orientation based on the rumors flying around the base. Feeling she needed to be honest with her command, the Airman First Class disclosed her sexual orientation. She received an honorable discharge.

Anti-Gay Harassment Intensifies, Ensnaring More Airmen

Another student leader, Airman First Class [Z], heard anti-gay comments as soon as she arrived at DLI in February 1999. Whenever some DLI students' names were mentioned, including many of the female students discussed in this section, other students would tell this Airman First Class, "don't hang out with them because they're dykes" (Exhibit 36).

In the fall, Air Force students began hounding Airman First Class [Z] and a female friend, Airman Erin Hollenshead. Over the course of the next few months, at least twenty male DLI students reportedly asked the Airmen if they were sexually involved with each other and commented on their perceived sexual orientation, including by repeatedly calling them "lipstick lesbians." Airman First Class [Z] tried dating male students to halt the anti-gay harassment, but it only got worse. Rumors about [Z] and Hollenshead's alleged relationship spread to other flights (Exhibits 36 & 37).

The Airmen also report that classmates routinely made hostile anti-gay comments and threats including: "If I ever found out someone is a faggot, I would kill him because faggots do not belong in the military," "gay people shouldn't have joined in the first place. They don't deserve to serve our country," and calling other DLI students "fucking faggots."

Airman First Class [Z] and Airman Hollenshead eventually reported the anti-gay harassment to Colonel Smith, the Air Force commanding officer at DLI, after a male student made an offensive gesture, called them "pussy suckers" and asked them "why would you want that, when you can have this," referring to himself. While reporting the harassment, Airman Hollenshead said, "I cannot serve my country in good conscience knowing that my classmates don't want me here and could possibly physically harm me if they suspected or learned that I am in fact gay" (Exhibits 37).

Airman First Class [Z] stated:

There is absolutely no way that I can escape from the constant questions and anti-gay behavior of my fellow students and it will only continue when most of us go on to Goodfellow AFB for our advanced training I am coming forward and telling you this information now because I refuse to spend my entire military career being hounded by my fellow service members (Exhibit 36).

Both service members are awaiting discharge.

Instructor Harasses Gay Soldier

While the cases above all involve Air Force students, two Army soldiers at DLI also reported violations of "Don't Ask, Don't Tell, Don't Pursue, Don't Harass." One soldier reports that his civilian language instructor asked him if he is gay in front of his entire class, leading to laughter and comments about the soldier's perceived sexual orientation by his classmates. On other occasions, the instructor asked him when he was going to get a girlfriend and if he had a

girlfriend yet. A classmate also reports that the instructor makes and tolerates constant anti-gay comments in class.

Soldier Harassed at Monterey

Another soldier, Private Timothy Dilley, switched classes at DLI to avoid students who constantly brought up topics about homosexuals in class and how “they don’t belong in the military.” Private Dilley believes that anti-gay comments were sometimes made because of the rumors that he is gay and students wanted to see how he would react to the derogatory comments and jokes. Dilley told his teacher he wanted to switch classes because he did not know of any other way to handle the situation (Exhibit 38).

Private Dilley also reported anti-gay harassment out of class. On one occasion, another DLI student reportedly asked him “Can’t you move any faster, you faggot.” Dilley also states he found “I bet you can’t wait for Santa Clause to cum,” written on his door shortly before Christmas. Private Dilley disclosed his sexual orientation to his command because of the anti-gay harassment and climate at DLI. He is in the process of being discharged.

SLDN Requests Investigation into DLI Violations

In an effort to halt the witch hunt of DLI students, SLDN contacted: DLI’s Air Force Commanding Officer; the Staff Judge Advocate at Goodfellow Air Force, who is also the Staff Judge Advocate for DLI; and the Secretary of the Air Force’s office to raise concerns about the base. The Air Force has ordered an investigation into the witch hunt and anti-gay harassment. The investigation’s results were not known at the time of this report’s release. DLI’s commander, Colonel Patrick Smith, investigated the reported asking and anti-gay harassment of the last three female airmen who came out, but only after SLDN’s involvement in the cases. It is unknown if any of the service members who violated the policy have been held accountable.

The command investigation, however, does not help the service members above. Despite the prohibitions against asking, pursuing and harassing, DLI leaders, instructors and students felt free to engage in all three activities. Almost all of the DLI service members mentioned above have been, or are in the process of being, discharged.

More Fishing Expeditions

Pursued Officer Fights to Serve

An active duty officer, who must remain unnamed, was pursued based on unsubstantiated allegations that did not constitute credible information under current regulations.⁶⁶ Her superior,

⁶⁶ DEP’T OF DEFENSE DIRECTIVE NO. 1332.14, encl. 4 F.1.; *Id.* NO. 1332.30 encl. 8.F.1. “Credible information exists, for example, when a *reliable person* (emphasis added) states that he or she observed or heard a Service member engaging in homosexual acts, or saying that he or she is a homosexual or bisexual or is married to a member of the same sex.” DEP’T OF DEFENSE DIRECTIVE NO. 1332.14, encl. 4.E.3.; *Id.* NO 1332.30 encl. 8.E.3. Credible information does not exist when “[t]he inquiry would be based on rumor, suspicion, or capricious claims concerning a member’s sexual orientation. . . .”

a Major, accused the officer of telling her she was in a lesbian relationship. The Major further alleged she saw the officer and her supposed girlfriend receive a blessing at a chapel service and that the officer had disclosed her lesbian relationship to two previous superiors (Exhibit 39).

Based on the Major's unsubstantiated allegations, the officer's commander appointed an inquiry officer to investigate the alleged incidents. The inquiry officer questioned nine people. Instead of limiting his questions to the specific allegations, as required,⁶⁷ the inquiry officer asked broad questions that were well beyond the scope of the Major's allegations. These questions included:

- "Have you witnessed any act or statement by the identified person under investigation . . . that could indicate that this person was involved in homosexual conduct? If so, please describe the situation in which the act or statement took place."
- "Do you know other person(s) involved in homosexual conduct with the identified person under investigation?"
- "Do you know of anyone else who has witnessed any act or statement of homosexual conduct by the identified person under investigation, and/or knows other person(s) involved in homosexual conduct with this person under investigation?" (Exhibits 40).

The inquiry officer conducted a witch hunt contrary to "Don't Ask, Don't Tell, Don't Pursue, Don't Harass"⁶⁸ by asking for the names of other people. The inquiry officer also asked questions—digging for additional bases for administrative separation or criminal prosecution – expanding the scope of the inquiry in violation of current regulations.⁶⁹

The inquiry officer interviewed two people who were present at the chapel, neither of whom saw the service member receive the alleged blessing. The inquiry officer also interviewed a former superior. He and the others interviewed stated they did not know of any homosexual statements or conduct by the officer. Despite his wide-ranging inquiry, the only so-called "evidence" the inquiry officer could turn up was one witness who reported the officer possessed a compact disc "labeled or marked as having music containing homosexual or lesbian content" (Exhibit 41). In fact, the compact disc was produced to raise money for breast cancer research. Even had the compact disc contained gay content, this would not be a sufficient ground for investigation or discharge under "Don't Ask, Don't Tell, Don't Pursue, Don't Harass."⁷⁰

⁶⁷ DEP'T OF DEFENSE DIRECTIVE NO. 1332.14, encl. 4.A.3. (1994) Id. NO. 1332.30 encl. 8.A.3. "Inquiries shall be limited to the factual circumstances directly relevant to the specific allegations."

⁶⁸ *Policy Concerning Homosexuality in the Armed Forces: Hearings Before the Senate Comm. On Armed Services*, S. Hrg. 103-845, 103rd Cong., 2d Sess. (1993) at 709 (statement of General Colin Powell). "We will not witch hunt. We will not chase. We will not seek to learn orientation."

⁶⁹ DEP'T OF DEFENSE DIRECTIVE NO. 1332.14, encl. 4.A.3. (1994) Id. NO. 1332.30 encl. 8.A.3. "Inquiries shall be limited to the factual circumstances directly relevant to the specific allegations."

⁷⁰ DEP'T OF DEFENSE DIRECTIVE NO. 1332.14, encl. 4.E.4; *Id.* NO. 1332.30 encl. 8.E.4. "Credible information does not exist when [t]he only information known is an associational activity such as a going to a gay

Despite the inquiry officer's inability to substantiate any of the allegations, a Colonel in the officer's chain-of-command advised the inquiry officer to check the officer's "prior service records for any adverse administrative actions relating to homosexual conduct as part of this fact-finding investigation." There was, however, no derogatory information contained in the officer's file (Exhibit 42). The order once again impermissibly expanded the inquiry in violation of "Don't Pursue" because it was not related to the Major's allegations.

Additionally, the Colonel advised the inquiry officer to search the internet files on the officer's computer based on her possessing the alleged "lesbian" compact disc (Exhibit 43). The order again impermissibly expanded the inquiry in violation of "Don't Pursue" because it was not related to the specific allegations against the officer. The order was made even more absurd by its suggestion that a musical compact disc would in some way be connected to files or e-mail stored on the officer's computer. The order is simply further evidence that the officer's chain-of-command was on a fishing expedition. Once again, no "gay" information was found.

In the Report of Investigation (Exhibit 39), the inquiry officer conceded the Major's uncorroborated allegations were the only information against the officer. Yet, despite the lack of any corroborating evidence, he recommended the command begin administrative separation proceedings against her. The officer's military defense counsel, with SLDN's assistance, successfully fought the recommendation. The officer's higher headquarters ultimately reversed the command's decision, finding that sufficient evidence for an administrative separation did not exist (Exhibit 44). The officer remains on active duty, but fears that knowledge of the investigation could lead to suspicion and anti-gay harassment if coworkers learn of it.

Airman Coerced to "Prove" He Is Gay

After Airman First Class Jeremy Cruz informed his command he is gay, enlisted leaders at Holloman Air Force Base violated "Don't Pursue" by conducting an unauthorized inquiry and by asking him to "prove" he is gay. The first "Don't Pursue" violation occurred when the Airman's First Sergeant, Senior Master Sergeant Barbara L. Townsend, gathered three other noncommissioned officers and proceeded to interrogate Airman First Class Cruz in front of them. She asked Cruz about his private life, without command authorization.⁷¹

First Sergeant Townsend read Cruz his Article 31 rights for suspicion of violating the military's sodomy provision. Townsend then asked Cruz questions about his sex life, including, "Did you have sex with a male person," and "Did you have sex with a male before you came into the Air Force?" Even if the investigation were properly initiated, the First Sergeant's questions were not proper, because they were not limited to the factual circumstances in his statement. Instead, the First Sergeant tried to solicit names of sexual partners who might have been in the military. The inquiry should have been limited to little more than whether Cruz made the statement.

bar, possessing or reading homosexual publications, associating with known homosexuals. . . . Such activity, in and of itself, does not provide evidence of homosexual conduct."

⁷¹ DEP'T OF DEFENSE DIRECTIVE NO. 1332.14, encl. 4 A.1; *Id.* NO. 1332.30 encl. 4.A.1. "Only the member's commander is authorized to initiate fact-finding inquiries involving homosexual conduct."

The First Sergeant and the other three noncommissioned officers concluded that “Amn Cruz is very believable. . . . we also agreed that he admitted to having gay feelings and wanting to act on them.” According to “Don’t Pursue,” the inquiry should have stopped there, and Cruz should have been administratively separated. Since Airman First Class Cruz had not provided the answers she was looking for, however, Townsend questioned if he was just “confused,” instead of gay (Exhibit 45).

In the days following First Sergeant Townsend’s unauthorized interrogation, the command-appointed inquiry officer, Chief Master Sergeant Joyce Gobrecht, questioned eight people about Airman Cruz’s sexual conduct, outing him to some of his coworkers in the process. The inquiry officer’s questions included:

- “Have you ever heard him talk about desires to engage in homosexual acts . . . ?”
- “Have you ever witnessed any homosexual acts by him?”
- “Do you know anyone who has witnessed any homosexual acts by him?”
- “Do you know if he has a boyfriend?” and
- “If you’ve seen or heard of any homosexual acts, what were they, with whom, when, where, etc.” (Exhibit 46).

These questions violated “Don’t Pursue” by wrongfully focusing on whether Cruz had sex instead of whether he made a coming-out statement, and by soliciting allegations against others. As evidence of how widely the inquiry officer cast her net, one questioned service member stated that he had only “hung out with [Cruz] once.”

The questions, however, did not stop there. First Sergeant Townsend renewed Airman First Class Cruz’s interrogation. With no basis whatsoever, she again read him his Article 31 rights “for violating Article 125 (sodomy).” Townsend wrote in the interrogation summary that she asked Cruz:

- “how he knew he wanted that lifestyle if he’s never engaged in homosexual activity;”
- “how do you know you are gay if you’ve never had sex with a man;”
- “if he’d had sex with a man;” and
- “to tell me about it . . . the number of men or how many times.”

Airman First Class Cruz states he finally cracked under the repeated questioning and revealed intimate details of his private sexual conduct. Townsend reported, “I started to write down the information . . . an example was the first man, they engaged every weekend; the next man was about every three days, etc.” (Exhibit 47).

First Sergeant Townsend reportedly stopped writing and coerced a written statement from Airman First Class Cruz identifying all of his sexual partners. Townsend’s aggressive and intrusive investigation goes against common decency as well as the law.

The Air Force conducted this investigation improperly. Initially, there was no clear commander authorization. There was no basis to investigate Cruz for sodomy. There was no justification for questioning unit personnel concerning Cruz's sexual conduct. Finally, there was no basis for requiring Cruz to list the names of past sexual partners. This was a witch hunt. In a simple coming out case such as this, the Department of Defense has clearly stated that "little or no investigation" should be conducted.⁷²

Navy Outs Sailor While Conducting Fishing Expedition

A Navy meteorologist, Petty Officer Second Class Nicole Barbe, stationed in Kingsville, Texas, faced an intrusive investigation after coming out to her command due to anti-gay harassment and the stress of living in the closet (Exhibits 48). As in other cases discussed in "Don't Pursue," the command-appointed inquiry officer did not limit the scope of his investigation to whether Petty Officer Second Class Barbe made a statement concerning her sexual orientation and its credibility. Instead, the inquiry officer, Lieutenant Commander Milot, impermissibly expanded the investigation's scope by asking Petty Officer Second Class Barbe questions about her sexual conduct (Exhibit 49).

Lieutenant Commander Milot asked other sailors impermissible questions, including if they had ever observed or heard Barbe say she engaged in homosexual acts. Additionally, Milot reportedly outed Barbe to dozens of service members, at two bases, when he asked sailors who barely knew her if they knew she is gay. After the investigation, a number of service members reportedly told Barbe they had only become aware of her sexual orientation because they had been faxed documents referring to the Homosexual Conduct Policy and to Petty Officer Second Class Barbe by name.

Current regulations state that a service member's sexual orientation is "a personal and private matter," but the inquiry officer failed to respect this basic tenet. The inquiry officer also failed to follow the rule that "little or no investigation" should be conducted when a service member comes out as gay, lesbian or bisexual.

Remarkably, Lieutenant Commander Milot stated in his Report of Investigation, "Although now an openly homosexual individual . . . [h]er continued presence in the Navy is consistent with the Navy's interest in good order and discipline and morale" (Exhibit 49). Petty Officer Second Class Barbe's commander, Commander Daniel Soper, then sent her a letter stating her retention was in the best interest of the Navy. However, Commander Soper's letter further admonished, "I strongly recommend that you continue to keep your sexual orientation a personal and private matter." That was impossible. The inquiry officer had reportedly outed her and Barbe no longer had any control over whom within the Navy knew she is gay. Even if she had wanted to comply, she could not (Exhibit 50)

⁷² OFFICE OF THE UNDER SECRETARY OF DEFENSE (PERSONNEL AND READINESS), *Report to the Secretary of Defense, Review of the Effectiveness of the Application and enforcement of the Department's Policy on Homosexual Conduct in the Military*, Apr. 1998, at 11. "The decision whether to initiate an investigation when a service member acknowledges his or her homosexuality and does not contest separation has generally rested with the individual commander. We concluded that, in most of these cases, little or no investigation should be conducted."

One example illustrates how untenable this suggestion was. After Barbe was retained, Barbe's supervisor, Chief Petty Officer Robert Tyo, reportedly threatened her by saying he was "watching her" so she would not do anything in her personal life that would subject her to discipline. Then, during a work-related dinner, Chief Petty Officer Tyo reportedly questioned Petty Officer Second Class Barbe, in front of her peers and their spouses, about why she did not bring a date. Soper and Tyo placed Barbe in a double bind by refusing to discharge her for being gay, while goading her and threatening her with possible punishment if she made any "missteps."

Ultimately, the Navy discharged Barbe after SLDN intervened. To our knowledge, the people who violated "Don't Ask, Don't Tell, Don't Pursue, Don't Harass" were not held accountable for their actions.

SLDN welcomes what seems to be an increasingly public desire by commanders to retain openly gay service members. SLDN documented more than twenty cases in the past year where commanders moved to retain openly gay personnel, mostly in the Navy. It is not clear what lies behind command motives in these cases.⁷³

Additional "Don't Pursue" Incidents

- A Senior Airman, Jose de Leon, serving at Andrews Air Force Base, Maryland, reported that his supervisor threatened all of his subordinates with adverse action if they did not report all statements of sexual orientation to their chain-of-command. The service member informed his command that he is gay after rumors circulated around his unit and he was repeatedly harassed about his perceived sexual orientation. This harassment included one airman reportedly saying "this is how de Leon likes it, in his ass," while making a motion between his legs with a pole. During a basketball game, the same airman yelled at Airman de Leon, "If you ever touch me again, I'll kick your faggot ass" (Exhibit 51).
- After being harassed by other *USS Abraham Lincoln* crewmembers, Seaman Luis Sierra went on an Unauthorized Absence (UA) because he feared for his safety. When he returned, he reported the anti-gay harassment and informed his commander he is gay. The ship's attorney, Lieutenant Dow, told Sierra that his statement was not sufficient for discharge. In response, Sierra wrote a letter to Dow stating, "I was very shocked that you asked me to prove that I am gay considering all I have gone through. . . . I would prefer to not disclose the intimate details of my life, but I

⁷³ Some commanders may be concerned with retaining quality personnel as every service struggles to meet their retention goals. Some may be trying to find a way to assess personnel based on their merit, as it should be. Some may be signaling to superiors that sexual orientation has nothing to do with military suitability and that retaining good soldiers, sailors, airmen and marines who are gay is in the best interest of the military.

feel like you have left me no choice, but to disclose my most personal thoughts . . .” (Exhibit 52).

- A Marine Private, stationed at Parris Island, South Carolina, came out to his command in basic training. The inquiry officer called the Private’s parents and questioned them about his sexual orientation. The inquiry officer also ordered the marine to write down every instance in which he had engaged in homosexual conduct and to provide the names and telephone numbers of people with whom he engaged in homosexual conduct (Exhibit 20).
- A Senior Airman’s wife told her command that her husband is gay. Fearing an investigation, the Senior Airman decided to be honest with his command by disclosing he is gay. The Senior Airman’s command nevertheless appointed an inquiry officer who wrongfully expanded the scope of the investigation by asking the Senior Airman questions such as:
 - “Are you now or have you ever been dating anyone;”
 - “Do you belong to any homosexual organizations;”⁷⁴
 - “Do you have any close friends that can be contacted that have knowledge of this matter;”
 - “Do you subscribe or purchase any gay or lesbian magazines, video’s (sic) or other pornographic material;”⁷⁵
and
 - “Do you or have you ever participated in gay parades or demonstrations or supported any gay organization’s (sic)”⁷⁶
(Exhibit 53).

The inquiry officer also questioned ten people regarding the Airman’s sexual orientation and private life.

“Don’t Pursue” Conclusion

In the past six years, commanders have pursued service members based on any information, however obtained, in direct violation of the investigative limits under “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass.” Commanders have pursued information that is defined as not credible, including anonymous allegations, false charges, rumor and innuendo. Commanders and inquiry officers have expanded inquiries, looking for information when their initial leads have run dry or proven untrue so that they could justify their inquiries. Commanders and inquiry officers have pursued other service members uncovered in their investigations. The bottom line

⁷⁴ DEP’T OF DEFENSE DIRECTIVE NO. 1332.14, encl. 4.E.4; *Id.* NO. 1332.30 encl. 4.E.4. Credible information does not exist when “The only information known is an associational activity such as going to a gay bar, possessing or reading homosexual publications, associating with known homosexuals, or marching in a gay rights rally in civilian clothes.”

⁷⁵ *Id.*

⁷⁶ *Id.*

is that commanders still work hard to put service members onto the radar screen, contrary to the policy's letter and intent that sexual orientation is a "personal and private" matter.

There are three reasons why "Don't Pursue" violations continue to increase: lack of guidance, accountability, and recourse. First, until this year, the Pentagon refused to distribute guidance on the policy's investigative limits or intent to respect privacy, despite repeated SLDN requests to get this information to the field. In August 1999, Secretary Cohen finally instructed the services to prepare training on the policy's investigative limits for all service members.

The Army's training materials include information regarding the policy's investigative limits, including what is and is not credible information and the grounds for a fact-finding inquiry. The Marine Corps training focuses on how to discharge service members. The Air Force has not made its training public, but should do so. Until all service training programs include the limits to investigations, and the intent of the policy to back off, it is likely that "Don't Pursue" violations will continue to increase.

Second, military leaders need to hold accountable those who ask, pursue and harass. Service members need to know what the consequences are for violating "Don't Ask, Don't Tell, Don't Pursue, Don't Harass," including actions from letters of counseling to court-martial charges, depending on the severity of the violation.

Third, service members who are improperly targeted need realistic, clearly identified recourse. Military attorneys, for example, should be permitted to represent service members before an inquiry is started and show why an inquiry is not appropriate.

In addition, commanders should state in writing, at the outset of an inquiry, the credible information on which the inquiry is based.

Finally, SLDN would welcome guidance from the Department of Defense or the services regarding the recent trend permitting known lesbian, gay and bisexual personnel to serve, and what steps they will take to ensure service members' safety and the viability of their careers in these cases.

LCR 04341

DON'T HARASS

*What has been alleged is that there is a lot of harassment of homosexual service members within the military. We have always said that every time we have clear evidence of harassment, we will investigate that. . . . We don't believe that there has been escalating harassment of gays in the military, and I don't believe that the evidence shows that. . . . [I]t's not an issue that generally comes up, that this is a problem for commanders.*⁷⁷

—Kenneth Bacon, Defense Department Spokesman
December 9, 1999

Butt pirate. Faggots. Queers. Dyke ass bitch. Bunch of flammers. Fucking faggot. Backside ranger. Die Faggot. Twisted freaks. Rump ranger. Lezzies. Pole smoker. Goddamn freaks.

—Typical anti-gay comments reported
by service members to SLDN

“Don't Harass” Violations Soar

“Don't Harass” states, “the Armed Forces do not tolerate harassment or violence against any service member for any reason.”⁷⁸ Despite this clear standard, SLDN documented 968 reports of anti-gay harassment this year, up 142% from 400 last year. Reports of anti-gay harassment, including death threats, assaults and verbal gay-bashing, more than doubled for the second consecutive year.

Despite six years of SLDN warnings that a tragedy like the 1992 murder of gay sailor Allen Schindler was likely to recur if service leaders did not take steps to stop anti-gay harassment,⁷⁹ military leaders utterly failed to begin to take steps to address this serious problem until after Private First Class Barry Winchell was murdered last summer.

In 1997, the Office of the Under Secretary of Defense issued the Dorn memorandum instructing commanders to investigate anti-gay threats and lesbian baiting, not service members who report it.⁸⁰ SLDN then documented that the services never sent the guidance to the field. In

⁷⁷ Defense Department Regular News Briefing Speaker: Kenneth H. Bacon, Defense Department Spokesman, trans. by Federal Document Clearing House, Dec. 9, 1999.

⁷⁸ *Applicant Briefing item on Separation Policy*, addendum to DEP'T OF DEFENSE DIRECTIVE NO. 1304.26, (1993), *Qualification Standards for Enlistment, Appointment, and Induction*.

⁷⁹ C. Dixon Osburn and Michelle M. Benecke, *Conduct Unbecoming: The First Year Under “Don't Ask, Don't Tell, Don't Pursue,”* Feb. 1995, at 27: “It is reasonably foreseeable that if the Department of Defense does not take corrective actions now, deaths of actual and perceived homosexual service members, like slain sailor Allen Schindler, will occur.”

⁸⁰ Under Secretary of Defense Edwin Dorn, *Guidelines for Investigating Threats Against Service Members Based on Alleged Homosexuality*, Mar. 24, 1997.

April 1998, the Pentagon conceded the services had not distributed the Dorn memorandum. The Pentagon not only ordered the Dorn memorandum's reissuance, but also that the memo be clarified to expressly include anti-gay harassment, not just threats.⁸¹ Months passed without the memo being sent to the field, despite repeated requests by SLDN. Only after Private First Class Barry Winchell's murder did the Pentagon finally distribute the memo.

This year, reports of anti-gay harassment, from death threats to verbal gay-bashing, came from nearly every major base and port. Service members report being harassed by officers and enlisted personnel. The anti-gay harassment often begins in basic training and continues throughout a service member's career. Today, anti-gay slurs, comments, and epithets are as much a part of the military culture as the uniform.

Overall, the Navy is the worst violator of "Don't Harass," with 330 incidents of anti-gay harassment during the past year, a 108% increase over the 158 violations reported the year before. The Army had the second highest number of harassment violations with 276, a 126% increase over the 122 violations found during the previous year. The Air Force had 217 incidents, an alarming 302% increase from last year's 54 violations. There were 134 Marine Corps violations, a 113% increase over last year's figure of 63.

Even after Secretary Cohen stated in August 1999 that he would not tolerate anti-gay harassment, SLDN documented 495 reports of anti-gay harassment, more than half the 968 total incidents of "Don't Harass" violations during the past year. Service members who contact SLDN endure the same daily anti-gay harassment that Private First Class Barry Winchell faced and they are terrified they may be the next service member who is attacked.

This section examines in depth the anti-gay climate at Fort Campbell, Kentucky that contributed to the murder of Private First Class Barry Winchell. The "Don't Harass" section then turns to additional examples of anti-gay harassment endured by SLDN clients from death threats to verbal gay-bashing. The section closes with an examination of lesbian baiting as "Don't Ask, Don't Tell, Don't Pursue, Don't Harass" continues to disproportionately impact women and derail their careers.

Anatomy of a Murder: Pervasive Anti-Gay Climate at Fort Campbell, Kentucky

The Murder of Private First Class Barry Winchell

During the early morning of July 5, 1999, just hours after our nation celebrated the anniversary of its independence, Private Calvin Glover took a baseball bat offered by Specialist Justin Fisher, beat Private First Class Barry Winchell to death, shattering his skull like an

⁸¹ OFFICE OF THE UNDER SECRETARY OF DEFENSE (PERSONNEL AND READINESS) Report to the Secretary of Defense, Office of the Undersecretary of Defense Personnel and Readiness, *Review of the Effectiveness of the Application and Enforcement of the Department's Policy on Homosexual Conduct in the Military*, Apr. 1998, at 14. ". . . in reissuing the memorandum providing guidelines for investigating threats against service members based on homosexuality, the Department should include language to make clear that harassment of service members based on their alleged or presumed sexual orientation is unacceptable and that service members who engage in such harassment will be held accountable."

eggshell while he slept in his barracks. Fifteen to twenty minutes transpired before Glover returned the baseball bat to Fisher, who then washed Winchell's blood off the bat.

The Army initially attempted to downplay the murder, calling Winchell's death the result of a "physical altercation in a post barracks," as though it was the result of a mutual fight (Exhibit 54). In response to a reporter's question, the Army also claimed there was no evidence that the murder was an anti-gay hate crime, without having investigated the possibility. As late as August, 1999, the Fort Campbell Criminal Investigation Division flat out denied to SLDN finding any evidence of a hate crime. SLDN conducted its own preliminary investigation and, contrary to the Army's initial position, found every reason to be concerned this was an anti-gay hate crime.

Five months later, in December 1999, the Army convicted Private Glover of premeditated murder and sentenced him to life in prison with the possibility of parole. Army prosecutors argued that Glover's primary motive was a predisposed hatred of gays. One month later, in January 2000, the Army convicted Specialist Justin Fisher for obstructing the criminal investigation into the murder, lying to investigators, and providing alcohol to a minor. For reasons that remain unclear, Major General Robert T. Clark, Commanding General, 101st Airborne Division (Air Assault) at Fort Campbell, accepted a lenient plea bargain with Fisher, reportedly over the objections of Winchell's family. The plea agreement dropped the original charges of principal to premeditated murder and accessory after the fact. If Fisher had been found guilty of those charges, he could have been sentenced to the maximum of life in prison. Instead, pursuant to the plea bargain, Specialist Fisher was sentenced to twelve and one-half years in prison, with possibility of parole in four years.

The courts-martial⁸² of Private Glover and Specialist Fisher provide a window into the virulent anti-gay climate at Fort Campbell that set the stage for this terrible tragedy.

Soldier after soldier testified during the preliminary hearings⁸³ that Private First Class Winchell had faced daily anti-gay harassment from his peers and supervisors for four months prior to his murder. Soldiers testified it was common to use words such as "fag," "faggot" and "queer." They also testified that Winchell became the target of daily, direct anti-gay harassment after Fisher started rumors that Winchell had gone to a gay bar in Nashville, Tennessee. Winchell tried to deny resulting questions about his sexual orientation at every turn, but the taunting continued unabated. At the criminal proceedings, soldiers testified that:

- Staff Sergeants Kleifgen and Dubielak, Private First Class Winchell's supervisors, asked Winchell directly if he were gay;

⁸² A court-martial is a military criminal proceeding that is similar to a civilian criminal trial. Both the military court-martial and civilian criminal trial use similar rules of evidence and in each forum an accused may choose a trial by jury or a trial by judge alone.

⁸³ An Article 32 hearing, which takes place before a court-martial, is somewhat similar to a civilian grand jury proceeding. However, in a military Article 32 hearing, the defense counsel may present evidence to reduce or dismiss the charges against his/her client.

- Staff Sergeant Kleifgen told his platoon, referring to Winchell, “I have a soldier I could get out of the Army if I wanted to. I have a soldier that is gay;”
- First Sergeant Secrist said, referring to Private First Class Winchell, “I’m gonna get that little faggot,” or words to that effect;
- Specialist Fisher allegedly told Private First Class Winchell, “I will make you my bitch;”
- Private Glover told Private Kenneth Buckler, “the one thing I can’t stand is faggots or niggers;” and
- Private Johanson allegedly asked Private Winchell, “Do you take it in the ass or mouth?”
- Specialist Fisher repeatedly taunted Private Glover about having “his ass kicked by a faggot” when Private First Class Winchell bested Private Glover in an altercation provoked by Private Glover on July 3, 1999.

Multiply the general anti-gay comments that permeate Fort Campbell and the comments directed specifically to Winchell, only a few of which are above, by 120 days and one begins to get a sense of the enormous strain placed on Private First Class Winchell at Fort Campbell. Two friends, Specialist Philip Ruiz and his wife, Melanie, testified that Winchell was profoundly troubled by the rumors and was concerned he would be kicked out of the Army he loved as a result of them. The Ruizes further testified that Private First Class Winchell was particularly concerned about possible violence by Specialist Fisher. Soldiers testified Specialist Fisher had previously assaulted Private Winchell with a metal dust pan, opening a cut that required stitches to Winchell’s face. And the Ruizes testified Specialist Fisher had threatened to kill Winchell one night when they returned from a night out in Nashville.

Staff Sergeants Kleifgen and Dubielak, while not blameless for asking, pursuing and harassing Winchell in direct violation of “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass,” recognized that what was happening to Winchell was wrong. When First Sergeant Secrist, the top enlisted leader in the unit, began to call Winchell a “faggot” and single him out for punishment, Kleifgen and Dubielak took steps to address the First Sergeant’s misconduct. They reported the First Sergeant to their commander, Captain Rouse, and subsequently to the base Inspector General. During the criminal proceedings, Staff Sergeant Kleifgen testified that neither Captain Rouse, nor the Inspector General, took action against First Sergeant Secrist.

On July 3, 1999, soldiers including Private First Class Winchell, Private Glover and Specialist Fisher, were drinking outside their barracks. According to soldiers’ testimony, Glover picked a fight with Winchell, which Winchell handily won. As the fight ended, Glover threatened Winchell, saying, “It’s not cool. I could kill you.”

Soldiers testified that Specialist Fisher taunted Glover ceaselessly on July 4, 1999 about having had “his ass kicked by a faggot.” Fisher himself testified that as the July 4 party ended, he invited Glover up to his and Winchell’s room for more alcohol. He played the compact disc from *Psycho* and taunted Glover further about being bested by Winchell. Fisher stated at his own sentencing hearing that he suggested to Glover that he do something about it. Glover took Fisher’s baseball bat, walked outside the room, and bashed Winchell to death.

One of the many questions that arises out of Winchell’s murder is who is or are responsible for the anti-gay harassment and failed implementation of “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass” that set the stage for Winchell’s murder. SLDN is concerned that if the Army holds anyone else accountable, it will scapegoat lower ranking noncommissioned officers, rather than placing blame at the top with Major General Clark, where it belongs. The following cases illustrate how anti-gay harassment was not isolated in Winchell’s unit, but continues to permeate the entire culture at Fort Campbell. The command climate is ultimately set by the top—Major General Clark.

“Faggot, Faggot, Down the Street. Shot Him, Shot Him, Till He Retreats”

Two months after Private First Class Winchell’s murder, Private Javier “Cortland” Torres feared he might be next in line to be killed. A heterosexual soldier, former Specialist Richard Adkins, warned Torres that he might be in danger after he overheard two members of Torres’ unit speculating about Torres’ sexual orientation. While one soldier supported Torres, the other soldier said “that’s fucked up.” Adkins told Torres that the tone of the conversation made him fear for Torres’ safety.

Private Torres reports that rumors about his sexual orientation became more prevalent after he expressed concern about Private First Class Winchell’s murder, upon learning of the crime. Torres did not know Winchell and did not serve in the same platoon, but was horrified to learn that one soldier had killed another soldier. In response to his expression of concern, soldiers derisively dismissed the murder, saying, “So what if he (Winchell) was killed. He was gay.” And “Who cares? He was just a fag.” The soldiers then turned on Private Torres and asked him if he were gay too (Exhibit 55).

Winchell’s murder and the increasing speculation about Torres’ sexual orientation terrified Torres. This fear was exacerbated by Torres’ observations of anti-gay harassment by his enlisted leaders.

Shortly after Winchell’s murder, Staff Sergeant Matelstreet led Private Torres’ unit on a run, singing the following cadence: “Faggot, faggot, down the street. Shot him, shot him, till he retreats” (Exhibit 55). The chant advocated violence against gays in the wake of the anti-gay hate crime murder of one of Fort Campbell’s own soldiers. Torres, for fear that his noncompliance would reveal that he is gay, felt forced to sing the chant. No one objected to the chant.

On several occasions between May and September 1999, Torres reportedly heard First Sergeant Teetly refer to soldiers as “getting porked up the ass” if they could not adequately

perform assigned tasks. Everyone in the unit understood this to be a disparaging remark about gay people. If the First Sergeant had made similarly disparaging remarks based on race, for example, or religion, he would no longer be serving in the United States Army (Exhibit 55).

At the end of August 1999, Sergeant Barry briefed Torres' unit on "Don't Ask, Don't Tell, Don't Pursue, Don't Harass." The class was intended to remind soldiers about the policy's investigative limits and prohibitions on anti-gay harassment. Torres reports that Sergeant Barry called the class a "fag briefing" and referred to gay soldiers as "fags." Sergeant Barry's comments again sent the unmistakable message to the soldiers that they did not really have to observe "Don't Ask, Don't Tell, Don't Pursue, Don't Harass" (Exhibit 55).

Private Torres did not know what to do. He feared that remaining silent would only fuel the speculation about his being gay and place him in harm's way. He could not report the anti-gay harassment to his leaders because they were the ones engaging in it. He was reluctant to come out to his command, for fear that they would mishandle the information and he could be murdered by bigoted soldiers. Ultimately, Private Torres concluded he had to come out and leave, despite his strong desire to serve, as his only way to protect his safety. With SLDN's assistance, Private Torres reported in detail the anti-gay harassment he was facing, and found a military defense attorney who expedited Private Torres' discharge.

The command at Fort Campbell took no steps on their own initiative to investigate or hold people accountable for the anti-gay harassment Torres witnessed and experienced. Only after SLDN and Congressional members raised this case to the highest level at the Pentagon was any investigation started. The results of that investigation have not yet been made available, although recent unofficial reports indicate that some steps may have been taken against Staff Sergeant Matelstreet.

"You Are a Faggot . . . and I Will Beat You with a Baseball Bat"

After Private First Class Winchell's murder, Specialist Michael McCoy observed increased anti-gay epithets, comments and graffiti at Fort Campbell. The increased anti-gay harassment indicates a lack of leadership in stopping anti-gay harassment even after Winchell's murder. In some cases, Specialist McCoy even observed soldiers mocking Winchell's murder. During one training exercise, for example, Specialist McCoy heard an infantry soldier state that if anyone answered a question wrong, "You are a faggot." Another soldier replied with "That's right, and I will beat you with a baseball bat" (Exhibit 56). These statements were made in the presence of noncommissioned officers, none of whom spoke up or intervened.

On other occasions, Specialist McCoy observed graffiti in public areas on post. One drawing on the wall of the Family Support Center restroom portrayed a two to three foot long baseball bat with the words "FAG WHACKER" prominently inscribed in the middle of the bat (Exhibit 57). This was not a small doodle, but a large and purposeful drawing mocking Winchell's murder and indicating the degree of anti-gay sentiment allowed to flourish at the base. At a post recreation center, graffiti appeared stating, "All Fagets [sic] in the Army will be killed" (Exhibit 58). Both the Family Support center and the post recreation center are heavily

used common areas at Fort Campbell in which officers and enlisted leaders could not have missed seeing the graffiti.

Specialist McCoy decided to come out and be discharged out of fear for his safety after rumors began circulating about his sexual orientation. While McCoy reports he had a good command that acted promptly in addressing the rumors, he feared that his leaders could not protect him twenty four hours a day, seven days a week. Specialist McCoy did not fear the colleagues in his unit, but soldiers outside of his unit who more freely engaged in anti-gay harassment (Exhibit 59). Because his job required him to train and work with soldiers from other units, like those who mocked Private First Class Winchell's murder, McCoy concluded he had no choice to protect his safety but to come out and be discharged.

Specialist McCoy was a good friend of Private First Class Winchell's and was devastated by his death. Specialist McCoy could not fathom the disrespect other soldiers showed by mocking Winchell's death and the failure of leaders to correct it on the spot.

Gays "Don't Deserve . . . Same Rights"

A third soldier arrived at Fort Campbell shortly after Winchell's murder and reports he was shocked to find a command climate of intolerance and indifference, characterized by constant anti-gay epithets and jokes. The soldier reports that a Lieutenant in his battalion told soldiers in the unit day room that gays "give nothing to society so they don't deserve the same rights that heterosexual people have." No soldier objected.

The soldier was forced to come out after a Sergeant searched through files on the soldier's personal computer⁸⁴ and discovered some gay-related materials. While the Sergeant did not report him to the command, the Sergeant teased him about being gay and told others about the soldier. Not wanting to become the victim of an assault or other anti-gay harassment, the soldier believed he had no other option but to come out to his command and be discharged.

Complete Failure of Leadership at Fort Campbell

In the wake of Private First Class Winchell's murder, gay discharges at Fort Campbell have nearly tripled, from 7 to 20. Without basis, Major General Clark has blamed the increase in gay discharges on gays "seeking an easy way out of the Army."⁸⁵ Major General Clark's comment suggests a total disregard for the anti-gay harassment reported by his soldiers.

The preliminary hearings in the Winchell murder case shed light on further command indifference for the well-being of soldiers at Fort Campbell, including:

- pervasive drinking by underage soldiers in the barracks;
- lack of adequate supervision in the barracks;
- violence in the barracks;

⁸⁴ See further discussion of case in the "Don't Ask" section of this report.

⁸⁵ Elizabeth Becker and Katharine Q. Steelye, *Policy on Gays Part of the Drill at Army Base*, N. Y. Times, Feb. 14, 2000, at A1.

- lack of 911 access from individual barracks room phones; and
- lack of training on “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass.”

Major General Clark has never once, to SLDN’s knowledge or the knowledge of the nearly 20 soldiers from Fort Campbell SLDN has assisted, publicly stated anti-gay harassment is wrong. Major General Clark alluded to anti-gay harassment for the first time months after Winchell’s murder and apparently in response to the Department of the Army and the high level of media interest in the Winchell case. In a memorandum titled “Respect for Others,” Major General Clark stated: “Respect for others is an Army Value and a cornerstone of discipline and *esprit de corps*. All soldiers will be treated with dignity and respect.” Clark’s failure to address anti-gay harassment directly, given the magnitude of information about anti-gay harassment that was then on the record, is inexplicable.

More recently, Major General Clark placed off-limits a gay-friendly bar in Nashville,⁸⁶ making it a criminal offense⁸⁷ to go to that bar. Under “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass,” soldiers may go to gay bars without fear of reprisal. Major General Clark states he made the move to protect soldiers from possible drug use or violence, but offered no evidence to back up his claim. SLDN has requested to know the basis of his claim. Without supporting information, this claim raises the question of whether his order was motivated by anti-gay animus.

Major General Clark also recently refused to permit publication of an ad in the base paper, *The Fort Campbell Courier*, alerting soldiers to how they can anonymously report anti-gay harassment to the Army Inspector General. On his behalf, the Fort Campbell Public Affairs Office stated, “We do not believe that running this advertisement is in the best interest of the command and its soldiers (Exhibit 60).” Soldiers are terrified to meet with the Inspector General review team for fear of being outed, harassed and discharged. Their fears are well-founded. The officer in charge of the Inspector General review team stated he believes he must turn in any service members found to be gay during the course of investigating anti-gay harassment. Given that the purpose of the ad was to inform soldiers of where they could safely turn to address harassment, one would think this would be a goal shared by the chain-of-command.

Major General Clark’s actions from start to finish underscore his failed leadership in addressing anti-gay harassment at Fort Campbell. The Army should take appropriate action to send the unmistakable message that it will hold accountable those who fail to address anti-gay harassment, and who permit a hostile command climate to flourish.

⁸⁶ *Id.*

⁸⁷ Violation of direct orders may result in criminal charges under the Uniform Code of Military Justice.

Anti-Gay Harassment Pervasive: From Officers and Enlisted

Marine Lieutenant Colonel Mocks Private First Class Winchell's Murder and Pentagon Order Against Anti-Gay Harassment

In October 1999, Marine Lieutenant Colonel Edward Melton informed his subordinates and his boss at Twenty-Nine Palms, California of his opinion of gay people in an e-mail. The e-mail related to the need to properly apply the "Homosexual Conduct Policy" and to stop anti-gay harassment. In his e-mail, Lieutenant Colonel Melton wrote:

Due to the "hate crime" death of a homo in the Army, we now have to take extra steps to ensure the safety of the queer who has 'told' (not kept his part of the DOD "don't ask, don't tell" policy). Commanders now bear the responsibility if someone decides to assault the young backside ranger. Be discreet and careful in your dealings with these characters. And remember, little ears are everywhere (Exhibit 61).

Lieutenant Colonel Melton violated the guidance against anti-gay harassment on its face. He also communicated to his subordinates that they did not need to take it seriously. He callously mocked Private First Class Winchell's murder.

Dismayed by the complete disregard for their son's murder, Private First Class Winchell's parents wrote to the Commandant of the Marine Corps, General J. L. Jones, and the base commander, Major General Clifford Stanley, seeking accountability. In their December 22, 1999, letter, Pat and Wally Kutteles wrote:

We can't put into words how appalled and upset we were when we read the text of an e-mail from a Marine Corps officer, Lt. Col. Edward Melton, mocking the murder of our son . . . Lt. Col. Melton's e-mail [also] shows a lack of concern for the men and women who serve under him and may be in need of his guidance, leadership or protection. We request that Lt. Col. Melton is held accountable for his actions and that he is removed from his position (Exhibit 62).

At this time, the Kutteles' have not received a response from General Jones or Major General Stanley. In the meantime, the e-mail has been widely published.⁸⁸ On January 26, 1999, the *San Diego Union-Tribune* reported that a combat center spokesman said, "Administrative action has been taken against Col. Melton, and he has been transferred." SLDN has been unable to verify from the Marine Corps whether, in fact, Lieutenant Colonel Melton was disciplined and, if so, exactly what actions were taken.

⁸⁸ Elizabeth Becker, *Military Orders a Broad Survey of Gay Abuse*, N. Y. Times, Dec. 14, 1999, and *Marine Officer Investigated for Allegedly Slurring Gays in E-mail*, CNN Headline News, Dec. 16, 1999.

"We Should Kill Them All"

Navy ROTC Midshipman Renee Farster reports she faced repeated anti-gay harassment at the University of Pennsylvania by ROTC instructors, other midshipmen and active duty Navy enlisted members and officers. One day, Gunnery Sergeant Sauer reportedly asked Midshipman Farster about a bracelet she was wearing. When she informed the Gunnery Sergeant that it was an AIDS awareness bracelet, he stated, "they deserve it. It's a fag disease. It's a way to control them" (Exhibit 63). Following the Gunnery Sergeant's example, Midshipman Farster's peers also made constant anti-gay comments including, "We should kill them all," and "They (homosexuals) disgust me." Other midshipmen often referred to gay men as "cocksuckers" and "fudgepackers."

Midshipman Farster eventually became a target for their attacks. In preparation for a Fall semester 1998 briefing on "Don't Ask, Don't Tell, Don't Pursue, Don't Harass," another midshipman e-mailed Midshipman Farster stating, "Hey, Renee, as you know we have to talk about faggots in drill tomorrow, so we'd like you to help us. We know you know a lot about stuff like this." During the unit briefing, many of Midshipman Farster's fellow midshipmen whispered comments about "goddamn freaks" and "lezzies." When one of the midshipman briefers asked what an officer should do if a fellow service member "came out" to him, Midshipman Farster reports hearing one midshipman say "kill him." Many midshipmen laughed approvingly at this comment.

Midshipman Farster hoped things would be different in the fleet, but they were not. During her summer training cruise onboard the *USS Yorktown*, she witnessed frequent anti-gay comments. Midshipman Farster was directly asked by the ship's officers, those responsible for oversight of the midshipmen trainees, what her views were of "four year lesbians." She states she was also asked, "what do you think of threesomes?" Midshipman Farster reports these officers stated, "[we] don't care too much about gay girls. They're hot, but guys, [we'd] like to kill them."

During the following school year, Midshipman Farster was the target of heightened anti-gay harassment. On one occasion in the Spring of 1999, the midshipmen were required to give impromptu speeches on a topic selected by other midshipmen. The first topic given to Midshipman Farster was "lesbians." Fortunately, Farster reports, another midshipman spoke up stating, "No. We're not going there."

Believing it was the only way she could end the anti-gay harassment and be true to the Navy Core Values of honesty and integrity, Midshipman Farster ultimately reported the harassment and informed her command that she is a lesbian. Midshipman Farster's command commended her courage and honesty, but nevertheless disenrolled her from the Navy ROTC program (Exhibit 64). To SLDN's knowledge, no ROTC instructor, midshipman, active duty Navy Officer or sailor has been held accountable for the anti-gay harassment Midshipman Farster reported.

*“I’m Not the One You Want to Tell That You Are Gay;
I Will Discharge You from the Navy and Send You Home in a Box”*

Seaman Apprentice Jeremy Manders reportedly experienced on-going anti-gay harassment onboard the aircraft carrier *USS Carl Vinson*. On January 28, 2000, Seaman Apprentice Manders wrote to the ship’s commander, Captain Bruce Clinan, that he felt “that [his] life [was] in danger.” (Exhibit 65). In his letter, Manders described the anti-gay climate on the ship, as well as threats directed at him by his supervisor Chief Petty Officer Smith. On one occasion, for example, Chief Petty Officer Smith reportedly asked Seaman Apprentice Manders if it were true that he was gay. Manders had little choice but to say, “No.” Chief Petty Officer Smith reportedly responded, “I am not the one you want to tell that you are gay, I will discharge you from the Navy and send you home in a box.” On another occasion, Seaman Apprentice Manders reports overhearing Chief Petty Officer Smith state in a discussion with other enlisted leaders, “I hate faggots. They have no right to be in the Navy.” (Exhibit 65).

Seaman Apprentice Manders also heard anti-gay comments by his peers. A sailor once stated he hated the San Francisco 49ers football team because “the city is filled with faggots and I wish that the city would burn to the ground.” Junior sailors, encouraged by Smith, told anti-gay jokes. Manders feared for his safety due to Chief Petty Officer Smith’s death threat and the *USS Carl Vinson*’s anti-gay climate. He reported the threat to his command and requested a discharge because of his safety concerns. SLDN has been unable to verify whether any disciplinary action has been taken against Chief Petty Officer Smith.

Seaman Apprentice Manders is not the only sailor on the *USS Carl Vinson* who has reported a pervasively anti-gay climate. Two Petty Officers contacted SLDN this year seeking help in combating anti-gay harassment on the ship. Both Petty Officers report they hear anti-gay epithets onboard several times each day and that other sailors openly speculate about their perceived sexual orientation. One of the Petty Officers, for example, reports she has heard sailors state, “We should kill them all,” when discussing gays. Another sailor contacted SLDN because he is tired of living in fear that his shipmates might harm him if they find out he is gay.

“We Don’t Like You Queers Around Here”

Airman First Class Dennis Potter reports being the target of repeated anti-gay harassment this year at Goodfellow Air Force Base in Texas. In August 1999, a concerned straight friend told Potter that other service members were discussing his perceived sexual orientation and referring to him as a “fucking faggot” (Exhibit 66). Potter’s friend also said she heard one of the airmen say about Airman First Class Potter, “that boy better watch himself or he is going to get what’s coming to him.” As a result, Potter feared for his safety. Potter’s fear escalated after military personnel confronted him in a straight bar near base and told him “you need to get out of here because we don’t like your type.”

Other service members harassed Airman First Class Potter with comments such as:

- “we don’t like you queers around here;”
- “what the hell are you gays doing here;”

- “look at the fucking faggot;” and
- “I thought they didn’t allow gays in the military” (Exhibit 66).

Ultimately, Airman First Class Potter came out to his command and accepted a discharge because he believed that this course of action was the only way to ensure his safety.

“Are You Going to Suck His Dick to Keep Him in?”

Major Robert Scott, a New Jersey Air National Guard fighter pilot, filed a discrimination suit in the Superior Court of New Jersey earlier this year. Major Scott claims he has endured constant anti-gay harassment from his fellow Guard members based on the perception that he is gay. He is heterosexual. According to his complaint, Major Scott reports he faced the following incidents of anti-gay harassment, among others :

- Major James Hay called him a “fucking faggot;”
- Captain Kirk Miller stated that by the time he was married to his third wife, Major Scott would be “working on his fourth boyfriend;”
- While referring to Major Scott’s efforts to convince another Guard member to remain in the unit, Major James Desantis asked Major Scott, “Are you going to suck his dick to keep him in;” and
- Lieutenant Colonel Robert Knauff, Lieutenant Colonel Robert Brenner, Lieutenant Colonel Larry Thomas, Major James Desantis and Captain Brian Bunn have all referred to Major Scott as a “homosexual” (Exhibit 67).

In his discrimination complaint, Major Scott states he attempted to address the harassment problem repeatedly with his unit command and then sought relief through the unit’s Equal Employment Opportunity Officer and the Adjutant General of the New Jersey National Guard. Not only did his command not stop the anti-gay harassment, but Major Scott was retaliated against for reporting the harassment. Major Scott alleges his National Guard command grounded him from flying without justification and segregated him from his fellow officers in the Fall of 1997. In the Spring of 1998, his National Guard command told Major Scott that he would remain grounded, would continue to be segregated, and was under investigation for unspecified wrong-doings. Then in the Spring of 1999, his command issued him a written reprimand for having a consensual sexual relationship with an unmarried female enlisted person. While it is common knowledge that several other members of the Guard have had sexual relationships with enlisted personnel, Major Scott has been the only Guard member disciplined.

Believing that he had no other option, Major Scott has filed a complaint in Superior Court seeking compensatory and punitive damages from The New Jersey Air National Guard, the State of New Jersey, and named members of his unit.

“[You Don’t] Show Enough Interest in the Dancing Girls Downtown”

Air Force Staff Sergeant Eric Gundberg reports that fellow airmen labeled him a “fag” during an assignment at Osan Air Force Base in South Korea. According to Gundberg, the airmen spread rumors that he was a “fag” because he did not “show enough interest in the dancing girls” downtown (Exhibit 68).

In June 1997, after Staff Sergeant Gundberg transferred to Beale Air Force Base, California, he attended an Equal Opportunity Class where the instructor routinely referred to gays as “fruits [and] fairys (sic).” In response to a question about whether the Air Force was allowed to discriminate, the instructor reportedly responded, “Of course, we don’t let disabled people in, or overweight individuals, and of course, fairies can’t come in, unless they keep their mouths shut about it that is.”

The final straw came when Staff Sergeant Gundberg’s senior supervisor, Master Sergeant Angel Munier, is reported to have openly made fun of another airman who was perceived to be gay. In a September letter to his command reporting the anti-gay harassment, Gundberg explained he could not speak up for the ridiculed airman because he was afraid the other noncommissioned officers would think he, too, was gay. Gundberg decided to report the anti-gay harassment because he could no longer remain silent about the treatment of those perceived to be gay, including himself. Staff Sergeant Gundberg also stated that, in the seven and one-half years he served in the Air Force, he heard approximately 300 to 400 anti-gay jokes and listened to 100 tirades about how “homosexuals are ruining the US military.”

“In the Fleet, Some People Wake up with Black Eyes for No Reason”

During training at the Naval base in Pensacola, Florida, Marine Private First Class Timothy Smalley reports that he faced continuous questions about his perceived sexual orientation. Private First Class Smalley’s supervisors and peers reportedly made comments to Smalley such as, “You stand like a bitch. You’ll get raped in the fleet standing like that,” and, “You need to watch the way you walk. Once you get into the fleet, people will begin to question certain things” (Exhibit 69). One of Smalley’s noncommissioned officers even confronted him, saying “If I beat you up, would you tell anyone? In the fleet, some people wake up with black eyes for no reason.”

Private First Class Smalley completed this training believing that once he reached his permanent assignment at Cherry Point, North Carolina, he would be able to serve safely. Smalley learned, however, that the noncommissioned officer who threatened him was being assigned to Cherry Point as well. Fear that the harassment would follow him to Cherry Point, and elsewhere in the Marine Corps, led Smalley to come out and report the harassment. The Marine Corps discharged Private First Class Smalley. To SLDN’s knowledge, no one has been held accountable for harassing him.

“If You Think You’re Hiding It, You’re Dead Wrong . . .”

Seaman Apprentice Lori Smith, assigned to the *USS Eisenhower*, found a threatening note left under the windshield wiper of her car in March 1999 while it was parked on base in Norfolk, Virginia. The note stated, among other things:

[I]f you think you’re hiding it, you’re dead wrong, yeah (sic) you know what I’m talking about, you dyke ass bitch. . . You homo’s (sic) are sickening, the Navy, has no room for you twisted freaks. . . Your (sic) constantly being watched, your every move, every step. . . Your (sic) pasrt (sic) overdue for a beatdown!!!!!! (Exhibit 70).

This note was the last straw for Seaman Apprentice Smith, who had endured countless anti-gay comments directed at her by shipmates over the preceding months. Other sailors often reportedly confronted Smith with comments such as:

- “I don’t know why they let them in the Navy if they know they’re like that;”
- “You know she’s gay, don’t you;”
- “Stupid dykes;”
- “Gays aren’t supposed to be here, why don’t they get out;” and
- “They have to be gay, they look too much like guys.” (Exhibit 71)

Additionally, Seaman Apprentice Smith was once performing official maintenance in a male sleeping area when a sailor announced, “female on deck,” as they are required to do. A sailor standing nearby looked past Smith and said, “Female? I don’t see any female.” Because these incidents caused Seaman Apprentice Smith to fear for her safety, she asked to be removed from the ship and discharged from the Navy despite her desire to serve our country.

Petty Officer Assaulted While Asleep on Ship

An unidentified assailant reportedly kicked the face of a Petty Officer assigned to the *USS Barry* while the Petty Officer was sleeping onboard the ship. Shortly before the incident, the Petty Officer wrote a letter to a civilian friend confiding his bisexuality. The letter disappeared from his sleeping area before he was able to mail it. The Petty Officer reports that, shortly thereafter, he became the target of anti-gay statements and threats, including, “I heard the guy who was kicked in Berthing 1 is a fag. I’d like to find the guy who kicked him because he deserves a medal.”

Once when the Petty Officer was alone in the ship’s bathroom, someone reportedly asked “Who’s in here?” The Petty Officer replied by stating his name. Several more sailors then came into the bathroom and threatened, “We don’t need faggots on ship” and “Something should be done to get rid of them.” The Petty Officer asked for SLDN’s assistance in requesting a discharge from the Navy because he did not feel safe after these incidents and others. Despite the

Petty Officer's fears for his safety and statement that he is bisexual, the Navy tried to convince him to continue serving. His commanders, however, did not promise to ensure his safety.

"Let's Go to a Gay Bar this Weekend and Fuck Some Queers Up"

A Marine Lance Corporal reports hearing other Marines threaten to harm gay people almost everyday while serving at Camp Pendelton, California. These threats include:

- "If I see a faggot, I'm gonna kill him;"
- "I'll beat those goddamned homos (sic) until they're dead;"
- "Let's go to a gay bar this weekend and fuck some queers up."
(Exhibit 72)

These comments made the Lance Corporal fear that other marines might harm him if they perceived him to be gay. Because he felt unsafe in the Marine Corps, he reluctantly decided his only option was to come out and be discharged.

Lesbian Baiting Continues

Women continue to be disproportionately impacted by "Don't Ask, Don't Tell, Don't Pursue, Don't Harass" because of lesbian baiting and gender bias. Based on Department of Defense statistics, women comprised 316 of the 1,034 gay discharges during the past year. Women comprised 31% of total discharges under "Don't Ask, Don't Tell, Don't Pursue, Don't Harass," although women comprise only 14% of the force. According to the Department of Defense's own discharge figures, this is the highest percentage of women discharged under gay policies in at least twenty years.⁸⁹ The highest percentage of female discharges this year were in the Army and Air Force. Thirty-five percent of Army soldiers discharged this past year under "Don't Ask, Don't Tell, Don't Pursue, Don't Harass" were women, while women make up only 15% of the force. In the Air Force, 37% of last year's discharges under the policy were women, while women make up only 18% of the Air Force. The most striking disparity was in the Marine Corps, where 21% of discharges under the policy were women, yet women comprise only 6% of the Marine Corps.

Lesbian baiting is a form of anti-gay harassment as well as a form of sexual harassment. Women are often called lesbians, regardless of their sexual orientation, for a variety of retaliatory reasons. Some men accuse women who refuse their sexual advances of being lesbians. Other men who sexually harass women accuse them of being lesbians when the women report the sexual harassment, in an attempt to turn the investigation away from their own misconduct. Others, men and women, accuse female superior officers of being lesbians in retaliation for poor performance evaluations or unpopular orders. And yet others accuse successful women of being lesbians to derail their careers. The stereotype remains that women in nontraditional job fields

⁸⁹ Michelle M. Benecke and Kirstin S. Dodge, *Military Women: Casualties of the Armed Forces' War on Lesbians and Gay Men*, in *Gay Rights, Military Wrongs: Political Perspectives on Lesbians and Gays in the Military* 71-108 (Craig A. Zimmerman, ed., 1996).

are viewed, as many have noted, as “dykes” or “whores.” Lesbian baiting thus continues to disproportionately affect women who serve our country.⁹⁰

As a result of “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass,” many women do not report anti-gay harassment. Others choose more traditional career paths, or tone down their ambition. Some women report they stop publicly socializing with other women for fear that they will be labeled as lesbians just because they are in a group with other women.

The following are a few examples of lesbian baiting.

*Marine Threatened with Involuntary “Outing”
After Reporting Sexual Harassment*

During the almost two years that Lance Corporal Kisha Frady was a Marine, she was continually harassed about the way she looks. Members of her unit called her a “big dyke,” told her that she was a “man in woman’s fatigues,” and referred to her motorcycle as her “giant vibrator.” While assigned to Camp Pendelton, California, Lance Corporal Frady’s roommate was sexually harassed by a male supervisor. Lance Corporal Frady stopped this harassment when she took her roommate to the command to report the noncommissioned officer’s actions. Shortly after reporting the sexual harassment, Lance Corporal Frady received an anonymous letter in the mail threatening to inform her command that she is a lesbian. Fearing the threat would lead to increased anti-gay harassment, discharge and even criminal prosecution, Lance Corporal Frady reluctantly told her command she is gay. Lance Corporal Frady chose to preempt the anonymous harasser, despite wanting to make the Marine Corps her career.

Anti-Gay Harassment Exacerbated by Sailor’s Refusal of Sexual Proposition

As described previously in this section, Seaman Apprentice Lori Smith was verbally harassed and threatened because she was perceived to be a lesbian. Smith reports that the anti-gay harassment started when a Petty Officer in the galley began making sexual comments to her. This Petty Officer repeatedly asked Smith if she was gay and asked her out on dates numerous times. The Petty Officer did this despite Smith’s consistent refusals and the fact that he was married (Exhibit 71).

In addition, Seaman Apprentice Smith rebuffed a male sailor’s sexual advances when she was off ship with friends. While relaxing at a hotel in Norfolk with six of her friends, a male sailor repeatedly told Seaman Apprentice Smith that he knew she was gay and sexually propositioned her. When Smith refused his repeated advances, he said, “You’re a fucking dyke” in front of other sailors. The anti-gay harassment of Seaman Apprentice Smith continued, even after she reported to her command that a threatening note had been placed on her car (Exhibit 73).

“Are You Married to a Man or a Woman”

A female Warrant Officer in a highly prestigious position, who is the only woman in her unit, was questioned about her marriage by her command. The Warrant Officer has served with

⁹⁰ *Id.*

distinction for more than fifteen years in the military, and has been married for most of that time. She is the only member of her unit whose marriage status was questioned. Prior to these developments, there were numerous rumors circulating throughout her unit that she is a lesbian. She believes the rumors and questions about her sexual orientation and her marriage arose because of her non-traditional work assignment. The Warrant Officer has requested a transfer out of her prestigious assignment and continues to serve in the military. However, her career remains in jeopardy.

“It Must Be True [That You Are Gay] Because I Have Never Seen You with a Guy”

Air Force women were lesbian baited in a witch hunt at the Defense Language Institute (DLI) in Monterey, California this year, as described in detail in the “Don’t Pursue” section. Female students at the base reported that Air Force senior enlisted leaders and other students asked and pursued the women about their perceived sexual orientation. The women report they repeatedly had to ward off sexually harassing comments designed to paint them as lesbians.

Airman First Class Deanna Grossi reports that Airman First Class Reyes would rub his fingers in front of his nose while saying to Airman Grossi, “let me smell your hand so I can see if you did the same thing I did last night.” (Exhibit 27) Airman Hollenshead reported to Colonel Smith, the Air Force commanding officer at DLI, that a male student had called her and another airman “pussy suckers” and then asked them, “Why would you want that, when you can have this?” while pointing to himself. A male airman told another female Airman First Class, “It must be true [that you are gay] because I have never seen you with a guy.” Some of these female airmen told SLDN that they tried dating men in an effort to stop the anti-gay harassment, but the rumors, questioning and anti-gay harassment persisted. Almost all of the airmen at DLI who contacted SLDN have been or are in the process of being discharged.

Additional Incidents of Anti-Gay Harassment Reported to SLDN in 1999

- Seaman Neil Salisbury reports he suffered anti-gay harassment onboard the *USS Blue Ridge*. Sailors called Seaman Salisbury “butt buster,” “rump ranger,” and “queer.” On one occasion, Seaman Salisbury was walking on the pier when a sailor yelled, “I fucking heard about you, you Faggot. I’m gonna kill you if I ever catch you looking at my ass.”
- Air Force Staff Sergeant Patrick Willis decided after almost fifteen years of military service that he could no longer endure constant anti-gay comments such as: “I hope no fag tried to hit on me because I would kill them;” “I’m glad that I don’t have to work with queers;” and “People like that should not be allowed to work with, or have custody of, children.” Staff Sergeant Willis also wanted to stop living a lie because he wants his children to grow up to be honest, tolerant, and respectful adults. As a result, he informed his new Air National Guard command in Starke, Florida

that he is gay. Staff Sergeant Willis was honorably discharged (Exhibit 24).

- A Seaman reports being assaulted by other Navy enlisted personnel at a base in Florida. During the assault, they reportedly called him “faggot” and “queer” and told him “I don’t want any faggots in my Navy.” The Seaman told SLDN that his barracks’ door was vandalized with threats such as, “Watch your ass or its going to get fucked or beat.” He also reported receiving death threats late at night by telephone, including “I’m gonna tag your ass,” and “I’m gonna cap your ass.”
- A Marine Lance Corporal assigned to Cherry Point, North Carolina, reports being so afraid for her safety that she left the base one weekend and did not return the following Monday. The Lance Corporal went “UA”—unauthorized absence—because she reportedly overheard a corporal in her unit say, “If I knew of a gay marine within my unit and we went to war together, I would kill that gay marine before I killed any of the enemy.”
- A Navy Petty Officer reportedly was the subject of repeated death threats. The Petty Officer reports that he found a note on his rack that read “DIE! FUCKING FAGGOT.” The Petty Officer also reports hearing: “All faggots need to be killed;” “I don’t know a fag, and if I did, I don’t know what the hell I would do to him;” “If I knew of a faggot onboard this ship I would take him to the gym and show him what being a real man is like;” and “Jerry (referring to Jerry Springer) needs to hang those queer guests he has on his show” (Exhibit 74). With SLDN’s assistance, this Petty Officer continues to serve.
- An Air Force Staff Sergeant reports finding a note on his door that read “Die Faggot! We know who you are!” Despite the threat, the Staff Sergeant remains on active duty (Exhibit 75).
- An Army Private was in basic training at Fort Benning, Georgia, when another soldier in his barracks discovered that the Private is gay by reading a letter the Private was writing home. The Private reports that after this occurred he experienced constant verbal and physical abuse. He reports he was punched and kicked by soldiers, and once tripped in a barracks stairwell and thrown down a flight of stairs. After being continually asked if he is gay, the Private confirmed the speculation. His Drill Sergeant then exclaimed to other soldiers, “Now you know where to get a blow job,” and pointed to the Private (Exhibit 76).

- Captain Philip Howland reported to his command that he observed anti-gay harassment at three separate Army posts during his military career. The anti-gay harassment included denigration of former soldiers who were gay and questioning about his own sexual orientation. No longer able to tolerate the anti-gay harassment and unwilling to spend the rest of his career looking over his shoulder in fear of investigation, Captain Howland informed his command he is gay (Exhibit 77). Despite discussing his sexual orientation, his administrative separation board wanted to know if or how they could keep him.

The Pentagon and Administration Respond to Anti-Gay Harassment

Pentagon Releases Anti-Gay Harassment and Investigations Guidelines

On August 13, 1999, just days after the highly charged testimony in Private Glover's preliminary hearing, Secretary Cohen released anti-gay harassment and investigations guidelines that had been bottled up at the Pentagon for more than fifteen months (Exhibit 78). According to *The New York Times*, a Clinton Administration official said, "[T]he Pentagon felt the need to announce the new guidelines as quickly as possible, given the uproar over the death last month of a gay soldier."⁹¹ Most notably, the guidelines state that reports of anti-gay harassment or threats must be investigated promptly and service members reporting anti-gay harassment should not be investigated or retaliated against because they report the anti-gay harassment. While the new guidelines are welcome steps forward, they fall short in several respects.

First, the guidelines dropped provisions about lesbian baiting that appeared in the original Dorn Memo. As the cases in this section illustrate, women continue to face allegations that they are lesbian, regardless of their sexual orientation, for retaliatory reasons. SLDN hopes the omission of lesbian baiting from the new guidelines is not a Pentagon retreat from addressing this form of anti-gay harassment and sexual harassment seriously.

Second, the guidelines fail to provide guidance to service members on how they may report anti-gay harassment without fear of retaliation. Service members should be able to report anti-gay harassment to their commanders, mental health counselors, Inspectors General, Chaplains, and equal opportunity officers, among others. The Pentagon has taken no steps, however, to make sure that these personnel are appropriately trained to handle such complaints. In fact, one Army spokesperson has said that the Equal Opportunity chain has been specifically instructed not to address issues of anti-gay harassment.⁹² Third, the guidelines fail to make clear that the military should not discharge service members who, in the course of reporting harassment, inadvertently reveal they are gay, or are found to be gay. As highlighted in the section, "Don't Tell," the Pentagon must make clear to all concerned personnel that private statements of sexual orientation during the course of reporting anti-gay harassment are not

⁹¹ Philip Shenon, *Pentagon Moving to End Abuses of "Don't Ask, Don't Tell" Policy*, N. Y. Times, Aug. 13, 1999, at A1.

⁹² Roberto Suro, *Military's Differing Lesson Plans Reflect Unease on Gay Policy*, Wash. Post, Mar. 4, 2000, at A1.

grounds for inquiry, investigation or discharge. Unless this basic step is taken, any assurance that service members will not suffer reprisals for reporting anti-gay harassment falls flat.

As military leaders know, the impact of even the best guidance depends on the leadership commitment with which it is applied. In each of the past six years, SLDN has noted a conspicuous lack of leadership, particularly from uniformed leaders, when it comes to the proper implementation of “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass.” Leaders must step up to the plate to stop harassment. This will require holding those who harass their fellow service members accountable for their actions. The Pentagon’s credibility rests on accountability.

Services Issue Statements on Anti-Gay Harassment

In the past few months, the Secretary and Chief of each service has issued a message against anti-gay harassment, a long-standing SLDN request. The pertinent part of the guidance for each of the services is as follows:

- Navy: “Respect for the individual is paramount. Commanding officers must not condone homosexual jokes, epithets, or derogatory comments, and must ensure a command climate that fosters respect for all individuals” (Exhibit 79).
- Marine Corps: “As all Marines learn in their earliest basic training, mistreatment of any Marine is incompatible with our core values and is unacceptable conduct that must be dealt with quickly and appropriately by commanders” (Exhibit 80).
- Air Force: “Harassment, threats or ridicule of individuals or groups based upon real or perceived differences, including sexual orientation, have no place in the United States Air Force and will not be tolerated We wholeheartedly endorse and support this policy. Each of us has an individual responsibility and professional obligation to do his or her best to prevent harassment of any nature and to immediately correct it if it occurs” (Exhibit 81).
- Army: “Harassment of soldiers for any reason, to include perceived sexual orientation, will not be tolerated” (Exhibit 82). “Commanders at every level will take appropriate action to prevent harassment of or threats against any member of the Army” (Exhibit 83).

This is an important development that will, finally, signal to commanders in the field that they have the support of their top leaders to take steps to prevent anti-gay harassment.

Services Begin Training to Prevent Anti-Gay Harassment

The Army is currently training soldiers on anti-gay harassment and the policy's investigative limits, and expects to complete the training within 90 days. The other services are due to follow within the next year. Because the training is so new, an in-depth analysis is not yet possible. One concern, however, is to better inform commanders about accountability. While some of the training makes clear that commanders should hold accountable anyone who engages in anti-gay harassment, the services should provide guidance on what that means. Those who engage in anti-gay harassment should face actions ranging from counseling to courts-martial, depending on the offense.

Reports to SLDN regarding the Army training thus far are mixed. Some soldiers report their leaders have taken the training seriously and have presented it intelligently. Other reports are to the contrary, including:

- An Army Judge Advocate General officer tasked to conduct the training reports, "The Army has done a disservice by using the slides they distributed. They need something that will reach the soldiers. My commanders barely understood. . . ." The officer further states, "Commanders are very uneasy about having to give this briefing . . . I think that the only way the current policy will work is if the commanders stand up and walk the walk" (Exhibit 84).
- An Army Lieutenant tasked to do the training reports he was concerned with the content of the briefing materials and he did not fully comprehend the slides even after reviewing additional materials. Prior to the briefing, a superior officer asked the trainer if he was gay because the Lieutenant stressed the training's importance. When the briefing was completed, a senior enlisted member stood up and told the entire unit an anti-gay joke.

Despite some problems with the conduct of the training, SLDN appreciates that the Army has commenced it. Given the delays that have characterized past Pentagon promises regarding "Don't Ask, Don't Tell, Don't Pursue, Don't Harass," SLDN is concerned to see the other services expeditiously follow suit and fulfill their commitment to train all personnel. The ultimate test of the training's success is whether service members understand the policy's investigative limits, its intent to respect people's privacy and the consequences of failing to follow the rules.

Defense Department Inspector General Directed to Assess Anti-Gay Harassment

In December 1999, Secretary of Defense William S. Cohen ordered the Department of Defense Inspector General (DoD IG) to review the application of the Homosexual Conduct Policy, including the extent of anti-gay harassment at representative installations in each

Service.⁹³ The Inspector General is surveying 75,000 service members, with a report due back to Secretary Cohen on March 13, 2000. When announced, SLDN questioned the efficacy of the survey because there is no way to compare the experience of gay service members with non-gay service members, and because gay service members risk being outed if they respond candidly. Indeed, as long as a law exists banning openly gay service members, few gays will feel comfortable reporting anything, no matter what steps the Inspector General takes to assure their confidences.

SLDN has received reports that some commands have prevented service members known to have experienced anti-gay harassment from participating in the survey, even when all other unit members were ordered to participate. Other service members report that, because of the way the survey is designed, those who do not report anti-gay harassment may skip quickly to the end of the survey and leave the survey room. Those who report harassment are left behind, which draws unwanted attention to them.

Some of the survey's questions are flawed and meaningless (Exhibit 85). Question #6, for example, asks service members: "To what extent do you understand 'Don't Ask, Don't Tell?'" A service member could think he or she understands the policy, but in reality he or she may be uninformed or misinformed. If the intent was to test actual knowledge of the policy, this question will not reach that goal.

Question #11 is likewise meaningless. It asks: "Has the 'Don't Ask, Don't Tell, Don't Pursue' policy been effective in preventing/reducing anti-gay harassment based on perceived sexuality?" First, there is no way to compare the experience of gay service members, who would have the most relevant information for the question, with non-gay service members because "Don't Tell" prevents gay service members from self-identification. Second, the question assumes the service member has a baseline by which to assess the effectiveness of "Don't Ask, Don't Tell, Don't Pursue, Don't Harass," which most do not.

Questions #12 and #13 also fail to understand the very nature of the problem the Inspector General is attempting to assess. Question #12 asks: "How often have you heard offensive speech, derogatory names, jokes or remarks about homosexuals in the last twelve months on your ship / at your installation?" Question #13 asks: "To what extent are offensive speech, derogatory comments and jokes tolerated on your ship / installations?" As the cases in "Don't Harass" point out, many non-gay service members view terms such as "fag," "faggot," "queer" and "dyke" as a normal part of military life. To a gay service member who is the target of such comments or hears them in the general command climate, these comments can be highly offensive. Thus, these questions fail to appreciate the extent to which the military is socializing service members to view use of anti-gay epithets as a "normal" part of the banter in a unit. They fail to provide specificity as to what constitutes "offensive" speech and "derogatory" comments.

The Inspector General survey could be further dissected, but the bottom line is this: the Inspector General survey has significant problems that will complicate the already difficult task of obtaining an accurate assessment of anti-gay harassment through official channels. To the

⁹³ *Secretary of Defense Directs Assessment of Extent of Harassment*, Office of Assistant Secretary of Defense (Public Affairs), Dec 13, 1999.

extent the Inspector General obtains any significant reading of the anti-gay harassment, it will be in spite of the survey, not because of it. Conversely, the Department of Defense will have no credibility whatsoever if it attempts to use the survey to minimize the serious problem of anti-gay harassment in the ranks.

President Signs Executive Order on Military Hate Crimes

In the aftermath of Private Winchell's murder, President Clinton, in October 1999, signed an Executive Order amending the *Manual for Courts-Martial* to provide for sentence enhancement in hate crime cases, including anti-gay hate crimes. The Executive Order's hate crimes provision states in part, "Evidence in aggravation may include evidence that the accused intentionally selected any victim or any property as the object of the offense because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability or sexual orientation of any person."⁹⁴ The Joint Service Committee in the Pentagon recommended the change prior to Winchell's murder to make military law conform with similar state statutes.⁹⁵

"Don't Harass" Conclusion

Lesbian, gay and bisexual service members must endure constant anti-gay threats and epithets as a condition of military service. While not all service members harass their colleagues, the current climate supports those who do. This climate is inimical to good order, discipline and the morale of our forces, and adversely affects military readiness.⁹⁶ Anti-gay harassment not only hurts the military, but it is an unjust return to the men and women who put their lives on the line for our country, only to be forced out, whether by being discharged or leaving at the end of their service obligation.

It is shameful that it took the murder of Private First Class Barry Winchell to move the Pentagon and Clinton Administration to act after six years of warnings by SLDN. Finally, the Pentagon has issued guidelines and training on anti-gay harassment. Secretary of Defense William Cohen has ordered the Inspector General to survey 75,000 troops to assess the level of anti-gay harassment in the armed forces, among others. President Clinton signed an Executive Order on hate crimes in the military. All of the actions taken by the Pentagon, the Administration and the individual services to address anti-gay harassment since Private First Class Winchell's murder are steps in the right direction. Real change, however, will not occur unless there is strong leadership and accountability.

⁹⁴ Executive Order No. 13,140 (1999).

⁹⁵ While the Executive Order had been on the President's desk for more than one year, and it did not factor into the prosecution of soldiers at Fort Campbell for the murder of PFC Barry Winchell, the Executive Order will aid law enforcement, prosecutors and commanders in deterring hate motivated violence. One of the great challenges in pressing the Army to conduct a full and fair investigation and prosecution into the murder of Private First Class Winchell was that the criminal investigators and Army prosecutors had no prior guidance about how to investigate or prosecute hate crimes. The services should avail themselves of the hate crimes unit within the Department of Justice to obtain appropriate training.

⁹⁶ As General Clark stated recently, the "cornerstone of discipline" is "respect for others." Scholars also affirm that "Abuse of homosexual service members hurts military readiness." See Elizabeth Kier, *Homosexuals in the U. S. Military* 23 *International Security* 5, 37 (1998).

Some may argue that even if “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass” were overturned, there would still be Private Glovers who would kill because of hatred. They may be correct, but “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass” reinforces the message that gays are second class citizens who are not worthy of the rights and responsibilities of citizenship. The fact that leaders have allowed service members to harass their counterparts with impunity reinforces this message, and gives a green light to those who would do violence. Whether or not “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass” remains the law of the land, military leaders have a duty to take care of our service members. To date, many military leaders have failed to do so.

CONCLUSION TO SIXTH ANNUAL REPORT

The Pentagon is at a critical juncture in implementing “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass.” Military leaders can either address, with commitment, the harassment and forced secrecy that push so many dedicated lesbian, gay and bisexual service members out of the armed forces, or they can continue with business as usual, at a high price to the military generally, as well as to individual service members.

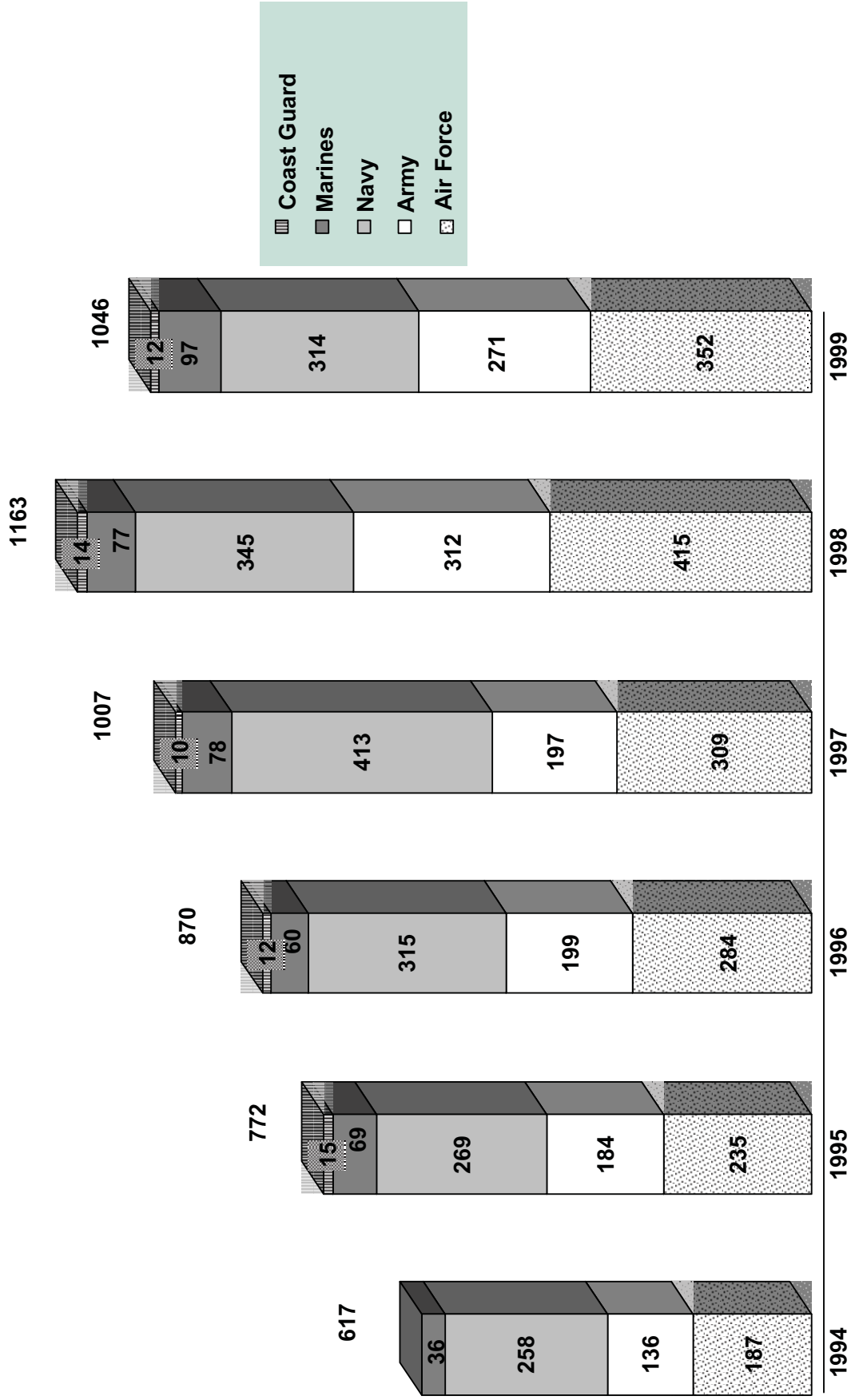
As Military leaders continue to struggle with critical retention and recruiting shortfalls,⁹⁷ they can ill afford to continue violating the letter and intent of the policy. Lesbian, gay and bisexual Americans’ contributions to our armed forces are valuable. The military’s indifference to the well-being of and hostility toward lesbian, gay and bisexual service members must cease. The failure of military leaders to fairly implement the policy’s provisions on privacy, investigative limits, accountability and recourse takes its toll on readiness by undercutting respect for rule and order. Forcing lesbian, gay and bisexual service members to hide, lie, evade and deceive their families, friends and colleagues breaks the bonds of trust among service members essential to unit cohesion.⁹⁸ Command climates poisoned by anti-gay abuses hurt readiness. As Specialist Edgar Rosa testified at Fort Campbell, the murder of Private First Class Barry Winchell has destroyed any illusion that he was part of “a band of brothers.”⁹⁹

⁹⁷Andrea Stone, *Army opens more to school dropouts*, USA Today, Feb. 4, 2000, at 13A.

⁹⁸ 10 U.S.C § 654(a)(7), “One of the most critical elements in combat capability is unit cohesion, that is, the bonds of trust among individual service members that make the combat effectiveness of a military unit”

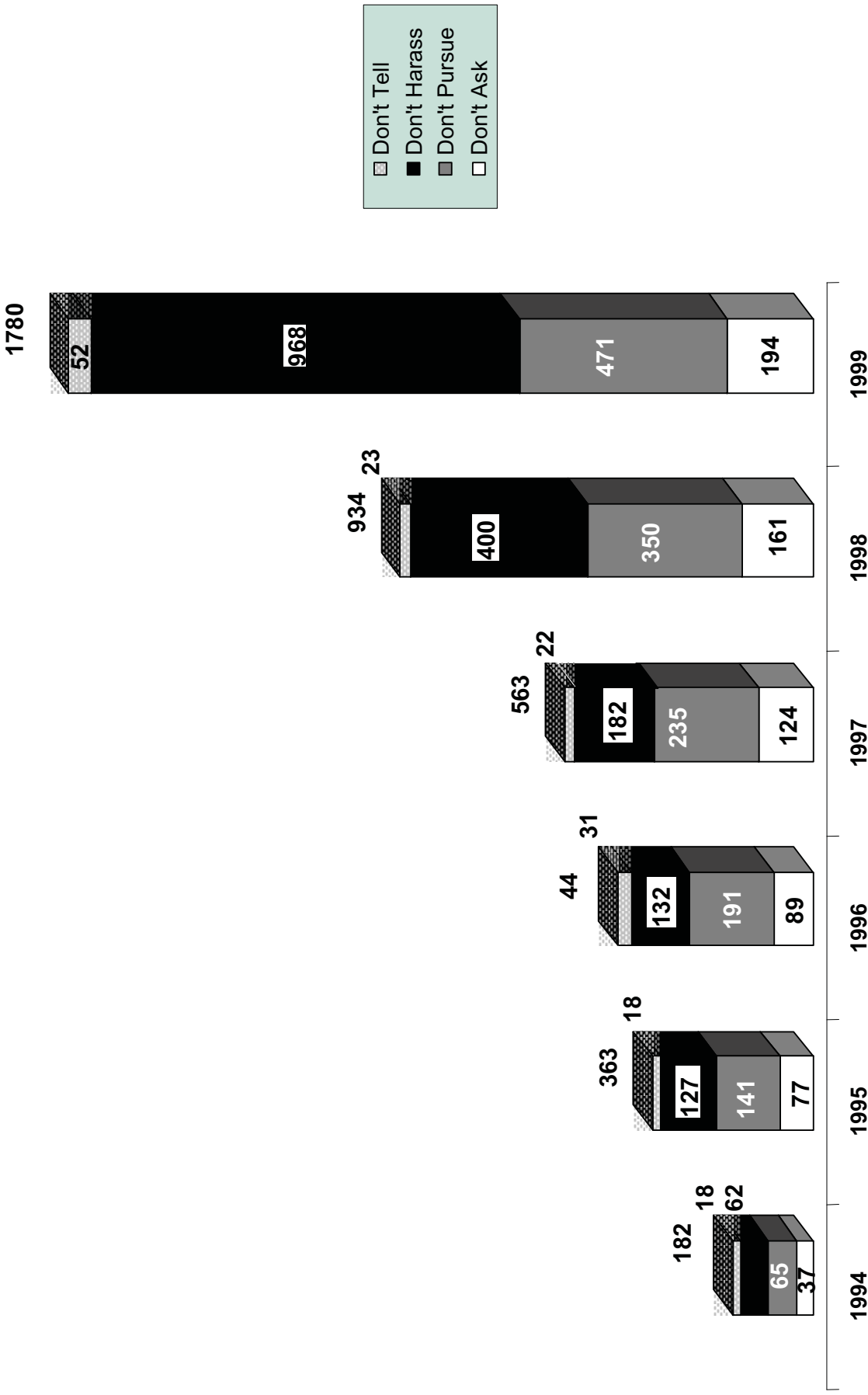
⁹⁹ Specialist Edgar Rosa, Delta Co., 2nd/502nd, Specialist Justin Fisher Art. 32 Hearing, Sept. 1, 1999.

Annual Gay Discharges Under “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass”



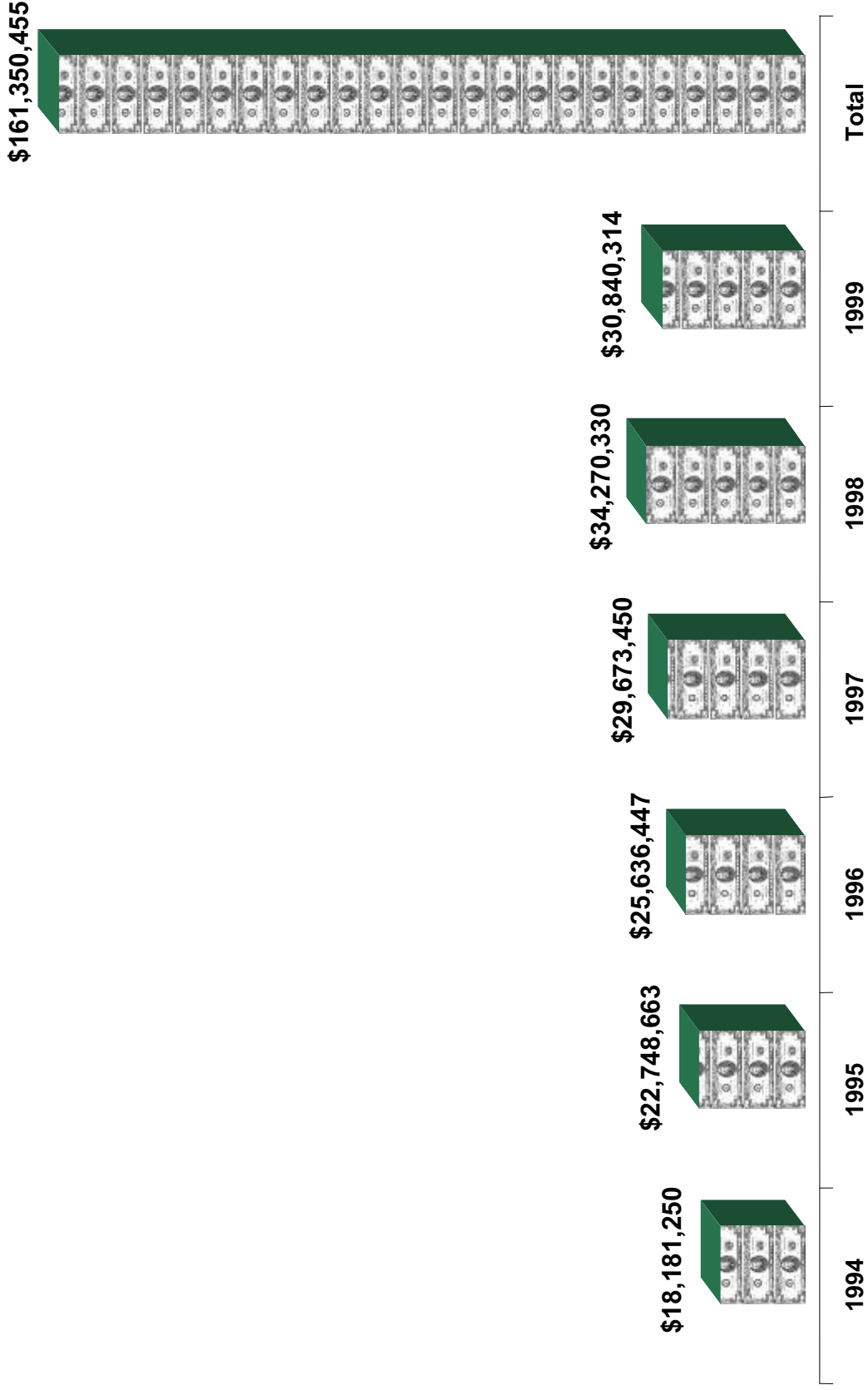
SOURCE: SERVICEMEMBERS LEGAL DEFENSE NETWORK, BASED ON
DEPARTMENT OF DEFENSE FIGURES

"Don't Ask, Don't Tell, Don't Pursue, Don't Harass" Command Violations 1994 – 1999



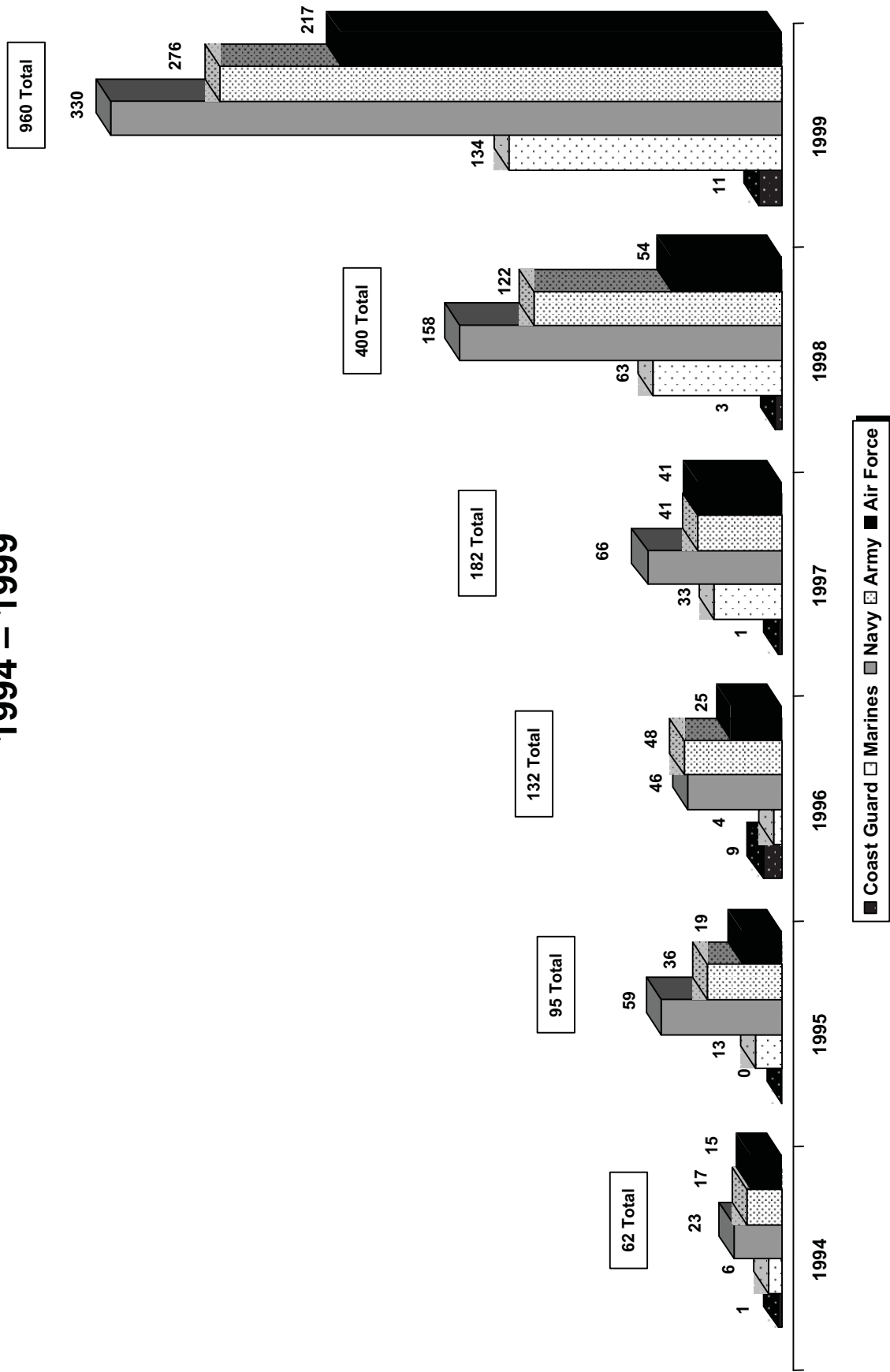
SOURCE: SERVICEMEMBERS LEGAL DEFENSE

Costs of Training Replacements for Service Members Discharged Under Gay Policy



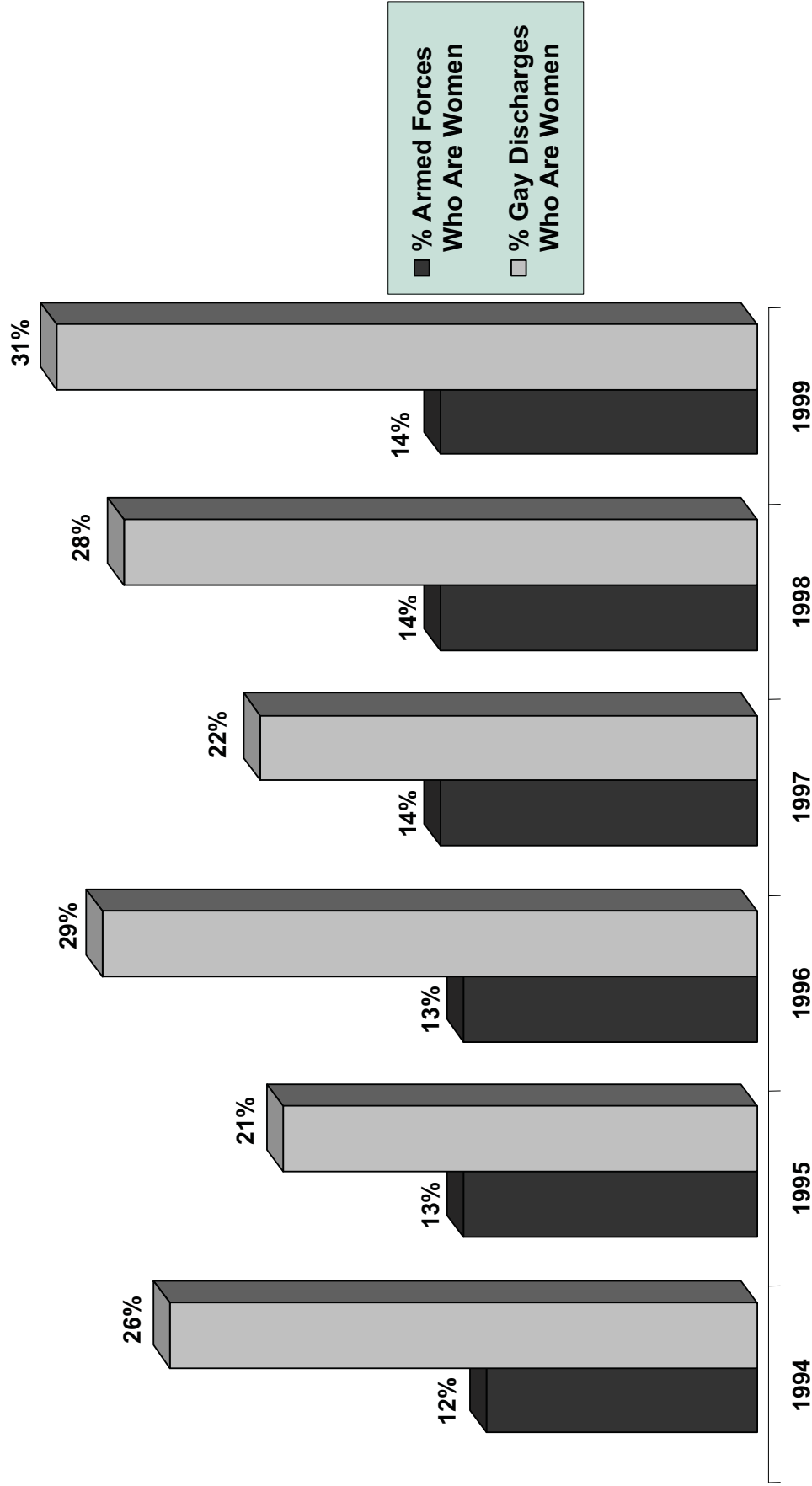
**SOURCE: SERVICEMEMBERS LEGAL DEFENSE NETWORK,
BASED ON GENERAL ACCOUNTING OFFICE FIGURES (IN 1993 DOLLARS)**

“Don’t Harass” Violations by Service 1994 – 1999



SOURCE: SERVICEMEMBERS LEGAL DEFENSE NETWORK

Lesbian Baiting: The Disproportionate Impact of the Gay Policies on Women 1994 – 1999



SOURCE: SERVICEMEMBERS LEGAL DEFENSE NETWORK,
BASED ON DEPARTMENT OF DEFENSE FIGURES

Conduct Unbecoming

THE SEVENTH ANNUAL REPORT ON

“DON’T ASK, DON’T TELL,
DON’T PURSUE, DON’T HARASS”

by

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DEDICATION

TO THE MEN AND WOMEN WHO ARE FAITHFULLY SERVING IN ENFORCED SILENCE TO SECURE FOR AMERICA THE FREEDOM THAT IS DENIED TO THEM.

**CONDUCT UNBECOMING:
THE SEVENTH ANNUAL REPORT ON
“DON’T ASK, DON’T TELL, DON’T PURSUE, DON’T HARASS”**

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Volume 2

Exhibits to *Conduct Unbecoming*
The Seventh Annual Report on “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass”
 are in a separate volume and may be obtained by contacting SLDN.

SLDN FINDINGS

Seventh Annual Report on “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass”

- 1. Pentagon Fails To Issue Directive And Instruction on Anti-Gay Harassment.** The Pentagon failed to issue promised orders to the services to revise service regulations and training to prevent anti-gay harassment implementing the Pentagon’s thirteen-point Anti-Harassment Action Plan published in July 2000.
- 2. Pentagon Survey Finds Anti-Gay Comments Commonplace - Threat To Unit Cohesion.** A Department of Defense Inspector General survey of 75,000 service members worldwide found 80% of respondents had heard derogatory, anti-gay remarks during the past year; 37% said they had witnessed or experienced targeted incidents of anti-gay harassment, 9% of whom reported anti-gay threats and 5% of whom reported witnessing or experiencing anti-gay physical assaults. The Pentagon called anti-gay harassment a threat to unit cohesion.
- 3. Pentagon Survey Finds Majority Not Trained on Policy; Those Who Claim Good Understanding of Policy Fail Three Basic Questions.** The same DoD Inspector General survey found that 57% percent of service members surveyed reported receiving no policy training. Of the 54% who stated they understood the policy to a “large” or “very large extent,” only 26% could answer all three basic questions about the policy correctly.
- 4. SLDN Cases Show Anti-Gay Harassment Remains At High Levels.** SLDN documented 871 incidents of anti-gay harassment, including assaults, death threats and verbal gay bashing from February 16, 2000 to February 15, 2001. Incidents of anti-gay harassment decreased in the Army and Marine Corps, but remained the same in the Navy and Air Force. The Navy, despite being smaller in size than the Army, led all services in anti-gay harassment incidents for the fourth year in a row with 332 “Don’t Harass” violations.
- 5. Pentagon Fails To Protect Those Reporting Harassment From Being Discharged.** Despite the Pentagon’s many good efforts to improve anti-harassment training and protections, it failed to make clear that service members should be able to report harassment to Inspectors General, law-enforcement officers, equal-opportunity representatives, health-care providers and others without fear of reprisal.
- 6. Doctors and Psychologists Told to Out Gay Service Members.** Psychologists report they continue to be instructed to turn in gay, lesbian, and bisexual military members who seek their help, despite promises by the Pentagon since 1998 to correct that practice. Officials have knowingly permitted erroneous instructions to circulate in the field that tell psychologists and doctors to out gay service members, including in new Army training on the policy.

7. **Army Inspector General Finds Anti-Gay Banter Common At Fort Campbell.** Despite Army spokespersons' claims there was no evidence of "homophobia" at Fort Campbell in July 2000, the Army Inspector General confirmed significant incidents of harassment, including anti-gay graffiti, cadences and routine anti-gay "banter." The Army IG conducted the review in the wake of the murder of Private First Class Barry Winchell.
8. **Army Secretary Fails To Act on Wrongful Death Claim in Murder of Winchell.** Private First Class Barry Winchell's parents filed a wrongful-death claim against the Army under the Military Claims Act for the murder of their son at Fort Campbell, Kentucky. Two soldiers brutally murdered Winchell with a baseball bat while he slept. Testimony at the Article 32 hearings of two soldiers charged in connection with the murder revealed that Winchell faced daily anti-gay harassment for four months prior to his murder and his leaders did not stop it. The Army Secretary has yet to act on the claim.
9. **Pentagon And Services Hold Few Leaders Accountable.** In the first six years, military leaders did not officially hold anyone accountable for asking, pursuing, or harassing. This past year, SLDN documented increased accountability, including actions taken against General Clark who was denied his third star for his conduct in addressing the anti-gay harassment scandal at Fort Campbell, Kentucky; Captain Brady at Fort Campbell, Kentucky who was disciplined by the new commanding general at the base for calling a gay soldier a "pole smoker" in front of his subordinate leaders; and Marine Corps Lieutenant Colonel Melton at Twenty-Nine Palms who had disseminated an anti-gay email to his subordinates.
10. **Army Training Reduces Asking, Pursuit and Harassment.** The Army, better than any other service, trained soldiers on preventing anti-gay harassment and on upholding the policy's investigative limits in the past year.
11. **Pursuits Decrease As Navy Retains Openly Gay Personnel.** SLDN documented 412 incidents in which service members were pursued, down from 471 violations the year before. The decrease in "Don't Pursue" violations is mostly attributable to a Navy aberration where leaders are retaining openly gay, lesbian and bisexual sailors unless they (1) provide self-incriminating information about sexual conduct which could carry criminal penalties, or (2) identify friends, including other sailors, who will confirm their sexual orientation, thereby opening the door to a potential witch hunt.
12. **Service Members Come Out to Escape Anti-Gay Harassment.** Gay, lesbian and bisexual service members overwhelmingly continue to come out because of unchecked harassment, contrary to the Pentagon's claim that gays are leaving the military "voluntarily" because they wanted "an easy way out." The military does not give members a choice to stay, even if they come out solely because of fear for their safety. Service members also come out for reasons of integrity as the gay ban's requirement of lying contradicts the services' core values of integrity, honor and candor.

- 13. Army Designates Chaplains As Confidential Resource, But Some Berate Gays Soldiers.** Despite identifying chaplains as a confidential resource, the Army has failed to train chaplains on how to handle complaints of anti-gay harassment. Some chaplains have berated gay, lesbian, and bisexual soldiers who have reported harassment. If chaplains are uncomfortable in providing support for gay, lesbian, and bisexual soldiers of faith, they should at the very least direct the soldier to another chaplain who would be willing to help.
- 14. Air Force Illegally Demands Gays To Repay Scholarships.** In contrast to the Army, Navy and Marine Corps, and in direct violation of Pentagon rules, the Air Force has aggressively pursued Air Force members to illegally force repayment of scholarship funds and enlistment bonuses after involuntarily discharging them for being gay.
- 15. U.K. Reports Defense Strong After Lifting Gay Ban.** Even critics of gays in the military in Great Britain have conceded that the data show that the U.K. military remains as strong as ever, and that there have been no measurable consequences of lifting the gay ban. Recent studies of the impact of openly gay personnel in the Israeli, Australian, Canadian, and the U. K. militaries unanimously concluded that there has been no negative impact.
- 16. Young Adults, Aged 18-25, Disproportionately Affected By Gay Ban.** While young adults comprise only 43% of the armed forces, they comprise 92% of the gay discharges in the Air Force and Navy in 1999. The DoD Inspector General found the majority of anti-gay harassment is inflicted by junior enlisted men on other junior enlisted men, the majority of whom are young adults, aged 18-25.
- 17. Women Disproportionately Affected By Gay Ban.** Women continue to be accused of being lesbians for retaliatory reasons, regardless of their actual sexual orientation. Women represent 24% of SLDN's cases, though women comprise only 14% of the active forces. Women have historically been discharged at twice the rate of their numbers in the military.
- 18. Commands Use Heavy-Handed Tactics to Pursue Gays.** SLDN documented continued use of threats to extract confessions about service members' sexual activities, including threats of criminal charges, confinement and non-judicial punishment.

SLDN RECOMMENDATIONS

Seventh Annual Report on “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass”

- 1. Implement Pentagon Directive and Instruction, and Service Regulations on Anti-Gay Harassment Immediately. Begin Training Immediately.** It is irresponsible for the Pentagon to drag its feet on implementing its anti-harassment programs that could save lives. The services should ensure every service member from recruit to flag officer receives appropriate training to prevent anti-gay harassment. The Pentagon should make clear to all services that anti-gay harassment includes, but is not limited to, inappropriate comments and gestures, mistreatment, threats, and assaults.
- 2. Permit Service Members to Report Anti-Gay Harassment and Crimes Without Fear of Being Outed and Discharged.** Inspectors General, law-enforcement personnel, equal-opportunity representatives, chaplains, health-care providers, commanders and other personnel who deal with harassment should be given clear instructions not to out service members who seek their help. Service members—straight, gay and bisexual—go to these sources for help, not to make a public statement of their sexual orientation. These are private contexts and would remain so if officials did not out service members who seek their help.
- 3. Adopt Rule of Privacy for Conversations with Health Care Providers.** The Pentagon should inform health-care providers there is no requirement to turn in gay, lesbian, and bisexual patients, and should further clarify that conversations with health-care providers are not a basis for investigation or discharge under current policy.
- 4. Hold Accountable Those Who Ask, Pursue or Harass.** Military leaders should aggressively hold accountable those who ask, pursue or harass, starting with the many examples cited in this report. Commanders must understand there are specific consequences for violations, from letters of counseling to courts-martial, depending on the offense.
- 5. Ensure Full and Appropriate Training on Investigative Limits.** The Pentagon should ensure the services train all personnel on the policy’s investigative limits and intent to respect service members’ privacy. Leaders must be involved in the training and set the proper tone for it. Training should also include specialized training for attorneys, chaplains and all those charged with the welfare of their troops.
- 6. Stop Illegal Air Force Recoupment Actions.** The Pentagon should order the Air Force to follow Pentagon rules prohibiting recoupment when service members are involuntarily discharged for being gay, lesbian, or bisexual, bringing the Air Force into line with all other services. The Air Force should change its guidance on investigative limits to make clear that no or little investigation is needed in most statements cases.

- 7. Train Navy Leaders To Take Appropriate Actions When Service Members Come Out To Report Harassment.** Navy leaders should not require sailors who come out to produce evidence of sexual conduct or identify friends, including fellow sailors, who could confirm their sexual orientation, as a prerequisite for transfer, addressing anti-gay harassment or initiating discharge proceedings.
- 8. Provide Recourse to Service Members to Stop Improper Investigations.** While recent orders requiring service secretary approval for “substantial investigations” and greater legal guidance from higher headquarters are helping, they still deprive members of the opportunity to show why an inquiry should not go forward in the first place. Members should be able to obtain a military defense attorney before an inquiry is initiated, and have an opportunity to show that no credible evidence exists.
- 9. Require Commanders to State in Writing Reasons for Investigations.** This would be a further step to prevent improper investigations.
- 10. Train Investigators on How to Handle Possible Anti-Gay Hate Crimes.** Criminal investigators and law-enforcement personnel need training to recognize and appropriately investigate possible anti-gay hate crimes.
- 11. Adopt Exclusionary Rule.** The Pentagon should adopt an exclusionary rule so that evidence obtained illegally, as in a witch hunt, can be excluded at administrative discharge boards.

**CONDUCT UNBECOMING:
THE SEVENTH ANNUAL REPORT ON
“DON’T ASK, DON’T TELL, DON’T PURSUE, DON’T HARASS”**

EXECUTIVE SUMMARY

“I’m a ‘Don’t Ask, Don’t Tell’ man.”
--President George Bush, January 7, 2000¹

“There have been some setbacks in terms of [the policy’s] full implementation....”
--Secretary of Defense William Cohen, March 12, 2000²

*“Treatment of all individuals with dignity and respect
is essential to good order and discipline.”*
--DoD Anti-Harassment Action Plan, July 21, 2000³

“Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass” (DADTDPDH) undermines our national security. Forcing gay, lesbian, and bisexual service members to hide, lie, evade and deceive their commanders, subordinates, peers, families, and friends breaks the bonds of trust among service members essential to unit cohesion.⁴ Forcing commanders to discharge mission-tested, valued members of their team because of who they are impairs mission readiness. Enforcing a law that treats an entire group of Americans as second-class citizens undercuts the very liberties and freedoms our military members fight to protect, and thereby undercuts military integrity.⁵

The continued failure of military leaders to fairly implement the policy’s provisions on privacy, investigative limits, accountability, and recourse also undercuts readiness by diminishing respect for rule and order. Command climates poisoned by anti-gay⁶ abuses and harassment destroy good order, discipline, and morale.

SLDN believes the days of DADTDPDH are numbered.⁷ Nevertheless, DADTDPDH is the current law and military leaders must rise to the occasion to ensure that it is properly

¹ *Excerpts from the Debate Among G.O.P. Candidates*, N.Y. TIMES, Jan. 7, 2000, at A15.

² Richard Whittle, Interview, *Secretary of Defense William Cohen*, DALLAS MORNING NEWS, Mar. 12, 2000, at 1J.

³ Department of Defense Working Group, *Anti-Harassment Action Plan* (July 21, 2000).

⁴ See 10 U.S.C § 654(a)(7), “One of the most critical elements in combat capability is unit cohesion, that is, the bonds of trust among individual service members that make the combat effectiveness of a military unit . . .” *Id.*

⁵ The Pentagon has discharged 2-4 people every day for being gay since DADTDPDH was first implemented. At the time this report went to publication, the Pentagon had not yet released the gay discharge figures for FY2000 which ended on September 30, 2000.

⁶ Whenever “gay” is used throughout this report, it is used as an all-inclusive term for gay, lesbian, and bisexual.

⁷ A recent study by Britain’s Ministry of Defense concluded the U.K.’s armed forces remain as strong now, one year after lifting its gay ban, as before lifting the ban. Four reports conducted by an independent think tank this past year concluded that there has been no measurable effect of lifting the gay bans in Israel, Canada, Australia or the United

administered and enforced. *Conduct Unbecoming: The Seventh Annual Report on “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass”* examines the military’s failure to implement core parts of DADTDPDH and how this has impacted military readiness in the past year.⁸

Pentagon Fails To Issue Anti-Harassment Rules As Anti-Gay Hostility Continues Unabated

Our gravest concern this year is that the reports of death threats, assaults and verbal gay-bashing continue almost unabated, especially in the Navy.⁹ While “Don’t Harass” violations decreased by 10%, from 968 reported violations in last year’s report to 871 this year,¹⁰ one would have expected a more substantial drop in incidents of anti-gay harassment given the Pentagon’s attention in the past year to this issue.

The words of Private First Class Ronald Chapman, in a letter to his family, are particularly moving, disturbing, heart-wrenching and telling:

I GOT BEAT UP LAST NIGHT. SOMEONE CAME TO MY BED – A GROUP OF SOMEONES – AND THEY WERE HITTING ME WITH BLANKETS AND SOAP. I AM ACHING ALL OVER MY BODY. MY WHOLE BODY HURTS.... I CAN’T BELIEVE THIS HAPPENED. WHO DID I HURT?¹¹

It may be that military leaders’ commitment to prevent harassment has been more words than action. The Pentagon has sat on a draft Department of Defense Directive and Instruction to the services for six months directing the services to implement regulations adhering to the basic principle that “treatment of all individuals with dignity and respect is essential to good order and discipline.”¹² The service regulations would: clarify that anti-gay harassment includes mistreatment, harassment and inappropriate comments or gestures; order training for every enlisted member and officer with the training tailored to the grade and level of responsibility of every service member; order accountability for those who harass as well as those who condone

Kingdom. See, Aaron Belkin et al (unpublished manuscripts on file with the Center for the Study of Sexual Minorities in the Military, University of California at Santa Barbara, and www.gaymilitary.ucsb.edu).

All of the original NATO countries, except Turkey and the United States, have lifted their gay bans. The United States is the only industrialized western nation that still has a gay ban in its armed forces.

⁸ SLDN has assisted more than 2,600 service members in the past seven years who have been harmed by the policy.

⁹ For the fourth year in a row, the Navy led all services in incidents of anti-gay harassment with 332 reported incidents from February 16, 2000 to February 15, 2001.

¹⁰ The reporting period for this year’s report is February 16, 2000 to February 15, 2001. SLDN’s reporting periods track the anniversary of DADTDPDH which was implemented in February 1994.

¹¹ Letter from Private First Class Chapman to his family (Sept. 2000). Chapman’s experience is discussed fully in the “Don’t Harass” section.

¹² Department of Defense Working Group, *Anti-Harassment Action Plan* (July 21, 2000). See Memorandum from Under Secretary of Defense (Personnel & Readiness) Bernard Rostker to the Secretary of the Army, Secretary of the Navy, Secretary of the Air Force, Chief of Staff of the Army, Chief of Naval Operations, Chief of Staff of the Air Force, and Commandant of the Marine Corps, *Approval and Implementation of the Action Plan Submitted in response to the DoD Inspector General’s report on the Military Environment With Respect to the Homosexual Conduct Policy* (July 21, 2000) (directing that the proposed action plan “be forwarded to the Services for implementation”).

harassment; and direct Inspectors General to measure the effectiveness of anti-gay harassment efforts each year.

The proposed Department of Defense Directive and Instruction do not go far enough in our opinion, and service members will continue to be at risk. The proposed rules fail to make clear that service members should be able to report harassment to Inspectors General, law-enforcement officers, equal-opportunity representatives, health-care providers and others without fear of reprisal. By failing to expressly permit gay service members to safely use the same channels to report harassment available to heterosexual service members, the Pentagon has inappropriately prioritized punishing gays, lesbians, and bisexuals over curbing anti-gay threats, assaults and other harassment. The proposed Pentagon guidance, however, would be an improvement over current rules.

The Pentagon's failure to enact the new anti-harassment programs is irresponsible given the murder of two service members – Seaman Allen Schindler in 1992 and Private First Class Barry Winchell in 1999¹³ – by fellow service members who were driven to kill by anti-gay animus.

The Pentagon's failure to act is inexcusable given the Inspector General's survey findings that anti-gay harassment is rampant among the ranks.¹⁴ In March 2000, the DoD Inspector General released a report on its survey of 75,000 service members.¹⁵ The report found that 80% of respondents heard derogatory, anti-gay remarks during the past year; 37% said they witnessed or experienced targeted incidents of anti-gay harassment, 9% of whom reported anti-gay threats and 5% of whom reported witnessing or experiencing anti-gay physical assaults. The majority of respondents reported their leaders took no steps to stop the harassment.

The Pentagon's failure to respond quickly and forcefully with the new anti-harassment measures is also irresponsible given the Pentagon's own conclusion that anti-gay harassment directly undermines good order, discipline and morale.¹⁶ In July 2000, a Department of Defense working group published an Anti-Harassment Action Plan and made thirteen recommendations to improve the Pentagon's anti-harassment efforts. The Pentagon adopted those recommendations and was to include them in a Department of Defense Directive and Instruction.

Despite former Secretary of Defense William Cohen's efforts to address harassment in the ranks through leadership messages, IG surveys and working group plans, the bottom line remains that the Pentagon has failed to issue the Directive and Instruction implementing the recommendations from the Anti-Harassment Action plan.

¹³ Winchell's parents have filed a wrongful death claim against the Army under the Military Claims Act for the murder of their son. Two soldiers brutally murdered Winchell with a baseball bat while he slept. Testimony at the courts-martial revealed that Winchell faced daily anti-gay harassment for four months prior to his murder and his leaders did not stop it. The Army Secretary has yet to act on the claim.

¹⁴ The Army Inspector General also found that anti-gay banter was common at Fort Campbell in a review of the installation's command climate in the wake of Winchell's murder. Army spokespersons claimed there was no evidence of "homophobia" at the base despite the IG's findings.

¹⁵ See Department of Defense Working Group, *Anti-Harassment Action Plan* (July 21, 2000).

¹⁶ See *id.*

Gay, lesbian and bisexual service members overwhelmingly continue to come out to their commanders and risk discharge because it is the only way to protect themselves from unchecked harassment. Service members also come out for reasons of integrity as the gay ban's requirement of lying contradicts the services' core values of integrity, honor and candor. Contrary to the Pentagon's claim that gays are leaving the military "voluntarily" because they wanted "an easy way out," the stories of our clients demonstrate their enormous courage, honor, selflessness and dedication to our country even in the face of unfriendly fire and failed leadership. The military does not give gays, lesbians and bisexuals a choice to stay, even if they come out solely because of fear for their safety.

Given that the Pentagon can deploy 10,000 troops half way around the world in less than twenty-four hours to respond to a crisis, it should be able to implement new anti-harassment rules. All it takes is leadership.

SLDN strongly recommends that the new Administration move swiftly to implement the proposed anti-harassment programs. SLDN also strongly recommends that the services hold accountable, not only those who engage in harassment, but those who condone it. SLDN further recommends that the Pentagon make clear that service members should not face reprisals for reporting harassment to Inspectors General, law-enforcement officers, equal-opportunity representatives, health-care providers and others charged with their care.

**While Asking and Pursuits Decrease,
Air Force Pursuits Increase In Recoupment Cases, and
Navy Pursuits Decrease as It Attempts to Retain Openly Gay Sailors**

There is some good news to report this year. For the first time in seven years under "Don't Ask, Don't Tell, Don't Pursue, Don't Harass," there is evidence that some military leaders are beginning to follow some of the rules. Reported instances of asking and pursuit are down from last year. "Don't Ask" violations decreased by 18%, from 194 reported violations in last year's report to 159 this year. "Don't Pursue" violations decreased by 13%, from 471 reported violations in last year's report to 412 this year.

The devil is in the details. "Don't Ask" violations decreased in the Army, Navy and Marine Corps, but increased in the Air Force. The decrease in Army "Don't Ask" violations appears directly attributable to improvements in Army training to uphold the policy's investigative limits. Based on our experience, SLDN concludes that Navy and Marine Corps training is not responsible for the decrease in asking in their services. The Air Force saw an increase in its asking violations, because its training appears to be limited to online, self-directed training which service members report has not been successful. What is clear, however, is that Navy, Marine Corps, and Air Force training programs are lagging behind the Army's.

One notable result from SLDN's cases across all services is that asking by commanders and supervisors is less frequent. Asking by peers, however, is constant. This report does not fully reflect the sheer volume of questions gay, lesbian, and bisexual service members face every day about dating, relationships, and social activities which require them to lie, evade, dissemble, and censor themselves. But it is staggering. "Don't Ask" is a myth. If military leaders are

committed to stopping questions about sexual orientation, they must discourage enlisted members from harassing each other about their personal lives.

As with the decrease in “Don’t Ask” violations, the decrease in “Don’t Pursue” violations tells a different story in each service as well. The slight decrease in Army “Don’t Pursue” violations again appears directly attributable to its efforts to train on the policy’s investigative limits. The decrease in overall “Don’t Pursue” violations is mostly attributable to an aberration in the Navy where leaders are retaining openly gay, lesbian and bisexual service members¹⁷ unless they (1) provide self-incriminating information about sexual conduct which could carry criminal penalties, or (2) identify friends, including other sailors, who will confirm their sexual orientation, thereby opening the door to a potential witch hunt. Thus, while the Navy is not conducting wide-ranging fishing expeditions or calling in friends and family to interrogate them about a sailor as in the past, the Navy is simply doing nothing. Given that most sailors are coming out to their commanders due to unchecked anti-gay harassment, and the Navy for the fourth year in a row leads all services in incidents of anti-gay harassment, the Navy’s failure to do anything – transfer the sailor, stop the harassment, or discharge the sailor – is placing gay, lesbian, and bisexual sailors at grave risk.

The Air Force, on the other hand, continues to pursue in record numbers. Air Force “Don’t Pursue” violations increased 13%, from 222 violations reported in last year’s report to 251 this year. The Air Force’s “Don’t Pursue” violations once again leads all other services in its pursuit of gay, lesbian and bisexual service members. A significant portion of the Air Force’s “Don’t Pursue” violations occur regularly in the context of recoupment cases where the service demands that Air Force members repay scholarship funds and enlistment bonuses after involuntarily discharging them for being gay. The Air Force, in sharp contrast to the Army, Navy and Marine Corps, and in direct violation of Pentagon guidance, has consistently ignored Pentagon and Air Force rules prohibiting recoupment in most cases and is now even bucking Pentagon and Air Force rules requiring secretarial approval prior to the initiation of “substantial inquiries.”¹⁸

SLDN recommends that the Pentagon recommit to ensuring full and adequate training on the policy’s investigative limits and privacy protections. The Department of Defense Inspector General in its March 2000 survey of 75,000 service members worldwide found that 57% had not received any policy training, and that of those who said they understood the policy to a large or very large extent, only 26% could answer correctly three basic questions about how the policy works.¹⁹ SLDN recommends that the Navy’s training program instruct commanding officers to respond appropriately to sailors’ complaints of harassment as well as their admissions of gay,

¹⁷ The retention of openly gay service members directly contradicts the purported rationale for the gay ban, and provides further evidence that the gay ban itself is preventing military leaders from staffing their missions with high quality personnel.

¹⁸ In 1999, in an effort to curb improper pursuits, the Pentagon issued new guidance requiring commanders to obtain service secretary approval prior to the initiation of a “substantial inquiry.” See Memorandum from Under Secretary of Defense Rudy de Leon to the Secretaries of the Military Departments, *Implementation of Recommendations Concerning Homosexual Conduct Policy* (Aug. 12, 1999) [hereinafter Under Secretary of Defense (P&R) Rudy de Leon 1999 “Implementation” Memo].

¹⁹ See Office of the Inspector General, Dep’t of Defense, *Evaluation Report: Military Environment With Respect to the Homosexual Conduct Policy* 4, 16 (2000) [hereinafter DoD Inspector General 2000 Report].

lesbian or bisexual sexual orientation. SLDN recommends that the Pentagon rein in the Air Force's illegal recouplement actions.

What is “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass?”

While some of the news this year is an improvement over that in *Conduct Unbecoming: The Sixth Annual Report*, it remains worse than our first through fifth reports. Much must continue to be done to live up to the minimal promises made in 1993. With a new Administration in power and having to implement a law not of its making, it is worth reviewing exactly what DADTDPDH is.

DADTDPDH contains exactly the same prohibitions on service by gays, lesbians, and bisexuals that have been in place for fifty years.²⁰ The Pentagon discharges gays, lesbians, and bisexuals for statements, acts, and marriage. In other words, the Pentagon fires service members who acknowledge they are gay, lesbian, or bisexual, engage in sexual or affectionate conduct (such as handholding) with someone of the same gender, or have a relationship with someone of the same gender.

DADTDPDH is the only law in the land that authorizes the firing of an American for being gay. There is no other federal, state, or local law like it. Indeed, DADTDPDH is the only law that punishes gays, lesbians, and bisexuals for coming out. Many Americans view DADTDPDH as a benign gentlemen's agreement with discretion as the key to job security. That is simply not the case. An honest statement of one's sexual orientation to anyone, anywhere, anytime may lead to being fired.

DADTDPDH is, however, significantly different from prior prohibitions on service in three respects. First, Congressional and military leaders acknowledged, for the first time in 1993, that gays, lesbians, and bisexuals serve our nation and do so honorably.²¹ Second, the policy also states sexual orientation is no longer a bar to military service.²² Third, President Clinton, Congress and military leaders agreed to end intrusive questions about service members' sexual orientation and to stop the military's infamous investigations to ferret out suspected gay, lesbian, and bisexual service members.²³ They agreed to take steps to prevent anti-gay

²⁰ C. Dixon Osburn, *A Policy in Desperate Search of a Rationale: The Military's Policy on Lesbians, Gays and Bisexuals*, 64 UMKC L. Rev. 199 (1995).

²¹ *Policy Concerning Homosexuality in the Armed Forces: Hearings Before the Senate Comm. On the Armed Services*, 103d Cong., 707 (1993) (statement of General Colin Powell) [hereinafter Powell statement].

“[H]omosexuals have privately served well in the past and are continuing to serve well today.” *Id.*

²² DEP'T OF DEFENSE DIRECTIVE NO. 1332.14, *Enlisted Administrative Separations* E3.A1.1.8.1.1 (1994) [hereinafter DODD 1332.14]; DEP'T OF DEFENSE DIRECTIVE NO. 1332.40, *Separation Procedures for Regular and Reserve Commissioned Officers* E2.3 (1997) [hereinafter DODD 1332.40]. “A member's sexual orientation is considered a personal and private matter, and is not a bar to continued service . . . unless manifested by homosexual conduct . . .” *Id.*

²³ See Powell statement, *supra* note 21, at 709. “We will not witch hunt. We will not chase. We will not seek to learn orientation.” *Id.*

harassment.²⁴ They agreed to treat gay, lesbian, and bisexual service members even-handedly in the criminal justice system, instead of criminally prosecuting them in circumstances where they would not prosecute heterosexual service members.²⁵ They agreed to implement the law with due regard for the privacy and associations of service members.²⁶ The law became known in 1993 as “Don’t Ask, Don’t Tell, Don’t Pursue” to signify the new limits to investigations and the intent to respect service members’ privacy. In February 2000, in the wake of Private First Class Barry Winchell’s murder by fellow soldiers at Fort Campbell, Kentucky, Pentagon officials added “Don’t Harass” to the title of the policy.

We now stand at a political crossroads and the question is whether the Bush Administration will do what the Clinton Administration failed to do and enforce DADTPDH with fairness and compassion. Today is the first day for the new Administration to demonstrate its resolve.

²⁴ DEP’T OF DEFENSE DIRECTIVE NO. 1304.26, *Qualification Standards for Enlistment, Appointment, and Induction: Applicant Briefing Item on Separation Policy, addendum* (1993). “The Armed Forces do not tolerate harassment or violence against any service member, for any reason.” *Id.*

²⁵ Memorandum from Secretary of Defense Les Aspin to the Secretaries of the Military Departments, *Implementation of the DoD Policy on Homosexual Conduct in the Armed Forces* (Dec. 21, 1993). “[The new policy] provides that investigations into sexual misconduct will be conducted in an evenhanded manner, without regard to whether the alleged misconduct involves homosexual or heterosexual conduct.” *Id.* Despite the rule, SLDN continues to document use of threats of criminal charges, confinement and non-judicial punishment against gay service members, as well as criminal prosecution for consensual, sexual conduct.

²⁶ President William J. Clinton, *Text of Remarks Announcing the New Policy*, WASH. POST, July 20, 1993, at A12. President Clinton pledged that the policy would provide for “a decent regard for the legitimate privacy and associational rights of all service members.” *Id.* Then Senator William Cohen understood that the “small amount of privacy under the current policy was intended to prevent the military from prying into people’s private lives.” *Policy Concerning Homosexuality in the Armed Forces: Hearings Before the Senate Comm. On Armed Services*, 103d Cong. 788 (statement of Senator William Cohen).

DON'T ASK

“Commanders or appointed inquiry officials shall not ask, and members shall not be required to reveal [their sexual orientation.]”

-- Department of Defense Directive²⁷

“I have soldiers question my sexual orientation and I find it hypocritical that I am required, under the “Don’t Ask, Don’t Tell” policy, to lie in order to keep my job.”

-- Specialist Jana Johnson, United States Army²⁸

During this reporting period, SLDN documented a significant decline in the number of “Don’t Ask” violations. SLDN documented 159 violations from February 16, 2000 to February 15, 2001. This decline represents an 18% decrease from last year’s total of 194 violations. This year’s total is the lowest number of violations since 1997. The decrease in “asking” is good news. That “asking” occurs at all, however, remains troubling. After all, “Don’t Ask” means don’t ask.²⁹ It is clear and unambiguous. It has been the law since 1994.

The decline in “Don’t Ask” violations has not been uniform across all services. While violations decreased in the Army, Navy and Marine Corps, “asking” violations increased by 21% in the Air Force.

The decline in Army violations appears attributable to new policy training stating that asking is prohibited, stemming from Pentagon orders in August 1999.³⁰ In our estimation, the training in the Navy and Marine Corps is not as effective as the Army’s, but “asking” violations have also dipped noticeably in those services. SLDN will continue to monitor the Navy and Marine Corps to identify what factors may be contributing to the decrease in their “Don’t Ask” violations. The increase in Air Force “asking” may be attributable to the fact that its policy training has been limited to online, self-directed training, perhaps demonstrating a lack of leadership commitment.

Past *Conduct Unbecoming* reports have cited to the lack of military leadership and lack of training on the policy as the primary reasons for its poor implementation. If military leaders

²⁷ DODD 1332.14, *supra* note 22, at E3.A4.1.4.3; DODD 1332.40, *supra* note 22, at E8.4.3.

²⁸ Specialist Johnson came out to the Army because of her strong sense of integrity. By living up to the Army’s core values of honor and integrity, she is being forced to leave the service because the Army considers an honorable soldier like her a threat to unit cohesion, morale, and good order and discipline.

²⁹ In its April 1998 report on the effectiveness of the implementation of DADTDPDH, the Pentagon reaffirmed the prohibition against “asking.” See Office of the Under Secretary of Defense (Personnel and Readiness), *Report to the Secretary of Defense: Review of the Effectiveness of the Application and Enforcement of the Department’s Policy on Homosexual Conduct in the Military*, Apr. 1998, at 2 [hereinafter Under Secretary of Defense (P&R) 1998 Report].

³⁰ See Under Secretary of Defense (P&R) Rudy de Leon 1999 “Implementation” Memo, *supra* note 18.

intensify training on the policy, and begin to hold those violating the policy accountable, a further decline in “Don’t Ask” violations should follow.

Uniformed leaders have two challenges in further reducing “Don’t Ask” violations. First, service leaders must reduce peer-to-peer “asking.” Second, leaders must recognize this form of “asking” as harassment that places gay, lesbian and bisexual service members in an untenable position of having to either answer the daily questions they face and risk discharge, or lie, dissemble and evade to avoid detection.

The good news from SLDN’s cases is that “asking” by military leaders appears to have dropped dramatically. The majority of SLDN’s cases do not involve incidents where commanders, non-commissioned officers, inquiry officers, investigators or security clearance investigators³¹ are asking service members if they are gay, lesbian and bisexual. The bad news is that other service members are still “asking” each other about their private lives, and those questions can pose great risk to gay, lesbian and bisexual service members.

Service members report being asked whether they are married, whom they are dating, and to show photos of romantic interests. Heterosexual service members can respond to these questions without a second thought. Gay, lesbian and bisexual service members cannot answer them without risking discharge. Silence in the face of such questioning fuels speculation. Lying, deception and evasion runs counter to the values of our men and women in uniform.

As one Army officer put it, “[i]magine knowing that in a matter of days you could be out of a job because the simplest investigation could conclude you were gay as easily as a straight person could be found to be married.”³² Professor Diane Mazur aptly describes the problem:

“[“Don’t Ask”] requires service members to continually conceal everyday information about what they do, where they go, and whom they see, far exceeding the scope of information more directly associated with intimate behavior. To keep secret the latter is difficult enough; to keep secret the former is to change the catch phrase of the policy to ‘Don’t Ask, Don’t Tell, Lie Consistently.’”³³

Often times, “asking” is harassment. How should gay, lesbian and bisexual service members respond when asked whether they are a “fag,” “faggot,” “dyke,” “queer,” or “carpet muncher?” Silence invites further harassment. In reality, almost any response invites further harassment. The only thing that stops such harassment is leadership commitment to hold accountable those who engage in such behavior. All services must do better in stopping “asking” that doubles as harassment.

³¹ SLDN’s cases indicate that security clearance investigators are generally adhering to the rules allowing gay service members to obtain access to classified information. See Executive Order No. 12,968, 60 C.F.R. 151, at 40250 (1995).

³² More of former Army Major Neal Naff’s experience is contained in the “Don’t Tell” section of this report. Major Naff, who is gay, was a neurosurgeon at Walter Reed Army Medical Center in Washington, D.C.

³³ Diane Mazur, *Sex and Lies: Rules of Ethics, Rules of Evidence, And Our Conflicted Views on the Significance of Honesty*, 14 NOTRE DAME J.L. ETHICS & PUB. POL’Y 679, 692 (2000).

This section analyzes “Don’t Ask” implementation by service.

Army “Don’t Ask” Violations Decrease Due to Good Training

“We are determined to continue to implement the Don’t Ask, Don’t Tell policy with fairness to all because that is the right thing to do for our soldiers.”

-- Secretary of the Army and Army Chief of Staff³⁴

SLDN documented thirty-five “Don’t Ask” violations in the Army during this past year. This represents a 21% decline from the prior year’s report of forty-four violations.

The Army’s training efforts on “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass” (DADTDPDH) appear to be contributing to the decline in “Don’t Ask” violations. The prescription for successful training on the policy is simple: top unit leaders presenting a clear and direct message that “asking” is wrong.

Fort Knox Commanding General Sets Leadership Example

The best example of strong Army leadership in implementing “Don’t Ask,” as well as the policy’s other provisions, comes from Fort Knox, Kentucky. Major General B.B. Bell, the Fort Knox commanding general, issued a memorandum (Exhibit 1) stating, “I will conduct mandatory [policy] training for all [Fort Knox] Colonel-level commanders and primary installation directors . . .,” thereby setting the proper tone, up front, for his subordinate leaders. The General further directed that “unit commanders personally conduct the Homosexual Conduct Policy training in their units . . .” Major General Bell went on to unambiguously state that anti-gay “[s]lurs, demeaning jokes, harassment, and maltreatment violate the trust placed in us by the American people and by those whom we lead.”

Major General Bell’s leadership sets an example for other commands to emulate. His actions – not just words – communicate the seriousness and purpose of the training.

Despite Army efforts, there are documented instances of continuing “Don’t Ask” violations. Generally, improper “asking” continues to be used against soldiers as a form of anti-gay harassment. A brief review of selected Army cases illustrates the problem.

Examples of Army “Don’t Ask” Violations

- Specialist Jana Johnson, at White Sands Missile Range, New Mexico, reports being asked, “what are you, a carpet muncher?” and “why don’t you go out with the rest of us, are you some kind of dyke?” Johnson, a twenty-four year old from Pennsylvania, wrote, “[t]he Army restricts me from defending myself against comments or jokes about my sexuality by forcing me to keep quiet” (Exhibit 2).

³⁴ Electronic Message from Headquarters, Department of the Army, to ALARACT, *Dignity and Respect for All* (Jan. 10, 2000) (HQDA WASHINGTON DC 101800Z JAN 00 (ALARACT 008/00)) [hereinafter ALARACT 008/00].

- A Private at Fort Jackson, South Carolina, reports being asked by a drill sergeant, “[d]id your recruiter ask if you are gay? If he had, would you have told?” (Exhibit 3).
- A Private First Class at Fort Leonard Wood, Missouri, reports being repeatedly asked by other soldiers. The Private First Class wrote, “[m]any other male and female soldiers have come up to me and asked me if I am gay or bisexual. This includes soldiers who [sic] I have never met who asked me about my sexual orientation while in the chow line. I either do not respond to their question or lie and tell them that whatever they heard about me is not true because I am scared that someone like my old platoon member will hurt me if they find out I am bisexual” (Exhibit 4).
- A Specialist in Ausbach, Germany, reports being asked in indirect ways. He reports receiving inquisitive comments such as:
 - Did you grow up with a lot of females?
 - [Other soldiers] ask me if you are gay or not, but I said I don’t know.
 - You must be a Momma’s boy.
- A Specialist at Fort Hood, Texas, reports both he and his roommate were asked whether they are gay by a Lieutenant in their unit. The Lieutenant also asked the Specialist, “[d]oesn’t living with a fag make you sick?”

Army “Don’t Ask” Summary

The decrease in reports of Army “Don’t Ask” violations likely reflects an enhanced awareness of the rules by soldiers who have finally been trained by their leaders. This training regimen represents a very solid first step in the Army’s commitment to educate its soldiers on DADTPDH. Ultimately, the success of the Army’s “Don’t Ask” adherence will depend on Army leaders’ continued focus on the issue and willingness to hold those violating the policy accountable.

Air Force “Don’t Ask” Violations Increase Sharply; Weak Training Likely Responsible

“Commanders and other leaders must develop and maintain a climate that fosters unit cohesion, esprit de corps, and mutual respect for all members of the command or organization.”

-- Secretary of the Air Force and Air Force Chief of Staff³⁵

³⁵ Memorandum from Gen Michael E. Ryan, Chief of Staff, & F. Whitten Peters, Secretary of the Air Force, to ALMAJCOM-FOA/CC, *Implementation of Anti-Harassment Action Plan* (Oct. 2, 2000) [hereinafter *AF Implementation of Anti-Harassment Action Plan Memo*].

SLDN documented eighty-six “Don’t Ask” violations in the Air Force during this past year. This represents a 21% increase from the prior year’s report of sixty-eight violations. The Air Force is the only service with an *increase* in “Don’t Ask” violations.

The increase in Air Force “asking” may be attributable to the fact that their training efforts appear to be limited to online, self-directed computer briefings. Many airmen report to SLDN that they have not received any briefing, online or otherwise. The Air Force’s increased “Don’t Ask” violations also appear driven by continued “asking” as a form of anti-gay harassment.

Ongoing “Don’t Ask” Violations at the Defense Language Institute, Monterey

Last year’s *Conduct Unbecoming* report discussed serious Air Force policy violations, including a witch hunt, at the Defense Language Institute (DLI) in Monterey, California.³⁶ Since last year’s report, SLDN has worked with Air Force officials to address some of the Monterey problems. Although this past year has not seen the egregious witch hunt of the prior year, some “asking” as anti-gay harassment continues.

- A female Airman First Class at DLI reports being asked. She wrote, “[a]most immediately after arriving at DLI, airmen started approaching my roommate and I [sic], saying the male airmen wanted to know if we are gay. We just couldn’t be bothered with dating at that time. There were too many other matters that took priority . . . That was my reason for entering the military. It was not to date” (Exhibit 5).
- An Airman First Class reports being asked by Major Smyth, a DLI Air Force doctor, who was treating him for a sore throat, “[y]ou haven’t been swapping spit with your roommate, have you?” The Airman First Class’s roommate had been diagnosed with a sore throat the prior week (Exhibit 6).
- Robert Firpo, a twenty-year-old Airman First Class assigned to DLI, reports other airmen asked “more than 100 times” whether he is gay or “a fag.” Additionally, Firpo reports, while at basic training at Lackland AFB, Texas, a drill instructor asked him if he knew who Ru Paul (a male pop music performer who dresses as a female) is. When Firpo responded in the negative, the instructor stated, “I’m surprised someone like you wouldn’t know. So what do you think about gays in the military” (Exhibit 7).

“Asking” for the purpose of harassing perceived gay airmen is wrong. Given DLI’s recent history of policy violations, more steps should be taken to train airmen assigned to the school and to hold those found violating “Don’t Ask” accountable.

³⁶See STACEY L. SOBEL ET AL., CONDUCT UNBECOMING: THE SIXTH ANNUAL REPORT ON “DON’T ASK, DON’T TELL, DON’T PURSUE, DON’T HARASS,” *Anatomy of a Witch Hunt: The Case of the Defense Language Institute*, 29-38 (2000) [hereinafter 6TH ANNUAL CONDUCT UNBECOMING REPORT]. The cases contained “Don’t Ask,” “Don’t Pursue,” and “Don’t Harass” violations.

Additional Examples of Air Force “Don’t Ask” Violations

- Staff Sergeant Dennis Kennedy reports being asked whether he is gay by another noncommissioned officer while attending an Air Force language course in Arlington, Virginia.
- Airman First Class Chad Moritz reports being asked whether he is gay by another airman at Little Rock Air Force Base (AFB), Arkansas. He reports being confronted with expressions of anti-gay sentiment constantly since enlisting in the service. Moritz, a twenty-year-old from Pennsylvania, states the asking was intended as harassment and “heightened [his] anxiety about being found out” (Exhibit 8).
- A female Airman First Class at Goodfellow AFB, Texas, reports being asked by a noncommissioned officer “have you had sexual relations with other females?”
- An Airman First Class at Hickam AFB, Hawaii, reports being asked whether he was dating a female airman in the squadron. When the Airman First Class responded “yes,” the questioner stated, “people think you play the other field.” Soon thereafter two other airmen questioned the Airman First Class, directly “asking” whether he is gay. The Airman First Class states the “asking” was intended as anti-gay harassment.
- An Airman at Langley AFB, Virginia, reports being asked by fifteen different people. The Airman states the questions included “you’re gay?,” “are you gay?,” “we all know you’re gay,” and “you’re gay, right?”
- A Second Lieutenant reports receiving inadvertent questions about her sexuality by other officers at Travis AFB, California, including “are you married?” and “you have a boyfriend, don’t you?” The Lieutenant reports becoming despondent upon realizing that such otherwise innocuous questions would likely follow her throughout her Air Force career. She believes it is only a matter of time before others begin to speculate about her sexual orientation.

Air Force “Don’t Ask” Summary

The Air Force is the only service with “Don’t Ask” violation *increases* during this past year. “Asking” for any reason is impermissible under current policy, but “asking” for the purpose of harassing perceived gays is particularly disturbing. Air Force trainers should reconfigure their training methods to provide effective command leadership to airmen on the mechanics of DADTDPDH. By doing so, the Air Force will likely move further towards General Ryan’s goal of providing “mutual respect for all members” of the service.

Navy “Don’t Ask” Violations Decrease Sharply Despite Weak Training

“The importance of ensuring that every sailor understands the [Don’t Ask, Don’t Tell]

policy cannot be overemphasized.”

- Chief of Naval Operations³⁷

SLDN documented twenty-six “Don’t Ask” violations in the Navy during this past year. This represents a dramatic 60% decrease from the prior year’s report of sixty-five violations. This decrease in Navy violations is very encouraging. The reasons for the decrease, however, are not entirely clear.

The Navy’s training on the policy appears to be intermittent, at best. Many sailors report to SLDN they have received no DADTDPDH training. Others report they have received some training as part of the broader Navy personnel and morale training presentation entitled “Developing and Building Trust.”³⁸ A brief mention of this important policy sandwiched between several other subjects is not sufficient to adequately train sailors. Navy leaders need to implement a stronger DADTDPDH training program.

The “Don’t Ask” violations documented this past year mostly involve asking-as-harassment type questions. This continued misconduct suggests many sailors have not been sufficiently trained on the DADTDPDH policy’s prohibition on asking.

Examples of Navy “Don’t Ask” Violations

- A twenty-one-year-old Seaman Apprentice reports being repeatedly questioned about his sexual orientation during training at the Great Lakes Naval Center, Illinois. The sailor wrote, “I was always denying any question of my sexual orientation by fellow recruits or recruit training staff. These comments included: ‘Why are you saluting like that?,’ [and] ‘Are you in the San Francisco Gay (sometimes Rainbow) Navy?’” (Exhibit 9).
- Seaman Apprentice James Cline, a twenty-year-old who was assigned to the *USS Harry S. Truman*, in Norfolk, Virginia, reports being asked whether he is gay by four different sailors onboard the ship (Exhibit 10).
- Seaman Thomas Gold, a twenty-five-year-old assigned to the Bethesda Naval Medical Center, in Maryland, reports another sailor directly “asking” whether Gold is gay. Gold, who was a hospital corpsman, further reports a comment by his supervisor, Petty Officer Demontiac, regarding an HIV positive sailor who was their patient. Demontiac told Gold, “oh, Gold, that’s one of your kind, you should be able to handle this” (Exhibit 11).

³⁷ Electronic Message from Chief of Naval Operations to NAVADMIN, *Homosexual Conduct Policy and Training Requirements* (Apr. 13, 2000) (CNO WASHINGTON DC 131430Z APR00 (NAVADMIN 094/00)) [hereinafter NAVADMIN 094/00].

³⁸ The “Developing and Building Trust” briefing contains subjects such as sexual harassment, inappropriate behavior, and grievance procedures.

- Seaman Apprentice Demarco Brooks, a nineteen-year-old assigned to the Pentagon, in Washington, D.C., reports being told by other sailors, “you don’t like girls anyway” and “you never look at girls, I’m worried about you.” Brooks states he believed these sailors were attempting to determine whether he is gay (Exhibit 12).
- Seaman Brandon Talamantez, a twenty-two-year-old assigned to the Naval Hospital in Bremerton, Washington, reports being frequently asked by other sailors whether he is gay. Talamantez wrote, “[w]hen confronted by fellow service members’ questioning my sexuality I have always been honest with them and with myself. [D]ue to the widespread rumors and speculation about my sexual orientation, I do not feel comfortable at work” (Exhibit 13).
- A Seaman assigned to the *USS Boxer* in San Diego, California, reports receiving harassing questions from his shipmates about whether he is gay. The Seaman wrote, “I hear from my shipmates [comments] such as ‘are you sure there is not anything you need to speak to the chaplain about,’ I know that my co-workers speculate about my sexual orientation” (Exhibit 14).
- A Petty Officer Third Class assigned to the *USS Russell* in Pearl Harbor, Hawaii, reports being asked by other sailors “is that your boyfriend you are leaving with?” The Petty Officer reports receiving this question in addition to other anti-gay harassment because of his perceived sexual orientation.
- A female Seaman Apprentice at the Great Lakes Naval Center, in Illinois, reports being asked by some male sailors whether she is a lesbian. She writes, “[s]ince entering the Navy, several sailors have asked whether I am a lesbian. At first, the questions began subtly, such as “do you have a boyfriend?” The questions have become increasingly more pointed.” The Seaman was eventually asked “do you mess around with women?” The Seaman reports fearing for her safety after realizing that many of the male sailors were participating in the harassing questions and speculation about her private life (Exhibit 15).
- Another Seaman at the Great Lakes Naval Training Center, in Illinois, also reports being questioned by other sailors about his sexual orientation. At least two different sailors asked him if he is gay.
- A sailor stationed in Charleston, South Carolina, reports being told, “we thought you were gay because you have a lisp” and “I don’t care if you are, just don’t hit on me.” The sailor reports these comments were but a few of many anti-gay comments made towards him.
- A male Petty Officer Second Class reports being “asked” by another sailor “how is your husband?” The Petty Officer reports this question followed “hints and innuendoes about my sexual orientation [which] were flying everywhere” (Exhibit 16).

Navy “Don’t Ask” Summary

The reasons for the drop in Navy “Don’t Ask” violations are not clear. It is clear, however, that the decrease is not the result of an effective DADTDPDH training program. The Navy’s gay policy training is superficial and sporadic at best. Navy leaders should reinforce Admiral Johnson’s observation that it is important for every sailor to understand the policy. “Don’t Ask” violations should not be occurring seven years into DADTDPDH. With proper training by Navy leaders, and with accountability for those violating “Don’t Ask,” the number of Navy violations should continue to decrease.

Marine Corps “Don’t Ask” Violations Decrease, but Policy Training Weak

“It is important that all Marines understand the [Don’t Ask, Don’t Tell] policy.”

- Commandant of the Marine Corps³⁹

SLDN documented eleven “Don’t Ask” violations in the Marine Corps during this past year. This represents a 35% decrease from the prior year’s report of seventeen violations.

The Marine Corps does not appear to have a clear-cut training requirement on the policy. Marine Corps leaders have, according to many Marines speaking to SLDN, failed to train service members on “Don’t Ask,” as well as the other provisions of the policy. The Marine Corps risks harm to combat readiness by failing to uniformly enforce the rules. The Marine Corps, as well as each of the services, cannot pick and choose which rules it will enforce.

Examples of Marine Corps “Don’t Ask” Violations

- A female Corporal stationed at Fort Meade, Maryland, reports being asked by another service member whether she was “fucking” another female.
- A Private First Class at Camp Pendleton, California, reports being asked by other Marines if he was “going to see his boyfriend.”
- A Lance Corporal at Twenty-Nine Palms, California, reports a close friend being repeatedly asked by other Marines whether the Lance Corporal is a lesbian.
- A Lance Corporal at Camp Lejeune, North Carolina, reports being asked by other Marines if he is gay.
- A Lance Corporal at Camp Pendleton was asked “are you a faggot?” and “do you take it up the ass?”

³⁹ Electronic Message from Commandant of the Marine Corps to MARADMIN, *Homosexual Conduct Policy* (Jan. 7, 2000) (CMC WASHINGTON DC 070800Z JAN00 (MARADMIN 014/00)) (Amended by MARADMIN 025/00) [hereinafter MARADMIN 014/00].

- A Corporal at Fort Meade, Maryland, reports being asked by several other Marines whether he is gay.

Marine Corps “Don’t Ask” Summary

It appears that the Marine Corps is failing to train its Marines on the “Don’t Ask” prohibition. SLDN believes the instances of “asking” amongst the junior enlisted members results from a lack of Marine leadership in training the force and ensuring enforcement of the policy. Marine leaders are ignoring General Jones’ declaration that all Marines should “understand the policy.”

Coast Guard “Don’t Ask” Violations

SLDN documented only one Coast Guard “Don’t Ask” violation during this reporting period. The violation consisted of a Coast Guard service member in Norfolk, Virginia, being asked whether he is gay by another junior enlisted member. Although the Coast Guard is not under the direct control of the Pentagon, it generally follows DoD’s lead regarding DADTDPTH. To our knowledge, the Coast Guard, which in peacetime is part of the Department of Transportation, has not implemented any policy-related training. The Coast Guard should fall in step with the DoD services and institutionalize policy training to ensure all its members – present and future – are educated on the “Don’t Ask” prohibition.

“Don’t Ask” Conclusion

“The Defense Department is committed to the fair and even-handed application and enforcement of its policy on homosexual conduct in the military.”

- Rudy de Leon, former Under Secretary of Defense (Personnel and Readiness)⁴⁰

The services’ training on “Don’t Ask” over the past year has yielded some good results, particularly in the Army. The instances of “Don’t Ask” violations, however, remain too high. Particularly among the junior enlisted members, “asking” remains a part of the military culture. The Pentagon remains too willing to tolerate “asking” while too willing to penalize “telling.” Military leaders must do more to ensure the “fair and even-handed application and enforcement” of DADTDPDH.

The failure of military leaders to enforce “Don’t Ask” hurts unit combat readiness by destroying trust. Leaders are charged to take care of their Soldiers, Sailors, Airmen and Marines. Gay, lesbian and bisexual service members are at the total mercy of their leaders to prevent harassing “asking,” since they are not permitted under “Don’t Tell” to defend themselves. When leaders tolerate “Don’t Ask” violations, demonstrating their willingness to ignore the rules in the case of gay service members, it sends a message to all that their leaders cannot be trusted.

⁴⁰ Under Secretary of Defense (P&R) Rudy de Leon 1999 “Implementation” Memo, *supra* note 18.

Even if leaders uniformly enforce “Don’t Ask,” it creates barriers between young men and women who are supposed to be team building. Cohesion is not fostered by compulsory thought or behavior or sexuality. Cohesion is fostered by trust. Soldiers who know and trust each other will support each other during times of crisis. Our government should not be in the business of segregating our fighting men and women into “us” versus “them.”

DON'T TELL

“We found that the large majority of the discharges for homosexual conduct are based on the statements of service members who identify themselves as homosexuals . . . the Services believe that most of these statement cases – although not all of them – involve service members who voluntarily elected to disclose their sexual orientation to their peers, supervisors or commander.”

-- April 1998 Report to the Secretary of Defense⁴¹

“To those who think this policy represents a just compromise, I ask you to imagine the dissemblance and dodging that would be required to hide from the world the fact that you were straight; imagine doing this in a workplace where honesty and camaraderie are otherwise valued; imagine if you can the wasted energy you would have to expend to keep the existence of your spouse a secret from your closest colleagues; imagine preserving your pretense at the expense of happiness from personal relationships that would have been richer had they been more open.”

-- Major Neal J. Naff, M.D., former Army Neurosurgeon⁴²

“Don’t Tell” is commonly viewed as the opposite side of the coin of “Don’t Ask.” While a service member cannot “ask” another service member about his or her sexual orientation, gay, lesbian and bisexual service members cannot “tell” the military about their sexual orientation.

Current policy, however, does not prohibit “telling” in all circumstances. It allows for gays to “tell” defense attorneys,⁴³ chaplains,⁴⁴ security clearance personnel⁴⁵ and, in limited circumstances, doctors who are treating patients for HIV.⁴⁶

The “Don’t Tell” privacy rules do not explicitly state whether statements of sexual orientation in other private contexts are permitted. SLDN believes that the policy permits all but public disclosures of sexual orientation. The policy allows gays to associate with friends,

⁴¹ Under Secretary of Defense (P&R) 1998 Report , *supra* note 29, at 2.

⁴² Major (Doctor) Naff disclosed his sexual orientation after receiving a briefing on the Army’s “homosexual conduct” policy. Major Naff wrote, “the tragic death of a gay soldier and the pervasive anti-gay sentiment in the ranks that prompted this briefing demanded a clear and powerful declaration of the worth and dignity of all soldiers regardless of their sexual orientation. But instead, the briefing only validated the fears and prejudices that foster that harassment because the message underlying the briefing points was this: gays are not wanted in the military; and if you discover someone is gay, inform on them and they will be separated from the military” (Exhibit 17).

⁴³ See MIL. R. EVID. 502.

⁴⁴ See MIL. R. EVID. 503.

⁴⁵ See DEP’T OF DEFENSE DIRECTIVE NO. 5200.2, *DoD Personnel Security Program* encl. 3.7 (1997). See also DEFENSE INVESTIGATIVE SERVICE MANUAL, DIS-20-1-M, encl. 18.C (1993).

⁴⁶ See DEP’T OF DEFENSE DIRECTIVE NO. 6485.1, *Human Immunodeficiency Virus-1 (HIV-1)* encl. 3.2.1.9 (1991). “Information obtained from a Service member during, or as a result of, an epidemiological assessment interview may not be used against the Service member (in adverse criminal or administrative actions).” *Id.*

participate in gay-friendly organizations and read gay publications.⁴⁷ Military and Congressional leaders have acknowledged that gays serve our country and serve well.⁴⁸ Further, the policy clearly states that “sexual orientation is a personal and private matter.”⁴⁹

SLDN believes that gay service members should be able to talk openly and honestly with psychotherapists, physicians, law enforcement officials, family and friends. Our view is supported by those who helped craft the current policy, former Under Secretary of Defense Edwin Dorn⁵⁰ and Northwestern University military sociologist Charles Moskos⁵¹ (Exhibits 18 & 19).⁵² While some good commands do not punish service members who disclose their sexual orientation in private, Pentagon and service officials have permitted discharge action against other service members who make disclosures in these same contexts.

The bottom line is that service members who come out to anyone, anywhere, anytime risk discharge if outed to a commander who wants to punish gays, lesbians and bisexuals. No other

⁴⁷ See DODD 1332.14, *supra* note 22, at E3.A4.1.3.3.4 (stating “[credible information does not exist when] the only information known is an associational activity such as going to a gay bar, possessing or reading homosexual publications, associating with known homosexuals”); DODD 1332.40, *supra* note 22, at E.8.3.3.4.

⁴⁸ General Colin Powell stated, “Homosexuals over history who have been willing to keep their orientation private have been successful members of those teams.” Powell statement, *supra* note 21, at 708. General H. Norman Schwarzkopf stated, “Do not get me wrong, please. I am not saying homosexuals have not served honorably in our Armed Forces in the past. Of course they have, and I am quite sure that they will in the future” *Policy Concerning Homosexuality in the Armed Forces: Hearings Before the Senate Comm. On the Armed Services*, 103d Cong. 596 (1993) (statement of General H. Norman Schwarzkopf) [hereinafter Schwarzkopf statement].

⁴⁹ DODD 1332.14, *supra* note 22, at E3.A1.1.8.1.1; DODD 1332.40, *supra* note 22, at E.2.3.

⁵⁰ See Letter from Edwin Dorn to The Honorable Carol DiBattiste, Under Secretary of the Air Force (May 1, 2000) (on file with Servicemembers Legal Defense Network).

Recent reports have indicated that physicians, EEO personnel, inspectors general and law enforcement personnel believe that they are obliged to turn in service members who reveal their sexual orientation when they report anti-gay harassment, or who are discovered to be gay during an investigation into the reported harassment. If these practices occur, then they have the effect of punishing the victim. This is not what I anticipated or intended when I was involved in the development of DoD’s 1997 anti-harassment guidance.

Id.

⁵¹ See Letter from Charles Moskos, Professor, Northwestern University, to The Honorable William S. Cohen, Secretary of Defense, (Apr. 12, 2000) (on file with Servicemembers Legal Defense Network).

In my opinion, military members who reveal their sexual orientation during private medical treatment sessions or in the course of reporting harassment and threats are not ‘telling’ in a manner contemplated under the policy. It is appropriate for officials to assist these service members, not turn them in. Indeed, it is the ‘outing’ of service members to their units that triggers concerns about unit cohesion.

Id.

⁵² Our view is further supported by former Reagan Administration defense official Lawrence Korb (Mr. Korb is now with the Council on Foreign Relations). See Letter from Lawrence J. Korb to The Honorable Carol A. DiBattiste, Undersecretary of the Air Force (May 8, 2000) (Exhibit 20). “My primary concerns are the on-going harassment of service members by their supervisors and peers, and the lack of safe places for service members to turn within the military if they are facing harassment, medical or mental health problems or seeking spiritual guidance.” *Id.*

law at the federal, state or local level instructs an employer to fire someone for coming out or being discovered as gay.

The Pentagon has suggested that gays are “voluntarily” coming out. The Pentagon has admitted, however, that it has no evidence to support its theory.⁵³ The blame-the-victim spin does two things. First, it diverts attention away from the Pentagon’s failure to curb asking, pursuits, and harassment, as well as failure to enforce the privacy protections originally promised under current policy. Second, the blame-the-victim spin diminishes the reasons why brave, patriotic Americans risk their careers, livelihoods and military relationships by coming out as gay, lesbian or bisexual. Most service members who “tell” do so to escape harassment or for reasons of personal integrity. “Telling” in these circumstances is not “voluntary,” because coming out for many is an absolute necessity for physical, mental, emotional, spiritual and professional well-being. Further, there is no such thing as a “voluntary discharge” under “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass” (DADTDPDH) as gay service members who face discharge cannot check off a box electing to stay in service. They have no choice.

This section examines two recurrent problems where service members are “outed” based on conversations made in private contexts: military health care providers and chaplains. The section, in contrast to past years’ reports, then examines why harassment and integrity compel some service members to “tell” at risk to their careers and livelihood.

Military Health Care Providers Continue to “Out” Gay Patients

“We found that none of the Services require health care professionals to report information provided by their patients . . .”

-- April 1998 Report to the Secretary of Defense⁵⁴

“It is my understanding, from the training I have received in the HPSP program that, as a physician, I am required to inform a sailors’ command of his/her homosexual orientation if they reveal that information to me.”

-- Lieutenant Dennis Townsend, M.D.⁵⁵

In the past year, SLDN documented continued instances in which health care providers reportedly turned in gay service members who sought their help in dealing with anti-gay harassment or the stresses imposed by DADTDPDH. Health care providers continue to report to SLDN they have been instructed to turn in gay, lesbian and bisexual service members who seek their help. Indeed, service members have been discharged based on private counseling sessions with military psychologists. In other cases, commanders and inquiry officers have examined service members’ medical records specifically to look for information that a service member is gay.

⁵³ Under Secretary of Defense (P&R) 1998 Report, *supra* note 29, at 2,5.

⁵⁴ *Id.* at 10.

⁵⁵ Letter from Lieutenant Dennis Townsend, MC, USNR to Captain Joel C. Lebow, MC, USN, Director, Medical Corps Professional Programs (OM), (Dec. 20, 1999) (Exhibit 21).

“Don’t Tell” hamstring conscientious health care providers. Issues involving sexual orientation are central to the provision of adequate health care, but health care providers are often reluctant to “ask” out of well-placed concern not to out gay service members. Service members are reluctant to “tell” for fear of being outed.

SLDN appreciates former President Clinton’s Executive Order providing that communications with mental health professionals cannot be used as evidence in criminal proceedings (Exhibit 22). This Executive Order, however, has only limited value for gay service members who, for the most part, face administrative discharge proceedings, rather than criminal prosecutions, under DADTDPDH. While the Department of Defense could follow established practice by extending this privilege to the administrative context, as it does with the attorney-client and chaplain-penitent privileges, it has failed to do so. The Pentagon could also address concerns about the privacy of conversations with mental health professionals within the context of DADTDPDH, by making it clear that private statements to health care providers are not the kind of statements that form a basis for discharge, but it has failed to do so.

SLDN also appreciates the Under Secretary of Defense’s clarification in the April 1998 report to the Secretary of Defense that health care providers are not, in fact, required to turn in gay service members. This clarification, however, has not made it to the field – two years later. Nor is it adequate to address the problem, as it allows individual therapists to turn in military members, whether required to or not, and deprives service members of the ability to trust therapists.

Army Doctors Directed to “Out” Gay Patients

SLDN is aware of a February 2000 briefing at Fort McNair, in Washington, D.C., during which an Army Major stated that health care providers are required to report soldiers who they learn are gay. The Major was presenting training on DADTDPDH.

The Major’s statement is flat wrong. There is no Army requirement for health care providers to turn in gays, nor is there any such requirement in the other services. Contrary to what the Pentagon has asserted, the Major’s briefing clearly establishes that health care providers continue to be misinformed on how to handle their gay, lesbian and bisexual patients.

Goodfellow Air Force Base (AFB) Doctor Outs Patient

Captain Joseph Berger, an Air Force physician at Goodfellow AFB, Texas, outed a patient of his, an Airman First Class, after surmising the patient’s sexual orientation. The Airman First Class had sought assistance for a medical condition resulting from a sexual assault.

Dr. Berger wrote to the Airman First Class’s command, essentially telling them he believed the Airman is gay. Dr. Berger wrote, “I am required to notify you . . . so further actions can be taken” (Exhibit 23). As a result of Dr. Berger’s violation of the Airman’s medical privacy, he became the target of an Air Force investigation into his private life that resulted in his discharge.

The discharge was insult to injury. The Airman had sought medical treatment because he had been criminally assaulted. The doctor re-victimized the patient, abandoning the Hippocratic Oath and the privacy rules under DADTDPDH. SLDN is assisting the Airman First Class in preparing an Inspector General complaint reporting Dr. Berger's alleged violation of patient confidentiality.

A military physician describes the dilemma as follows, "[t]he medical necessity for inquiring about sexuality is not even debatable. That the military compromises the physical and mental health of gay service members by denying them candor with their military physicians is reprehensible."⁵⁶

Keesler AFB Psychotherapist "Outs" Bisexual Patient

Contrary to current guidance, Ms. Lamb, an Air Force civilian psychotherapist at Keesler AFB, Mississippi, told her client, Captain Ruth Ross-Powell, that she was "required" to turn her into her command after the captain came out as bisexual. Soon thereafter, Captain Ross-Powell found herself the target of a command directed inquiry into her private life apparently resulting from Ms. Lamb's outing her. The Captain, a twenty-nine-year-old dentist, reports she was stunned. She had sought help for dealing with her sexuality. She never conceived that a fellow member of the health professions would ever violate patient confidentiality.

The inquiry officer's final report includes a copy of Captain Ross-Powell's mental health records, including Ms. Lamb's notes concerning Ross-Powell's bisexuality. SLDN is assisting Captain Ross-Powell in reporting Ms. Lamb's alleged violation of patient confidentiality.

Air Force psychotherapists and doctors are not required to turn in their gay patients. Gay, lesbian and bisexual service members are discouraged from seeking health care if they fear losing their careers as the result. Healthy service members are the cornerstone of military readiness. Denying medical resources to gay service members undermines national security. The military practice of improperly directing health-care providers to violate their patients' confidentiality is unprofessional, unethical and medically unsound.

A military physician, upon receiving a briefing inappropriately directing doctors to turn-in their gay patients, offers this assessment: "[o]f all the ill conceived directives generated by this 'don't ask, don't tell' policy this abrogation of patient physician confidentiality is one that is particularly adverse to the interests of the [military]. The present policy affords the admission of homosexuality to a physician less protection than the admission of illicit drug abuse and, in this regard, essentially equates a homosexual admission with homicidal, felonious, or treasonous intent."⁵⁷

⁵⁶ *Id.*

⁵⁷ Letter from Army Major Neal J. Naff, M.D. to Air Force Colonel Steven J. Lepper (May 7, 2000) (Exhibit 24) [hereinafter Naff letter].

Some Military Chaplains “Tell” and Harass

“A soldier can discuss any topic regarding sexual orientation with a . . . chaplain.”

-- United States Army DADTPDH Training Pamphlet⁵⁸

Military chaplains can be an invaluable resource for service members of faith who are gay, lesbian or bisexual.⁵⁹ While most chaplains keep the confidences of gay service members, some do not.⁶⁰ Others continue to give bad legal advice, such as directing service members to turn themselves in, rather than sending service members to a military defense attorney for advice about the policy.⁶¹

As in past *Conduct Unbecoming* reports, SLDN documented a number of cases this past year where chaplains have berated gay service members, telling them they are sick, going to hell, and deviant. No matter one’s religious beliefs, this is an inappropriate response to a service member reporting harassment or seeking guidance in dealing with his or her sexual orientation.

In last year’s report, SLDN noted that the Army had adopted a new training regimen which made clear to all soldiers that there are two confidential resources for reporting anti-gay harassment: military defense attorneys and chaplains.⁶² In each service, chaplains are widely viewed as special resources upon whom service members may call for support and help on matters of personal sensitivity. Last year, SLDN warned that gay, lesbian and bisexual service members would indeed turn to chaplains for assistance and that those chaplains needed to receive appropriate training to respond to these situations. To our knowledge, a year after the fact, neither the Pentagon nor any of the services has conducted chaplain training. The predictable result is that some chaplains are unprepared for their responsibilities.

⁵⁸ *Don’t Ask, Don’t Tell: Army Homosexual Conduct Policy*, HOT TOPICS: CURRENT ISSUES FOR ARMY LEADERS 8 (Winter 2000).

⁵⁹ See generally Army Regulation 165-1, *Chaplain Activities in the United States Army* (1998) [hereinafter AR 165-1]. “A privileged communication is defined as any communication to a chaplain [including those made as a] matter of conscience.” *Id.* at 4.4 m(1).

⁶⁰ All communications between gay, lesbian and bisexual service members and chaplains should be confidential. Military chaplain regulations generally provide that chaplains respect the confidentiality of “sensitive information.” Matters relating to sexual orientation must be considered, at a minimum, as sensitive information. Further, commands should establish guidelines for punishing chaplains who violate confidentiality.

⁶¹ Chaplains should encourage gay service members who are considering revealing their sexual orientation to their command to first speak with a military defense attorney to learn the many legal consequences of coming out. Chaplains should never direct service members to “come out” against the service member’s will. Further, chaplains should encourage gay service members who wish to report harassment to first speak with a military defense attorney to obtain the legal information they need before taking such a step. The exception is when the service member’s safety is in immediate jeopardy. Chaplains should in these cases assist service members, if requested, in reporting the harassment while maintaining the member’s confidences.

⁶² It is not clear whether the Air Force, Navy and Marine Corps have similarly designated chaplains and defense attorneys as safe resources for gays reporting harassment and violence. Presumably, the military rules of evidence – establishing a privilege of communications between service members and defense attorneys, as well as between service members and chaplains – would provide some safety. Each service should unambiguously designate defense attorneys and chaplains as “safe spaces” for gay, lesbian and bisexual service members discussing issues related to sexual orientation and/or anti-gay harassment.

USS Dubuque Navy Chaplain "Tells"

Seaman Apprentice Derjuan Tharrington reports that he believes the *USS Dubuque's* chaplain outed him to his supervisor resulting in his discharge. The chaplain's actions, if true, not only violate the chaplain-penitent privilege, but DADTDPDH.

Seaman Tharrington, a twenty-one-year-old from Oklahoma, had become the target of incessant anti-gay harassment (Tharrington's harassment story is fully discussed in the "Don't Harass" section). He went to the chaplain, Lieutenant Lee, for moral support and to ask for help in ending the harassment.

During his conversation with Chaplain Lee, Tharrington confided in the chaplain that he is gay. Tharrington reports he and Chaplain Lee specifically discussed the need to keep the matter of his sexual orientation private.

After his conversation with Chaplain Lee, Lieutenant Joyce, Tharrington's supervisor, reportedly approached Tharrington and grilled Tharrington on what he had discussed with Chaplain Lee. Seaman Tharrington responded, "[i]t is between me and the chaplain," adhering to "Don't Tell" despite the inadvertent "asking." Lieutenant Joyce then reportedly stated, "well, I'll just have to find out for myself."

Tharrington believes Chaplain Lee "told" Lieutenant Joyce that Tharrington is gay. Soon thereafter, Lieutenant Joyce reported Tharrington to the ship executive officer.

The Pentagon has instructed commands to take seriously reports of anti-gay harassment and to help those targeted by the harassment. The Pentagon harassment policy states, "[s]ervice members should be able to report crimes and harassment free from fear of harm, reprisal, or inappropriate or inadequate governmental response."⁶³

Seaman Tharrington went to Chaplain Lee seeking support in his effort to escape anti-gay harassment. Instead, Tharrington found himself the target of an intrusive command inquiry into his private life.

Army Chaplain in Germany Harasses Lesbian Sergeant

Chaplain Leininger, a Major stationed in Heidelberg, Germany, berated Sergeant Gidonny Ramos for being a lesbian. He reportedly told her that while some Christian chaplains accepted gays, he did not. Leininger then allegedly threatened Sergeant Ramos with "going to

⁶³ See Memorandum from Rudy de Leon, Under Secretary of Defense, to the Secretaries of the Military Departments, *Guidelines for Investigating Threats Against or Harassment of Service Members Based on Alleged Homosexuality* (Aug. 12, 1999). [hereinafter Under Secretary of Defense (P&R) Rudy de Leon 1999 "Investigating Threats Guidelines" Memo]. "Commanders must take appropriate actions in such instances, with due consideration given to the safety of persons who report threats or harassment, and see that persons found to have made threats or engaged in threatening or harassing conduct are held fully accountable . . . the report of a threat or harassment should result in the prompt investigation of the threat or harassment itself. Investigators should not solicit allegations concerning the sexual orientation or homosexual conduct of the threatened or harassed person." *Id.*

hell” and told her “homosexuality is a curable disease.”⁶⁴ He reportedly urged Ramos to seek information from the “ex-gay ministry” movement⁶⁵ (Exhibit 25).

Sergeant Ramos’ supervisor, Sergeant First Class Lopez, had ordered her to seek guidance from the chaplain after her civilian husband “outed” her to her command. She had recently come out to her husband. Lopez confronted Ramos, directly “asking” whether she is a lesbian.⁶⁶

Chaplain Leininger ordered Ramos into compulsory marriage counseling. In mid-August, 2000, in her husband’s presence, Leininger called Sergeant Ramos a “sexual deviant,” stating that “people like [Ramos did] not belong in the Army.” Leininger further called Ramos an “embarrassment to the uniform.” Sergeant Ramos reports the chaplain stated he would “remain quiet” about Ramos’ “sexual perversions” conditioned on her participation in the marriage counseling sessions.

Sergeant Ramos, realizing she was trapped in an untenable situation, told her command she is a lesbian and subsequently was honorably discharged. Ramos should not have had to sacrifice her military career as the only means to escape. Chaplain Leininger’s misconduct is particularly troubling because the Army has designated chaplains as safe places for gay, lesbian and bisexual soldiers.⁶⁷ SLDN, on Sergeant Ramos’ behalf, filed an Army Inspector General complaint asking that Chaplain Leininger and Sergeant First Class Lopez be held accountable for their alleged misconduct.

Chaplains must not use their status as government officials to engage in personal, anti-gay crusades. Such behavior erodes gay, lesbian and bisexual soldiers’ confidence in the Army’s commitment to eradicating anti-gay hostility within the ranks.⁶⁸ Misconduct like that engaged in

⁶⁴ Science, long ago, discarded the myth that being gay is an illness. Homosexuality is a normal, healthy sexual orientation. See *Resolution of the American Psychiatric Association* (Dec. 15, 1973), reprinted in 131 AM. J. PSYCHIATRY 497 (1974) (removing homosexuality from APA’s list of mental disorders); American Psychological Association, *Minutes of the Annual Meeting of the Council of Representatives*, 30 AM. PSYCHOLOGIST 620, 633 (1975); NASW, Policy Statement of Lesbian and Gay Issues (1993), reprinted in NASW, *Social Work Speaks: NASW Policy Statements* 162, 162-65 (3d ed. 1994); John C. Gonisorek, *The Empirical Basis for the Demise of the Illness Model of Homosexuality*, in *HOMOSEXUALITY: RESEARCH IMPLICATIONS FOR PUBLIC POLICY* 115, 155-236 (John C. Gonisorek & James D. Weinrich eds., 1991).

⁶⁵ The “ex-gay” ministries claim that sexual orientation is a matter of choice and those who are gay can choose to be heterosexual. The American Psychological Association has concluded that reclamation therapy does not work, and that sexual orientation is a core integral part of an individual’s identity. See American Psychiatric Association, *Position Statement: COPP Position Statement on Therapies Focused on Attempts to Change Sexual Orientation (Reparative or Conversion Therapies)*, available at http://www.psych.org/pract_of_psych/copptherapyaddendum83100.cfm (last visited Mar. 6, 2001).

⁶⁶ Sergeant First Class Lopez proceeded to engage in harassment of Sergeant Ramos. Lopez made sexist and homophobic comments towards Ramos and sent her degrading e-mails. Lopez reportedly said, “gay soldiers lack the moral integrity to lead soldiers” and “women should not be allowed to do real Army work like fighting in combat.” Ramos reports the poor example set by Lopez, a senior noncommissioned officer leader, led to other soldiers within her section joining in the anti-gay harassment (Exhibit 25).

⁶⁷ *Don’t Ask, Don’t Tell: Army Homosexual Conduct Policy*, HOT TOPICS: CURRENT ISSUES FOR ARMY LEADERS 8 (Winter 2000) (stating “[a] soldier can discuss any topic regarding sexual orientation with a legal assistance attorney or chaplain.”).

⁶⁸ ALARACT 008/00, *supra* note 34.

by Leininger will likely have a chilling affect on soldiers' willingness to seek assistance from chaplains, thereby lowering confidence in the Chaplain Corps and harming unit readiness.

Fort Benning Chaplain Berates Gay Soldier

Upon confiding in Chaplain Smith that he is gay, Private First Class Matthew Burgess states that the chaplain told him "you are going to hell." Chaplain Smith likened being gay to being an adulterer and pedophile. Smith further told Private First Class Burgess he can "change" and attempted to provide Burgess with materials from the "ex-gay ministries" (Exhibit 26).

Private First Class Burgess, a twenty-four-year-old from Kentucky, had become the target of anti-gay harassment while assigned to Fort Benning, Georgia⁶⁹ and was seeking help from his chaplain, as a recent briefing on DADTDPDH instructed him to do. SLDN assisted Burgess in reporting Chaplain Smith's alleged misconduct to the command. We do not know whether the command held Chaplain Smith accountable.

Telling gay soldiers to trust the chaplain on the one hand, and having a chaplain violate that trust undermines confidence in Army leaders. Sadly, such situations harm faith in the Chaplain Corps, harm gay, lesbian and bisexual soldiers, and – most importantly – harm military readiness.

SLDN has long recommended that chaplains receive specific instructions not to turn in gay service members who seek their help and to treat these conversations as confidential, per the chaplain-penitent privilege. Further, chaplains must be willing to recommend another chaplain if their personal beliefs preclude them from adequately advising gay service members.⁷⁰ As staff officers, chaplains should not engage in behavior that gay service members would likely perceive as harassment, in violation of the policy's "Don't Harass" component. Chaplains should assist commands in combating anti-gay harassment. The Pentagon should initiate policy training programs tailored for the unique duties of chaplains in serving the needs of gay, lesbian and bisexual service members.

⁶⁹ Private First Class Burgess reports three other soldiers threatened him with violence in August 2000.

⁷⁰ A Marine Private First Class in Yorktown, Virginia, reports to SLDN he too received lukewarm support from his unit chaplain. The Private First Class went to the chaplain in June 2000 telling the chaplain he was struggling with being gay and in the Marines. The chaplain told the Private First Class to read Bible verses on resisting temptation. When the Private First Class later returned to the chaplain telling him that Bible verses were not the answer to his dilemma, the chaplain gave the Private First Class materials to the "ex gay ministry" and urged the Private First Class to "try to overcome" his gay feelings (Exhibit 27).

The Story Behind “Telling:” Gays “Tell” to Escape Harassment and Live with Integrity

“[I]magine being monitored for any revelation into your most private life; imagine returning every phone message to an unfamiliar number with the fear that the ax may be falling; imagine concealing your anxiety from your friends at work to protect them from the dilemma of honoring your confidence or informing on you as Army policy dictates; imagine an Army investigator being the first to tell your family that you are gay. Imagine all this and you have only a glimpse of life as a gay service member under “Don’t Ask, Don’t Tell.”

- Major Neal J. Naff, M.D., former Army Neurosurgeon⁷¹

Service members are sometimes compelled to disclose their sexual orientation to the military for one of two primary reasons: (1) protection from anti-gay harassment; and (2) wanting to live their lives honestly.

Coming Out to Escape Harassment

“Telling” to escape anti-gay harassment is common in SLDN’s cases. A poignant example comes from Fort Campbell, Kentucky, in the case of Army doctor, Major Paul Gott. Major Gott wrote:

I am writing to inform you that I am gay . . . I had the misfortune to be the surgeon on call the night Private First Class Winchell was brought to the emergency room at Fort Campbell. The obvious brutality and hatred that must have motivated his attacker struck me deeply. In the days that followed, the knowledge that the attack was an anti-gay hate crime filled me with outrage and disgust. Yet I remained silent. Imagine the stress and anxiety of working in an environment where the brutal murder of a person simply for being gay was the topic of casual conversation . . . the response I perceived was that it was a tragic, though not unexpected, consequence of gays serving in the military. I am sure I am not alone among gay servicemembers who sat silently through these conversations with a sense of nausea and fear.

I do not like having to openly declare my sexuality. It is a profoundly personal issue. But it is also something that I am not ashamed of and I think it is wrong to be forced to hide it. I can no longer, in clear conscience, be silent and bear witness to the ongoing harassment and violence faced by gay service members (Exhibit 28).

The “Don’t Harass” section of this report contains a detailed analysis, by service, of many service members being forced to “tell” in order to protect their safety – and indeed sometimes their lives – in the face of virulent anti-gay hostility. The “Don’t Tell” section will, therefore, focus on the “integrity” component compelling some gays to “tell.”

⁷¹ Naff letter, *supra* note 57.

Coming Out for Reasons of Integrity

Although each of the services stresses the virtue of integrity, “Don’t Tell,” in essence, requires gay service members to lie as a condition of their service. If gay, lesbian or bisexual service members “tell” anyone – military or civilian – their careers may be in jeopardy. Therefore, to protect against harm to their military careers, gays, lesbians and bisexuals are forced to lie.

Lying is harmful to military readiness. As Law Professor Diane H. Mazur writes:

If there is one thing that is undisputed and seems self-evident, it is that cohesion depends on mutual trust within the unit. The honor code for servicemembers provides that they will not lie or cheat, and for good reason. Honesty is a quality that attracts respect. Secrecy and deception invite suspicion, which in turn erodes trust, the rock on which cohesion is built.⁷²

This institutionalized requirement to deceive undermines the credibility of military leaders who stress honor and integrity. As Professor Mazur writes, “[i]n the case of [“Don’t Tell”] there are no alternatives that combine service to country and an ethic of truthfulness: lying is part and parcel of service.”⁷³

For some gay, lesbian and bisexual service members, once they come to personal terms with their sexual orientation, they are deeply troubled by the military’s hypocrisy as illustrated by the friction between “Don’t Tell” and the core value of “integrity.” It is this dismay at being denied the opportunity to live with integrity that drives some gays to “tell.”

Many Gays Have Not Fully Accepted Their Sexuality Upon Entering Military Service

The issue of gay, lesbian and bisexual service members “telling” is further complicated by the very nature of human sexuality development.

Most men and women join the Armed Forces at a very young age. With few exceptions, gay, lesbian and bisexual youth have not fully internalized and accepted their sexual orientation at the point when they enlist or are commissioned in the service. SLDN’s cases reflect this reality. Many young gay service members contact SLDN only after they have reached a comfort level with who they are. Once gays, lesbians and bisexuals reach this level of self-acceptance,⁷⁴

⁷² Mazur, *supra* note 33, at 693.

⁷³ *Id.* at 723

⁷⁴ Many gay, lesbian and bisexuals experience a period of confusion and denial regarding their sexuality before “coming out.” In an article entitled “Sexual Orientation Identity Formation: A Western Phenomenon,” Dr. Vivienne Cass identified several stages of “cognitive awareness, self-understanding, and sense of identity in relation to the concept of homosexual sexual orientation and the impact these levels of self-knowledge have on the management of social interchanges.” According to her, these states are: “Stage 1 – Identity Confusion, Stage 2 – Identity Comparison, Stage 3 – Identity Tolerance, Stage 4 – Identity Acceptance, Stage 5 – Identity Pride, Stage 6 – Identity Synthesis,” and each stage marks “different levels of self-understanding that indicate an increasingly first person

they find it more difficult to balance the requirements of “Don’t Tell” with their need to lead healthy lives.⁷⁵

Below are examples, by service, of the ethical, moral and untenable dilemma “Don’t Tell” places on gay, lesbian and bisexual service members.

Core Military Values of Honesty and Integrity are Harmed by “Don’t Tell”

“[M]ilitary leadership must evolve from a foundation of trust and confidence. The ethics and integrity of our military leadership must be much higher than the society at large and even the elected officials that serve that society. Success in combat, which is our business, depends on trust and confidence in our leaders and each other. Ethics and integrity are the basic elements of Trust and Confidence in our military leadership, both from above and more importantly from below.”

- Admiral (Retired) Leon A. Edney⁷⁶

ARMY: “Integrity: Do What’s Right, Legally and Morally”

- United States Army Core Values⁷⁷

- “Now imagine that out of a desire to serve you submit to that perverse system, honor the immoral bargain of silence, and serve with distinction only to be told [that gays are] not fit to serve. At that point, for the first time perhaps, your outrage turns inward at your own complicity and your own foolishness. You know in your heart that your own service testifies to the fallacy of this most unjust directive. You know it is a testimony that must be made. It is at that point that I finally speak out.” - Major Neal J. Naff, M.D., former Army Neurosurgeon, Walter Reed Army Medical Center, Washington, D.C. (Exhibit 17).
- “[While recently visiting the Jefferson Memorial, in Washington, D.C., I read] the opening of the Declaration of Independence: *We hold these truths to be self evident; that all men are created equal, that they are endowed by their Creator with certain inalienable rights, among these are life, liberty, and the pursuit of happiness* These are the most basic principles upon which our country was founded. In a fundamental sense the ‘Don’t Ask, Don’t Tell’ policy violates these most basic rights. I once took great pride in military service and

account of self as lesbian or gay.” In other words, the process of coming to identify oneself as gay proceeds only very gradually. See Vivienne Cass, Ph.D., *Sexual Orientation Identity Formation: A Western Phenomenon*, in TEXTBOOK OF HOMOSEXUALITY AND MENTAL HEALTH 227, 231-47 (Robert P. Cabaj & Terry S. Stein, eds., 1996).

⁷⁵ Further, young gays, lesbians and bisexuals have far more examples of healthy role models today than ever before. When gay, lesbian and bisexual service members see greater acceptance of homosexuality within society at large, it is understandably difficult for them to reconcile the contradictions inherent under “Don’t Tell.” The result for some is a decision to “tell.”

⁷⁶ Committee on the Judiciary, United States House of Representatives, *Statement Submitted to the Committee on Judiciary, United States House of Representatives By Leon A. Edney Admiral USN (Retired), Dec. 1, 1998*, available at <http://www.house.gov/judiciary/101304.htm> (last visited Mar. 4, 2001). Also Mazur, *supra* note 33, at 687 n.35.

⁷⁷ United States Army, *Army Values: Integrity*, at <http://www.dtic.mil/armylink/graphics/integrity.jpg> (last visited Mar. 4, 2001).

defending these ideals; now I find it an increasingly oppressive burden.” Major Paul Gott, M.D., Fort Campbell, Kentucky (Exhibit 28).

- “The decision to inform the Army [that I am gay] is the most difficult decision I have ever made . . . [t]he Seven Core Army Values: Loyalty, Duty, Respect, Self-less Service, Honor, Integrity, and Personal Courage excited me about serving in the Army. However, those same seven values are the reason for informing you of my homosexuality and the double life that I am forced to live while serving in the Army. During the later half of my tour as a Platoon Leader and now as Executive Officer of a Basic Training Unit, it has become evident that living this double life while proudly leading soldiers, compromises the seven Army values I believe in so deeply. At the same time, I now live in increased fear of, and isolation from, the organization I have given almost eight years of my life.” First Lieutenant Stephen Boeckels, Fort Knox, Kentucky (Exhibit 29).

AIR FORCE: “Integrity First”
- United States Air Force Core Values⁷⁸

- “After over three years of serving active duty in the Air Force, I can no longer avoid an ethical dilemma that has been plaguing me. The burden has become too great on my mental, physical and spiritual health. I’ve learned many lessons as I start my eighth year⁷⁹ of overall service, and the lesson that has most strongly influenced me, and that I value the most, is integrity. With this lesson in mind, I make the following statement. I am a lesbian.” First Lieutenant Megan Kuzmich, Air Force Agency for Modeling and Simulation, Orlando, Florida (Exhibit 30).
- “I am a lesbian. For me this has been an ongoing struggle. A moral struggle, for I have done my best to embody the Air Force core values throughout my two years of active duty. This has been an internal battle, for a gay service member must live a double-life. His or her private life must be a closely guarded secret. I have been living this difficult double-life and can no longer do so. I have decided to simply tell the truth.” First Lieutenant Shalanda Baker, Los Angeles AFB, California (Exhibit 31).
- “I am a gay man who wants to continue to serve his country honorably and openly. I have made many sacrifices since entering the service and am more than willing to continue making them, but as an honest man instead of as a coward. I can no longer deal with the added stress of having to hide who I am to those I work for and with each and every day. The Air Force takes a very clear stance on integrity, yet makes its homosexual members lie in order to keep serving a nation that they have just as much right to love someone in as their heterosexual counterparts. I am not willing to live that lie any longer and I believe that

⁷⁸ United States Air Force, The Core Values of the Air Force, *available at* http://www.af.mil/news/speech/current/The_Core_Values_of_the_Air_.html (reporting a speech given by The Honorable Sheila E. Widnall, then Secretary of the Air Force, to Air Force Academy Cadets, at Colorado Springs on Apr. 18, 1996) (last visited Mar. 4, 2001).

⁷⁹ First Lieutenant Kuzmich is a graduate of the United States Air Force Academy, in Colorado Springs, Colorado.

nobody should have to.” Second Lieutenant Christopher Pristera, Keesler AFB, Mississippi (Exhibit 32).

NAVY: “Honor: Be honest and truthful in our dealings with each other.”

- United States Navy Core Values⁸⁰

- “Just last week, I had my performance review and the highest marks I received were for military bearing. One of the reasons this is true is because I take the military values of honesty and integrity very seriously. It is this sense of honor that dictates I inform my chain of command that through much self reflection I have come to acknowledge I am gay. I need to openly acknowledge my whole identity to myself, my family, my friends, and my colleagues without shame or reservation and live an openly gay life.” Lieutenant Commander Tom DeBlois, M.D., San Diego, California (Exhibit 33).
- “I am gay. I want to serve my term as a naval officer, but because of the Navy’s policy on homosexuals, I have been forced to keep my sexuality a secret. This conflicts with my belief in upholding the Navy’s core values of honor, courage and commitment. I want to serve in the military, but I do not want to have to lie about who I am any longer. Denying my homosexuality only supports the bigotry I have encountered by making it seem like it is something to be abhorred. With all of this in mind, I respectfully request to continue service as an openly gay officer in the United States Navy. I feel this will [allow me to] live my life honestly and as a better officer” Ensign Francisco Fikes, Newport, Rhode Island (Exhibit 34).
- “It seems hypocritical for me not to inform my command that I am gay. I strongly believe in the Navy’s core values and I do not want to compromise my integrity by failing to be honest with my command. My sexual orientation has no bearing on my ability to be a good doctor or a good officer or my ability to serve my country.” Lieutenant Dennis Townsend, M.D., East Tennessee State University Medical Center (Exhibit 21).

⁸⁰ United States Navy, *Core Values of the United States Navy*, available at <http://www.chinfo.navy.mil/navpalib/traditions/html/corvalu.html> (last visited Mar. 4, 2001).

“Don’t Tell” Conclusion

“It is with inexpressable sadness that I make this statement to you, but I can no longer remain complicit in a system that negates the promise of our Founders and denies me and others our most fundamental rights as Americans.”

- Major Neal J. Naff, M.D., former Army Neurosurgeon⁸¹

“Don’t Tell” is harmful to combat readiness because it sows the seeds of distrust amongst service personnel. The evasion and deceit necessary to survive under “Don’t Tell” erodes the bonds of trust and camaraderie so necessary for effective military units.

Some gay, lesbian and bisexual service members are compelled to “tell” as their only recourse to escape harassment, including threats of physical violence. The solution lies in the hands of military leaders. They should step up to the plate and put a halt to expressions of anti-gay bias within the ranks.

Other service members “tell” because of the enormous ethical dilemma created by the policy. Congress and military leaders should stop the hypocrisy that results from its “core values” and its requiring gay, lesbian and bisexual service members to lie.

The intent of the policy, to provide some privacy for gay, lesbian and bisexual service members, is thwarted when military therapists, physicians and chaplains “tell” or harass gay service members. Combat readiness is harmed when gays and lesbians in uniform are denied safe access to health care, spiritual counseling, and law enforcement protection for fear of their careers and safety. In the face of such risk and, often times, hostility, it is clear why some gays, lesbians and bisexuals conclude “telling” is their only recourse.

⁸¹ Naff letter, *supra* note 57.

DON'T PURSUE

“In most of these cases, little or no investigation should be conducted.”⁸²

-- Under Secretary of Defense (P&R) 1998 Report

“Do you know how long [they] have been together; have you ever seen physical contact between them; have you ever seen any sexual contact; and can you elaborate on any lovers.”

-- Examples of Questions Asked of SLDN Client This Year

“Don’t Pursue” is intended to get commanders and investigators to back off and respect gay, lesbian and bisexual service members’ privacy. “Don’t Pursue” contains more than a dozen specific investigative limits as laid out in DoD instructions and directives (Exhibit 35). These limits establish a minimum threshold to start an inquiry and restrict the scope of an inquiry even when one is properly initiated. While written investigative limits are helpful, they are often ignored. Commanders and investigators continue to pry, search and dig in violation of “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass” (DADTDPDH).

“Don’t Pursue” Violations Decrease Fishing Expeditions, Witch Hunts and “Prove It” Reports Continue

SLDN documented 412 “Don’t Pursue” violations from February 16, 2000 to February 15, 2001, compared to 471 the year before, a 13% decrease. Despite the decrease overall, Air Force “Don’t Pursue” violations increased 13% this report year, with 251 violations compared to 222 the year before. The Marine Corps saw an 11% increase, with forty-two violations in this report year compared to thirty-eight violations the previous year. Army violations decreased 15% in the last year, with 100 violations compared to 117 the year before. In the Navy, violations dramatically decreased 79% this report year to nineteen, compared to ninety-two violations in the preceding year. No violations were reported in the Coast Guard this report year compared to 1 reported violation the year before.

The most common “Don’t Pursue” violations continue to be fishing expeditions, witch hunts and “prove it” cases. Fishing expeditions are cases where an inquiry is expanded beyond the original allegation⁸³ to seek out additional grounds for discharge and other potentially harmful information against the service member. Sometimes, fishing expeditions start out with false allegations and turn into attempts to find any damaging information against a service member.

Witch hunts occur when commands or peers seek out the sexual orientation of a group of service members. While mass investigations of service members have waned in recent years under DADTDPDH, they are not obsolete.

⁸² Under Secretary of Defense (P&R) 1998 Report, *supra* note 29, at 11.

⁸³ See DODD 1332.14, *supra* note 22, at E3.A4. 1.1.3; DODD 1332.40, *supra* note 22, at E8.1.3. “Inquiries will be limited to the factual circumstances directly relevant to the specific allegations.” *Id.*

In “prove it” cases, commands attempt to dig up dirt on a service member who has already come out as gay. These investigations seek to punish gay service members by forcing them to provide information that could lead to criminal prosecution or other adverse legal action beyond being fired and losing their benefits.

In April 1998, the Pentagon attempted to rein in the services’ improper pursuits by stating, “when a service member acknowledges his or her homosexuality and does not contest separation . . . little or no investigation should be conducted.”⁸⁴ The Department of Defense reiterated its orders in a 1999 policy memorandum.⁸⁵ The Pentagon memorandum stated, “initiation of any substantial investigation into whether a service member made a statement . . . for the purpose of seeking separation [must] be approved at the Military Department secretarial level.”⁸⁶ A substantial investigation is defined as “anything other than asking questions of the service member or individuals whom the service member names for the purposes of corroboration.”⁸⁷

On February 1, 2000, the Pentagon ordered new training on the policy’s investigative limits in a further effort to curb the services’ investigative excesses.⁸⁸ The need to conduct training on the investigative limits was clearly demonstrated in March 2000 when a Department of Defense Inspector General survey found that most service members surveyed were unable to answer three very basic questions about the policy correctly. Of the 54% of those surveyed who stated they understood the policy to a “large” or “very large extent,” only 26% could answer all three questions correctly.⁸⁹

The Pentagon’s efforts to curb pursuits have had limited success. The truest result has been in the Army where “Don’t Pursue” violations have decreased slightly due to an honest effort to reduce “substantial investigations” consistent with the Pentagon’s guidance.

The Air Force, by contrast, has witnessed increased “Don’t Pursue” violations, especially in recoupment cases. Recoupment cases are those where the services demand that personnel involuntarily discharged for being gay, lesbian, or bisexual repay scholarship funds or enlistment bonuses. In stark contrast to the other services, the Air Force has willfully ignored the DoD prohibitions on substantial inquiries and recoupment, and the requirement for secretarial approval to conduct inquiries. The Air Force’s bucking the Pentagon’s rules on investigative limits dates back to a November 1994 memorandum authorizing witch hunts, interrogation of family and friends of service members under investigation and other “Don’t Pursue” violations (Exhibit 36).

The Navy’s sharp decrease in “Don’t Pursue” violations has skewed the data this year, falsely suggesting that there is a true downward trend in “Don’t Pursue” violations. The decline

⁸⁴ Under Secretary of Defense (P&R) 1998 Report, *supra* note 29, at 11.

⁸⁵ See Under Secretary of Defense (P&R) Rudy de Leon 1999 “Implementation” Memo, *supra* note 18.

⁸⁶ *Id.*

⁸⁷ Under Secretary of Defense (P&R) 1998 Report, *supra* note 29, at 12.

⁸⁸ See generally News Release, Department of Defense, Secretary Cohen Approves Services Homosexual Conduct Training Plans (Feb. 1, 2000) (on file with Servicemembers Legal Defense Network).

⁸⁹ See DoD Inspector General 2000 Report, *supra* note 19, at 4,16.

in Navy violations is a false echo. The Navy's improved performance is not due to following the "Don't Pursue" guidelines, but by doing nothing, which is not what the current rules intend.

The Navy is attempting to retain openly gay, lesbian and bisexual service members by refusing to discharge them unless they (1) provide self-incriminating evidence of sexual conduct, or (2) by identifying friends, including fellow sailors, who could confirm their sexual orientation, opening the door to a possible witch hunt. The Navy's inaction is placing gay, lesbian and bisexual sailors in danger because most are coming out to escape anti-gay harassment. As the "Don't Harass" section examines,⁹⁰ the Navy – year after year – ranks as far and above the worst service when it comes to anti-gay harassment. By failing to transfer threatened sailors and stop the harassment, the Navy risks another anti-gay murder like Allen Schindler's.⁹¹ If the Navy will not protect gay, lesbian or bisexual sailors, then it should discharge those who wish to leave the service to escape anti-gay harassment.

Violations of "Don't Pursue" hurt unit cohesion, morale and readiness. If military personnel freely pursue suspected gay, lesbian and bisexual personnel, these service members will live under the constant fear of invasive investigations and possible criminal prosecution. This section discusses common problems in implementing "Don't Pursue" in each of the services.

Army "Don't Pursue" Violations Decrease

"In most cases of homosexual admission, no investigation is required."⁹²

-- Secretary of the Army and Army Chief of Staff

"When you say that you have participated in Homosexual/Bisexual acts, what do you mean?"

-- Question Asked of SLDN Army Client by His First Sergeant

The Army saw a slight decrease in its "Don't Pursue" violations from February 16, 2000 to February 15, 2001, with 117 violations last year compared to 100 violations this year. The Army's numbers hopefully reflect that it is taking the right steps to prevent "Don't Pursue" violations, but it is too early to tell if new guidance and training will have a permanent effect. The Army, similar to the other services this year, reduced the number of reported cases where coworkers or friends were sought out and improperly questioned about a soldier's sexual orientation or personal life in violation of "Don't Pursue." The Army's most common "Don't Pursue" problems are commands and inquiry officers expanding the scope of inquiries and unauthorized substantial investigations.

On January 10, 2000, the Army issued guidance implementing the Pentagon's August 1999 directive to the services to provide additional guidance on the policy.⁹³ The new Army

⁹⁰ See discussion *infra* pp. 79-84.

⁹¹ In 1992, Seaman Allen Schindler was brutally beaten to death by fellow shipmates for being gay.

⁹² Electronic Message from Headquarters, Department of the Army, to ALARACT, *Homosexual Conduct Policy* (Jan. 10, 2000) (HQDA WASHINGTON DC 101700Z JAN 00).

⁹³ See *id.*

guidance varies slightly from the Pentagon's. The Army guidance states, "[i]n most cases of homosexual admission, no investigation is required." This language should make it clear to commands that they must not embark upon fishing expeditions to dig up dirt on soldiers in violation of "Don't Pursue."

The Army guidelines contain language similar to the DoD guidance on substantial inquiries.⁹⁴ The Army instructs, "[t]he initiation of any substantial investigation into whether an admission of homosexuality was made for the purpose of seeking separation from the Army and/or whether recoupment of financial benefits is warranted must be approved at the Army secretariat level."⁹⁵ The Army guidance further directs commands to not take any actions, including processing gay, lesbian or bisexual soldiers for discharge until either substantial inquiry permission is denied, or granted and the substantial investigation is concluded.⁹⁶ SLDN is not aware of any Army cases where secretary level approval for a substantial inquiry was requested. Consequently, it is impossible to know if commands are halting substantial investigations while waiting for secretary approval.

While there have been some improvements in the Army's implementation, the number of violations continues at almost the same rate as in the past. The Army must do more to ensure soldiers are not improperly pursued by commands or inquiry officers.

Army Drops Discharge Action Against First Lieutenant Steve May

In January 2001, the Army announced it was dropping its planned discharge of First Lieutenant Steve May, an openly gay Arizona State Representative. May will continue to serve in the Army reserves until May 11, 2001, when his obligation is completed.

The Army wrongfully initiated discharge proceedings against May after learning of remarks he made about his sexual orientation during a debate on domestic partner benefits on the floor of the Arizona state legislature. At the time, he was an active reservist. May won his legislative seat as an openly gay candidate, making his sexual orientation a matter of record at the time the Army called him to active duty.

First Lieutenant May, who has served as Executive Officer of his reserve unit, has been hailed as an exemplary officer. Since the investigation, May's superiors have stated that May "has been nothing less than outstanding since he joined the unit" (Exhibit 37). In addition, May's fellow soldiers testified in September 2000, at his administrative discharge hearing that May's removal would hurt his unit's cohesion and morale.

By dropping the discharge, it appears that the Army has tacitly recognized it never should have pursued May. The current law does not contemplate discharging elected officials for

⁹⁴ The Army guideline defines a substantial inquiry "as one that extends beyond questioning the member, individuals suggested by the member for interview, and the member's immediate supervisory chain of command." *Id.*

⁹⁵ *Id.* The Secretary has designated the Assistant Secretary of the Army for Manpower and Reserve Affairs (ASA M&RA) as the approval authority for initiation of substantial investigations. Requests for approval will be forwarded through command channels to the ASA (M&RA)." *Id.*

⁹⁶ *Id.*

statements they have made as elected officials. Nor does DADTDPDH contemplate punishing soldiers for statements made as civilians or while in the inactive reserves. In the end, the Army made the right decision to drop the case.

Army First Sergeant Conducts Improper Investigation of New Recruit

A young Army Private stationed at Fort Leonard Wood, Missouri, reports to SLDN that his First Sergeant initiated an unauthorized and invasive investigation by asking wide-ranging questions from a pre-printed form. After the Private came out as bisexual due to his fear of harassment and being turned in to his command as bisexual by another soldier, his First Sergeant started an apparently unauthorized inquiry into the soldier's personal life. This is a "Don't Pursue" violation because: (1) only a commander may initiate an inquiry regarding a soldier's sexual orientation, not an enlisted leader,⁹⁷ and (2) an inquiry officer may not fish for additional evidence against a soldier, thereby impermissibly expanding the scope of the inquiry.⁹⁸

The First Sergeant asked the Private a number of improper questions from a pre-typed form (Exhibit 38).⁹⁹ The form's questions improperly included:

- Have you engaged in Homosexual/Bisexual acts;
- Did you engage in Homosexual/Bisexual acts of your own free will;
- Did you engage in Homosexual/Bisexual acts because you were forced or drunk;
- Did you engage in Homosexual/Bisexual acts as an experiment;
- Did you engage in Homosexual/Bisexual acts because you were influenced by another;
- When you say that you have participated in Homosexual/Bisexual acts, what do you mean; and
- Have you had sexual relationships with both males and females.

The First Sergeant asked the Private additional questions not on the form including:

- How frequently do you have sexual relations with people of the same and opposite sex;
- Who are your past sexual partners;
- Tell me about your past partners;
- When did you start to become bisexual; and
- Were you pushed to start.

⁹⁷ See Army Regulation 600-20, *Army Command Policy* 4-19(d)(1)(a) (1999) [hereinafter AR 600-20].

⁹⁸ See *id.* at 4-19d(1)(c).

⁹⁹ The attached form is not the actual form used in this soldier's case, but it was received from Ft. Leonard Wood personnel. The soldier reported to SLDN that he believes it is the same form used in his case.

The Army guidelines, like the DoD directives, limit an inquiry to “the actual circumstances directly relevant to the specific allegation.”¹⁰⁰ The only permissible questions in this case were ones focused on the Private’s statement that he is bisexual. The soldier never mentioned “acts” or anything about his past. The First Sergeant’s questions not only violated “Don’t Pursue,” but also placed the soldier in danger of criminal charges, given that the Uniform Code of Military Justice imposes criminal penalties for sodomy and indecent acts – information for which the inquiry officer was deliberately fishing.

The soldier answered the questions honestly and provided a significant amount of personal information about his sex life prior to joining the service. Apparently unsatisfied with the soldier’s intimate disclosures about his bisexuality, the First Sergeant embarked on another fishing expedition against the Private by asking the Private’s fiancé numerous inappropriate and intrusive questions about the Private’s personal life including:

- What sexual acts had she seen the Private do;
- Had she seen the Private with another man;
- What positions was the Private in;
- Did he engage in anal or oral acts;
- Had she been involved in a threesome with the Private and another male; and
- What are the names of the Private's past male lovers.

That Army personnel would go to such great lengths to get information about a service member’s personal life, after the service member disclosed his sexual orientation out of fear for his safety, is wrong and violates “Don’t Pursue.” The soldier wrote to his command regarding the improper investigation. SLDN is unaware if disciplinary action was taken against the First Sergeant.

Army Expands Scope of Investigation into Officer’s Sexual Orientation

The Army wrongfully pursued a female officer after a civilian woman reported an alleged fight to the officer’s post military police. The Army criminal investigators questioned the two women, as well as three witnesses, including the civilian woman’s daughter about the incident. During the investigation, the criminal investigators improperly asked questions about the two women’s relationship. The criminal investigators turned the information over to the officer’s command who appointed an administrative inquiry officer.

The criminal investigator asked the civilian woman improper questions about her relationship with the officer, including:

- What acts did you perform on each other;
- How long have you been sexually active with her;
- Do you have any proof of the relationship;
- Has [the officer] been with anyone else sexually since 1992;

¹⁰⁰ AR 600-20, *supra* note 97, at 4-19d(1)(c).

- When was the last time you two were together sexually;
- Has [the officer] ever been with a man since you have know [sic] her;
- How many times have you had sex with her; and
- Do you know of any other women she had sex with

These questions are improper because they are irrelevant to a criminal investigation. These questions are also improper because criminal investigators should refer allegations involving only adult private consensual sexual conduct to the subject's commander for appropriate investigation or disposition.¹⁰¹

The command appointed inquiry officer also violated "Don't Pursue" in this case by asking the witnesses wide-ranging questions that went beyond the allegation that the officer was in a lesbian relationship, impermissibly expanding the scope of the inquiry. The inquiry officer improperly questioned the civilian woman's twelve year old daughter by asking her "[w]hat can you tell me about the relationship between your mom and [the officer]." The inquiry officer improperly asked the other witnesses:

- When you say they've been "together" what does that mean;
- Does [the officer] have any other romantic relationships;
- Do you know her name;
- Is she living in her house;
- Do you know how long [they] have been together;
- Have you ever seen physical contact between them;
- Have you ever seen any sexual contact; and
- Can you elaborate on any lovers.

These questions were outside the factual allegations and inappropriately placed the officer in harm of criminal charges. The officer is still serving and fighting to save her career.

Inquiry Officer Conducts Substantial Investigation Without Secretarial Approval

The Army improperly conducted an unauthorized substantial inquiry after Captain Elizabeth Recupero stated she needed to be honest with the Army by coming out as a lesbian. Captain Recupero, who is on an approved educational deferment prior to active duty service, has been living as an openly gay woman for most of the time since she completed her ROTC training.

In January 2001, Captain Recupero received a memorandum from the command appointed inquiry officer, Mr. Jeffrey Lubin, asking her twenty-two questions to determine whether Captain Recupero made her statement for the purpose of seeking separation. Army

¹⁰¹ See DEP'T OF DEFENSE INSTRUCTION 5505.8, *Investigations of Sexual Misconduct by the Defense Criminal Investigative Organizations and Other DoD Law Enforcement Organizations* 1 (1994) [hereinafter D ODI 5505.8].

policy requires secretarial approval to conduct an investigation to determine whether a soldier is trying to avoid their military obligation.¹⁰² It appears that none was obtained in this case.

Army “Don’t Pursue” Summary

More than the other services, the Army appears to be taking the first good steps to curb its improper and unauthorized pursuits. It is too early to tell whether these steps will result in long-term improvements. The Army should conduct further training to ensure that all soldiers understand that fishing expeditions violate DADTDPDH, substantial inquiries without secretarial approval are prohibited and violators will be held accountable for their actions. These actions are necessary to promote DADTDPDH compliance and thereby, improve unit cohesion, morale and readiness within the Army.

The Air Force Continues to Lead the Way in “Don’t Pursue” Violations

“Informal fact-finding inquiries...are the preferred method of addressing homosexual conduct.”¹⁰³

-- Guidelines for Fact-Finding Inquiries into Homosexual Conduct

In the last five years, have you ever hugged an adult female who was not a relative? If so, how many times?

-- Question Asked of SLDN Air Force Client by Inquiry Officer

In the past year, Air Force “Don’t Pursue” violations continued their upward surge. SLDN documented 251 Air Force “Don’t Pursue” violations from February 16, 2000 to February 15, 2001, a 13% increase over the 222 reported violations the previous year. The Air Force once again led all other services in improper pursuits of service members.

The primary reason why Air Force violations increased again this year is the continued use of wide-ranging fishing expeditions in the context of recoupment cases. Recoupment cases are those where Air Force members are involuntarily discharged for being gay, lesbian or bisexual and forced to repay scholarship funds or bonuses. DoD policy prohibits recoupment in these circumstances. Since the implementation of DADTDPDH, however, the Air Force has ignored the rules and vigorously pursued gay, lesbian and bisexual service members.

Part of the reason for the Air Force’s continued intransigence may lie in its new guidelines on fact-finding inquiries implementing the Pentagon’s guidance on investigative

¹⁰² Electronic Message from Headquarters, Department of the Army, to ALARACT, *Homosexual Conduct Policy* (Jan. 10, 2000) (HQDA WASHINGTON DC 101700Z JAN 00). “The Secretary has designated the Assistant Secretary of the Army for Manpower & Reserve Affairs (ASA M&RA) as the approval authority for initiation of substantial investigations. Requests for approval will be forwarded through command channels to the ASA (M&RA).” *Id.*

¹⁰³ *Guidelines for Fact-Finding Inquiries into Homosexual Conduct, in Interim Change 2000-1 to Air Force Instruction 36-3206, Administrative Discharge Procedures For Commissioned Officers, A.2.4.1 (Mar. 10, 2000) [hereinafter AFI 36-3206 Guidelines].*

limits.¹⁰⁴ The new guidelines, unlike those promulgated by the DoD and the other services, do not state that “little to no investigation” should occur in cases where Air Force members make a statement that they are gay, lesbian or bisexual.

The Air Force guidelines do, however, instruct commanders to seek secretary approval prior to initiating “a substantial inquiry to determine whether or not a statement of homosexuality was made for the purpose of seeking separation from military service.”¹⁰⁵ The Air Force defines a substantial inquiry as one “that extends beyond questioning the member who made the statement, and/or a third party who reports that a member made a statement, individuals suggested by the member for interview¹⁰⁶ and the member’s immediate supervisory chain of command.”¹⁰⁷ Thus, it appears that Air Force leaders are deliberately bucking the Pentagon by pursuing service members, especially in recoupment cases. Not only do Air Force commanders and inquiry officers routinely conduct wide-ranging fishing expeditions, particularly in recoupment cases, but they also rarely seek secretarial approval before launching a substantial inquiry.

Gay, lesbian and bisexual personnel lose confidence in their leaders when they fail to fairly enforce DADTDPDH. Lack of trust and confidence among members harms unit cohesion and morale and, consequently, lowers the Air Force’s combat readiness and ability to complete its mission.

The Air Force Wrongly Pursues and Seeks Recoupment from Keesler AFB Officer

The Air Force wrongfully launched an unauthorized substantial investigation of twenty-four-year-old Second Lieutenant Christopher J. Pristera.¹⁰⁸ The Air Force's apparent aim was to force Pristera to repay scholarship funds as punishment for his honesty, an act of retaliation expressly prohibited by current regulations.

The action against Pristera started when he wrote to his commander:

“[t]he Air Force takes a very clear stance on integrity, yet makes it’s [sic] homosexual members lie in order to keep serving a nation that they have just as much right to love someone in as their

¹⁰⁴ See *id.* (Exhibit 39).

¹⁰⁵ A commander “must submit a request for approval through the chain of command and the Vice Chief of Staff of the Air Force (AF/CV) to the Undersecretary of the Air Force (SAF/US). The request must explain why there is a clear interest in conducting the substantial inquiry, why it is expected that the expanded inquiry will result in additional relevant evidence and why the Air Force benefit in expanding the inquiry outweighs any foreseeable disadvantage of expanded inquiry.” *Id.* at A2.1.3.

¹⁰⁶ “A member who makes a voluntarily [sic] statement acknowledging his or her homosexuality may, but will not be required to, provide the names of other individuals to be interviewed relevant to his or her statement.” *Id.* at A2.1.5.

¹⁰⁷ *Id.* at A2.2.6.

¹⁰⁸ Second Lieutenant Pristera came out to the Air Force for integrity reasons after attending the Millenium March on Washington. The Millennium March on Washington was held on April 30, 2000 for the purpose of advancing gay, lesbian, bisexual and transgender equality.

heterosexual counterparts. I am not willing to live that lie any longer and I believe that nobody should have to . . .” (Exhibit 32).

The command appointed inquiry officer initiated a "substantial inquiry" in this case without secretary approval. Under DADTDPDH and Air Force instructions, an inquiry officer's inquiry must be limited to the factual circumstances relevant to the allegation.¹⁰⁹ The only relevant questions for Pristera were: (1) did he make the statement; and (2) if so, are the contents truthful. Any questioning beyond these specific, narrow issues represent a violation of “Don’t Pursue.”¹¹⁰ The Air Force asked Second Lieutenant Pristera 177 questions, the majority of which were not related to either of these issues. The questions related to whether Pristera was “seeking separation” were improper because there was no secretary approval to ask them.

After Pristera chose to fight the command's discharge efforts at a Board of Inquiry (BOI), the recorder (the government's attorney), Major Barbara Shestko, improperly questioned Air Force personnel about whether Pristera was seeking separation – an unauthorized substantial inquiry. The questions were also improper because Major Shestko did not have Pristera's permission to question these individuals. Air Force instructions permit an inquiry officer to only question individuals the service member suggests or others with secretary approval.¹¹¹ At the BOI, Major Shestko proclaimed, “[t]hose rules simply do not apply to the recorder.” (Exhibit 40).¹¹² Contrary to Shestko's assertions, however, there are no exceptions to the investigative limits under DADTDPDH.

Ultimately, the BOI recommended Pristera repay his Air Force ROTC scholarship¹¹³ in violation of DoD and Air Force rules. The Defense Department policy contained in the “Deutch Memorandum” states, “a member's statement that he or she is a homosexual, though grounds for separation if it demonstrates a propensity or intent to engage in homosexual acts, does *not* constitute a basis for recoupment....[unless it was] made...*for the purpose of seeking separation.*”¹¹⁴

In other words, the BOI should only have recommended recoupment if the clear weight of the evidence proved that Second Lieutenant Pristera made his statement for the purpose of avoiding further military service. Pristera repeatedly stated he wanted to stay in the Air Force and no evidence was presented that he was “seeking separation.” Major Shestko twice conceded Pristera wants to serve (Exhibit 42). Since the only evidence presented at the BOI was that

¹⁰⁹ “Inquiries shall be limited to the factual circumstances directly relevant to the specific allegations.” AFI 36-3206 *Guidelines*, *supra* note 103, at A2.1.5.

¹¹⁰ *See id.*

¹¹¹ *See id.* at A2.1.5, A2.2.6.

¹¹² Additionally disturbing, is the fact that Major Shestko and an assistant attorney attempted to intimidate these witnesses into watering down their statements of support for Pristera by stressing how senior officers on the board may frown upon officers who supported a gay man (Exhibit 41).

¹¹³ At the time Pristera went to his board, he had served more than two years of his four-year Air Force commitment.

¹¹⁴ Memorandum from The Deputy Secretary of Defense to the Secretaries of the Military Departments, *Recoupment of Education Assistance Funds, Bonuses and Special Pay from Persons Disenrolled or Separated on the Basis of Homosexual Conduct*, (May 17, 1994) (issued by then Deputy Secretary of Defense John M. Deutch) (emphasis added).

Pristera wanted to continue serving, the BOI was prohibited by DoD policy from ordering recoupment.

In August 1999, the Air Force acknowledged that the Deutch Memorandum limited recoupment in cases similar to Pristera's. As the Department of Air Force General Counsel's office states, "[a]lthough cast in technical language, *the general intention of the Memorandum appears to be to avoid recoupment in such cases. . .*" (emphasis added).¹¹⁵

The Air Force has consistently failed to properly apply DoD rules regarding recoupment. While the other services rarely seek recoupment from their gay, lesbian and bisexual service members,¹¹⁶ the Air Force appears to seek recoupment in all cases where educational funds or bonus money may be a factor.¹¹⁷ The Air Force appears to be using an irrebuttable presumption that all service members who make statements about their sexual orientation must be "seeking separation," which flies in the face of Pentagon recoupment policy.

SLDN is aware of many cases where the Air Force improperly pursued service members who wanted to continue serving in its attempt to recoup against them. Second Lieutenant Pristera continues to fight to preserve his career.

Command Criminally Prosecutes Threatened Airman at Shaw Air Force Base

The Air Force wrongfully pursued twenty-two year old Senior Airman Lauren Brown, who was assigned to Shaw Air Force Base in South Carolina, by pressing criminal charges against her after she reported death threats (discussed in more detail in "Don't Harass").¹¹⁸

The Air Force asserts that Senior Airman Brown attempted to commit insurance fraud by setting her own car on fire. The Sumter County, South Carolina, Sheriff's department and Brown's insurance company investigated the crime and found no evidence of wrong-doing on her part. Nevertheless, the Air Force pressed criminal charges against Brown for fraud, ignoring the results of the civilian investigations and the real evidence in the case – that Brown had received multiple threats on her life because others perceived her as a lesbian (Exhibit 43).

The Pentagon has been very clear that service members should not face reprisal for reporting anti-gay harassment. One cannot help but conclude that Brown's command retaliated against her for exactly that. Brown's command re-victimized her, and endangered her well-being

¹¹⁵ See Memorandum from the Office of the General Counsel Air Force to SAF/OS, *Recoupment in HPSP Homosexual Statement Cases* (Aug. 9, 1999).

¹¹⁶ The Navy recently dropped a recoupment action against a former midshipman, Tommie Lee Watkins, who resigned from the Naval Academy when faced with an investigation into his sexual orientation.

¹¹⁷ In fact, earlier this year an Air Force spokesman, Major Chet Curtis, stated, "[a]bout 100 graduates of the Air Force's medical program were discharged from January 1996 to [July 1999] for being gay. All have been asked to repay the money...." The New York Times on the Web, *Discharged Gay Doctor Sues Pentagon, Over Cost of Education* (June 1, 2000) available at www.nytimes.com. This comment was made in connection to *Hensala v. Peters*, where Dr. John Hensala is suing the Air Force for improperly seeking recoupment against him for his medical school costs even though he repeatedly fought to stay in the Air Force.

¹¹⁸ See discussion *infra* pp. 75-76.

because Brown received yet another death threat after her car had been burned. It appears that the Air Force never investigated this threat or the others.

Even when a court-martial found Brown not guilty of fraud,¹¹⁹ Brown's command failed to take steps to protect her safety. Ultimately, Brown came out as a lesbian in order to protect her own safety and was honorably discharged in January 2001.

*The Air Force Asks More than 100 Wide-Ranging Questions
in Unauthorized Substantial Investigation*

In November 2000, the Air Force improperly investigated a female Lieutenant who came out, by asking her more than 100 intrusive questions in direct violation of "Don't Pursue." The Air Force launched a substantial investigation into the Lieutenant's private life apparently without the required Air Force Secretary approval. Even if a substantial investigation had been approved, the inquiry officer's actions violated "Don't Pursue" because he engaged in wide-ranging questioning that was not relevant to the Lieutenant's statement (Exhibit 44). The questions included:

- How did you come to realize you are homosexual?
- In the last five years, have you held hands in public with an adult female who was not a relative? If so, how many times?
- In the last five years, have you ever kissed an adult female on the lips who was not a relative? If so, how many times?
- In the last five years, have you ever hugged an adult female who was not a relative? If so, how many times?
- Have you ever gone out on a "date" with an adult female who was not a relative? If so, how many times?
- Are you currently involved with an adult female? If so, what is her name, address and telephone? May I contact that person?
- Have you dated someone of the opposite sex?
- When was the last time you dated someone of the opposite sex?
- How often did you date this person?
- Have you ever frequented a homosexual bar? How often? When was the last time?
- Are you a member of any homosexual organizations? If so, which ones?
- What are the addresses, telephone numbers of these organizations and names, telephone numbers of points of contact? May I contact these organizations and interview the points of contact...?

¹¹⁹ Senior Airman Brown reports that the court-martial judge approached her after the proceedings were completed and stated that the charges against her were improper. He reportedly added that Brown could come to him directly if she encountered any problems in the future.

These questions are impermissible under “Don’t Pursue.”

First, the only appropriate issue to ascertain in a statement case is whether the service member made a statement that he or she is lesbian, gay or bisexual. “Don’t Pursue” limits inquiries to the factual circumstances of the service member’s statement. The Lieutenant’s letter did not contain information about sexual conduct. Therefore, any questions that go beyond the statement’s affirmation of sexual orientation violate “Don’t Pursue.”

Second, even in service secretary approved substantial inquiries, an inquiry officer may only ask questions regarding whether a service member is seeking separation. Secretary approval does not mean that all other inquiry limits under current regulations are suspended. Thus, under any circumstances inquiry officers cannot ask about associational activities that are otherwise permissible under DoD and Air Force rules,¹²⁰ and irrelevant to a DADTDPDH inquiry. Therefore, the above questions are still improper even in approved substantial inquiries because they extend beyond the permissible scope of the inquiry.

Lieutenant Pursued without Credible Evidence

First Lieutenant Ben Glenn,¹²¹ who was stationed at the Pentagon, in Washington, DC, was improperly pursued after a disgruntled ex-partner telephoned Glenn’s command and told them that Glenn is gay. First Lieutenant Glenn, who had been in the Air Force for two years, was shocked when his commanding officer informed him that a “homosexual conduct” investigation was being opened on him.

The command should have ignored the “outing” because a disgruntled ex-partner is not a reliable source because of the ex-partner’s motive to fabricate, exaggerate, lie or deceive. Further, the command has no basis to gauge the honesty or integrity of an unknown civilian versus a mission-tested officer. Therefore, the allegation was not credible and insufficient grounds to start an inquiry into Glenn’s sexual orientation.¹²² The command, however, moved forward with an intrusive investigation into First Lieutenant Glenn’s private life in violation of “Don’t Pursue” (Exhibit 45). The result was the needless destruction of a young officer’s Air Force career.

¹²⁰ “Credible information does not exist, for example, when...[t]he only information known is an associational activity such as going to a gay bar, possessing or reading homosexual publications, associating with known homosexuals....Such activity, in and of itself, does not provide evidence of homosexual conduct.” AFI 36-3206 *Guidelines*, *supra* note 103, at A2.3.3, A2.3.3.3; *also* DODD 1332.14, *supra* note 22, at E3.A4.1.3.3, E3.A4.1.3.3.4; DODD 1332.40, *supra* note 22, at E8.3.3, E8.3.3.4; *Guidelines for Fact-Finding Inquiries into Homosexual Conduct*, in IC 2000-1 to Air Force Instruction 36-3208, *Administrative Separation of Airmen*, A4.4, A4.4.4 (Mar. 10, 2000) [hereinafter AFI 36-3208 *Guidelines*].

¹²¹ First Lieutenant Glenn, a twenty-five-year-old from Florida, attended Duke University on an Air Force ROTC scholarship.

¹²² Not all accusations of homosexual conduct, including statements, constitute “credible information” as a basis for inquiry or discharge. The policy states “credible information” does not exist when the source of the accusation is unreliable. An anonymous civilian contacting a command in an effort to harm a gay member’s military career should not be considered “credible information.” The ill intentions motivating the “teller” should give commanding officers pause, particularly when – as was the case of First Lieutenant Glenn – the gay allegation was about a sterling officer.

“Don’t Pursue” was intended to prevent harm to gays’ military careers in just such instances. Former Secretary of Defense Les Aspin explained in 1993, “[i]f I came to the commander and said that you told me that you were gay, if that was the only thing going, my expectation would be that commander would not do anything.”¹²³ These service members know that commands often investigate any allegation that a service member is gay, lesbian or bisexual, regardless of the service member’s significant contributions and dedication. “Don’t Pursue” was intended to prevent these type of “outings” and allow the services to retain the considerable talents of gay, lesbian and bisexual members such as First Lieutenant Glenn.

Air Force “Don’t Pursue” Summary

The Air Force should make clear that substantial inquiries are unnecessary in most circumstances by changing its guidance to comport with the Pentagon’s, by including language that “little or no investigation” is necessary in most cases. In order to better implement “Don’t Pursue,” the Air Force must hold officials accountable for not seeking secretary approval for substantial inquiries. The Air Force should comply with current recoupment policy and make clear to commanders, inquiry officers and attorneys that a statement of sexual orientation alone is not evidence that a service member is attempting to seek separation.

The Air Force’s inability to properly implement “Don’t Pursue” sends a message to its members that they cannot trust commanders to follow the rules. If commanders cannot lead by implementing “Don’t Pursue” fairly, then service members will not have faith in their commands and unit cohesion and morale will suffer. Until the Air Force fixes its implementation problems, its readiness will be negatively affected.

¹²³ *Policy Concerning Homosexuality in the Armed Forces: Hearings Before the Senate Comm. On the Armed Services*, 103d Cong., 721 (1993) (testimony of then Secretary of Defense Les Aspin).

Navy “Don’t Pursue” Violations Drop Significantly

“In most cases where a servicemember has stated that he or she is a homosexual or bisexual and does not contest separation, little or no investigation should be necessary.”¹²⁴

-- Chief of Naval Operations

“A statement in which an individual professes to be a homosexual is not a basis for separation from the Navy.”

-- Excerpt of Email to SLDN from Ship’s Legal Officer

In the past year, the number of Navy “Don’t Pursue” violations dropped dramatically from ninety-two to nineteen. This is a mixed blessing.

On the one hand, the Navy, more than any other service, has made it clear to commands that there are limits to investigations, including the requirement to obtain Secretary of the Navy approval for substantial inquiries.¹²⁵ The Navy was the first service to send messages to its service members on the investigative limits and reiterated this important guidance three times in a one-year period.¹²⁶ Some commands seem to be adhering to the investigative limits, resulting in a sharp decrease in Navy "Don't Pursue" violations.

On the other hand, Navy commands often do not discharge openly gay sailors who seek discharge to escape anti-gay threats and assaults. For the sixth year since DADTDPDH became the law, the Navy led all other services in reports of anti-gay harassment. When commands force sailors to come out to escape harassment and then refuse to discharge the service member or stop the harassment, they are creating a recipe for disaster.

In 1992, Seaman Allen Schindler told his command that he was receiving anti-gay threats. The command failed to act and two shipmates brutally murdered Schindler while on shore leave in Japan. If the Navy does not take immediate corrective actions, it is reasonably foreseeable that another murder could take place.

One possible reason Navy commanders are retaining openly gay service members is the guidance issued on October 28, 1999, incorrectly interpreting current DoD policy. The Navy guidance states, “[i]f a commanding officer determines that the member is not a person who engages in, attempts to engage in, or intends to engage in, homosexual acts, then no further processing is required and the member should be expected to perform his/her duties.”¹²⁷ In fact,

¹²⁴ Electronic Message from Chief of Naval Operations to NAVADMIN, *Continuing Guidance Concerning Proper Application of DoD Homosexual Conduct Policy* (Oct. 28, 1999) (CNO WASHINGTON DC 281833Z OCT 99 (NAVADMIN 291/99)) (Exhibit 46) [hereinafter NAVADMIN 291/99].

¹²⁵ *See id.*

¹²⁶ *See id.*; see also NAVADMIN 094/00, *supra* note 37; Memorandum from Carolyn H. Becraft, The Assistant Secretary of the Navy (Manpower & Reserve Affairs), to the Vice Chief of Naval Operations and the Assistant Commandant of the Marine Corps, *Further Guidance on Homosexual Policy* (Feb. 16, 2000) (on file with Servicemembers Legal Defense Network).

¹²⁷ NAVADMIN 094/00, *supra* note 37.

one ship's legal officer sent an email to SLDN stating, "[a] statement in which an individual professes to be a homosexual is not a basis for separation from the Navy." (Exhibit 47).

This legal officer's interpretation clearly contradicts Navy policy stating that separation is mandatory when a sailor makes a statement that he or she is gay, lesbian or bisexual and has not rebutted the presumption that he or she has the propensity to engage in same gender sexual conduct.¹²⁸

The result is that the Navy, in sharp contrast to the other services, is retaining openly gay, lesbian and bisexual sailors who have come out to escape harassment or for reasons of integrity. While we welcome the Navy's forwarding thinking on integrating openly gay troops, the Navy is not adhering to current law and is placing openly gay service members in danger. The Navy's "Don't Pursue" numbers thus appear to be suppressed by a misreading of the law, not by adhering to the policy's investigative limits.

USS Dubuque Captain Engages in Witch Hunt for Gay Sailors

One case painfully illustrates how the Navy is retaining openly gay sailors who have come out to escape harassment, and then compounds the problem by failing to protect the sailors or stop the harassment. In this case, the ship's Captain even tried to compel a sailor to identify other gay sailors on the ship, an apparent attempt at a witch hunt. In July 2000, a twenty-one year old *USS Dubuque* Seaman Apprentice, Derjuan Tharrington, verbally came out to his supervisor, Lieutenant Joyce, due to continuous harassment and rumors based upon his perceived sexual orientation (discussed in more detail in "Don't Tell").¹²⁹

The ship's commanding officer, Captain Hejl, asked to meet with Tharrington and others in his chain of command. When the Captain asked if he wanted to get out of the Navy, Tharrington reportedly told him, "I'm not trying to get out. I would prefer a transfer." Seaman Apprentice Tharrington reports that Captain Hejl proceeded to ask "[w]ho have you been with on this ship, because I am not going to tolerate that." This question could be viewed as a witch hunt for other gay sailors on his ship. The Captain's questions were irrelevant to whether Tharrington made a statement that he is gay, and put him and possibly other sailors in jeopardy of discharge, or worse, criminal charges.¹³⁰

When the sailor declined to reveal other gay sailors, the Captain reportedly informed him, "I won't do anything about this until I know who you have been with and that would put you in legal jeopardy so I advise you against that." Even though Captain Hejl acknowledged the legal jeopardy he was placing Tharrington in, it did not stop him from pursuing the intimate details of Tharrington's personal life. Additionally, the Captain's insistence that he could not do anything about the statement without more information is wrong. Captain Hejl should have stopped the anti-gay harassment in accordance with the Navy's anti-gay harassment policy. Instead, Captain

¹²⁸ See MILPERSMAN 1910-148, Ch-24, *Separation By Reason of Homosexual Conduct 2* (2000) [hereinafter MILPERSMAN 1910-148].

¹²⁹ See discussion *supra* p. 26. See discussion *infra* pp. 81-82.

¹³⁰ The Uniform Code of Criminal Justice criminalizes some forms of consensual, adult, sexual relationships.

Hejl decided to retain Tharrington despite knowing he is gay and took no steps to protect him from harassment.

Captain Hejl was clearly concerned that DADTDPDH was impeding his ability to complete the mission. He reportedly told Tharrington, "I need people to work." Had he taken care of his sailors by stopping the harassment, he would have achieved his goal.

Tharrington's military defense attorney obtained a temporary transfer off the ship for him. The command acknowledged that Tharrington received anti-gay remarks and threats and had counseled the sailors who committed the harassment. Seaman Apprentice Tharrington later notified the command that he intended to file a complaint because the command did not follow the rules, stop the harassment or transfer him permanently. In the end, he reluctantly accepted discharge because the command did not intend to transfer him off the ship. He was honorably discharged from the Navy.

Unfortunately, Captain Hejl's interpretation of the rules is not unusual in the Navy where commands often tell sailors to either prove that they are gay or that a statement is not enough to discharge them from service. While the Navy and the other services struggle to meet retention and recruitment goals, commanders should prioritize taking care of their people, and not dismiss legitimate anti-gay harassment complaints. Captain Hejl's failed leadership could undermine his sailors' confidence in their leaders and diminish military readiness.

Officer Wrongfully Pursued and Accused of Sodomy

The Navy improperly pursued a male officer by attempting to discharge him for misconduct due in part to alleged sodomy under Article 125 of the Uniform Code of Military Justice.¹³¹ The allegation was based on an unsubstantiated law enforcement report that the officer had a "boyfriend." The Navy should have never pursued the officer for an alleged gay relationship in which the only evidence was suspicion and innuendo.¹³²

In April 2000, the officer's civilian roommate called an ambulance when he found the officer unconscious on the bathroom floor. Local police arrived at their apartment and spoke to the roommate and a civilian male friend of the officer who was also present. The officer received proper medical attention, and the law enforcement officials filed a report which was forwarded to the officer's command.

Unbeknownst to the officer, the police report referred to the officer's civilian friend as his "boyfriend." Neither the officer, roommate nor friend ever said to the police that the friend was anything other than a friend. The police simply made that conclusion and included it in the report. Unfortunately, suspicions, reported as facts, carry consequences for military members under DADTDPDH.

¹³¹ Allegations of consensual homosexual conduct should be handled administratively under DADTDPDH instead of Article 125 sodomy charges. See DODI 5505.8, *supra* note 101, at 1. Article 125 is supposed to apply equally to gay, lesbian, bisexual and straight service members, but it is often used in an unevenhanded manner against gay, lesbian and bisexual personnel.

¹³² See NAVADMIN 291/99, *supra* note 124.

The officer's commander ordered administrative discharge proceedings for misconduct, due in part to allegedly committing sodomy. Since Article 125 is a criminal provision, the command's actions carried the implied threat of criminal prosecution.

The command's actions in this case constituted an improper pursuit of the officer. First, the commanding officer did not have credible evidence to conduct an investigation into the officer's sexual orientation or to allege a violation of Article 125. No evidence was presented that the officer had in fact engaged in any homosexual acts or made a statement of sexual orientation. Any inquiry or action to administratively separate the officer based on the police officers' reports would have been improper because the reports were based merely on suspicion and opinion, and therefore, did not constitute credible information, the prerequisite for an inquiry. The officer decided to resign instead of being subjected to the anxiety of facing a board of high ranking officers on charges of sodomy and other violations.

*Naval Criminal Investigative Service Pursues Service
Members at Gay Friendly Establishments*

Starting in April 2000, a number of service members contacting SLDN reported that the Naval Criminal Investigative Service (NCIS), in conjunction with other services' criminal units, was conducting undercover surveillance operations in District of Columbia gay friendly bars and nightclubs. These criminal investigative activities appear to be an attempt to skirt the letter and intent of DADTDPDH. Current policy prohibits military criminal investigative organizations from investigating service members' sexual orientations.¹³³ The policy further allows for all service members to engage in associational activities such as going to gay bars.¹³⁴

The evidence obtained by SLDN suggests criminal investigators were specifically targeting suspected gay service members and, while unable to discharge them for patronizing the gay friendly bar or nightclub, solicited them to engage in other conduct which could carry administrative discharge or criminal prosecution (Exhibit 48). According to evidence obtained by SLDN, NCIS conducted surveillance at eight District of Columbia bars or nightclubs, all of them gay-friendly establishments.¹³⁵

NCIS Special Agent John P. O'Connor gave testimony that criminal investigators targeted individuals they believed to be service members at the gay friendly establishments without any prior evidence of service member misconduct. O'Connor testified, "when we identify someone who we think is a U.S. military member...we target that individual and then see if the information can be developed." According to the testimony, male covert operatives approached "military looking" men, initiated conversation, flirted and then asked the men whether they knew where the operative could obtain illegal substances. O'Connor further testified that NCIS undercover agents "try to elicit the information that the individual is a military member and...run their plates and try to confirm that information."

¹³³ See DODI 5505.8, *supra* note 101, at 2.

¹³⁴ See, e.g., DODD 1332.40, *supra* note 22, at E8.3.3.4.

¹³⁵ Two Article 32 hearings were held in this case. At the second hearing, NCIS Special Agent John P. O'Connor gave the names of eight gay friendly establishments. Fewer establishments were named at the first hearing.

SLDN contacted NCIS regarding our concerns about its conduct. Congressman Barney Frank also posed questions to NCIS about improperly pursuing suspected gay service members. NCIS responded to Congressman Frank's questions by stating, "[t]here was never any 'random' taking down of license plate numbers [outside gay friendly establishments]." (Exhibit 49). NCIS conceded, however, that one of its agents "walked through the parking lot and in a precise and purposeful manner, not randomly, wrote down the license plates of 20 cars that appeared to be military...then [ran them] through the computer identification system...." NCIS also conceded that it shared the information with the criminal divisions of each of the services, including the Coast Guard.

According to NCIS, "[t]he only purpose was to show that military members were present at a club where drug activities were known to be taking place. . . ." SLDN does not dispute the Navy's authority to regulate drug possession, distribution or use by its members. The evidence here, however, strongly suggests that the Navy was trying to target gay service members at gay friendly establishments. The Navy claims that it conducts similar surveillance and sting operations at nongay clubs, but it did not provide examples. NCIS officials identified only gay friendly establishments targeted by NCIS. This unevenhanded investigative tactic violates DADTDPDH's intent to erase the double standard defense criminal investigative organizations historically applied to gay, lesbian and bisexual service members.

The Navy has no business conducting under cover surveillance operations targeting gay, lesbian or bisexual service members who are trying to abide by DADTDPDH by keeping their private lives private. Gay-friendly establishments are supposed to be safe places where gay, lesbian and bisexual service members may go while keeping their sexual orientation a "personal and private matter."

SLDN asked NCIS to halt its improper operations. While no service members have contacted SLDN recently, SLDN remains concerned and will continue to monitor the services' activities.¹³⁶ To SLDN's knowledge, the Navy has not held anyone accountable for this ill-conceived and improper operation.

Navy Uses Boards of Inquiry to Dig up Dirt on Officers

In the past year, SLDN received two reports that the Navy improperly used gay officers' discharge hearings to obtain potentially harmful information in violation of "Don't Pursue."

In one case, Lieutenant Commander Tom Deblois, a Navy psychiatrist stationed in San Diego, came out to the Navy for integrity reasons. He explained, "I can no longer live in shame and secrecy I can not [sic] preach to my children to be proud of who they are, when I can not [sic] freely model the pride I have for myself" (Exhibit 33).

The Navy initiated administrative actions to discharge Deblois telling him, "[t]he least favorable characterization of service that may be recommended is Other Than Honorable. If the

¹³⁶ This includes reviewing the military practice of listing gay friendly establishments as "off-limits" in order to determine if the services are impermissibly targeting gay friendly establishments.

Board finds no evidence of misconduct, the only characterization that may be recommended is Honorable” (Exhibit 50).

The Navy should not have stated that the least favorable discharge was Other Than Honorable in this case. Pentagon and Navy policy states, “[a] discharge shall be characterized as honorable to under honorable conditions when the sole basis for separation is homosexual conduct, unless aggravating acts are included in the findings.”¹³⁷

Lieutenant Commander Deblois, a highly regarded doctor with an impeccable record, had merely made a statement of his sexual orientation. When the discrepancy was pointed out to the command’s legal advisor, he stated, “[i]f the board finds any misconduct, they may be able to give an [Other than Honorable]”¹³⁸ (Exhibit 51). The Board’s ability to enter into a fishing expedition of Lieutenant Commander Deblois’ life put him in an untenable position. A Board of Inquiry is not allowed to dig up dirt or pursue an officer’s personal life in order to lower his discharge characterization. This is the equivalent of an unauthorized substantial investigation and constitutes a “Don’t Pursue” violation.

The legal advisor’s statement indicates the Navy was on a search and destroy mission to not only ruin this doctor’s career, but label him as a wrongdoer. SLDN recommends that the Navy stop trying to punish its gay, lesbian and bisexual officers by using Boards of Inquiry to lower their discharge characterizations.

Legal Office Prevents Investigation Based on Photograph in Gay Newspaper

There are some cases in the last year where commands, legal offices and inquiry officers demonstrated they knew and followed the limits to investigations. A San Diego Naval Station command properly implemented “Don’t Pursue” by ensuring that a sailor’s sexual orientation was not investigated based upon a picture in a local gay and lesbian newspaper. Upon learning that the sailor’s photograph was in the newspaper, the command properly sought guidance from the base legal office to determine whether it should initiate an investigation. According to the sailor, a senior noncommissioned officer told him the base legal office said that DADTDPDH prohibited an investigation.¹³⁹ The command and legal office properly followed the policy in this case and the sailor continues to serve.

Navy “Don’t Pursue” Summary

The Navy’s “Don’t Pursue” numbers have dropped significantly this year, lowering the service’s total “Don’t Pursue” violations. The Navy’s record is a mixed blessing. The good news is that in contrast to the other services, the Navy conducted far fewer fishing expeditions to dig up dirt on sailors. The bad news is that commanders are failing to stop the harassment which

¹³⁷ DODD 1132.40, *supra* note 22, at E7.2.2.2. See also Electronic Message from Chief of Naval Operations to NAVADMIN, *Implementation of DoD Policy on Homosexual Conduct* 7(F) (Mar. 11, 1994) (CNO WASHINGTON DC 110300Z MAR 94 (NAVADMIN 033/94)).

¹³⁸ To allow further inquiry and possibly new grounds for discharge to be raised at the BOI not only violates “Don’t Pursue,” but due process.

¹³⁹ See MILPERSMAN 1910-148, *supra* note 128, at 3. “Credible Information does not exist when the only known information is associational activity such as frequenting homosexual bars” *Id.*

compels service members to come out, leaving them in a potentially more precarious situation than before.

The Navy needs to remove the language in its guidelines that allows a commander, at his or her discretion, to decide if a sailor has the propensity to engage in acts and then possibly send him or her back to work. The Navy is the only service using this provision. Changing the language may be one step towards correctly implementing the policy and getting commanders to stop asking sailors to “prove” they are gay, lesbian or bisexual.¹⁴⁰

Marine Corps “Don’t Pursue” Numbers Increase

“As a general rule, when a service member states that he or she is a homosexual or bisexual and does not contest separation, little or no investigation is necessary.”¹⁴¹

Commandant of the Marine Corps

“When was the last time you had an encounter with a female?

When did you lose your virginity?”

-- Questions Asked of SLDN Marine Corps Client by an Inquiry Officer

The number of Marine Corps “Don’t Pursue” violations increased slightly in the past year with forty-two compared to thirty-eight last year. Despite the increased number of violations, SLDN’s cases revealed some positive changes in the Marine Corps’ implementation of “Don’t Pursue.” This year, unlike previous years, SLDN received no reports of the Marine Corps improperly interviewing friends, family or military coworkers in an attempt to dig up dirt on a Marine or to determine if a Marine is gay, lesbian or bisexual. The Marine Corps, however, needs to take steps to lower its other violations, including preventing: (1) criminal investigative division (CID) personnel from improperly pursuing service members; (2) commanders and inquiry officers from expanding the scope of investigations; and (3) command attempts to force service members to “prove” they are gay.

On January 7, 2000, the Marine Corps issued new guidance on the “Homosexual Conduct Policy.”¹⁴² Like the Navy and Army, the Marine Corps guidance mirrors the Pentagon’s guidance by stating, “[a]s a general rule, when a service member states that he or she is a homosexual or bisexual and does not contest separation, little or no investigation is necessary.”¹⁴³

Similarly, the Marine Corps’ language limiting substantial investigations follows the Pentagon’s guidance.¹⁴⁴ One difference in the Marine Corps’ guidance states, “[s]uch

¹⁴⁰ It is important to note that this Navy practice is undermining the military rationale for DADTDPDH by retaining openly gay sailors.

¹⁴¹ MARADMIN 014/00, *supra* note 39.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴

authorization [for substantial inquiries] is not required for investigation of homosexual acts or marriages, as distinguished from homosexual statements.” It is not clear why this language was added, but it is potentially harmful to service members because commands may mistakenly believe that they can embark on wide-ranging investigations in non-statements cases.

While there have been a number of cases in the last year where commands or inquiry officers have taken appropriate action to enforce the policy’s “Don’t Pursue” provision, the Marine Corps has to do a better job of following “Don’t Pursue” across the board.

Command Retains Marine Improperly Pursued by CID Agents

A Marine Corps command reversed course, by halting an improper investigation by the Criminal Investigative Division (CID) and saving the career of a Marine. CID improperly pursued the Marine for being gay after reportedly discovering HIV related materials in his house. The Marine had granted CID permission to search his home and car for a stolen office computer (Exhibit 52). CID found no evidence linking the Marine to the theft.

After scouring the Marine’s wallet, photo albums, personal files and private letters, however, the agents hauled the Marine into their office and interrogated him about his sexual orientation. The Marine states that the agents requested his permission to return to his apartment because they claimed that, while searching for the computer, they saw personal items they wanted to confiscate.¹⁴⁵

The Marine reports that a CID agent, while picking his teeth with a “K-Bar” type military knife, said, “[i]t’s not really my job to get into people’s lifestyles, why don’t you go ahead and just talk to us about it.” After the Marine did not respond, the CID agents reportedly told him that his command had been notified that the agents saw items inside his house suggesting he might be gay.

The Marine believes that the agents may have seen some publications that provide information on HIV/AIDS resources, as well as updates on HIV disease treatment and health management matters. The Marine’s command was aware that he is HIV positive and he fears that the command used the CID computer investigation as a ruse to discover whether he is gay. If this is true, the CID agents’ actions violated “Don’t Pursue” because speculation about the Marine’s

However, in the event that a commander suspects that a service member has made a statement for the purpose of seeking separation from Naval service in order to avoid a service obligation or upcoming deployment and who believes that the member is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts and who desires to initiate an investigation into the truth of the statement, the commander must obtain authorization from [Assistant Secretary of the Navy (Manpower and Reserve Affairs)] via the chain of command before initiating a substantial investigation.

Id.

¹⁴⁵ It appears that the agents were searching for something other than the missing computer because they did not seem interested in the Marine’s personal computer and did not inspect the computer’s serial number.

sexual orientation is not a valid basis to investigate his private life under the policy.¹⁴⁶ Additionally, “Don’t Pursue” prohibits inquiries into a service member’s sexual orientation based on publications that may be considered gay related.¹⁴⁷ Regardless of the motive, the agents violated DADTPDH because military criminal investigative organizations are prohibited from conducting investigations to determine the sexual orientation of a service member.¹⁴⁸

SLDN contacted the Marine’s command to stop the illegal pursuit and the inquiry ended. The Marine’s career was preserved with his retirement and health benefits intact.

Command Halts Improper Pursuit of Marine Visiting Gay Friendly Business

A Marine’s command improperly investigated him after another service member reported he had been in a local gay-friendly restaurant. This constitutes a “Don’t Pursue” violation because the policy does not prohibit Marines from going to gay-friendly businesses.¹⁴⁹

As in the Marine’s case discussed above, it appears that a criminal investigative unit was improperly involved in this case. According to the Marine, a few days later, a male in civilian attire approached the Marine at the restaurant and asked him whether the restaurant is “gay or gay-owned.” Three of the Marine’s friends who were present at the time reportedly identified the questioner as a NCIS agent. Once again, the clientele or ownership of a business is not credible evidence of a service member’s sexual orientation and is not an appropriate matter of investigation for military criminal organizations.

SLDN contacted the Marine’s commander, and informed him that rumors or suspicion that a Marine is gay is not proper information upon which to base an investigation¹⁵⁰ and that it appeared that the Marine’s First Sergeant investigated the Marine without the required command authorization (Exhibit 53).¹⁵¹ The commander properly responded that it would look into the matter.

In the end, the Marine requested an administrative separation from the Marine Corps due to the ongoing harassment he faced from other Marines after the other service member’s report. The Marine received an honorable discharge.

¹⁴⁶ See DODD 1332.14, *supra* note 22, at E3.A4.1.3.3, E3.A4.1.3.3.2, E3.A4.1.3.3.3. “Credible information does not exist when the only information is the opinions of others that a member is homosexual [or] when the inquiry would be based on rumor, suspicion, or capricious claims concerning a member’s sexual orientation.” *Id.*

¹⁴⁷ See *id.* at E3.A4.1.3.3, E3.A4.1.3.3.4.

¹⁴⁸ See DODI 5505.8, *supra* note 101, at 2. “No Defense criminal investigative organization or other DoD law enforcement organization will conduct an investigation solely to determine a servicemember’s sexual orientation.” News Release, Office of the Assistant Secretary of Defense (Public Affairs), Secretary Aspin Releases New Regulations on Homosexual Conduct in the Armed Forces (Dec. 22, 1993).

¹⁴⁹ See DODD 1332.14, *supra* note 22, at E3.A4.1.3.3, E3.A4.1.3.3.4. “Credible information does not exist ... when the only information known is an associational activity such as going to a gay bar...., [or] associating with known homosexuals....” *Id.*

¹⁵⁰ See *id.* at E3.A4.1.3.3, E3.A4.1.3.3.2, E3.A4.1.3.3.3. “Credible information does not exist when the information is the opinions of others that a member is a homosexual [or] where the inquiry would be based on rumor, suspicion, or capricious claims concerning a member’s sexual orientation.” *Id.*

¹⁵¹ See *id.* at E3.A4.1.1.1. “Only the member’s commander is authorized to initiate fact-finding inquiries involving homosexual conduct.” *Id.*

Commanding Officer Asks Marines to Prove It and Expands Scope of Inquiry

A Henderson Hall commanding officer, Major Jeffrey B. Barber, improperly pursued two Lance Corporals this year by asking them potentially harmful questions in an attempt to get them to prove they are gay, lesbian or bisexual.

Major Barber improperly pursued twenty-one year old Lance Corporal Nikeya Cunningham, after she came out in August 2000 for integrity reasons (Exhibit 54). Major Barber initiated a substantial inquiry against her without first receiving service secretary authorization. According to the Quantico Marine Corps base staff judge advocate, Major Barber asked Cunningham questions about:

- Purchasing same sex pornography;
- Visiting establishments catering to homosexuals; and
- Joining gay or lesbian organizations (Exhibit 55).

Lance Corporal Cunningham further reports Barber asked her whether she had sex with women.

“Don’t Pursue” limits inquiries “to the factual circumstances directly relevant to the specific allegation.”¹⁵² Even if Major Barber had the proper authorization to conduct a substantial inquiry, he should not have asked these questions because Cunningham’s sex life and associational activities were not relevant to Cunningham’s statement.

It appears that Major Barber decided that since Lance Corporal Cunningham failed to “prove” she is gay by not answering potentially harmful questions, her statement must not be credible. Consequently, Major Barber attempted to retain Cunningham. He wrote to SLDN that he is unable to provide any assurance, however, that she would not be discharged in the future for being a lesbian (Exhibit 56). SLDN has filed an Inspector General complaint regarding the policy violations in this case. Lance Corporal Cunningham continues to serve.

In another Henderson Hall case this year, a Marine who came out to Major Barber reported that the major also asked him questions that violated “Don’t Pursue.” Major Barber allegedly asked the Marine:

- How many men have you had sex with;
- Why do you think you are gay;
- What exactly have you done with other men;
- Why weren’t you more specific in your statement;
- Was it another Marine; and
- What did you do?

¹⁵² Electronic Message from Commandant of the Marine Corps to ALMAR, *U.S. Marine Corps Implementation of DoD Homosexual Conduct/ Administrative Separation Policy for Officers* 4(C)(1)(c) (Feb. 28, 1994) (CMC WASHINGTON DC 281600Z FEB 94 (ALMAR 64/94)(directing changes to MARCORSEPMAN).

In addition to impermissibly expanding the scope of the inquiry, Major Barber's questions also potentially placed the Marine in serious legal jeopardy due to the Uniform Code of Military Justice implications for same-gender sexual relationships. These questions also violate "Don't Pursue" because Major Barber was pursuing the identity of other Marines in what appears to be an attempted witch hunt.

New River Personnel Violate "Don't Pursue" by Expanding Investigation

A young Private First Class at New River Marine Corps Air Station, North Carolina, reports that numerous Marines violated "Don't Pursue" by asking her improper questions after she came out to her command. She wrote, "I am not able to be the person I really am...I feel that I am being dishonest not only with myself but with everyone I work with" (Exhibit 57).

According to the Private First Class, her non-commissioned officers improperly asked her, "[w]hen did you become bisexual?" A Marine Corps civilian psychiatrist her command ordered her to see also reportedly asked her: "[a]re you in a relationship;" "[w]hen did you become bisexual;" and "[i]s someone you are attracted to making you make this decision?" The psychiatrist's questions violated "Don't Pursue" because they were not relevant to the Marine's coming out statement.

The command-appointed inquiry officer also asked her improper questions including:

- Have you been sexually solicited or attacked in boot camp;
- Have you been sexually solicited or attacked by any marine;
- When did you become bisexual;
- Was it before or after joining the Marine Corps;
- If you were bisexual before joining, why did you join the Corps knowing how the Marine Corps feels about this kind of thing;
- Are you in a relationship now;
- When was the last time you had an encounter with a female;
- When did you lose your virginity; and
- Are you bisexual or lesbian.

This is yet another example of the Marine Corps embarking upon an impermissible inquiry. The inquiry officer's questions are inappropriate. Whether the Private First Class was solicited or attacked by others is irrelevant to her statement, and indicates that the inquiry officer is not familiar with issues related to sexual orientation. The questions are also demeaning in that they wrongfully suggest that a gay, lesbian or bisexual Marine would only make a statement if they had been sexually solicited or attacked.

Questions related to when she knew she is bisexual are also irrelevant. Gay, lesbian and bisexual Marines are allowed to serve in the military¹⁵³ and questions related to the timing of a person's sexual awareness are inappropriate. Additionally, the inquiry officer's questions

¹⁵³ See MARADMIN 014/00, *supra* note 39.

regarding the Private First Class' sexual history are invasions of her personal privacy, in no way were relevant to her statement and potentially placed her in legal jeopardy. Finally, asking whether the Marine is lesbian or bisexual has no impact on the policy's implementation and is therefore, irrelevant to the inquiry. The Private First Class' command is still conducting an inquiry in her case.

Commanding Officer Witch Hunts Marine Corps Woman

A heterosexual Marine reports to SLDN that she was investigated for being a lesbian after an old roommate emailed the Marine's command and falsely stated that the Marine is in a sexual relationship with a female service member. The Marine's commanding officer reportedly said that the Marine was not under investigation. The commanding officer, however, began to ask the Marine improper questions about the Marine's close friend, the female service member named in the email.

According to the Marine, the commanding officer asked her if the female service member is gay and stated that the female service member "looks like she is because she looks so masculine." The commanding officer reportedly told the Marine that she wasn't going to ask her if she was gay "because someone spoke up in your defense and said you are not gay," but the commanding officer "knew" that the female service member is gay. The commanding officer's questions and comments constitute a witch hunt and a violation of "Don't Pursue" because the commanding officer is trying to determine a service member's sexual orientation based upon mere rumors and suspicion.

The commanding officer reportedly told the Marine, "you should consider your association with people who are gay because it makes others perceive that you are too and perception counts one hundred percent." The commanding officer then reportedly said, "[h]anging out with gay people is like hanging out with drug dealers and you shouldn't be doing this because it harms your reputation." The commanding officer's last statement is repugnant in that it compares gay, lesbian and bisexual people to drug dealers. Her statements are also contrary to DADTDPDH which allows Marines to associate with gay people without the fear of being pursued. The Marine continues to serve, but is fearful of an unwarranted investigation into her private life.

Marine Corps “Don’t Pursue” Summary

Marine Corps personnel appear to be implementing “Don’t Pursue” better in the last year. The Marine Corps, however, must better train its officers and non-commissioned officers about the limits to “Don’t Pursue” including seeking secretariat approval to initiate substantial investigations and limiting the scope of inquiries. Additionally, the Marine Corps must work with its criminal investigative units to ensure that they are not investigating Marines’ sexual orientation through improper criminal investigations, including monitoring gay-friendly businesses.

No Coast Guard “Don’t Pursue” Violations

There were no reports of “Don’t Pursue” violations in the Coast Guard in the past year. While the Coast Guard’s regulations closely follow the four DoD services, the Coast Guard has not, to SLDN’s knowledge, updated them with any guidance related to proper implementation of the policy in the last two years. Although the Coast Guard is not under the direction of DoD, but the Department of Transportation, it implements the DoD’s rules and directives related to DADTPDH. The Coast Guard should issue new guidance to strengthen its members’ understanding of “Don’t Pursue.”

“Don’t Pursue” Conclusion

Overall, “Don’t Pursue” violations dropped in the last year, the first decline since the policy was implemented in 1993. This change, however, is mainly due to a disproportionate drop in Navy violations because it is not implementing “Don’t Pursue” as intended. In order to truly establish a downward trend in violations, all services must improve their policy implementation. This can be achieved if: (1) the Air Force stops fishing expeditions and unauthorized substantial investigations, especially in recoupment cases; (2) the Army halts fishing expeditions and unauthorized substantial investigations; (3) the Navy stops asking service members to “prove it” and follows the intent of the policy; and (4) the Marine Corps ends fishing expeditions, and CID involvement in investigations.

If the Pentagon is unable to stop personnel from improperly pursuing perceived gay, lesbian and bisexual service members, these service members will not be able to perform their jobs to the best of their abilities and commands will lose precious time and resources pursuing those who, in many cases, only want to serve. Consequently, “Don’t Pursue” violations only serve to harm unit cohesion, morale and readiness.

DON'T HARASS

“Treatment of all individuals with dignity and respect is essential to good order and discipline. Mistreatment, harassment, and inappropriate comments or gestures undermine this principle and have no place in our armed forces. Commanders and leaders must develop and maintain a climate that fosters unit cohesion, esprit de corps, and mutual respect for all members of the command or organization”

-- Department of Defense Working Group on Harassment¹⁵⁴

“I got beat up last night. Someone came to my bed – a group of someones – and they were hitting me with blankets and soap. I am aching all over my body. My whole body hurts ... I can't believe this happened. Who did I hurt?”

-- Private First Class Ronald Chapman¹⁵⁵

SLDN documented 871 reports of anti-gay harassment during this reporting period, February 16, 2000 to February 15, 2001. This represents a 10% decline from the 968 harassment incidents documented during 1999. This modest decrease is due primarily to anti-harassment efforts in the Army. “Don’t Harass” Army violations decreased 24%, dropping from 276 to 209. The Navy, by contrast, remained the worst violator of “Don’t Harass” with a slight increase, 332 this year compared with last year’s service leading 330. The Air Force violations remained high at 214, compared to 217 in 1999. Marine Corps “Don’t Harass” violations dropped 32%, from 134 to ninety-two. The Coast Guard saw a sharp 45% increase, twenty-four this year compared to eleven in 1999.

The Pentagon has fallen short of its promises to curb anti-gay harassment. The Pentagon promised a Department of Defense Directive and Instruction that would order each of the services to implement better regulations and training on anti-gay harassment. The Pentagon has been sitting on the new guidance for six months, an irresponsible act given the pervasive climate of anti-gay harassment documented by the Pentagon itself.

The Pentagon tells young Americans volunteering for service to our nation, as part of their pre-enlistment induction procedures, that harassment is wrong. Specifically, recruits must sign paperwork stating they have received the Department of Defense (DoD) harassment briefing. This briefing states, in part, “[t]he Armed Forces do not tolerate harassment or violence against any service member for any reason.”¹⁵⁶

¹⁵⁴ Department of Defense Working Group, *Anti-Harassment Action Plan* (July 21, 2000).

¹⁵⁵ Letter from Private First Class Chapman to his family (Sept. 2000). Chapman’s experience is discussed fully later in the “Don’t Harass” section.

¹⁵⁶ DEP’T OF DEFENSE DIRECTIVE NO. 1304.26, *Qualification Standards for Enlistment, Appointment, and Induction, Applicant Briefing Item on Separation Policy* addendum (1993).

Once our young men and women complete their oath of enlistment, however, they frequently find a reality that tolerates – and often encourages – harassment of those perceived as gay, lesbian or bisexual. What’s worse, these young Americans find many uniformed leaders who, not only continue to ignore the “Don’t Harass” provisions, but sometimes directly participate in the prohibited behavior.

Pentagon Finally Acknowledges Anti-Gay Harassment Problem

The Department of Defense has finally taken strong steps this past year to address the long-standing problem of anti-gay harassment. Reacting to the July 1999 anti-gay murder of Army Private First Class Barry Winchell,¹⁵⁷ and to past SLDN documentation of the harassing climate permeating each service, then Secretary of Defense William Cohen ordered the Pentagon Inspector General to conduct a world-wide study on harassment within the ranks.

Inspector General Finds Pervasive Anti-Gay Harassment

The Pentagon Inspector General (IG) released a report, in March 2000, which – for the first time – admitted that harassment of members perceived as gay was widespread. The IG report found 80% of service members report hearing anti-gay comments. The survey also found that 37% of 75,000 service members surveyed said they had witnessed or experienced targeted incidents of such harassment, 9% of whom reported witnessing threats, and 5% of whom reported witnessing physical assaults¹⁵⁸ (Exhibit 58). The IG documented that eighty-five percent said their command tolerates anti-gay harassment, and 57% reported receiving no training on “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass” (DADTDPDH).

The IG report marked the first time ever that the Pentagon has acknowledged the pervasiveness of anti-gay harassment and said it is a problem. Then Secretary of Defense William Cohen stated that anti-gay harassment undermines military readiness.¹⁵⁹ Admitting to a problem is the first step in fixing it.

Upon receipt of the IG’s findings, Secretary Cohen commissioned a DoD Working Group¹⁶⁰ to study the IG’s findings and formulate an anti-harassment action plan¹⁶¹ that built on the anti-gay harassment programs implemented by some services in January and February 2000.

¹⁵⁷ Private First Class Barry Winchell was bludgeoned to death with a baseball bat by another soldier in an Army barracks on Fort Campbell, Kentucky, on July 5, 1999. In December 1999, the Army convicted Private Calvin Glover of premeditated murder and sentenced him to life in prison with the possibility of parole. Army prosecutors argued that Glover’s primary motive was a predisposed hatred of gays. One month later, in January 2000, the Army convicted Specialist Justin Fisher for obstructing the criminal investigation into the murder, lying to investigators, and providing alcohol to a minor. For reasons that remain unclear, Major General Robert T. Clark, who was the Commanding General of the 101st Airborne Division (Air Assault) at Fort Campbell at the time, accepted a lenient plea bargain with Fisher, over the objections of Winchell’s family. The plea agreement dropped the original charges of principal to premeditated murder and accessory after the fact.

¹⁵⁸ See DoD Inspector General 2000 Report, *supra* note 19, at 4.

¹⁵⁹ See *generally* News Release, Department of Defense, Secretary Cohen Approves Services Homosexual Conduct Policy Plans (Feb. 1, 2000).

¹⁶⁰ The Working Group consisted of senior civilian and military leaders, and was chaired by then Under Secretary of the Air Force Carol DiBattiste.

Working Group Issues Anti-Harassment Action Plan

The Defense Department approved the Working Group's "Anti-Harassment Action Plan" on July 21, 2000.¹⁶² The Working Group's plan contains thirteen points, adopting seven of SLDN's long-standing recommendations for curbing anti-gay harassment (Exhibit 60). These include: strong condemnation of mistreatment, harassment, and inappropriate comments or gestures; accountability for those who harass or condone harassment; training for every service member, specifically tailored to their grade and level of responsibility; and informing service members about confidential and non-confidential channels to report harassment. The Anti-Harassment Action Plan again made clear and unambiguous that harassment undermines unit cohesion.

Each of the services have made some efforts toward implementing their own anti-harassment training programs.¹⁶³ Each of them, however, continues to await the green light from the Pentagon in the form of a Directive and Instruction to update their training regulations in a manner consistent with the Anti-Harassment Action Plan.¹⁶⁴

The fact that the Pentagon has been sitting on its hands for the past six months and failing to issue the anti-harassment Directive and Instruction is reckless. Private First Class Winchell is dead because of military leaders' indifference. Reports of overt anti-gay animus within the ranks remain alarmingly high. It should not take the murder of another young gay, lesbian or bisexual service member to convince senior Pentagon leaders to do their job.

¹⁶¹ SLDN communicated with the Working Group and offered specific recommendations on how to accomplish its goals. See Letter from Servicemembers Legal Defense Network to Department of Defense Homosexual Conduct Policy Working Group (May 8, 2000) (Exhibit 59).

¹⁶² See Memorandum from Under Secretary of Defense Bernard Rostker to Secretary of the Army, Secretary of the Navy, Secretary of the Air Force, Chief of Staff of the Army, Chief of Naval Operations, Chief of Staff of the Air Force, and Commandant of the Marine Corps, *Approval and Implementation of the Action Plan Submitted in Response to the DoD Inspector General's Report on the Military Environment With Respect to the Homosexual Conduct Policy* (July 21, 2000).

¹⁶³ See, e.g., ALARACT 008/00, *supra* note 34; Memorandum from Gen Michael E. Ryan, Chief of Staff, & F. Whitten Peters, Secretary of the Air Force, to All Air Force Personnel, *Air Force Policy on Harassment* (Jan. 10, 2000) [hereinafter *AF Policy on Harassment Memo*]. SLDN has provided each Service with detailed recommendations on how best to implement the Anti-Harassment Action Plan within their respective spheres. (Exhibit 61). See Memorandum from Michelle Benecke, C. Dixon Osburn & Stacey Sobel to Honorable Carol A. DiBattiste, Undersecretary of the Air Force, *Implementation of DoD Working Group Action Plan on Anti-Gay Harassment* (Oct. 27, 2000); Memoranda from C. Dixon Osburn & Michelle Benecke to CDR Bill Correllus, *Implementation of DoD Working Group Action Plan on Anti-Gay Harassment* (Oct. 27, 2000) (providing recommendations for the United States Navy and the United States Marine Corps); Memorandum from C. Dixon Osburn & Michelle Benecke to The Honorable P.T. Henry, GEN John Abrams & LTG Timothy Maude, *Implementation of DoD Working Group Action Plan on Anti-Gay Harassment* (Oct. 18, 2000) (providing recommendations for the United States Army).

¹⁶⁴ The Air Force is the exception. Then Secretary of the Air Force F. Whitten Peters, and Chief of Staff General Michael E. Ryan, ordered the "Implementation of Anti-Harassment Action Plan" on October 2, 2000. Then Secretary Peters wrote, "[w]e wholeheartedly endorse and support this action plan and have begun developing specific implementing instructions, revising training materials, and establishing measures of effectiveness and adherence to policy." *AF Implementation of Anti-Harassment Action Plan Memo*, *supra* note 35.

Army leaders have, thus far, provided the best example of taking high visibility roles in training soldiers not to mistreat each other based upon perceived differences in sexual orientation. The other services' anti-harassment training programs are lagging behind that of the Army, but they appear to be taking some measurable steps in the right direction.

This section analyzes this past year's anti-gay harassment policies and trends – the good and the bad – by service. The “Don't Harass” section also includes an update on the climate developments at Fort Campbell, Kentucky, in the wake of Private First Class Winchell's murder.

Army “Don't Harass” Violations Drop as Leaders Begin Training the Troops

“Whenever we violate the trust of any soldier, we violate the trust of all soldiers”

-- Secretary of the Army and the Army Chief of Staff¹⁶⁵

SLDN documented 209 incidents of anti-gay harassment in the Army during the year 2000. This represents a 24% decline in “Don't Harass” violations from the prior year's report of 276.

The Army provides the best illustration of trying to “do what's right” in its anti-gay harassment prevention efforts. Since the death of one of their own, Private First Class Winchell, top Army officials have generally provided strong leadership in the form of policy edicts and training mandates. The Army appears to be leading the way among the services in implementing training programs and holding those found responsible for anti-gay misconduct accountable.

The Army strengthened its “Don't Harass” policy in January 2000 (Exhibit 62). The directive, entitled “Dignity and Respect for All,”¹⁶⁶ states in part, “[h]arassment of soldiers for any reason, to include perceived sexual orientation, will not be tolerated.”

While the full impact of the Army's heightened emphasis on treating perceived gay soldiers in a dignified and respectful manner remains to be seen, there are indications of progress. This section begins with a discussion of positive indicators of Army progress, as illustrated – ironically – by Fort Campbell. The section then focuses on ongoing Army problem areas in “Don't Harass” implementation.

¹⁶⁵ ALARACT 008/00, *supra* note 34.

¹⁶⁶ *See id.* (Exhibit 62).

Reports of Army Leaders “Doing What’s Right” on the Rise

New 101st Airborne Division’s Commanding General Dresses-Down Anti-Gay Captain

The Fort Campbell, Kentucky, commanding general intervened in the case of a gay soldier being harassed by his chain-of-command. Matthew Laxton, a twenty-one-year-old from Missouri, had served as an infantryman for almost three years and had already been promoted to the rank of Sergeant. Upon arriving at Fort Campbell, in August 2000, from an assignment in South Korea, Sergeant Laxton reports being stunned by the intensity of anti-gay fervor within his unit, Delta Company, 1-327 Infantry Battalion.

Sergeant Laxton became concerned for his safety after becoming the target of harassing comments and physical threats by other soldiers. He was further disturbed by soldiers in Delta company ridiculing the murder of Private First Class Winchell at Fort Campbell the previous summer. Sergeant Laxton reports unit leaders – officers and noncommissioned officers – did not seem to mind the anti-gay comments, some leaders even participated in them. Ultimately, Laxton reluctantly concluded that the only way to protect himself from the harassment was to sacrifice his Army career by coming out to his commanding officer.

Sergeant Laxton confided in his platoon sergeant that he is gay and sought counsel as to what steps he should take to ensure his safety. Laxton, with his platoon sergeant’s support, disclosed his sexual orientation to his company commander, Captain Edward Brady. After explaining to Brady the anti-gay hostility which compelled his coming-out, Sergeant Laxton was shocked when the Captain ordered him to “prove” he is gay.¹⁶⁷ Additionally, Brady expressed no interest in investigating or halting the anti-gay harassment Sergeant Laxton reported.

At Sergeant Laxton’s request, SLDN intervened and persuaded the command to protect Laxton from further harassment. Soon thereafter, however, Laxton’s platoon sergeant overheard Brady, in the presence of the battalion commander, Lieutenant Colonel Gibbs, derisively call Laxton a “pole smoker.” Surprisingly, Lieutenant Colonel Gibbs simply ignored the Captain’s unprofessional behavior. The platoon sergeant, recognizing the impropriety of Captain Brady’s bigoted remark and wanting to “take care of his soldier” – which is a noncommissioned officer’s primary responsibility¹⁶⁸ – reported Brady’s misconduct.

In the events that followed, Captain Brady retaliated against the platoon sergeant by threatening to lower the sergeant’s official performance report. Sergeant Laxton, out of loyalty to his platoon sergeant, filed an IG complaint, reporting the abusive Captain (Exhibit 63).

¹⁶⁷ As discussed in the “Don’t Pursue” section, the DADTPDH policy contains no “prove it” requirement. Gay, lesbian and bisexual soldiers who are compelled by conscience or harassment to come out to the Army should not be subjected to the indignity of “proving” they are gay. Indeed, ordering gays to “prove it” is little more than a mutant variation of prohibited anti-gay harassment.

¹⁶⁸ See United States Army Noncommissioned Officers Academy, *The Creed of the Noncommissioned Officer*, available at <http://www.knox.army.mil/school/ncoa/creed.htm> (last updated Nov. 6, 2000).

Ultimately, SLDN contacted the new Fort Campbell commanding general, Major General Richard A. Cody,¹⁶⁹ asking for the platoon sergeant's and Sergeant Laxton's protection. Major General Cody promptly looked into the matter and took swift steps to address the problem. Major General Cody assured SLDN that the platoon sergeant's career would not be harmed. What's more, Major General Cody reportedly issued a personal reprimand to Captain Brady, holding him accountable for his leadership failure. The Army, unfortunately, lost the talents and experience of Sergeant Laxton.

Captain Brady's anti-gay bigotry, and Lieutenant Colonel Gibbs' indifference towards it, amounted to harassment. Major General Cody, however, set a good leadership example by holding the Captain accountable, thereby sending a message to other Fort Campbell leaders that there are consequences to participating in and allowing anti-gay harassment.

In the wake of Private First Class Winchell's murder, the Department of the Army IG conducted an investigation of harassment at Fort Campbell. The IG found significant levels of anti-gay harassment in its July 2000 report.¹⁷⁰ In addition to the anti-gay harassment faced by Private First Class Winchell prior to his murder, the Army confirmed that anti-gay "joking and bantering" occurred amongst soldiers "on a regular basis." The IG further verified that anti-gay cadences occurred during physical training runs and anti-gay graffiti appeared in public on the installation (Exhibit 64). Private First Class Winchell's parents have filed a wrongful-death claim against the Army under the Military Claims Act for the murder of their son. The Army Secretary has yet to act on the claim.

The experience of Sergeant Laxton indicates that anti-gay harassment remains a problem at Fort Campbell. Major General Cody's response to the harassment, however, indicates that conditions at Fort Campbell are changing for the better.

Other Good Examples of Army Leaders' Efforts to "Do What's Right"

- A company commander at Fort Benning, Georgia, related to SLDN how he is trying to teach his soldiers not to hate gays. The Captain states he believes he has some gay soldiers within his unit and states they are important members of his team.
- A company commander at Fort Bragg, North Carolina, told SLDN he does not tolerate anti-gay harassment, and is training his soldiers to respect each others' privacy. This Captain also states he has gays within his command whom he respects.
- A company commander at Fort Rucker, Alabama, states he believes the DADTPDH policy creates divisions within his unit and causes needless leadership challenges. This Captain is

¹⁶⁹ Major General Cody replaced Major General Robert T. Clark, who commanded the 101st Airborne Division during the time of Private First Class Winchell's murder. Under Clark, SLDN documented a pervasive anti-gay climate across Fort Campbell. Since Clark's departure, SLDN receives fewer reports of egregious "Don't Harass" violations from the installation. Clark, who was not promoted to Lieutenant General upon his departure from Fort Campbell, is presently assigned as Deputy Commanding General for the 5th U.S. Army, at Fort Sam Houston, Texas.

¹⁷⁰ See generally Inspector General, department of the Army, Fort Campbell task Force, *DAIG Special Assessment / Investigation of Violations of the DOD Homosexual Conduct Policy at Fort Campbell* (2000).

working hard to train his soldiers to work together cohesively without regard to perceived differences in sexual orientation.

- An Army lawyer in Germany reports to SLDN that many commanding officers tell him that they do not care whether or not a soldier is gay, so long as they do a good job. This attorney relates how commanders often express frustration at having to balance the inequities presented by the DADTDPDH policy. He further reports many commanders are taking high visibility leadership roles in an attempt to end anti-gay harassment.

Regrettably, this year SLDN also has reports of egregious “Don’t Harass” violations by some soldiers and their leaders. In addition to the harassment by chaplains, discussed in the “Don’t Tell” section, these violations include an anti-gay beating and threats of violence.

Some Army Leaders Continue to Tolerate, and Sometimes Participate in, Harassment

Fort Jackson, South Carolina, Soldier Physically Assaulted

Ronald Chapman was physically assaulted by other soldiers after a drill sergeant called Chapman a “faggot.” Private First Class Chapman, a nineteen-year-old from Massachusetts, reported for basic training to Echo company, 1-28 Infantry Regiment, Fort Jackson full of hope and dreams of bettering himself in the service of our country.¹⁷¹ Soon after arriving, Drill Sergeant Hagadush called Chapman a “faggot.” Soon thereafter, Chapman reports the harassment began and included being threatened with “I’ll pound your face” and “don’t go to sleep tonight.”

Private First Class Chapman reports being assaulted and beaten by other Echo company soldiers in September 2000, soon after the “faggot” incident. Chapman described the attack in a letter to his parents, “I have some bad news for you. I got beat up last night. Someone came to my bed – a group of someones – and they were hitting me with blankets and soap. I am aching all over my body. My whole body hurts. I can’t tell anyone because they left no marks. Who’ll believe me? I can’t believe this all has happened. Who did I hurt?” (Exhibit 65).

Private First Class Chapman’s mother contacted SLDN asking for help. SLDN intervened and pressed the command to conduct an investigation into the assault (Exhibit 66). Fearing for his safety, Chapman informed his command that he is gay in order to escape from the hostility.

Although reported incidents of physical assault are rare, this case illustrates what can happen when Army leaders fail to lead. The criminal assault of Private First Class Chapman appears to have directly stemmed from Drill Sergeant Hagadush’s calling Chapman a “faggot.”

¹⁷¹ Private First Class Chapman reports he enlisted in the Army because he wanted to obtain educational benefits through the GI Bill, and grow into an adult while offering his service to the military. Chapman’s reasons for enlisting mirror those of many SLDN clients: patriotic young men and women who view the opportunities presented by military service as benefiting both themselves and our nation. These young gay, lesbian and bisexual Americans are not only willing to make the extraordinary sacrifices asked of all members of the Armed Forces, they are willing to make the added sacrifice asked only of them: to live their lives in the lonely isolation required to prevent anyone in the military from learning about their orientation.

Regrettably, Chapman was forced to “tell” because his leaders and other soldiers violated “Don’t Harass.” When a leader, such as this Echo company drill sergeant, calls a subordinate a “faggot,” unit readiness suffers because of the harm caused to the targeted soldier, as well as the distrust created amongst other soldiers resulting from the leader’s poor example. SLDN is unaware of any steps taken by Fort Jackson leaders or the Army to hold Hagadush or those who committed the criminal assault accountable.

Fort Totten, New York, Reserve Commander Harassed

First Lieutenant Paul Sprague became a target for anti-gay harassment due to his presenting his unit’s DADTDPDH training. First Lieutenant Sprague served as the 354th Transportation Battalion Headquarters Detachment commanding officer. A twenty-nine-year-old native of New Jersey, Sprague had over ten years combined active duty and reserve service. Selected to command his battalion’s headquarters element, Sprague reports being anxious as he prepared to present the battalion’s DADTDPDH training.

While preparing the briefing, First Lieutenant Sprague reports being approached by a Captain, who stated, “[s]ince I’m not a homo, I don’t need to attend this briefing.” Sprague explained to the officer the Army’s commitment to the training. The officer responded by harassingly asking Sprague, “[a]re you a homo?” (Exhibit 67).

First Lieutenant Sprague reports he presented the mandatory training and then asked whether the soldiers had questions about the policy. After Sprague fielded soldiers’ questions – which consisted mostly of soldiers expressing difficulty understanding how gays pose an “unacceptable risk” to unit cohesion¹⁷² – the battalion Sergeant Major rose before the unit. The Sergeant Major proceeded to tell an offensive anti-gay joke.¹⁷³ Sprague says he was stunned: stunned by the anti-gay joke; stunned that a senior enlisted leader would lead in the harassment; and stunned that the leader would tell an anti-gay “joke” in the wake of training that anti-gay jokes were wrong and hurt Army readiness.

First Lieutenant Sprague reports returning to his office in a state of shock. While pondering the anti-gay animus he had encountered that day, Sprague states a soldier approached him and volunteered that the soldier “used to seek out homosexuals in the Village¹⁷⁴ and beat them up” (Exhibit 67).

This series of events led First Lieutenant Sprague to reluctantly conclude he could not continue safely serving in the face of such ignorance and hostility. Later that day, after being awarded with his third Army achievement medal, Sprague told his battalion commander he is gay. First Lieutenant Sprague later wrote, “[e]very medal I have earned is a reflection of me, and I accomplished these award winning feats because of who I am, including my sexual orientation

¹⁷² One of the “rationales” for the policy is that the presence of openly gay soldiers would “create an unacceptable risk” to unit cohesion and morale of other soldiers. See 10 U.S.C. § 654(a)(15). According to First Lieutenant Sprague, several members of his unit disagreed with this rationale, stating that they do not believe gays would disrupt cohesion or morale.

¹⁷³ The “joke” involved a cucumber, broomstick, flashlight, and two gay men.

¹⁷⁴ The “Village” is a reference to Greenwich Village in New York City where many gays, lesbians and bisexuals live.

... the Army applauds and rewards my efforts as a soldier but denounces my sexual orientation as a human being.” Sprague continued, “[i]t is difficult to believe that knowledge of my sexual orientation would suddenly present an unacceptable risk to my unit after having served my country for ten years” (Exhibit 67).

First Lieutenant Sprague is exactly the type of leader the Army should want to retain. Instead, because of leadership failures on the part of Sprague’s superiors, the Army is losing a high quality officer. Sprague’s being gay is not harmful to cohesion or readiness, as evidenced by over ten years of outstanding service and numerous commendations.

The combat readiness of the 354th Transportation Battalion is, however, probably affected by the attitudes expressed by the Captain and Sergeant Major. Such attitudes foster intolerance among soldiers, thereby creating distrust within the unit. First Lieutenant Sprague’s leaders failed him and the Army suffered as a result.

Other Examples of Harassment and Threats of Violence Towards Gay Soldiers

- A Second Lieutenant wrote to her command, “[t]he Army’s generally homophobic environment can make daily interactions with my peers extremely stressful. I feel like a coward every time I stand by in silence and listen to my peers and superiors make off-color comments and jokes about homosexuals” (Exhibit 68). The Lieutenant further reports receiving anti-gay harassment while a cadet. The harassment consisted of some members of her graduating class preparing a “Class of 2000 Homo Factor Report,” referring to gays as “homos” and “sperm slurping” (Exhibit 69).
- Private Scott Nickell, is an eighteen-year-old soldier assigned to the 175th Engineering Company at Fort Bragg, North Carolina. Nickell wrote to his commanding officer stating, “I can no longer tolerate the many gay jokes and comments I hear everyday. This includes words like “fag,” “queer,” and “homo” that are used during everyday conversation. I feel restrained and violated when I hear anti-gay comments because I am unable to say anything in defense. Doing so would just create suspicion and further harassment from other soldiers. It is also disheartening when these jokes and comments are made by or in the presence of senior enlisted personnel who do nothing to stop it” (Exhibit 70).
- A nineteen-year-old Private assigned to, Fort Leonard Wood, Missouri, wrote to his command stating, “[a soldier said] if we find a faggot in the platoon, we’re going to give him a blanket party he won’t forget . . . [e]ver since I arrived at Fort Leonard Wood I have heard soldiers call other soldiers “queer,” “cocksucker” and “faggot,” and I was scared that if other soldiers knew I was bisexual that I would get a blanket party” (Exhibit 4).
- A soldier in the South disclosed his sexual orientation to his command after becoming the “target of escalating anti-gay harassment” from other soldiers, including his unit First Sergeant. The soldier wrote, “[the First Sergeant] told me, in front of other [soldiers] that he would shoot and kill me if we were ever in the same foxhole together during a war.” The First Sergeant had previously threatened violence against the soldier because the First

Sergeant perceived the soldier as gay. The soldier wrote, “[the First Sergeant] threatened to shove a tube of mechanical lubricant up my anus . . .” (Exhibit 71).

Lesbian Baiting Remains an Army Problem

Women continue to be disproportionately impacted by DADTDPDH because of lesbian baiting¹⁷⁵ and gender bias.¹⁷⁶ Based on the most recent available Pentagon statistics, women comprised 316 of the 1,034 gay discharges in 1999, 31% of the total 1999 discharges, although women comprise only 14% of the force. Past years’ rates of female discharges within DoD were similarly high: in 1998, 28% of the gay discharges were female; in 1997, 22%; in 1996, 29%; in 1995, 21%; and in 1994, women comprised 26% of the gay discharges.

In the Army, women comprised 35% of the Army’s total gay discharges in 1999. These percentages are alarmingly high particularly because only 15% of Army personnel are female.

Army ROTC Cadet Called “Not Feminine Enough”

Elizabeth Moseanko’s ROTC instructor lesbian baited her by claiming Moseanko is not feminine enough. Cadet Moseanko enrolled in the Seattle University Army ROTC program with high hopes of becoming an officer. Moseanko’s dream, however, came to an end after she became the target of harassing rumors and suspicion that she is a lesbian. Moseanko, a twenty year old native of Washington, reports other cadets began harassing her by asking whether she is a lesbian because some of her female friends have “short hair.”

Upon hearing about the harassment, ROTC instructor Major Joe McClung ordered Cadet Moseanko into his office. McClung reportedly told her to let her “hair grow out,” “wear earrings,” and “make-up” (Exhibit 72).

Major McClung’s apparent belief that Moseanko is not feminine enough represents lesbian baiting because he assumed she is gay based upon how she looks and then, apparently because he assumed she is a lesbian, discriminated against her by failing to stop the harassment. Instead, McClung reportedly joined in the harassment by chastising Cadet Moseanko for not conforming to his expectation of her gender role. Such inappropriate stereotyping and discrimination is often found among women in nontraditional job fields, such as the military.¹⁷⁷

¹⁷⁵ Lesbian baiting is a form of anti-gay harassment as well as a form of sexual harassment. Women are often called lesbians, regardless of their sexual orientation, for a variety of retaliatory reasons. Some men accuse women who refuse their sexual advances of being lesbians. Other men who sexually harass women accuse them of being lesbians when the women report the sexual harassment, in an attempt to turn the investigation away from their own misconduct. Others, men and women, accuse female superior officers of being lesbians in retaliation for poor performance evaluations or unpopular orders. And yet others accuse successful women of being lesbians to derail their careers. The stereotype remains that women in nontraditional job fields are viewed, as many have noted, as “dykes.” Lesbian baiting thus continues to disproportionately affect women who serve our country.

¹⁷⁶ See Michelle M. Benecke and Kirsten S. Dodge, *Military Women: Casualties of the Armed Forces’ War on Lesbians and Gay Men*, in GAY RIGHTS, MILITARY WRONGS: POLITICAL PERSPECTIVES ON LESBIANS AND GAYS IN THE MILITARY 71-108 (Craig A. Zimmerman, ed., 1996).

¹⁷⁷ As a result of DADTDPDH, many women do not report anti-gay harassment. Others choose more traditional career paths, or tone down their ambition. Some women report they stop publicly socializing with other women for fear that they will be labeled as lesbians just because they are in a group with other women.

With SLDN's assistance, Moseanko has reported this harassment and asked that Major McClung, and others, be held accountable. McClung's "Don't Harass" lesbian baiting led to the Army's loss of Cadet Moseanko, thereby exacerbating the Army's ongoing personnel recruiting and retention challenges.¹⁷⁸

Army "Don't Harass" Summary

Although "Don't Harass" violations remain an Army problem, the Army has taken some encouraging steps in the right direction. Army leaders have stated, "[s]oldiers who offer their commitment and their lives in this service should and must be treated with dignity, honor and respect ... [e]very soldier has the right to expect treatment consistent with our core values, a safe and secure environment, and the support of their chain of command."¹⁷⁹ The message, however, has not filtered down to all of the lower level commands. Consistent and focused leadership, training and accountability up and down the chain of command must continue in order for the Army to fully become a safe place for gay, lesbian and bisexual soldiers, thereby improving its combat readiness.

Air Force "Don't Harass" Violations Remain Alarming High, Leadership Lacking

"Every Air Force member deserves to work and live in an environment that is free of discrimination and harassment."

-- Secretary of the Air Force and the Air Force Chief of Staff¹⁸⁰

SLDN documented 214 incidents of anti-gay harassment in the Air Force during the year 2000. This represents a 1% decrease in "Don't Harass" violations from the prior year's report of 217 violations.

The rate of anti-gay harassment in the Air Force remains too high. Although the Air Force has taken some tentative steps towards ending the anti-gay climates that have permeated many commands for so long, it has a long way to go.¹⁸¹ Air Force leaders strengthened "Don't Harass" in January 2000 (Exhibit 73). The directive, entitled "Air Force Policy on Harassment"¹⁸² states, in part, "harassment, threats or ridicule of individuals or groups based

¹⁷⁸ See generally United States Army, *United States Army Posture Statement FY01, Executive Summary*, at http://www.army.mil/aps/aps_es.htm (last visited Mar. 5, 2001).

¹⁷⁹ ALARACT 008/00, *supra* note 34 (Exhibit 62).

¹⁸⁰ *AF Policy on Harassment Memo*, *supra* note 163.

¹⁸¹ The Air Force appears to have implemented some "Don't Harass" training, in the context of online computer briefings. Many airmen report to SLDN, however, that they have not received the training. The Air Force "training" program, to the extent it exists, is not nearly as developed and thorough as that of the Army. Requiring some airmen to read an online briefing is a poor substitute for the visible leadership required to ensure a clear understanding of "Don't Harass."

¹⁸² *AF Policy on Harassment Memo*, *supra* note 163.

upon their real or perceived differences, including sexual orientation, have no place in the United States Air Force and will not be tolerated.”¹⁸³

Air Force Chief of Staff General Ryan stated, “[anti-gay harassment] show[s] a lack of self control that discredits the person who engages in such conduct and, at the same time, erodes morale, good order and discipline.”¹⁸⁴ The Air Force must continue to focus on “Don’t Harass” implementation in order to stop the harm to its combat readiness caused by airmen’s lack of “self control.”

This section begins with a review of good examples of “Don’t Harass” adherence identified within the Air Force during the past year. The section then focuses on ongoing Air Force problem areas in “Don’t Harass” implementation.

Positive Indicators of Air Force “Don’t Harass” Adherence

Langley Air Force Base Harassment Report Taken Seriously; Reporting of Anti-Gay Threats and Harassment Remains Difficult Challenge

An Airman at Langley Air Force Base (AFB), Virginia, contacted SLDN after becoming the target of constant anti-gay harassment. The young Airman states that for most of his first two years on the base he faced incessant harassing questions about his sexuality because he was perceived as gay. Some airmen reportedly used the phrase “fag monster.” The Airman’s supervisor participated in and tolerated the anti-gay hostility.

With SLDN’s assistance, the Airman reported the harassment to his commanding officer. The Airman wrote, “[m]any of the jokes and insinuations are deeply graphic . . . [t]he harassment is a never-ending always-present part of the daily routine for my office.”

The Airman explained his anxiety:

I joined the Air Force because of its reputation as a professional military environment and intend on making a career of it. I find it very difficult to stay motivated to that end while I’m in the current hostile environment. I hope that we can bring a stop to this harassment and return the professionalism to our shop that we should be known for.

The Airman’s decision to report the harassment in an attempt to save his career was difficult. The services continue to struggle with how to handle reports of anti-gay harassment in

¹⁸³ *Id.* Air Force leadership issued further orders, in October 2000, directing commanding officers to implement the DoD Anti-Harassment Action Plan. See *AF Implementation of Anti-Harassment Action Plan Memo*, supra note 35. The directive states, in part, “[w]e wholeheartedly endorse and support this action plan and have begun developing specific implementing instructions, revising training materials, and establishing measures of effectiveness and adherence to policy. In the meantime, we expect all commanders to use this action plan as a guide to preventing harassment in their units” *Id.* (Exhibit 74).

¹⁸⁴ *AF Policy on Harassment Memo*, supra note 163.

a way that does not harm the careers of those targeted by the harassment. In August 1999, the Pentagon issued clearer and stronger direction on how to investigate threats against and harassment of those perceived as gay¹⁸⁵ (Exhibit 75).

Reporting harassment is difficult because it brings the service member “up on the radar screen.” If the command ignores the report or does not respond appropriately, it sends a green light to other service members that they may harass and abuse those perceived as gay with impunity. Also, members who report harassment risk investigation under the “homosexual conduct” policy based on retaliatory accusations lodged by the perpetrator(s) of harassment.¹⁸⁶ Service members further risk the possibility that their sexual orientation will be discovered, against their will, in the course of any harassment investigation.¹⁸⁷

This Langley AFB Airman, however, weighed the risks and, because he genuinely wanted to continue military service, decided to report the harassment and hope that his command properly followed DoD policy. As it turned out, his command took the Airman’s complaint seriously by initiating measures to halt the harassment. Although SLDN does not know the final resolution, the Airman’s commanding officer assured him that those responsible for the prohibited harassment would be held accountable. Further, the Airman was transferred, per his request, to another unit where he could continue working in his skill area.

This good report from Langley AFB suggests that some Air Force officers are stepping up to the plate and providing the needed leadership to implement the “Don’t Harass” provisions. While it is unfortunate that the Airman faced any harassment, at least his leaders followed the rules once he brought the problem to their attention.

¹⁸⁵ See Under Secretary of Defense (P&R) Rudy de Leon 1999 “*Investigating Threats Guidelines*” Memo, *supra* note 63. This memorandum re-issued and strengthened the prior DoD harassment investigation guidance. See Memorandum from Under Secretary Edwin Dorn to Secretaries of the Military Departments, Chairman of the Joint Chiefs of Staff, and the Inspector General of the Department of Defense, *Guidelines for Investigating Threats Against Service Members Based on Alleged Homosexuality* (Mar. 24, 1997).

¹⁸⁶ The case of Senior Airman Noel Freeman, discussed later in this section, illustrates the dilemma facing gay, lesbian and bisexual service members in reporting harassment. Elijah Tuatagaloa, another airman in Freeman’s unit, spread rumors around the Kelly AFB, Texas, dormitory that Freeman is gay. Senior Airman Freeman confronted Tuatagaloa about his behavior. Freeman wrote, “[w]hile [Airman First Class] Tuatagaloa seemed genuinely surprised that I was even remotely concerned about the rumors, I considered speaking with his supervisor regarding his actions. I opted not to do so out of fear that I would be investigated and subsequently discharged” (Exhibit 76).

¹⁸⁷ Well-meaning leaders sometimes elicit this information when questioning a service member, or discover it when examining evidence in the case. Service members sometimes inadvertently reveal this information by the way they make their report, or because they are experiencing great anxiety from being attacked or harassed. A service member may blurt out, “I was attacked because I’m gay.”

Other Good Reports on the Air Force “Don’t Harass” Front

- The former Goodfellow AFB, Texas, Staff Judge Advocate, Lieutenant Colonel David Wesley, was very cooperative in SLDN’s efforts to end anti-gay harassment at the base and at the Defense Language Institute¹⁸⁸ in Monterey, California. Lieutenant Colonel Wesley sent Air Force personnel to Monterey to educate airmen on the policy.
- Air Force defense attorneys at Andrews AFB, Maryland, Hurlburt Field, Florida, Little Rock AFB, Arkansas, and Keesler AFB, Mississippi, report they are having more success advocating for their gay clients with Air Force commanding officers. These defense attorneys report commands are taking issues relating to the policy more seriously. These lawyers generally believe that the Air Force leadership’s recent focus on “Don’t Harass” policy implementation is having favorable results.

Air Force “Don’t Harass” Violations Continue

Shaw Air Force Base Airman Receives Death Threats

Senior Airman Lauren Brown, a twenty-three-year-old Texas native, came out to her command after receiving several death threats and having her private life investigated by Air Force officials. In a November 2000 letter to her commanding officer, Brown wrote, “I have served five years in the Air Force. I served those years honorably and with distinction. I was recently selected for promotion to staff sergeant. I love my job in the Air Force. Up till this year, I loved serving in the military. I have gone to great lengths to protect my career. I can’t and won’t stay silent anymore” (Exhibit 43).

Senior Airman Brown continued, “[o]ver the past year, my life at Shaw AFB has become completely intolerable. During Exercise Bright Star in Egypt last October, I began receiving death threats.” Brown reports the words “die you fucking dyke” were written on the window of her government leased vehicle. Brown reported this threat to her Air Force supervisor.

Soon after returning from Egypt, Brown received another death threat on Shaw AFB. This time, a note was left on her vehicle stating, “God hates queers and so do we, die you fucking dyke.” Senior Airman Brown explains she feared both for her safety and her career: “I did not want or need to spur an investigation into my personal life. I wanted to stay in the military. I loved my job and was looking forward to my new assignment, so although I was worried about the threats, I could not risk my career by coming forward” (Exhibit 43). Thus, Brown reluctantly decided not to report the newest threat.

The threats continued. Senior Airman Brown’s life was in danger. A few weeks later someone slashed two of her car tires. Soon thereafter someone torched her car, completely destroying it. Brown understandably viewed these incidents as part of the pattern of anti-gay harassment she had endured. She knew she had to report the criminal conduct.

¹⁸⁸ The Goodfellow AFB Staff Judge Advocate is responsible for Air Force Defense Language Institute legal matters relating to DADTPDH.

During the investigation of the vehicle arson, Senior Airman Brown reported the death threats, but states the Air Force did not seriously investigate them. Several months later, she received another death threat, in the form of a written note on her vehicle stating, “gun, knife, bat. I just can’t decide which one. It’s not over dyke.” Instead of investigating the last threat, the Air Force Office of Special Investigations fingerprinted Brown and, to her knowledge, did not investigate any of the threats.

After Senior Airman Brown reported these incidents, one of her supervisors called her a “fucking rug muncher.” The Air Force closed the investigation into the death threats, taking no action. Brown, still fearing for her safety, felt she had no alternative but to come-out. Her fear of repercussions and retaliation if she reported the initial threats turned out to be justified.

Senior Airman’s Brown’s case illustrates precisely what should not be happening in the application of Air Force “Don’t Harass” policy. It shocks the conscience that lesbian airmen still face the risk of death threats, especially in light of top Air Force leaders’ emphasis on treating gays with dignity and respect. Further, for a service member’s supervisor to use derisive, anti-gay slurs toward her is wrong. It is wrong for the Air Force to fail to take reports of death threats seriously. It is wrong for the Air Force to fail to take steps to protect a perceived lesbian who fears for her life.

The failure of Brown’s leaders to prevent the threats and harassment led to her having to sacrifice her military career. This leadership failure harms readiness because it sends the signal that leaders are not enforcing “Don’t Harass” and are not taking care of their people, thereby creating distrust and dissent within the ranks.

Defense Language Institute Harassment Problem Continues

In last year’s *Conduct Unbecoming* report,¹⁸⁹ SLDN discussed an illegal witch hunt at the Defense Language Institute (DLI), in Monterey California. Since learning of the DLI problems, senior Pentagon and Air Force legal officials have been helpful in attempting to correct the problem. Air Force leaders initiated policy training for airmen assigned to DLI. Airmen report to SLDN that one of those responsible for last year’s witch hunt has retired from the service. Airmen have also reported to SLDN that their officer in charge, Colonel Smith, has been sensitive to their concerns and safety. Despite these good efforts, however, SLDN documented further instances of “Don’t Harass” violations within DLI during the past year.

¹⁸⁹ See 6TH ANNUAL CONDUCT UNBECOMING REPORT, *supra* note 36.

*Airman First Class Firpo Reportedly Harassed by DLI Chaplain
and Civilian Language Instructors*

Airman First Class Robert Firpo, a twenty-year-old from Washington, reports being the target of many “Don’t Harass” violations while at the Defense Language Institute.¹⁹⁰ Firpo, despondent over the incessant anti-gay harassment from other airmen, sought out the unit chaplain for advice on how to handle the harassment. The unit Chaplain, Captain Ingles, reportedly told Firpo to “grow up and figure out which sex is the correct one to be attracted to.” Ingles further reportedly told Firpo that he is “immature for liking males” (Exhibit 7).

According to Airman First Class Firpo, DLI civilian language instructors contributed to the harassment. For example, two civilian instructors, Ms. Chung and Dr. Shin, each reportedly ridiculed Firpo – in front of the entire class – for being gay, with Dr. Shin specifically suggesting Firpo was a “fag.” Firpo further reports being repeatedly told by a noncommissioned officer, Technical Sergeant Thrasher, that Firpo “needed to be in jail for what he does.”

The “Don’t Harass” violations by Air Force DLI leaders spilled over to the junior enlisted airmen. For example, Firpo reports other airmen told him, “fag, you don’t belong here” and referred to him as “that fag calls himself a squad leader.” Airman First Class Firpo states over the following months he was called “fag” dozens of times. He further reports one of his roommates posting a sign in their barracks room which said “fag free zone.” According to Firpo, he “received more than 100 notes left on the accountability board of my room door, these handwritten notes were anti-gay or gay-hate comments targeted at me” (Exhibit 7).

Airman First Class Firpo eventually decided he had no choice but to come out to his command and request a discharge so that he could escape the pervasive anti-gay hostility at DLI. Firpo wrote, “I have enjoyed serving in the Air Force and would like to continue my Air Force Career. I have not told other people about my sexual orientation, nor have I performed any acts . . . [H]owever, I know that I do not need to subject myself to living and working in a place with such high levels of harassment and unkindness” (Exhibit 7). Other airmen confirmed Firpo’s reports of ongoing harassment at DLI.

Airman First Class Harassed by DLI Doctor

An Airman First Class also reports being targeted for harassment at DLI because of his perceived sexual orientation. The Airman First Class, reports¹⁹¹ another service member stated, “[t]here will be no faggots in my military!”

Soon thereafter, the Airman First Class visited the DLI medical clinic where he was tested for mononucleosis. The Air Force doctor, Major Smyth, asked the Airman First Class

¹⁹⁰ Airman First Class Firpo states he was first harassed about his perceived sexual orientation by two basic training Technical Instructors at Lackland AFB, Texas, Staff Sergeant Saar and Staff Sergeant Ashcraft.

¹⁹¹ The Airman First Class reports the anti-gay harassment began while in basic training at Lackland AFB, Texas, where he was threatened with sexual violence by another male recruit. Further, according to the Airman First Class he was harassed by two Technical Instructors, Staff Sergeant Smith and Senior Airman Peters. Both of these TI’s taunted the Airman First Class in front of other recruits.

whether he had “been swapping spit with [the Airman’s male] roommate” and reportedly further stated, “[g]ood, because if you would have been, we would have had to have put you in the Navy, and on a submarine” (Exhibit 6).

The Airman First Class eventually felt compelled to come out to his commanding officer. The Airman First Class wrote:

[t]he point is that things that aren’t supposed to be said by anyone in the military are being said. And, the people that are taking offense to these comments are too fearful for their own personal safety to say something. I feel as if I were to have said anything in any of these previous moments I have talked about, would leave me open to more ridicule” (Exhibit 6).

Airman First Class Firpo and the other Airman First Class’s DLI experiences are, unfortunately, merely reflective of a continued hostile anti-gay climate permeating the base. Although SLDN reported the DLI problems in last year’s *Conduct Unbecoming* report, and despite good faith efforts by some Air Force leaders to address the problems, DLI appears to remain a hotbed of anti-gay animus.¹⁹²

For DLI language instructors, the chaplain, and the doctor to verbally abuse an airman because of his perceived sexuality violates the bonds of trust enlisted service members must have in their leaders in order to develop as a cohesive unit. Air Force officers must provide stronger leadership and training on the “Don’t Harass” policy to all DLI personnel, especially officers and other permanent party cadre. DLI officials found to have engaged in “Don’t Harass” violations should be held accountable.

Harassment at Kelly Air Force Base and Texas A&M University

Senior Airman Noel Freeman, a twenty-one-year-old from California, was harassed at Kelly AFB, Texas, and later as a cadet in the Texas A&M ROTC program. Freeman served honorably for four years in the Air Force. While assigned to Kelly AFB, Airman Shawn Kelly and Airman Zach Levesque called Freeman “faggot” and “homo,” and asked him, “hey fag, are you going to fuck that guy?” (Exhibit 76).

After leaving the Air Force, Freeman enrolled in the Texas A&M University Air Force ROTC program. Freeman, who was now a cadet, states he became the target of anti-gay harassment by members of the Texas A&M Corps of Cadets after being spotted sitting at the campus “Gay, Lesbian, Bisexual and Transgendered Aggies” information table in the university student center. According to Freeman, some other cadets’ reaction was “very hostile – bordering on violent . . . I was called an embarrassment and disgrace to my outfit and the Corps. I have never been made to feel worse and more ashamed of who and what I am” (Exhibit 77).

¹⁹² DLI is located in Monterey, California, and the installation is ran by the Army. SLDN receives reports from DLI soldiers who are also being harassed because of their perceived sexual orientation.

The hostile reaction of his cadet peers led Freeman to fear for his safety. He sadly concluded that he could not serve in the military again. SLDN has no evidence that the ROTC program commanding officer, Colonel Gregory Zaniewski, conducted any kind of inquiry into the threats and harassment of Freeman.

Cadet Freeman wrote:

I love the Air Force more than anything I have ever done in my life. I want so very much to be a pilot and Air Force officer, but I realized I could not go through this for another 16 years. It is just too difficult, and I have to be able to live a reasonably happy life. Current policy does not allow me to do so" (Exhibit 76).

The purpose of ROTC programs is to train young men and women to be military leaders.¹⁹³ Cadet Freeman was an ideal ROTC cadet due to his years of honorable enlisted service. Freeman's desire to become an officer shows his strong commitment to the Air Force. The "Don't Harass" violations at Texas A&M set a bad example for future Air Force leaders.

Air Force "Don't Harass" Summary

Despite some good first steps by top Air Force leaders to heighten awareness of "Don't Harass" within the service, much work remains to be done. Air Force Chief of Staff, General Ryan, has stated, "[o]ur professionalism demands . . . that we treat each other with dignity and respect."¹⁹⁴ Air Force leaders' good words must be communicated and understood by leaders at every level of the chain of command.

Navy "Don't Harass" Violations Increase, Again Navy is Most Hostile Service

"Today's Navy/Marine Corps team is composed of diverse individuals from every part of the United States. Respect for the individual is paramount."
-Chief of Naval Operations¹⁹⁵

SLDN documented 332 incidents of anti-gay harassment in the Navy during the year 2000. This represents a slight increase in "Don't Harass" violations from the prior year's report of 330 violations. The Navy is the only DoD service with an *increase* in "Don't Harass" violations this past year. The Navy has consistently rated as the worst service for anti-gay harassment, leading the way in "Don't Harass" violations from 1997 to present.

Despite its poor "Don't Harass" record, this past year the Navy has taken some good, albeit tentative, steps towards addressing the problem. Chief of Naval Operations, Admiral Jay

¹⁹³ See United States Air Force, *ROTC Home*, at <http://www.afoats.af.mil/rotc.htm> (stating that the mission of Air Force ROTC is "to Produce Leaders for the Air Force and build better Citizens for America[.]") (last visited Mar. 5, 2001).

¹⁹⁴ AF *Policy on Harassment* Memo, *supra* note 163.

¹⁹⁵ NAVADMIN 291/99, *supra* note 124.

Johnson stated, “[c]ommanding officers must not condone homosexual jokes, epithets, or derogatory comments, and must ensure a command climate that fosters respect for all individuals.”¹⁹⁶ Although the top Navy leaders have issued these helpful directives, “Don’t Harass” violations remain alarmingly high in the service.¹⁹⁷

This section begins with a discussion of positive Navy “Don’t Harass” developments. The section then examines the ongoing “Don’t Harass” violations documented by SLDN. Unfortunately, the evidence indicates that the Navy has a long way to go before the Admiral Johnson’s order to respect all sailors is followed.

Despite Serious Navy “Don’t Harass” Problems, There are Some Hopeful Signs of Progress

San Diego Based Sailor Safely Reports Harassment

A sailor stationed in San Diego, California, contacted SLDN asking for help in stopping severe anti-gay harassment facing him. The sailor reported that two other sailors physically assaulted him onboard his ship. The attackers called the sailor “homo,” “fruitcake,” and “gayboy.” The assault reportedly occurred in the presence of some noncommissioned officers who failed to intervene.

According to the sailor, he was later threatened by a senior petty officer who told him, “[t]here are no faggots in my Navy, shipmate.” The petty officer proceeded to address the other sailors within his section declaring, “[w]e all know that [the sailor] is gay, so whatever you do to him, make sure they cannot trace it to you” (Exhibit 78).

The sailor reported additional harassment, including:

- Being told, “I do not like fags, but since I have to work with one, I will tolerate you.”
- Being threatened, “watch your back, faggot.”
- Being asked, “hey, you’re that faggot everyone’s talking about, aren’t you?”
- The sailor’s car was vandalized, with the word “fag” written on the vehicle windows with a grease pen (Exhibit 78).

SLDN assisted the sailor in reporting these “Don’t Harass” violations to his commanding officer and requested an investigation. In compliance with Navy policy, the commanding officer honored the sailor’s request and temporarily removed him from the unit, pending completion of the inquiry into the misconduct.¹⁹⁸ Although we do not know the final results of the inquiry, the command has assured SLDN that the sailor’s concerns are being taken seriously.

¹⁹⁶ *Id.*

¹⁹⁷ As best SLDN can tell, to the extent that “Don’t Harass” training has actually occurred in some Navy elements, the training is incorporated as a brief portion of the “Developing and Building Trust” presentation. The Navy appears to be lagging far behind the Army in implementing clear and thorough policy training for its sailors and leaders.

¹⁹⁸ The Chief of Naval Operations stated in an April 28, 1998 message:

The sailor continues to serve, benefiting both the interests of the Navy and the interests of the sailor. The ultimate benefactor, however, is military readiness. Despite the multiple “Don’t Harass” violations which led to the sailor’s report, the command’s willingness to follow Navy policy by stopping the harassment without prejudicing the sailor sends the right leadership message to sailors: anti-gay harassment violates Navy policy and will not be tolerated.

High Rate of Navy “Don’t Harass” Violations is Alarming

Unfortunately, most reports SLDN receives from sailors indicate that adherence to “Don’t Harass” within the Service is the exception, rather than the norm.

USS Dubuque Commanding Officer Ignores Sailor’s Report of Harassment; Sailor then Physically Assaulted and Threatened

Seaman Apprentice Derjuan Tharrington was physically assaulted by other sailors after he reported anti-gay harassment to his ship’s commanding officer (Tharrington’s experience is further documented in the “Don’t Tell” section). Tharrington, a twenty-two-year-old from Oklahoma, was afraid. Other sailors were mercilessly harassing him after rumors he might be gay began swirling around the ship. “You hang out with homosexuals, you must be gay;” “do you suck dick?;” and “will you suck my dick?,” were some of the crass things other sailors said. Tharrington reports being repeatedly asked whether he is gay. He began to fear for his safety onboard the *USS Dubuque*.

Seaman Tharrington reported the harassment to the *USS Dubuque* commanding officer, Captain T.A. Hejl, and requested a transfer to another ship. Captain Hejl proceeded to read Tharrington the riot act. In response to Tharrington’s expressing safety concerns, Captain Hejl told him, “you signed on the line now you have to deal with it” (meaning the anti-gay harassment).

After meeting with the commanding officer, Seaman Tharrington reports being suddenly reassigned to mess duty in the enlisted dining facility. While working in the enlisted mess, other sailors assaulted Tharrington by throwing food trays at him. Sailors approached Tharrington and stated they had “heard the rumors [Tharrington] went to the chaplain stating he is gay.” One sailor, Petty Officer Harmon, further threatened Tharrington by saying, “I’m going to beat your

[t]he fact that a service member reports being threatened because he or she is said or is perceived to be homosexual shall not by itself constitute credible information justifying the initiation of an investigation of the threatened service member. The report of the threat should result in the prompt investigation of the threat itself. Investigators should not solicit allegations concerning the sexual orientation or homosexual conduct of the threatened person . . . Service members should be able to report crimes free from fear of harm, reprisal or inappropriate or inadequate governmental response.

Electronic Message from Chief of Naval Operations to NAVADMIN, *Guidelines for Investigating Threats Against Service Members Based on Alleged Homosexuality* (Apr. 22, 1998) (CNO WASHINGTON DC 221712Z APR 98 (NAVADMIN 089/98)).

fucking ass, you faggot.” Other sailors yelled that they were “going to get [Tharrington’s] black ass because [he is] gay,” a comment that is both racist and anti-gay.

Ultimately, Seaman Tharrington was forced to file a complaint to his command to try to halt the harassment (Exhibit 79). Tharrington wrote, “I consider myself to be an above average sailor who does not need this harassment . . . and see no reason to end my Naval career [due to] other people’s misconduct. I respectfully request to be transferred to another Command”

Captain Hejl, in response to Tharrington’s pleas for protection against the harassment wrote, “your claims of feeling ‘unsafe aboard this ship’ . . . are groundless” (Exhibit 80). Leadership is set by the top. Here, leadership appears to be completely lacking.

Other Navy “Don’t Harass” Violations

Some short examples provide the best illustration of the Navy “Don’t Harass” problem’s broad scope:

- A twenty-one-year-old Seaman Apprentice, from Washington, reports an instructor at the Great Lakes Naval Training Center, in Illinois, Petty Officer Manganaro, stated – in front of the entire class – that Manganaro had no respect for “homos” and “would never shake a fag’s hand.” The sailor reports the class then briefly discussed the anti-gay murder of sailor Allen Schindler, who was beaten to death by his shipmates in 1992. Manganaro then reportedly asked the class, “[h]ow many people here hate gays?” and how many of the sailors wanted to “kill all the gays?” (Exhibit 9). The sailor reports about half the class raised their hands in response to these questions.
- Petty Officer First Class Thomas Gold reports receiving several death threats while stationed at the National Naval Medical Center in Bethesda, Maryland. Petty Officer Gold, a twenty-five-year-old from California, reports to SLDN receiving several written death threats including, “fags die in the military,” (Exhibit 81) “faggots die out in the field,” and “we hate you.” Gold further reports being threatened by Petty Officer Towner who stated, “I’m gonna kick that faggot’s ass” (Exhibit 11).
- Petty Officer Second Class Barnabe Fernandez, a twenty-three-year-old assigned to the *USS Milius* in San Diego, California, reports receiving written threats stating, “I hate you” with swastikas on them. Fernandez further reports being threatened with “[y]ou’re a fag and you’re going to die.” Other threats included notes with a drawing of a hangman and swastikas, “you’re going to die,” and “faggot” written on them. Further, several sailors reportedly called Fernandez a “faggot.”
- A Petty Officer First Class stationed at the Naval Nuclear Power School in Charleston, South Carolina, reports experiencing rampant anti-gay harassment. The Petty Officer reports frequent use of the word “fag,” as well as “gay synonymous with stupid, flawed, or feminine” by sailors in his unit. According to the Petty Officer, some Navy leaders participate in the misconduct. The Petty Officer states, “the work and respect I have given to the Navy has not been returned to me by the Navy” (Exhibit 82).

- A sailor assigned to the Great Lakes Naval Center, in Illinois, reports constantly being lesbian baited. The sailor reports being fearful for her safety. She wrote, “[e]very day I was asked if I was male or female. Often times it was in a very threatening manner with a number of male sailors approaching me and sometimes physically intimidating me by getting in my face and questioning me. I would feel a lot of hostility when I was forced to explain to different male sailors that I am a woman” (Exhibit 83).
- Korrinne Bayer, a Petty Officer Second Class assigned to the *USS Boxer* in San Diego, California, reports frequently hearing sailors use the word “dyke” and “faggot.” The twenty-two-year-old Michigan native feared becoming the target of harassment should others learn or suspect she is a lesbian. She writes, “I began to change my pronouns when discussing my personal life, and certain friends were even given male names so I could keep in touch via E-mail without arousing suspicion” (Exhibit 84).
- Petty Officer First Class Anthony Ricciardo, a twenty-five-year-old assigned to the Nuclear Power Training Unit in Ballston Spa, New York, reports constantly hearing anti-gay “jokes,” and use of the words “fag” and “homo.” Ricciardo, a Pennsylvania native, states noncommissioned officers often participate in the harassment. Ricciardo wrote, “I do not expect to be treated unprofessionally nor treated as less than human solely because of my sexual orientation” (Exhibit 85).
- A sailor stationed at the Navy Nuclear Power Training Center in Charleston, South Carolina, describes a pervasive anti-gay climate. The sailor writes, “[when my] shipmates suspect or know about one’s sexual orientation their entire attitude changes towards that person. It changes in such a way that it makes the person feel as if they are an infection; unwelcome. They will almost definitely become the butt of many jokes and face harassment in their daily lives. And no one should have to bear that just because of their personal identity” (Exhibit 86).
- A sailor assigned to the Great Lakes Naval Training Center, in Illinois, reports constant anti-lesbian harassment. She reports noncommissioned officers telling lesbian “jokes,” and general anti-gay comments. She states she received prank telephone calls, and had a firecracker thrown into her living quarters, in what she believed was a hate-crime.
- A sailor at Point Mugu, California, reports frequently hearing the words “fag” and “queer.” The sailor further reports other sailors who suspect he is gay making gay “jokes” and using effeminate gestures whenever he is around.

Navy “Don’t Harass” Summary

The Navy’s “Don’t Harass” compliance leaves much to be desired. Year after year, service members’ reports indicate the Navy is the most hostile and anti-gay of the services. Former Chief of Naval Operations, Admiral Jay Johnson, stated, “[c]ommanding officers must not condone homosexual jokes, epithets, or derogatory comments, and must ensure a command

climate that fosters respect for all individuals.”¹⁹⁹ Admiral Johnson’s good words have not been translated into action across the fleet. The Navy remains a needlessly dangerous place for gay, lesbian and bisexual sailors. The willingness of Navy leaders to allow “Don’t Harass” violations is harmful to military readiness because it undermines unit cohesion. These Navy failures are simply unacceptable.

Marine Corps “Don’t Harass” Violations Decrease Despite Lack of Training

“Mistreatment of Any Marine is Incompatible with our Core Values”

--Commandant of the Marine Corps²⁰⁰

The Marine Corps had ninety-two incidents of anti-gay harassment during the year 2000. This represents a 31% decrease in “Don’t Harass” violations from the prior year’s report of 134 violations. Despite this encouraging decrease, SLDN continues to receive reports of egregious anti-gay harassment within the Marine Corps.

The Marine Corps has taken some tentative steps in the right direction to combat anti-gay harassment. The Commandant has stated that “[a]ll Marines learn in their earliest basic training [that harassment is wrong and] unacceptable conduct must be dealt with quickly and appropriately by commanders.”²⁰¹ “Don’t Harass” violations within the Marine Corps, however, remain a source of grave concern.²⁰²

This section begins with a review of the “good” in Marine Corps “Don’t Harass” implementation. The section then provides some illustrations of the pervasive “Don’t Harass” violations reflected in most of SLDN’s Marine Corps cases. Like the Navy, the Marine Corps has a long way to go before all of its members are free from “mistreatment.”

¹⁹⁹ NAVADMIN 291/99, *supra* note 124.

²⁰⁰ MARADMIN 014/00, *supra* note 39.

²⁰¹ *Id.*

²⁰² The Marine Corps does not appear to have a clear “Don’t Harass” training requirement. Although the Commandant asserts that Marines are taught “in their earliest basic training” not to mistreat each other, SLDN’s cases suggest this is not true. Many Marines report to SLDN that they have received little to no training on DADTPDH in the last year. The Marine Corps, although an element of the Department of the Navy, does not appear to have a DADTPDH training program similar to the Navy’s annual requirement.

**Although Infrequent, Some Reports of Marine Corps
“Don’t Harass” Compliance Received**

Marine Corps Holds Anti-Gay Lieutenant Colonel Melton Accountable

The Marine Corps has taken disciplinary actions against a Lieutenant Colonel’s anti-gay conduct reported in last year’s *Conduct Unbecoming* report. In October 1999, Lieutenant Colonel Edward Melton informed his subordinates and his boss at Twenty-Nine Palms, California, of his opinion of gay people in an e-mail.²⁰³ Melton’s email mocked the murder of Private First Class Winchell, and referred to gays as “homos” and “back side rangers.”²⁰⁴

In response to this outrageous conduct by Melton, Congressman Frank and other members of the United States House of Representatives wrote to then Secretary of Defense William Cohen demanding the Pentagon hold Lieutenant Colonel Melton accountable. Congressman Barney Frank received a letter from the Assistant Secretary of the Navy, Carolyn Becraft, stating, “[a]fter reviewing the investigation, Major General [Clifford L.] Stanley ordered Melton relieved of his duties as executive director of the Marine Corps Communications-Electronics School, and he was reassigned as a special projects officer without supervisory duties. He subsequently retired on July 1, 2000” (Exhibit 88).

The Marine Corps’ decisive punishment of Lieutenant Colonel Melton sends the right leadership message to Marines. Those engaging in illegal anti-gay harassment are breaking the rules and their recklessness risks harming their careers.

*Camp Lejeune, North Carolina, Commanding Officer Takes Swift
Action After SLDN Report of Anti-Gay Harassment*

A Marine’s battalion Sergeant Major at Camp Lejeune, North Carolina, called him a “faggot.” Sergeant Major Rosenfield, the senior noncommissioned officer in the battalion, also threatened to place the Marine in the brig, upon learning that he is gay. The Marine felt compelled to disclose his sexual orientation after becoming the target of incessant “asking,” “pursuing,” and “harassment.”

Instead of taking steps to halt the illegal harassment and other policy violations, Sergeant Major Rosenfield, instead, joined in with harassment of his own. Sergeant Major Rosenfield’s

²⁰³ See 6TH ANNUAL CONDUCT UNBECOMING REPORT, *supra* note 36, at 55. In his e-mail, Lieutenant Colonel Melton wrote:

Due to the ‘hate crime’ death of a homo in the Army, we now have to take extra steps to ensure the safety of the queer who has ‘told’ (not kept his part of the DoD ‘don’t ask, don’t tell’ policy). Commanders now bear the responsibility if someone decides to assault the young backside ranger. Be discreet and careful in your dealings with these characters. And remember, little ears are everywhere.

Id. (Exhibit 87).

²⁰⁴ Lieutenant Colonel Melton’s actions were widely reported in the media. See *id.* at 55 n.88.

poor leadership example appeared to spur added anti-gay harassment towards the Marine, by other Marines.

The Marine requested SLDN assistance to ensure his safety and obtain an honorable discharge. SLDN wrote to the Marine's regimental commander, Colonel Mastin Robeson, reporting the Sergeant Majors' misconduct and other policy violations (Exhibit 53).

Colonel Robeson acted swiftly to protect the Marine and investigate the Sergeant Major. Colonel Robeson wrote to SLDN, "I can assure you that the allegations of impropriety within my command disturb me and I am personally looking into the situation" (Exhibit 89). Robeson's decisive leadership sent the right message to all the Marines in the 8th Marine Regiment, 2d Marine Division, at Camp Lejeune.

The Commandant of the Marine Corps, General James Jones, stated that mistreatment of Marines will not be tolerated. Sergeant Major Rosenfield, however, ignored General Jones' order and actively participated in perpetuating the anti-gay animus within his battalion. Fortunately, Colonel Robeson took General Jones' order more seriously. Although SLDN does not know the final resolution of Robeson's investigation, the Marine reports being well treated and quickly processed for an honorable separation from the Marine Corps after Colonel Robeson's personal intervention.

Other Good Reports of Marine Corps "Don't Harass" Application

- Lance Corporal Nikeya Cunningham reports being "out" to all of her Marine platoon members at Henderson Hall, Virginia. She states that she has not been harassed by any Marine, although they all know she is a lesbian. Cunningham's being a lesbian has not harmed Headquarters Company's morale or readiness. To the contrary, Cunningham reports being fully accepted by all of her fellow Marines.²⁰⁵
- A Marine Corps company commander at Camp Pendleton, California, told SLDN he does not tolerate anti-gay harassment within his command. The captain states that he does not care whether a Marine is gay, so long as they can do the job.
- A Marine Lance Corporal at Camp Pendleton, California, reports being "out" to all members of his platoon and being fully accepted and respected. In fact, when the Lance Corporal once became the target of harassment from another Marine, the platoon members rallied around him in support. In this case, unit readiness appears to have been enhanced by this Lance Corporal's "openness," as other Marines expressed admiration for his courage. To the extent there was any harm to cohesion and morale, it came from the lone harasser – whose behavior the other young Marines collectively squashed.

²⁰⁵ Lance Corporal Cunningham's presence as an openly lesbian Marine has had no adverse affect on her unit's readiness. Her example provides clear evidence of the hypocrisy of DADTDPDH, the rationale of which is the presence of openly gay Marines would disrupt unit cohesion and harm readiness. As Cunningham shows, this rationale is flat wrong.

Many Marine Corps Leaders Continue to Ignore “Don’t Harass” Policy

Unfortunately, instances of Marine Corps compliance with the “Don’t Harass” policy are few and far between. The overwhelming number of Marines contacting SLDN this past year report their commands’ are failing to train Marines to not “mistreat” each other, apparently choosing to ignore General Jones’ orders.

Lance Corporal Lesbian-Baited at Twenty-Nine Palms, California

Lance Corporal Jackie Meyer, a twenty-two-year-old from Wisconsin, had had enough. For more than a year and a half, Meyer had put up with harassment and innuendo. Other Marines assigned to Twenty-Nine Palms speculated she must be gay because she does not conform to their perception of how a female should look.

She reports, “[m]ost people assume I’m a lesbian. When I was at medical one of the doctors asked me why I had such short hair. I told him I like it that way. He then told me that a lot of people talk about me and about my sexual orientation. He said that most people think that I’m gay” (Exhibit 90).

Lance Corporal Meyer further reports, “[t]he people I work with are very homophobic . . . I am forced to stay silent while my coworkers talk about how they hate gays and that if their kids end up gay they’ll disown them and kick them out” (Exhibit 90). She also reports hearing hateful words such as “fag,” “butt-packer,” and “butt-plate” on a daily basis.

Lance Corporal Meyer decided she had to “tell” her command she is a lesbian. Meyer wrote, “I don’t look straight. I don’t act straight, and I am concerned that it would only be a matter of time before I am investigated for being who I am” (Exhibit 90).

Meyer explains her dilemma as follows, “[i]t’s very hard to listen to those comments and not let it affect me. I’ve tried. Every day I try. It’s not fair that because of the Marine Corps’ ‘Homosexual Conduct Policy’ I have waived all of my first amendment rights while my coworkers can speak so hatefully” (Exhibit 90).

The “Don’t Harass” violations leading to Meyer’s departing the Marine Corps are harmful to unit readiness. Anytime Marines mistreat other Marines, the seeds of distrust are sewn and unit cohesion is the victim. Further, the Marine Corps’ loss of Lance Corporal Meyer harmed readiness because she was a good Marine with much to offer our country.

Other Marine Corps “Don’t Harass” Violations

- A Marine in Seattle, Washington, reports being harassed by his commanding officer. The commanding officer and other Marines, called the Marine “fag,” “homo,” “fruity,” and “princess.” When the Marine attempted to report the harassment through the chain of command, the commanding officer attempted to prevent him from doing so. Eventually, the Marine was able to report the illegal harassment and received a transfer to another base (Exhibit 91).

- A Marine assigned to Cherry Point, North Carolina, reports daily anti-gay harassment by other Marines. “What a flaming faggot he is,” “oh my god, she looks like a dyke,” and “are you doing it with little boys?” are but a few of the hostile comments. The Marine reports, at a prior assignment overseas, being directly harassed by two Marine Staff Sergeants. The Marine writes, “[e]ven though I did everything in my power to keep my sexual orientation hidden, the Staff Sergeants at my old command discussed my perceived sexual orientation with others in my section” (Exhibit 92).
- A straight Marine at Camp Pendleton, California, reports becoming the target of anti-gay harassment, even though he is heterosexual. The Marine reports a few other Marines perceived him as being gay and began hassling him, ultimately vandalizing his car. After the Marine reported the illegal harassment to his command, he found a disturbing computer generated picture attached to his barracks room door. The picture was of a headless Marine with the words, “[t]his is what we do to gays in the Marines,” written beneath it.²⁰⁶
- Another twenty-one-year-old Lance Corporal from Camp Pendleton reports receiving multiple death threats and threats of physical harm. He reports the following harassment from other Marines:
 - “I’m gonna fucking kill you mother fucker”
 - “I’m going to stomp your brains out”
 - “I’ll fucking kill you and leave you without the use of your limbs”
 - “Death to all faggots”
 - “Do you take it in the ass?”
 - “Yeah, so are you a fudge packer?”
 - “Do you really like to suck dick?”
 - “Do you really like to get fucked?”
 - “How is it to fuck your best friend in the ass?”
 - “Fuck you, faggot”

The Lance Corporal reported the death threats and received a written response from the commanding officer of the 2d Battalion, 4th Marines, Lieutenant Colonel R.F. Raczkowski, stating “the threats have not been substantiated, however, specific individuals who may have acted inappropriately towards [the Lance Corporal] have been counseled” (Exhibit 93).

²⁰⁶ This is not the first time SLDN has received reports of heterosexuals being targeted under the policy. Under DADTDPDH, anyone suspected as being gay, lesbian or bisexual is a potential target for harassment and pursuit. The actual sexual orientation of the service member is not enough to protect them from the policy’s harmful affects. *See generally* JANET HALLEY, DON’T: A READERS GUIDE TO THE MILITARY’S ANTI-GAY POLICY (1999) (discussing this phenomenon). DADTDPDH defines “homosexual acts” to include “bodily contacts which a ‘reasonable person’ would understand to demonstrate a propensity or intent to engage in” an erotic, same-sex bodily contact. Professor Halley writes, “no self-identified heterosexual can be sure of conforming consistently to the heterosexual protocols stipulated by the “reasonable person” . . . given the rich homosocial practices of comradeship in the military . . . few service members can possibly be so unambiguously straight that they will never wonder whether a reasonable person might construe their actions as homosexual conduct.” *Id.* at 117-18.

- A Lance Corporal from Camp Lejeune, North Carolina, reports being called “faggot” by other Marines. After living his life in constant fear of the harassment and becoming the target of an anti-gay investigation, the Lance Corporal – a twenty-one-year-old from Illinois – decided to “come out.” He wrote to his commanding officer, “I cannot hide the fact that I am gay any longer. I have decided that I will not try to hide it. I must be honest about who I am because it is too difficult to be gay in the military and hide it” (Exhibit 94).
- A twenty-year-old Lance Corporal from Massachusetts reports anti-gay death threats at Twenty-Nine Palms, California. The Lance Corporal overheard another Marine threaten to “kill that faggot.” He reports often hearing Marines in his unit talk about killing gays. The Lance Corporal reports being directly told by another Marine, “[i]f there’s a faggot, we’ll take care of him.”
- A twenty-three-year-old Lance Corporal stationed at Henderson Hall, Virginia, reports being harassed. The Marine was asked whether he likes to “take dick in the ass” and whether “a big one feels good up there” (Exhibit 95).

Marine Corps “Don’t Harass” Summary

The Marine Corps has a long way to go before all Marines are free from the threat of “mistreatment” at the hands of their comrades. Marine leaders must do more to train on “Don’t Harass” and hold those responsible for harassment accountable. The good words of Marine Corps Commandant, General Jones, have, thus far, not translated into good actions throughout the Corps. The failure of Marine Corps leaders to ensure the fair treatment of all Marines is likely harming the combat readiness of the Corps.

Coast Guard “Don’t Harass” Violations Rise Sharply

“The respect we have and show toward one another is the tie that binds us together in these times of constant and accelerating change.”

--Commandant of the Coast Guard²⁰⁷

SLDN documented twenty-four incidents of anti-gay harassment in the Coast Guard during the year 2000, up 45% from eleven documented “Don’t Harass” violations in 1999.

The Coast Guard, although a part of the Department of Transportation, follows the Department of Defense regulations on “Homosexual Conduct,” including the “Don’t Harass” provisions. SLDN has no evidence that Coast Guard leaders conduct DADTDPDH policy training. This apparent lack of training is likely the reason for the Coast Guard’s increase in “Don’t Harass” violations. Despite being the smallest of the services, SLDN continues to document egregious reports of anti-gay threats and harassment within the Coast Guard.

²⁰⁷ Commandant of the United States Coast Guard, *Sexual Harassment Prevention Policy Statement*, at <http://www.uscg.mil/mlclant/pdiv/pmsexualharassment.htm> (last visited Mar. 3, 2001).

Gay Sailor Assaulted Onboard CGC Northland

James Swinney, a twenty-two-year-old from Connecticut, was physically assaulted by a petty officer onboard the Coast Guard Cutter (CGC) *Northland* after the petty officer learned Swinney is gay. Petty Officer Frederick reportedly grabbed Swinney by the arm and threw him against the wall onboard the ship, yelling – in the presence of other sailors – “if we were off the base I’d kick your ass!”²⁰⁸ According to Swinney, Petty Officer Frederick also told him “you’re nothing but a little pussy” (referring to Swinney’s being gay). Swinney reported the assault to his supervisor, Ensign Fiortine, as well as to the ship commanding officer, Captain Mcgough.

Seaman Swinney initially became the target of anti-gay hostility due to other *CGC Northland* sailors’ perceptions of his sexual orientation. Swinney reports, “I have heard comments coming from the crew down in the deck berthing such as ‘homo’s should die.’” When Swinney reported the anti-gay harassment to his command, his noncommissioned officer supervisor, Petty Officer Owens, yelled at him – in front of the entire section – “[y]ou’re a fucking loser and a fucking coward” (Exhibit 96).

The physical assault on Seaman Swinney occurred after SLDN had written to Captain Mcgough expressing concern for Swinney’s safety. The command failed to protect Swinney from anti-gay violence. SLDN is working with Swinney to file an IG complaint requesting accountability for the criminal assault and anti-gay harassment.

Coast Guard “Don’t Harass” Violations

- A Sailor received anti-gay harassment while assigned to the *CGC Polar Sea* in Bellevue, Washington. The sailor reports receiving the following comments:
 - “So did you get it in the ass while you were in Bangor?”
 - “What’s up fag?”
 - “Who ya givin’ head to now?”
 - “What’s it like being fucked in the ass?” (Exhibit 97).

The sailor wrote, “[t]he environment that I work and live in is unbearable and severely threatening at times. There is absolutely no reason why anyone would have to withstand and sustain this level of degradation” (Exhibit 97).

- Seaman Ron Zarriello was assigned to the Coast Guard Training Center, in Yorktown, Virginia, when he became the target of anti-gay hostility. An eighteen-year-old-from Maryland, Zarriello writes, “[m]any Coast Guard servicemembers degrade homosexuals and their lifestyle by making jokes and laughing about them; creating a feeling that gays are not welcomed. Everyday comments such as “faggot” or “queer” and people making fun of the community I am now a part of takes an enormous toll on my self-confidence and self-esteem” (Exhibit 98).

²⁰⁸ Seaman Swinney reports Petty Officer Frederick was the ship medical coordinator and Swinney had gone to Frederick for medical treatment for a foot problem.

- A sailor assigned to the Coast Guard Air Station in North Bend, Oregon, wrote to his commanding officer, “I have suffered an endless array of anti-gay slurs in my presence during my enlistment. The explicit hostility towards so-called “faggots” and “queers” has been shocking and personally demeaning. Frankly, it has absolutely undermined my ability to concentrate on the life-saving duties for which I am responsible” (Exhibit 99).

Coast Guard “Don’t Harass” Summary

Coast Guard leaders are failing to train their subordinates on the “Don’t Harass” provisions. As the sailor’s comment cited above reflects, it is nothing less than the readiness of the service that suffers from unfettered anti-gay hostility within the ranks. The Coast Guard Commandant should issue specific written directive similar to those issued by the DoD services, prohibiting anti-gay threats and harassment. Admiral Loy should further unambiguously state that all Coast Guard personnel – including those perceived as gay, lesbian and bisexual – must be treated with dignity and respect.

“Don’t Harass” Conclusion

“And to win wars, we create cohesive teams of warriors who will bond so tightly that they are prepared to go into battle and give their lives if necessary for the accomplishment of the mission and for the cohesion of the group and for their individual buddies. We cannot allow anything to happen which would disrupt that feeling of cohesion within the force.”

-- General Colin Powell, former Chairman Joint Chiefs of Staff²⁰⁹

According to National Security Advisor Condoleezza Rice, President Bush is “committed to a harassment-free environment for all of our military people.”²¹⁰ Unfortunately, most military leaders do not appear to share the President’s commitment.

Past *Conduct Unbecoming* reports have directly addressed military leaders’ stubborn unwillingness to enforce “Don’t Harass.”²¹¹ The result has been a pervasive and hostile anti-gay climate within each of the services. The bottom line is that military leadership was lacking, the policy was not being followed, and military readiness suffered. Hopefully, this year’s modest reduction in the number of “Don’t Harass” violations reflects an improvement in command leadership climates.

Military combat readiness suffers whenever unit cohesion is harmed. This proposition is codified into federal law. The statute states, “[o]ne of the most critical elements in combat capability is unit cohesion, that is, the bonds of trust among individual service members that

²⁰⁹ Powell statement, *supra* note 21, at 708.

²¹⁰ Letter from Condoleezza Rice, Assistant to the President for National Security Affairs, to C. Dixon Osburn, Executive Director, Servicemembers Legal Defense Network (Feb. 20, 2001) (Exhibit 100).

²¹¹ *See, e.g.*, 6TH ANNUAL CONDUCT UNBECOMING REPORT, *supra* note 36.

make the combat effectiveness of a military unit greater than the sum of the combat effectiveness of the individual unit members.”²¹²

Leaders’ failure to stamp out anti-gay harassment within the ranks allows an atmosphere of distrust and fear to fester.²¹³ Success in combat hinges upon trust and teamwork.²¹⁴ Targeting a segment of service members for ridicule and abuse destroys trust and, therefore, destroys teamwork.²¹⁵

The preliminary steps taken by the Pentagon and the services to address anti-gay harassment are encouraging. There remains, however, much hard work to be done. Uniformed leaders must continue to be front-and-center in providing the needed leadership, training and accountability. During the past year, many military leaders have spoken the right words.²¹⁶ We will have to wait and see whether those words translate into action. In the meantime, the combat readiness of our Armed Forces and the integrity of military leaders – as well as the safety and careers of gay, lesbian and bisexual service members – hang in the balance.

²¹² 10 U.S.C. § 654(a)(7).

²¹³ See generally DoD Inspector General 2000 Report, *supra* note 19. The Pentagon’s own study of more than 75,000 service members shows that gay, lesbian and bisexual youth are the primary targets of illegal military harassment. The Pentagon concluded, “harassment of perceived homosexuals was most often done by junior enlisted males to other junior enlisted males.” *Id.* at 18. Junior enlisted personnel are almost exclusively youth.

²¹⁴ General H. Norman Schwarzkopf offered this definition of success in combat:

What keeps soldiers in their foxholes rather than running away in the face of mass waves of attacking enemy, what keeps the marines attacking up the hills under withering machinegun fire, what keeps the pilots flying through heavy surface-to-air missile fire to deliver the bombs on targets, is the simple fact that they do not want to let down their buddies on the left or the right. They do not want to betray their unit and their comrades with whom they have established a special bond through shared hardship and sacrifice not only in the war but also in the training and the preparation for the war. It is called unit cohesion

Schwarzkopf testimony, *supra* note 48, at 595.

²¹⁵ Additionally, SLDN’s past *Conduct Unbecoming* Reports have documented the harmful affect anti-gay harassment has upon personnel retention. Most service members who come out – and are subsequently discharged – report to SLDN that anti-gay harassment played a role in their decision to sacrifice their careers by “telling.” Many other gay, lesbian and bisexual members report to SLDN that – in order to escape the harassment – they leave the military at the end of their enlistment or, if officers, simply resign. The Services have, as a result of allowing unfettered harassment of those perceived as gay, lost the talented contributions of many patriotic gay, lesbian and bisexual Americans. As a result, military readiness has suffered.

²¹⁶ See ALARACT 008/00, *supra* note 34.



Conduct Unbecoming

THE EIGHTH ANNUAL REPORT ON

*“Don’t Ask, Don’t Tell,
Don’t Pursue, Don’t Harass”*

SERVICEMEMBERS LEGAL DEFENSE NETWORK

LCR 04475

DEDICATION

THIS REPORT IS DEDICATED TO ALL THOSE WHO LOST THEIR LIVES IN THE SEPTEMBER 11, 2001 ATTACKS ON THE UNITED STATES, ESPECIALLY LIEUTENANT GENERAL TIMOTHY J. MAUDE, THE ARMY'S DEPUTY CHIEF OF STAFF FOR PERSONNEL. LTG MAUDE WAS THE ARMY'S POINT PERSON ON MATTERS RELATED TO "DON'T ASK, DON'T TELL." LTG MAUDE PLAYED A PIVOTAL ROLE IN WORKING TO PROTECT OUR MEN AND WOMEN IN UNIFORM FROM ANTI-GAY HARASSMENT.



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SERVICEMEMBERS LEGAL DEFENSE NETWORK

SERVICEMEMBERS LEGAL DEFENSE NETWORK (SLDN) IS DEDICATED TO ENDING WITCH HUNTS, DEATH THREATS, IMPRISONMENT, LESBIAN-BAITING, DISCHARGES AND OTHER DISCRIMINATORY ACTIONS AGAINST MEN AND WOMEN IN THE MILITARY HARMED BY “DON’T ASK, DON’T TELL, DON’T PURSUE, DON’T HARASS,” AND RELATED POLICIES, THROUGH DIRECT LEGAL ASSISTANCE, WATCHDOG ACTIVITIES, POLICY WORK, OUTREACH AND EDUCATION, AND LITIGATION SUPPORT. SINCE 1993, SLDN HAS ASSISTED MORE THAN 3,300 SERVICE MEMBERS AFFECTED BY THE POLICY.

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THE EIGHTH ANNUAL REPORT ON

“Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass”

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EXECUTIVE SUMMARY



OUR REAL STRENGTH ARE THE PEOPLE WHO FLY [THE PLANES], AND WHO MAINTAIN THEM, THE PEOPLE WHO MAKE THE MILITARY GO.

President George W. Bush¹

This year has been a difficult and challenging one for all of America.

We are at war. At a time when we need our forces to be at their strongest, “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass” (DADTDPDH) continues to undermine our national security. It has never been more obvious than in the weeks and months following September 11th that this policy weakens our military, deteriorates our readiness and undermines the morale and cohesion of our troops. The day has arrived for the Bush Administration and Members of Congress to preserve the strength of our nation and repeal the military’s gay ban once and for all.

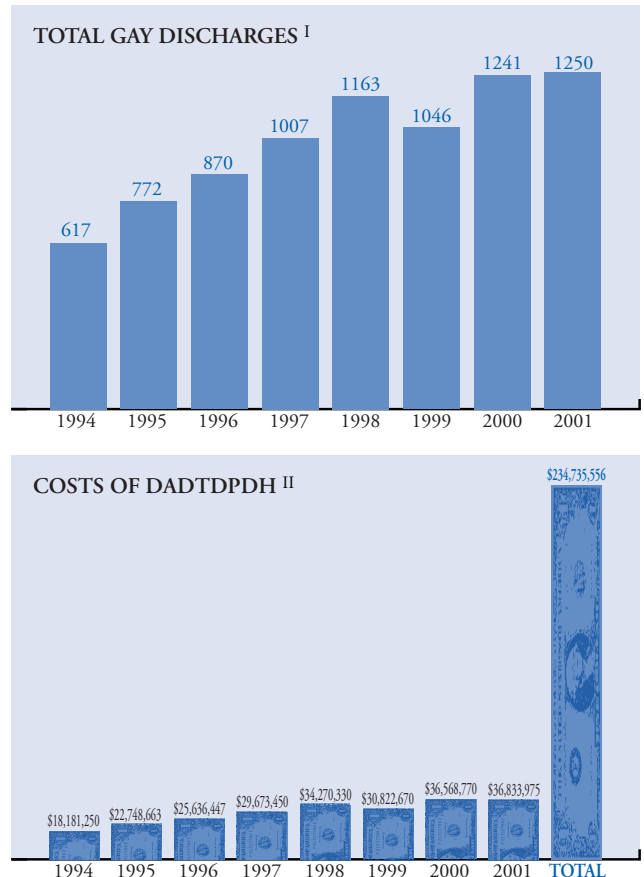
Lesbian, gay and bisexual Americans are making important contributions to the war on terrorism from Navy Airman Paul Peverelle, whose story is detailed in the Navy section of this report, to the anonymous soldier quoted in the Army section who is currently deployed in Operation Enduring Freedom. Lesbians, gays and bisexuals are flying planes. They are translating documents. They are fighting on the front lines. During this conflict, and throughout the history of our nation’s armed

forces, lesbian, gay and bisexual Americans make, and have made, “the military go.” And the military makes them go home – sometimes without careers, discharged for being gay, and sometimes in body bags.

The price we pay for federally sanctioned discrimination is too high. In 2001, the armed services fired more than 1250 lesbians, gays and bisexuals. This figure includes unofficial Air Force discharge statistics received by SLDN from a source outside the Air Force - the Air Force has so far refused to release to SLDN its discharge numbers for 2001. Assuming that the Air Force official numbers match its unofficial numbers, 2001 saw more gay dis-

charges than any year since 1987.

Since the policy’s implementation, more than 7,800 American service members have lost their jobs because of anti-gay discrimination.



Taxpayers have paid more than \$230 million to facilitate this federal policy of job discrimination. Not included in the figures are the costs of investigation or the loss of countless men and women who resign or choose not to reenlist because of the gay ban.

There is no question that their skills are urgently needed. In the days following the initiation of the war on

terrorism, each Service, except the Coast Guard, issued “stop-loss” orders to suspend some administrative discharges.² Their goal? To retain needed personnel. Yet, as they sought so clearly to retain qualified personnel, they took time to specifically mandate that lesbian, gay and bisexual service members continue to be fired. As our nation seeks to “make the military go,” the Pentagon continues to tell helicopter pilots,

cryptologists, doctors and others with skills we so urgently need to simply “go home.” Not because they cannot do their job, but because of their sexual orientation.

The time has come to align our priorities and pursue terrorists, not the patriotic Americans who risk their lives for our freedom while denied their own.

**WHITE WASH OF SILENCE:
THE BUSH ADMINISTRATION’S
FAILURE TO PROTECT OUR
MILITARY PERSONNEL**

Harassment is once again at record levels,⁵ an epidemic the Pentagon itself recognizes directly undermines good order, discipline and morale.⁶

Asking and pursuing continue in all the services. Yet, nearly two years after the Pentagon adopted a thirteen point Anti-Harassment Action Plan,

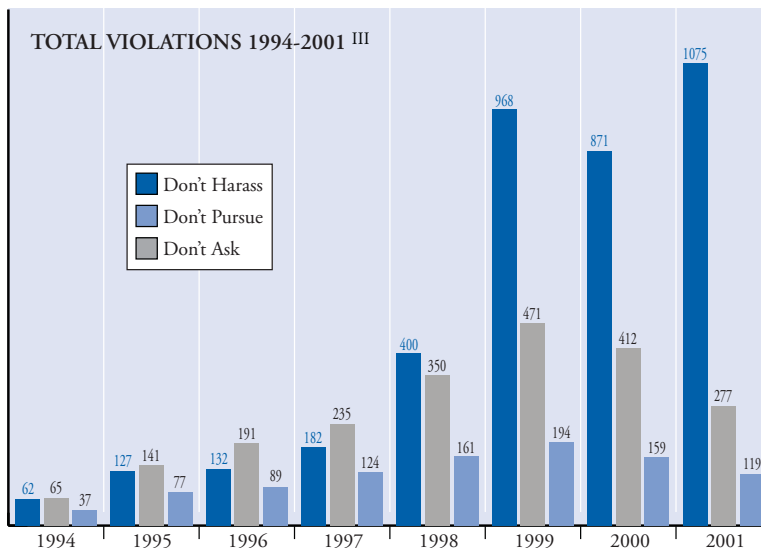
nearly three years after the brutal murder of Private First Class Barry Winchell at Fort Campbell Kentucky, who was murdered because of his perceived sexual orientation, and nearly three years after the Pentagon ordered regular refresher training on DADTDPDH, none of the services have complied with either order. That is nothing less than scandalous.

In March 2000, the DoD Inspector General released a report on its survey of 75,000 service members. The report found that 80% of respondents heard derogatory, anti-gay remarks during the past year; 37% said they witnessed or experienced targeted incidents of anti-gay harassment, 9% of whom reported anti-gay threats and 5% of whom reported witnessing or experiencing anti-gay physical assaults. The majority of respondents reported their leaders took no steps to stop the harassment.

Treatment of all individuals with dignity and respect is essential to good order and discipline.

- DoD Anti-Harassment Action Plan (July 21, 2000) ³

The White House and the Pentagon have allowed a climate of pervasive anti-gay⁴ sentiment to fester and grow within the services. Administration officials have granted implicit permission for every threat, assault and act of intimidation that has occurred on their watch because they have done nothing to stop it.



This year the Navy was caught short when an *Associated Press* photographer took a photo of a bomb with the words “High Jack this fags” scrawled across it. Navy officials called it a “spontaneous act of penmanship” and not reflective of the climate on board the *USS Enterprise*, where the incident took place. Navy Airman Paul Peverelle, however, was stationed on the *USS Enterprise* at that time and was verbally harassed and threatened for being gay while on board. That is simply unacceptable. In the Army section, we discuss how lawyers at the Judge Advocate General school in Charlottesville, VA have reportedly made a mockery of the anti-harass-

ment training. In the Air Force section, we describe how the Air Force is seeking to discharge Captain Monica Hill after she requested a deferment from active duty to care for her dying partner. She lost her partner and now is about to lose her job.

Until military officials are held accountable for harassment, until their jobs are on the line, lives will continue to be ruined. This year marks the tenth anniversary of Seaman Allen Schindler's death at the hands of fellow sailors because of his perceived sexual orientation. It was

his murder that prompted, in part, the debate on gays in the military nine years ago. Since then, the evidence continues to grow that DADTDPDH undermines military readiness and should end. Today, the United States is conducting joint operations with our allies who have lifted their bans without incident. In defense of homeland security, uniformed personnel are working



Seaman Schindler

alongside openly gay people as they protect our nation: civilian government employees, countless federal, state and local law enforcement and emergency personnel, and private-sector-employees.

Sadly, it is reasonable to foresee that as the current Administration continues to do nothing, and bury its head in the sand, there could be yet another anti-gay murder in our armed forces.

TURNING COMMITMENT INTO ACTION:
"FOR ALL OF OUR MILITARY PEOPLE"

The President is committed to a harassment-free environment for all of our military people.

Dr. Condaleeza Rice (February 20, 2001)⁷

Until the day the policy is repealed, the Bush Administration must take proactive steps to stop asking, pursuit and harassment. Among our recommendations:

- ★ Hold the services accountable for their failure to implement the thirteen-point Anti-Harassment Action Plan published in July 2000. The Pentagon's failure to require the services to fully implement the Plan as ordered, which could save lives, is irresponsible. The services should ensure every service member from recruit to flag and general officer receives appropriate training to prevent anti-gay harassment. The Pentagon should also make clear to all services that anti-gay harassment includes, but is not

limited to, inappropriate comments and gestures, mistreatment, threats, and assaults.

- ★ Permit service members to report anti-gay harassment and crimes without fear of being outed and discharged. Inspectors

General, law-enforcement personnel, equal-opportunity representatives, chaplains, health-care providers, commanders and other personnel who deal with harassment should be given clear instructions not to out service members who seek their help. Service members—straight, lesbian, gay and bisexual—go to these sources for help. There must also be adequate training on how to handle complaints of harassment, which is currently lacking.

- ★ The Pentagon must recommit to ensuring full and adequate training on the policy's investigative limits and privacy protections. The Department of Defense Inspector General, in a March 2000 survey of 75,000 service members, found that 57% had not received any poli-

cy training, and of those who said they understood the policy to a large or very large extent, only 26% could answer correctly three basic questions about how the policy works.

- ★ Hold accountable those who ask, pursue or harass. Military leaders should aggressively hold accountable those who ask, pursue or harass, starting with the many examples cited in this report. Commanders must understand there are specific consequences for violations, from letters of counseling to courts-martial, depending on the offense. The Pentagon must uphold and enforce its own law.

If, as Dr. Rice asserted to SLDN in her letter of February 20, 2001, "the President is committed to a harassment-free environment for all of our military people," the White House will surely agree that taking these steps is urgently needed to protect those who protect our nation. The time has come to adopt and implement the policies that will preserve the strength of our armed forces and our nation.



13 POINT ANTI-HARASSMENT ACTION PLAN

General Recommendations:

1. The Department of Defense should adopt an overarching principle regarding harassment, including that based on perceived sexual orientation:

“Treatment of all individuals with dignity and respect is essential to good order and discipline. Mistreatment, harassment, and inappropriate comments or gestures undermine this principle and have no place in our armed forces. Commanders and leaders must develop and maintain a climate that fosters unit cohesion, esprit de corps, and mutual respect for all members of the command or organization.”

2. The Department of Defense should issue a single Department-wide directive on harassment.
 - It should make clear that mistreatment, harassment, and inappropriate comments or gestures, including that based on sexual orientation, are not acceptable.
 - Further, the directive should make clear that commanders and leaders will be held accountable for failure to enforce this directive.

Recommendations Regarding Training:

3. The Services shall ensure feedback on reporting mechanisms are in place to measure homosexual conduct policy training and anti-harassment training effectiveness in the following three areas: knowledge, behavior, and climate.
4. The Services shall review all homosexual conduct policy training and anti-harassment training programs to ensure they address the elements and intent of the DoD overarching principle and implementing directive.
5. The Services shall review homosexual conduct policy training and anti-harassment training programs annually to ensure they contain all information required by law and policy, including the DoD overarching principle and implementing directive, and are tailored to the grade and responsibility level of their audiences.

Recommendations Regarding Reporting:

6. The Services shall review all avenues for reporting mistreatment, harassment, and inappropriate comments or gestures to ensure they facilitate effective leadership response.
 - Reporting at the lowest level possible within the chain of command shall be encouraged.
 - Personnel shall be informed of other confidential and non-confidential avenues to report mistreatment, harassment, and inappropriate comments or gestures.
7. The Services shall ensure homosexual conduct policy training and anti-harassment training programs address all avenues to report mistreatment, harassment, and inappropriate comments or gestures and ensure persons receiving reports of mistreatment, harassment, and inappropriate comments or gestures know how to handle these reports.
8. The Services shall ensure that directives, guidance, and training clearly explain the application of the “don’t ask, don’t tell” policy in the context of receiving and reporting complaints of mistreatment, harassment, and inappropriate comments or gestures, including:
 - Complaints will be taken seriously, regardless of actual or perceived sexual orientation;
 - Those receiving complaints must not ask about sexual orientation – questions about sexual orientation are not needed to handle complaints; violators will be held accountable; and
 - Those reporting harassment ought not tell about or disclose sexual orientation – information regarding sexual orientation is not needed for complaints to be taken seriously.

Recommendations Regarding Enforcement:

9. The Services shall ensure that commanders and leaders take appropriate action against anyone who engages in mistreatment, harassment, and inappropriate comments or gestures.
10. The Services shall ensure that commanders and leaders take appropriate action against anyone who condones or ignores mistreatment, harassment, and inappropriate comments or gestures.
11. The Services shall examine homosexual conduct policy training and anti-harassment training programs to ensure they provide tailored training on enforcement mechanisms.

Recommendations Regarding Measurement:

12. The Services shall ensure inspection programs assess adherence to the DoD overarching principle and implementing directive through measurement of knowledge, behavior, and climate.
13. The Services shall determine the extent to which homosexual conduct policy training and anti-harassment training programs, and the implementation of this action plan, are effective in addressing mistreatment, harassment, and inappropriate comments or gestures.

July 21, 2000

THE WORLD SEES OUR
COMPASSION:
SETTING THE TONE FOR
PRESERVING DIGNITY & RESPECT

*The world sees our compassion
toward one another.*

President George W. Bush⁸

Ultimately, the ban on gays in the military must be lifted, and the United States must join the rest of the industrialized western nations that have abandoned their policies of

discrimination. Forcing lesbian, gay and bisexual service members to hide, lie, evade and deceive their commanders, subordinates, peers, families and friends breaks the bonds of trust among service members essential to unit cohesion. It is also inherently un-American, as is forcing commanders to discharge mission-tested, valued members of their team because of who they are. Enforcing a law that treats an entire group of Americans as second-class citizens undercuts the very liberties and freedoms our military members fight to protect.

Leadership is needed, from the halls of the White House to the halls of the Pentagon. Allowing rampant harassment and policy violations to continue unchecked will lead to the loss of qualified personnel, lowered morale and diminished unit cohesion.

As goes the armed forces, so goes the nation. It is time for the Bush Administration to end its silence on this issue. It is time for discrimination in our nation's military to go.

WHAT IS “DON’T ASK, DON’T TELL, DON’T PURSUE, DON’T HARASS”?



DADTDPDH is a ban on lesbians, gays and bisexuals serving in the military

– similar to the policies banning service that have been in place for the past fifty years.⁹ DADTDPDH is the only law in the land that authorizes the firing of an American for being gay. There is no other federal, state, or local law like it. Indeed, DADTDPDH is the only law that punishes lesbians, gays, and bisexuals for coming out. Many Americans view DADTDPDH as a benign gentlemen’s agreement with discretion as the key to job security. That is simply not the case. An honest statement of one’s sexual orientation to anyone, anywhere, anytime may lead to being fired.

THE HISTORY OF THE POLICY

DADTDPDH is the result of a failed effort by President Clinton to end the ban on gays in the military. Spurred in part by the brutal 1992 murder of Seaman Allen Shindler, candidate Clinton proposed ending the ban by issuing an Executive Order overriding the Department of Defense regulations that barred gays

from serving. Congress, however, intervened and the ban was made law, theoretically preventing action by future Commanders in Chief.

This law was, however, significantly different from prior prohibitions on service in three respects. First, Congressional and military leaders acknowledged, for the first time in 1993, that lesbians, gays and bisexuals serve our nation and do so honorably.¹⁰ Second, the policy also states sexual orientation is no longer a bar to military service.¹¹ Third, President Clinton, Congress and military leaders agreed to end intrusive questions about service members’ sexual orientation and to stop the military’s infamous investigations to ferret out suspected lesbian, gay and bisexual service members.¹² They agreed to take steps to prevent anti-gay harassment.¹³ They agreed to treat lesbian, gay and bisexual service members even-handedly in the criminal justice system, instead of criminally prosecuting them in circumstances where they would not prosecute heterosexual service members.¹⁴ They agreed to implement the law with due regard for the privacy and associations of service members.¹⁵ The law became known in 1993 as “Don’t Ask, Don’t Tell,

Don’t Pursue” to signify the new limits to investigations and the intent to respect service members’ privacy.

Small steps were made to keep some of these promises. Questioning on sexual orientation at induction stopped. Criminal prosecutions have decreased and witch-hunts have declined. President Clinton issued an Executive Order ending discrimination in the issuance of security clearances. The Department of Defense issued guidelines on anti-gay harassment and limits on investigations.

Then, in 1999, PFC Barry Winchell was murdered by fellow soldiers at Fort Campbell, Kentucky. In the wake of this murder, the Department of Defense (DoD) issued new guidance on prohibiting anti-gay harassment. President Clinton issued an Executive Order providing for sentence enhancement under the Uniform Code of Military Justice (UCMJ) for hate crimes, as well as a limited psychotherapist-patient privilege. In February 2000, Pentagon officials added “Don’t Harass” to the title of the policy. The Pentagon then did a survey on anti-gay harassment, finding it was widespread. Thereafter the Pentagon formed a working group which issued a 13-point action plan

<i>Seaman Allen Shindler murdered</i>	<i>Candidate Clinton proposes ending DoD regulations banning gays from the Military</i>	<i>Congress enacts DADTDP into law</i>	<i>August 1995: President signs Executive Order ending sexual orientation discrimination in issuance of security clearances</i>	<i>March 1997: DoD issues Dorn Memo on anti gay harassment</i>
1992	1993	1995	1996	1997

to address anti-gay harassment which the services were then directed to implement.

These limited steps, spurred in large part by the murder of PFC Winchell, have done little to fulfill the promises made when the policy was created. Intrusive questioning continues. Harassment continues in epidemic proportions. Little regard for service member privacy has been shown during the life of this law. Simply put, asking, pursuing and harassing have continued for all of the nine years since the law was passed.

THE POLICY ITSELF

SLDN documents violations of the policy reported to us by service members. In order to understand the critiques of the policy and the violations documented in this report, it is important to understand the policy. One way to understand the law, and implementing regulations, known as DADTDPDH is by breaking it down to its component parts.

Don't Ask. Commanders or appointed inquiry officials shall not ask, and members shall not be required to reveal, their sexual orientation.¹⁶

Don't Tell. "A basis for discharge exists if . . . [t]he member has said that he or she is a homosexual or bisexual, or made some other statement that indicates a propensity or intent to engage in homosexual acts"¹⁷

Don't Pursue. More than a dozen specific investigative limits, as laid out in DoD instructions and directives, comprise "Don't Pursue." It is the most complicated and least understood component of the policy. These investigative limits establish a minimum threshold to start an inquiry and restrict the scope of an inquiry even when one is properly initiated.

A service member may be investigated and administratively discharged if they:

- 1) make a statement that they are lesbian, gay or bisexual;
- 2) engage in physical contact with someone of the same sex for the purposes of sexual gratification; or
- 3) marry, or attempt to marry, someone of the same sex.¹⁸

Only a service member's commanding officer may initiate an inquiry into homosexual conduct.¹⁹ In order to begin an inquiry, the commanding officer must receive credible information from a reliable source that a service member has violated the policy.²⁰ Actions that are associational behavior, such as having gay friends, going to a gay bar, attending gay pride events, and reading gay magazines or books, are never to be considered credible.²¹ In addition, a service member's report to his/her command regarding harassment or assault based on perceived sexuality is never to be considered credible evidence.²²

If a determination is made that credible information exists that a service member has violated the policy, a service member's commanding officer may initiate a "limited inquiry" into the allegation or statement. That inquiry is limited in two primary ways. First, the command may only investigate the factual circumstances directly relevant to the specific allegation(s).²³ Second, in statements cases, the command may only question the service member, his/her chain of command, and anyone that the service member suggests.²⁴ In most cases of homosexu-

	July 5, 1999: <i>PFC Barry Winchell murdered</i>	August 12, 1999: DoD issues DeLeon Memo prohibiting anti-gay harassment	October 1999: President Clinton issues Executive Order providing for limited psychotherapist-patient privilege and sentence enhancement under UCMJ for hate crimes	February 2000: "Don't Harass" added to Homosexual Conduct Policy	March 16, 2000: DoD Publishes IG Report documenting rampant anti-gay harassment	July 21, 2000: DoD Working Group issues 13 point Anti-Harassment Action Plan - Services directed to implement
1998	1999	2000				

al statement, no investigation is necessary.²⁵ Cases involving private sexual acts between consenting adults should be dealt with administratively, and criminal investigators should not be involved.²⁶

The command may not attempt to gather additional information not relevant to the specific act or allegation, and the command may not question anyone outside of those listed above without approval from the Secretary of that Service.²⁷ Such an investigation is considered a "substantial investigation."²⁸ In order to request authority to conduct a "substantial investigation," the service member's command must be able to clearly articulate an appropriate basis for an investigation.²⁹

As with a "limited inquiry," only a service member's commanding officer has the authority to request permission to conduct a "substantial investigation."³⁰ By definition, a "substantial investigation" is anything that extends beyond questioning the service member, the service member's immediate chain of command, and anyone the service member suggests.³¹

Don't Harass. "The Armed Forces do not tolerate harassment or violence against any service member, for any reason."³² There are many regulations and laws that prohibit harassment and can be applied to anti-gay harassment cases.

Harassment can take different forms, ranging from a hostile climate rife with anti-gay comments, to direct verbal and physical abuse to death threats.

DADTDPDH is a complex policy comprised of statute, regulations and policy memoranda. The above description, however, covers the basic policy components – and those are fairly simple. Don't ask about sexual orientation. Don't investigate sexual orientation, except in specific circumstances in limited ways.

Don't harass. Don't tolerate harassment based on perceived sexual orientation. Unfortunately, even after nine years, the Services continue to violate these basic rules.



AN “ARMY OF ONE” – WITH ONE EXCEPTION

“[A]LMOST ON A DAILY BASIS, I HEAR ‘EAG’ COMMENTS AND ‘GAY’ JOKES ... FROM MOST RANKS ... FROM PRACTICALLY EVERY MEMBER OF MY [UNIT] ... ONE OF WHOM IS A [JAG OFFICER] ... ONE OF THE CHAPLAINS HERE HAD MADE SOME SORT OF ‘GAY’ JOKE ... NCOs AND OFFICERS NEVER TAKE ACTION AGAINST THOSE MAKING THE COMMENTS, INSTEAD THEY JUST LAUGH ALONG.”

soldier deployed overseas in Operation Enduring Freedom in a communication to SLDN

Private First Class Barry Winchell was beaten to death in July 1999, in his barracks at Fort Campbell, Kentucky, by fellow soldiers who believed him to be gay. Over two and a half years later, the Army has yet to take any effective action to eliminate the type of anti-gay harassment that eventually led to PFC Winchell’s brutal murder. Army leaders refuse to implement the Anti-Harassment Action Plan. In



PFC Winchell

today’s Army, harassment of lesbian, gay and bisexual soldiers – including those serving in our nation’s war on ter-

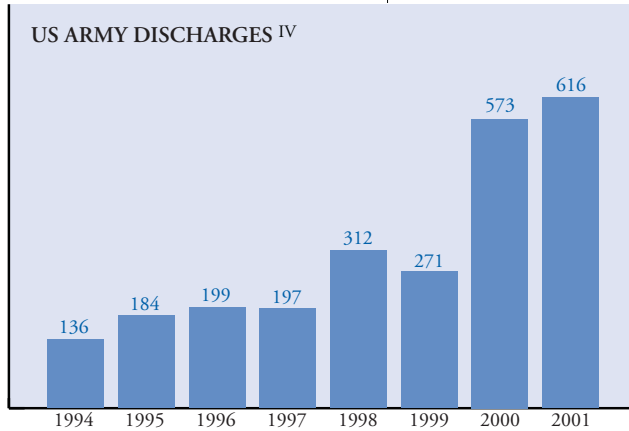
rorism – is alive and well. SLDN’s cases reflect a worsening, hostile climate where gay soldiers face great risk of bodily harm – or death – not only from our nation’s enemies, but also from our own troops.

SLDN documented during 2001 a record 513 instances of anti-gay harassment in the Army, a shocking 145% increase from the year 2000. The death threats and hateful anti-gay ridicule permeating virtually every aspect of Army culture led to more than 616 lesbian, gay and bisexual soldiers being fired from their jobs – the most discharges in any service.³³ Fort Campbell – site of the Winchell murder – chalked up 222 gay discharges, accounting for 36% of the Army’s total. Gay soldiers continue to report frequently being “asked” and “pursued,” in direct violation of “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass.” The story in the Army this year,

much more so than in the past, is about failed leadership driven by callous indifference. Army leaders, up and down the chain of command, have failed to implement the safety and training initiatives launched in the wake of PFC Winchell’s murder. Last year, SLDN lauded the Army for finally acknowledging its anti-gay harassment problem and taking some good first steps to fix it. This year, SLDN sharply criticizes Army leaders for collectively – and quite purposefully – losing interest. Many junior leaders have tolerated, encouraged and participated in anti-gay harassment, reflecting the failure of senior leadership to act. The Army’s “Vision” states “[w]e are about leadership; it is our stock in trade.”³⁴ If the Army’s climbing discharge and harassment rates are what the Army calls leadership, its time to replenish the merchandise and restock its shelves.

This section discusses what the Army did – more pointedly, what it failed to do – during 2001, and what steps the Army needs to take in 2002 to get back on track.

**NOTHING LESS THAN HELL:
ANTI-GAY HARASSMENT
AT RECORD LEVELS**



The Army's anti-gay harassment crisis is, arguably, worse than ever. In a year where the Army fired more than 616 lesbian, gay and bisexual soldiers, SLDN documented an astounding 513 Army "Don't Harass" violations. The Army's record high discharge rate appears to be the direct result of the worsening epidemic of anti-gay hostility. The following sampling of soldier testimonies vividly illustrates the scope of the Army's anti-gay harassment crisis.

Specialist Dell Sellers, who had over six years exceptional service, reports finding pervasive anti-gay harassment at every one of his assignments, including two tours of duty in South Korea and one each at Fort Stewart, Georgia, and Fort Carson, Colorado.

- "If I were to find out if anybody in this unit was gay, I would fucking kill that individual." – Leader's statement to soldier at Fort Sheridan, Illinois.

- "Beat the shit out of those fags ... beat the faggot mother-fucker half dead ... kicked that faggot's ass." –

Comments frequently heard by soldier at Fort Gordon, Georgia.

- "Who hates this damn faggot?" – Leader's question to young soldiers

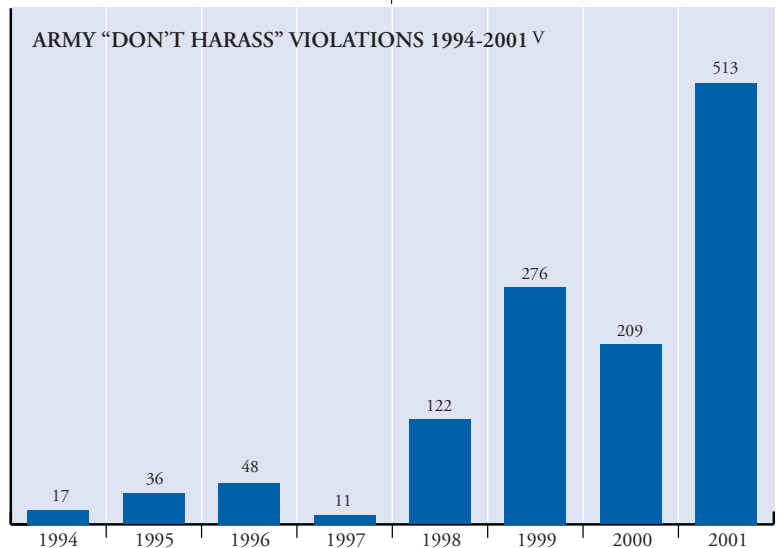
regarding a gay soldier at Fort Benning, Georgia.

- "Dyke" – frequent comment directed to female soldier at Fort Bliss, Texas.
- "Why are you smiling like a faggot swinging limb to limb from a dick tree?" – Drill Sergeant's question to soldier at Fort Benning, Georgia.

"[B]eing forced to lay there ... even being prodded into laughing [at] these horrible ... jokes ... is nothing less than hell."

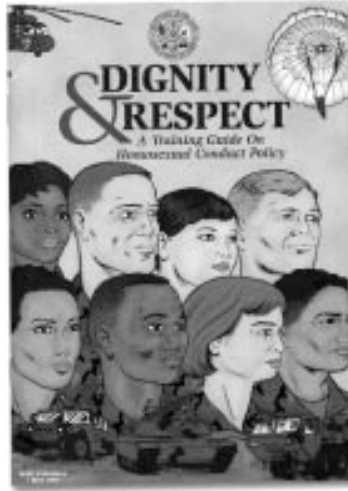
Anonymous Officer, Fort Knox, Kentucky

The year 2001 was a particular disappointment given that it came on the heels of the Army's most determined effort to "do what's right" by its gay soldiers during the year immediately following PFC Winchell's murder. In early 2000, for example, the Army issued a directive stating that "harassment of soldiers for any reason, to include perceived sexual orientation, will not be tolerated," and ordered that all soldiers receive "refresher training" on the policy.³⁵ The Army even revamped its "homosexual conduct policy" training materials, focusing on the need to treat all soldiers with "dignity and respect."³⁶ The Army directed that its training regulation, Army Regulation 350-1, be revised to include an annual "Don't Harass" training requirement.³⁷ The Army's orders followed the Pentagon's mandate to comply with a thirteen point Anti-Harassment Action Plan.



Army Chief of Staff General Eric K. Shinseki issued the following order: “[a]ny derogatory words about any group, including those based upon sexual orientation ... may subject a soldier to adverse administrative actions or disciplinary measures under the UCMJ.”³⁸ In an effort to stress the importance of the subject matter, General Shinseki personally trained all other Army four star Generals on the policy, and encouraged them to do the same with their subordinate General officers.³⁹

This past year, however, the Army did almost nothing. Although the Army issued its first-ever training publication, entitled “Dignity and Respect: a Training Guide on Homosexual Conduct Policy,” in May 2001, soldiers report to SLDN that the training guide is not being used. Over two years after directing its revision, the Army has not updated Army Regulation 350-1 to require annual training. The sad truth is soldiers report receiving no policy training at the unit level during 2001. The Army is doing pre-



Department of the Army, May 2001

vious little to implement the Anti-Harassment Action Plan.

The policy “can only be successful through the direct and positive involvement of commanders and other leaders at every level...”

The Army Inspector General⁴⁰

The Army leadership’s lack of serious-

ness and long-term commitment to the Anti-Harassment Action Plan is obvious from the fact that there has been no effort whatsoever to engage the Army’s Non-Commissioned Officers (NCOs). NCOs are the Army’s backbone. The Sergeant Major of the Army, its most senior NCO, has never once publicly spoken about the importance of treating lesbian and gay soldiers – and those perceived as such – with dignity and respect. Until NCOs become directly involved “at every level,” the Anti-Harassment Action Plan will remain dead in the water.

Systemic policy training is in place at the Army’s schools – implemented following PFC Winchell’s murder. It is, however, treated as the functional equivalent of a “Jerry Springer” television episode. This “training” cannot be viewed as a good-faith effort to comply with the Anti-Harassment Action Plan when it is conducted in such an unprofessional manner. A shocking illustration comes from the highest levels of Army “academia,” its law school.

**IT’S (TOO) ELEMENTARY:
TRAINING AT THE ARMY’S
JAG SCHOOL**

“Faggots” “Queers” “Tinky Winky”
words contained in JAG School briefing

SLDN has received a report about attorney-instructors at the Army’s JAG School routinely engaging in professional misconduct while presenting formal training on the policy.

The Army’s school for training attorneys and senior leaders on Uniform Code of Military Justice (UCMJ) subjects, located in Charlottesville, Virginia, has developed formal policy training in response to General

Shinseki’s January 2000 directive. The Army JAG School’s approach, however, appears intended to poke fun at gays and ridicule the policy, rather than to teach Army leaders how to apply the rules.

According to a reserve officer who recently attended the school, three Army Majors – each a JAG attorney – presented a course entitled “Reserve Component Separations,” a portion of which ridiculed lesbian, gay and bisexual soldiers. This specific class was taught on January 9, 2002 and was attended by approximately 85 Army Reserve and National Guard attorney-students. The class was presented by Majors Robertson, Tuckey, and Woodward. SLDN’s understanding is that this

“training” is part of a standard JAG School course taught to all Army lawyers passing through the Charlottesville campus, as well as to all senior Army commanding officers (in the ranks of Colonel and above).

Major Robertson, the chief instructor on the “Homosexual Conduct Policy” portion of the course, said that he supervised the attorneys defending PFC Winchell’s murderers during their courts-martial while assigned as the Chief of the Trial Defense Service at Fort Campbell, Kentucky.

Major Robertson then reportedly conducted a “Power-Point” presentation, with imported video and sound clips, that at least one officer per-

ceived as inappropriate, unprofessional and demeaning. The training reportedly used a clip from the movie “Stripes” referring to gay Americans as “queers,” an image of the television “Tele-Tubby” character “Tinky-Winky,” and other video clips containing the word “faggot.” The officer providing this information to SLDN reports that most of the students laughed during this presentation, leading the officer to conclude the training was nothing more than a joke.

During 2001, and prior to this report of JAG School misconduct, SLDN twice wrote to the Judge Advocate General of the Army, Major General Thomas J. Romig, raising issues of concern about how Army lawyers implement the policy. MG Romig declined to directly address SLDN’s concerns, choosing instead to respond, “[o]ur objective is to ensure that all individuals who serve in our Army are treated with dignity and respect, free from harassment, now and in the future.”⁴¹

SLDN calls on MG Romig to immediately investigate this reported misconduct. If substantiated, MG Romig should take swift action up to and including relieving these instructors from their duties for professional dereliction. MG Romig should further consider pressing UCMJ charges for “Conduct Unbecoming an Officer” and violating General Shinseki’s order.⁴²

**HAUNTED BY MURDER:
THE SPECIAL CASE OF
FORT CAMPBELL, KENTUCKY**

number of gay discharges, having also discharged more gay troops than other bases – 160 (28% of the Army total) – during 2000.

“[W]e share a common goal of ensuring that all Fort Campbell soldiers – straight, gay, lesbian, and those perceived to be gay or lesbian – are treated with dignity and respect.”⁴³

Major General Richard A. Cody, Commanding General Fort Campbell

Under the command of Major General Richard A. Cody, Fort Campbell has worked to improve the base’s climate. MG Cody, for example, ordered Fort Campbell leaders to



and defamatory comments regarding gays while assigned to the base.



Fort Campbell discharged 222 lesbian, gay and bisexual soldiers during 2001, more than any other Army instal-

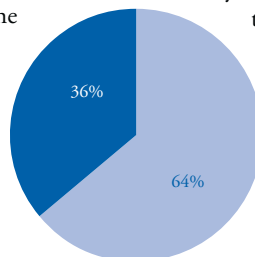
“vigorously police the content of [cadence runs and] training briefs ... to ensure that they are devoid of profanity or phrases demeaning of others.”⁴⁴

Unfortunately, some Fort Campbell leaders continue to perpetuate anti-gay attitudes within their units by tolerating hateful anti-gay remarks. Fort Campbell’s alarmingly high gay discharge rate is at least partly driven by ongoing instances of leader-

tolerated peer-on-peer harassment. Despite MG Cody’s efforts, much work remains to be done.

During 2001, SLDN assisted eight soldiers from Fort Campbell. Every one of these soldiers report hearing degrading

lation. Fort Campbell, the site of PFC Barry Winchell’s brutal anti-gay murder in July 1999, accounted for an astonishing 36% of the Army’s reported gay discharges. This is the second consecutive year in which Fort Campbell has had an inordinate



Discharges from Ft. Campbell, Kentucky comprised 36% of all Army discharges⁴⁵

- “Since my arrival at Fort Campbell, I have heard many anti-gay comments (e.g., “fag,” “faggot,” etc.). Several times, the comments have been heard by NCOs, but I have not seen any NCO make an on-the-spot correction to stop the comments.” - former Infantryman Keagan Smith⁴⁵
- “I must sit silently while other soldiers ridicule gays and bisexuals. I feel compelled to go along with these ‘jokes’ because if I do not, then I would become the target ...” - from a bisexual soldier at Fort Campbell
- “He’s definitely a Homo” - comment made towards a bisexual soldier at Fort Campbell



Pat Kutteles
mother of PFC Barry Winchell

• “He got what he deserved” - comment referring to PFC Winchell repeatedly heard by a Fort Campbell soldier

First Lieutenant Shawn Brown served as an Air Defense Artillery Battalion personnel officer at Fort Campbell, completing his Army commitment in May 2001. 1LT Brown reports hearing many anti-gay comments made by Fort Campbell personnel, ranging from junior enlisted soldiers to members of the officer corps. Brown states that under the current policy “ignorance breeds” because few are willing to speak out against harassment for fear of somehow seeming to oppose Army policy. 1LT Brown was an exceptional officer, but he knew that



1LT Brown

had knowledge of his being gay come to Army leaders’ attention they would have promptly branded him as unfit for duty. 1LT Brown left the Army at the end of his commitment because of this irrational prejudice. He is one of many soldiers who never show up in the statistics of gay discharges, but nonetheless is a casualty of the policy.

SLDN has worked with Fort Campbell to identify steps to curb its high gay discharge rate. In December 2001, SLDN provided Fort Campbell with ten specific recommendations on how to improve the conditions under which its lesbian, gay and bisexual troops live and work.⁴⁶

SLDN’s recommendations focused on the continued effort to fix training deficiencies identified in the July 2000 Army Inspector General’s Fort Campbell Task Force Report.⁴⁷ The Army IG Report concluded Fort Campbell had no “sustainment training” on the policy and its leaders lacked an “understanding and working knowledge” of the policy. The Army IG further concluded that successful implementation of safety and policy training required commitment from

Army leaders “at every level.”

SLDN recommended that Fort Campbell reexamine its procedures for handling gay discharges. For example, SLDN found, following PFC Winchell’s murder, Fort Campbell instituted a unique system requiring battalion level (Lieutenant Colonel) commanders to personally handle gay cases. This unique requirement had the unintended consequence of severing junior leader involvement – especially that of NCOs – in matters relating to the policy, thereby failing to comply with one of the key conclusions of the Army IG Fort Campbell Task Force’s report.

Severing junior leaders from responsibility for policy implementation relieves them from accountability in its implementation. SLDN has urged MG Cody to involve his senior non-commissioned officer, the Division Sergeant Major, in policy training and in setting the proper leadership example.

Fort Campbell’s ongoing problems with anti-gay harassment, epidemic throughout the broader Army, can only be addressed through forceful leadership and holding accountable those – especially leaders – who violate the “Don’t Harass” policy.

**ANYTHING BUT MAJESTIC:
LIFE AT FORT BRAGG, N.C.**

“You may be certain that all members of this command work for the respect and dignity of all soldiers.”

Lieutenant General Dan K. McNeill, Commanding General Fort Bragg⁴⁸

Despite Lieutenant General McNeill’s assertions to the contrary, Fort Bragg leaders are failing to work for the “dignity and respect” of

lesbian, gay and bisexual soldiers. The cases of Staff Sergeant Wayne Peacock and Sergeant Carlos Torres illustrate the numerous reports of

anti-gay harassment SLDN received from Fort Bragg.

SSG Wayne Peacock reached a point where he could no longer tol-



SSG Peacock

erate the pervasive anti-gay climate at Fort Bragg. A certified paratrooper with over 70 jumps from combat aircraft, Peacock wrote to his command, “I have served with

honor for *over six years* ... I know that I have nothing to be ashamed of and I can no longer continue silently suffering from the constant barrage of anti-gay comments that other soldiers – and leaders – make here at Fort Bragg.”⁴⁹

SGT Carlos Torres reluctantly disclosed his sexual orientation to Fort Bragg leaders after becoming fed up with the constant anti-gay harassment. SGT Torres wrote to his command “I have honorably served as a soldier for *over ten years* ... [and can no longer endure] the frequent anti-gay hostility I am exposed to from other soldiers, to include some NCOs. It seems to be okay at Fort Bragg for soldiers to make derogatory comments about and towards gays. I can no longer tolerate this bigotry and must speak out.”⁵⁰

The poor climate at Fort Bragg is further evidenced by an anti-gay cartoon that ran in the on-post newspaper in late September 2001. The cartoon stereotypes gay soldiers as weak and unreliable. Although Fort Bragg leaders apologized to SLDN

THE FLOP ZONE *Twisted and sometimes profound perspectives from airborne land*



Cartoon Appearing in Ft. Bragg Newspaper, Paraglide, September 2001.

for the leadership lapse in allowing the offensive publication, that it happened at all shows that much hard work remains to be done. The publication also vividly illustrates the Army’s failure to appreciate the many contributions of its lesbian, gay and bisexual soldiers, such as those of SSG Peacock and SGT Torres. With a combined 16 plus years of excellent military experience, Peacock and Torres epitomize the very type of patriot needed by our nation’s Army in this time of war.

SGT Torres are likely to be counted among Ft. Bragg’s discharges, since both Peacock’s and Torres’ discharge paperwork stated as their reason for separation “completion of required active service” – despite the fact that neither Peacock nor Torres actually completed their terms of enlistment.⁵¹ The possibility that Fort Bragg leaders may have falsified soldiers’ discharge paperwork in order to misrepresent statistics is a serious matter and should be promptly investigated.

SLDN is also concerned by Fort Bragg’s reported statistics for gay discharges, which show a mysterious and unexplained decrease, from 29 discharges in 2000 to only four discharges in 2001.

Interestingly, neither SSG Peacock nor

COMMENTS AND CONDUCT:
A FORT CARSON SOLDIER’S STORY

“I have become the target of relentless anti-gay harassment which includes having a Staff Sergeant threaten to kill me if he learns I am gay ... All I can think about is the soldier back in 1999 that was killed at Fort Campbell for his perceived sexuality.”

Private Mike Wooten, Fort Carson⁵²

The case of Private Mike Wooten, at Fort Carson, Colorado, further illustrates the consequences of the Army’s failure to train on the policy and allowing leader driven anti-gay

hate. The death threat was the last straw. After suffering through months of harassment, Private Wooten realized he had to come out in order to protect himself from an onslaught of anti-gay abuse and to ensure his safety.



Wooten wrote to his command, “I routinely hear hateful anti-gay comments such as ‘that vacuum sucks as good as you do’ and ‘you can suck my cock.’” Wooten continued:

[W]ithin F Troop, rumors of other soldiers’ sexual orientation are rampant.... NCOs sometimes participate in this speculation and frequently hear the anti-gay comments being made but never take steps to stop the comments.... I have heard other soldiers within my unit talk openly about perceived gay soldiers and stated ‘I wish I could kick their ass.’ This leads me to further fear for my safety if the speculation about my private life is verified.

Wooten added:

I have tried to put up a good front and be strong. I have brushed off the constant comments and hazing by trying to appear 'not gay.' Sometimes I have attempted to deflect attention by going along with the hateful jokes made by soldiers and NCOs. This has caused me great shame and personal pain.... I have tried to serve my country, but I can't.

SLDN notified Fort Carson's then-Commanding General, Major General Edward Soriano, who took immediate steps to ensure Wooten's safety. MG Soriano ordered an investigation into the allegations of wrongdoing within F Troop and

whether F Troop and the 3rd Armored Cavalry Regiment were "conducting required training on [the policy]."

The Fort Carson report substantiated the hostile anti-gay climate and lack of training. The report's findings include:

- "[T]he comments and conduct of various soldiers and noncommissioned officers within F Troop created an atmosphere where offensive, crude comments and jokes were made and condoned by Private Wooten's immediate section chain of command."
- "F Troop has no record of conducting [DADTDPDH]

training. In addition, the Troop commander is not aware of the Troop ever conducting the training. ... There is not a local Commanding General policy letter covering the Homosexual Conduct Policy."

- "Staff Sergeant Christopher Porter would sometimes participate in the joking and would often use the word 'fag' in front of other non-commissioned officers and soldiers."⁵³

SLDN salutes MG Soriano for allowing such a thorough and objective investigation into his command's "Don't Harass" adherence. Few commanders are so forthright.

**OUT OF BALANCE:
A DISCONNECT BETWEEN
WORDS AND ACTIONS**

"Army culture is out of balance. There is friction between Army beliefs and practices. Over time, that friction threatens readiness."

Report to the Army, 2001⁵⁴

The friction between the Army's stated belief in the dignity of lesbian, gay and bisexual soldiers, and its failure to fully implement practices consistent with the Anti-Harassment Action Plan, has

created an environment hostile to Army personnel. As the above illustrations from the JAG School, Fort Campbell, Fort Bragg, and Fort Carson demonstrate, Army leaders have a long way to go to erase this friction.

**ARE YOU HAVING A PROBLEM?
ARMY "PURSUING" GAY SOLDIERS
AT RECORD PACE; "DON'T ASK"
VIOLATIONS CONTINUE**

"I doubt very seriously that you are straight."

Senior NCO's statement to female soldier at Fort Bragg, North Carolina

interest in ensuring lesbian, gay and bisexual soldiers are treated with "dignity and respect." Nonetheless, the ongoing instances of Army leaders fishing for personal information about perceived gay soldiers is alarming. Often times, upon learning a soldier is gay, leaders launch

leaders. When leaders ask questions such as "are you a lesbian?" and "are you having a problem with your sexuality?" they violate not only "Don't Ask," but "Don't Pursue" as well. Army leaders are prohibited from conducting inquiries solely to determine whether a soldier is straight, lesbian, gay or bisexual.⁵⁵

SLDN documented a record 133 Army "Don't Pursue," along with 23 "Don't Ask," violations during 2001. It should come as no surprise that Army leaders feel they have a green-light to "pursue" since their senior leadership has, by and large, lost

intrusive, improper inquiries attempting to gather evidence to harm the soldier, frequently by asking about sexual behaviors.

Other times, soldiers are asked about their sexuality by their peers or their



[T]he Army has proven to be much more homophobic and anti-gay than I had imagined ... There has been a lot of suspicion and rumors about service members being gay throughout my unit and it has finally become too emotionally draining and stressful worrying about people finding out about me.⁵⁶

Private Estrella's command should have simply initiated administrative discharge proceedings but instead chose to launch an intrusive investigation into Estrella's sex life. Questions asked of Private Estrella included:

- "Do you desire to have sexual relations with an individual of the same sex?"
- "Do you have a same sex partner here in Germany or stateside?"
- "Do any of the soldiers living in the barracks know that you profess to be gay?"⁵⁷

In cases where lesbian, gay or bisexual soldiers come out, the Army may involuntarily discharge them. However, Army leaders remain bound by "Don't Pursue" and should never ask intrusive questions about the soldier's private life, particularly about "homosexual acts," just because the soldier came out.

"Have you engaged in, attempted to engage in or solicited another to engage in a homosexual act?"

First Sergeant's question to soldier at Fort Huachuca, Arizona



Private Orlando Estrella came out to his command, in May 2001, because of anti-gay harassment. Private Estrella wrote:

"What made you gay?"

First Sergeant's question of soldier at Fort Wainwright, Alaska

Training, and consequences for those who violate the limits on investigations, is the only way to check the rising tide of Army "Don't Pursue" violations. "Don't Ask" violations, on the other hand, present a different dilemma. That asking occurs at all, nine years into the policy is troubling, although not surprising. In a real sense, the "Don't Ask" policy inhibits development of trust between soldiers.

"Are you having a problem with your sexuality? The Army tells me I'm not allowed to ask, so I won't"

Drill Sergeant's question to soldier at Fort Huachuca, Arizona

It is unreasonable to expect soldiers not to query each other about their personal lives. Indeed, such basic interpersonal interaction is part and parcel of how young men and women develop trust in each other and become cohesive as a team. When soldiers ask questions such as "are you married?" or "are you dating anyone?," they are merely engaging in socially acceptable behaviors which, under the bizarre twist of the "Don't Ask" policy, violates Army rules and places gays at great risk. Such otherwise benign questioning is no different from that heard everyday around the proverbial corporate water-cooler, with one notable exception: gay soldiers who answer truthfully risk being fired from their jobs, and becoming the targets of increased harassment.

"Are you a lesbian?"

Question asked of female officer at Fort Lee, Virginia

Most lesbian, gay and bisexual soldiers report being compelled to “play along” and pretend to be heterosexual as the only way to protect themselves from being “asked.” A gay soldier serving in *Operation Enduring Freedom* describes the dilemma: “I think that I may have done a good job trying to convince my co-workers and command that I am not gay ... I worry daily that I might accidentally say or do some-

thing that might indicate my sexual orientation.”

“Are you gay?”

Sergeant’s question asked of female soldier at Fort Carson, Colorado

Although the Army’s core values call for soldiers to live with integrity and honor, for lesbian, gay and bisexual troops, “Don’t Ask” essentially asks

them to deceive and evade. “Don’t Ask” muddies the trust-through-bonding water. It creates an obstacle that forces soldiers to distance themselves from each other by avoiding and, sometimes, deceiving. Over time, the friction between the need to trust and the need to live with integrity, between the requirement to “not ask” and the natural inclination to “ask,” threatens military readiness.

ARMY CONCLUSION

Almost three years after PFC Winchell’s murder, the Army still has a problem. It fired a record 616 lesbian, gay and bisexual soldiers during 2001. The “Don’t Harass” policy is in shambles. “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass” doesn’t work. The question for Army leaders is what are they going to do about it? To get back on track in 2002, the Army should:

- ★ Fully implement the Anti-Harassment Action Plan;
- ★ Make the Non-Commissioned Officer Corps become involved in taking care of lesbian, gay and bisexual soldiers;

- ★ Hold policy violators accountable. Start with a thorough investigation of the reported misconduct at the Judge Advocate General’s (JAG) School;
- ★ Investigate Fort Bragg’s possible manipulation of its gay discharge numbers; and
- ★ Establish a joint Department of the Army – Servicemembers Legal Defense Network Task Force to explore better ways to ensure Army compliance with the policy.

In 2000, the Army made some good first steps. 2001, however, was marked by Army leaders’ complacency, indifference and stagnation.

When Army leaders allow command climates to be polluted by virulent anti-gay hostility, soldiers are unable to establish esprit and camaraderie within their platoons. When Army leaders allow perceived lesbian, gay and bisexual soldiers to be “asked” and “pursued,” trust and teamwork are the victims.

The friction between the Army’s “dignity and respect” rhetoric and its widely embraced homophobic practices has created an acute infection within the Army culture. The culture is out of balance and nothing less than readiness – as measured in the lives of young Americans, including those who are lesbian, gay and bisexual – hangs in the balance.



**“AMERICA’S AIR FORCE –
NO ONE COMES CLOSE”
ESPECIALLY IF YOU ARE GAY**

“THE LAST ADMINISTRATION CALLED IT ‘DON’T ASK, DON’T TELL,’ BUT THAT ISN’T A CORRECT WAY TO DESCRIBE IT. BASICALLY, HOMOSEXUALITY IS LIKE ALCOHOLISM, THIEVERY, LYING AND IS NOT TOLERATED IN THE MILITARY.... IF I THINK YOU ARE A HOMOSEXUAL, I WILL ASK YOU.”

November 2001 Commander’s Call briefing conducted by a Colonel to an overseas Squadron on the Air Force’s Homosexual Conduct Policy.⁵⁸

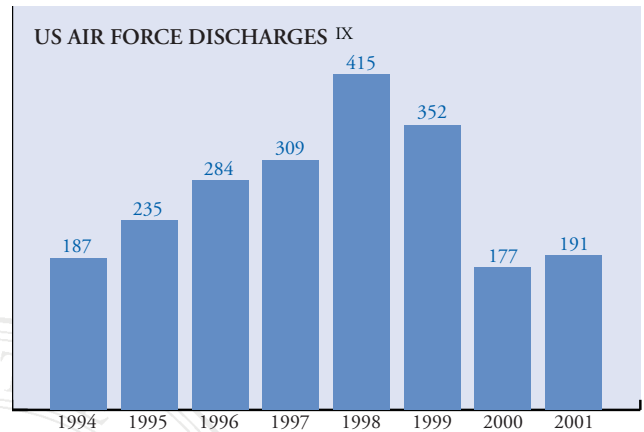
Comparing homosexuality to “alcoholism, thievery [and] lying,”

an Air Force Colonel demonstrated this year how comfortable he now is in conveying his bigotry to those he commands. His forthright assertion that he will ask airmen if they are gay flies in the face of “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass.” His utter disrespect for both the letter of the law and service members, epitomizes the brick wall SLDN has faced with the Air Force throughout 2001.

Given the grave leadership delinquencies SLDN continues to see in the Air Force with respect to DADT-DPDH, it might be expected that SLDN would have counted more violations than ever before in the Air Force. However, SLDN has recorded fewer total violations of DADT-DPDH by the Air Force during the past year. While it is impossible to

say with certainty what factors led to this decrease in the number of violations, it is clear from SLDN’s Air Force cases that the Air Force has not improved its application of the policy. Therefore, other factors may have contributed to a decrease in total Air Force violations.

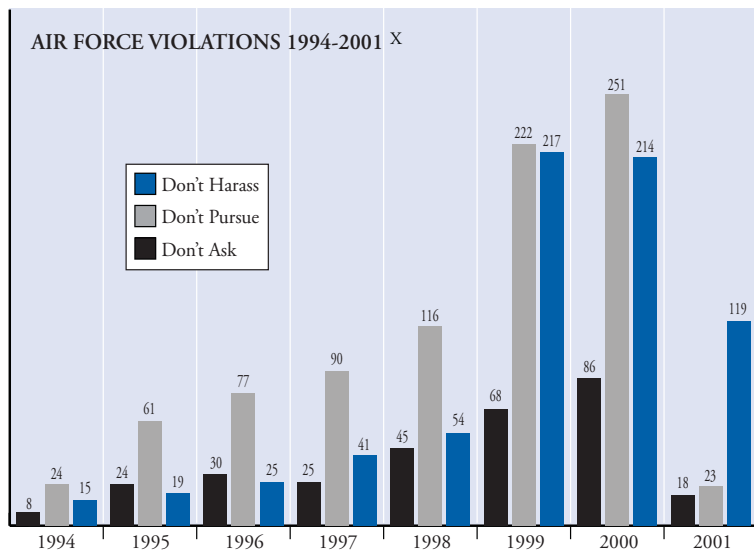
First, the total number of SLDN’s Air Force cases was significantly lower than previous years. Some of this may be attributable to the ongoing war against terrorism. Second, when looking specifically at the issue of harassment, unlike previous years, this year SLDN had more Air Force officers than Air Force enlisted members as clients. While it should not be said in a blanket statement that only enlisted service members are harassed, both SLDN and the DoD have observed that enlisted



service members tend to be subjected to more harassment, direct and indirect, than officers.

Finally, regarding pursuit violations, SLDN has observed that much of the Air Force’s past violations of the anti-pursuit provisions seem to be because of witch-hunts or motivated by recoupment. During the past year, SLDN did not document a single witch-hunt. Furthermore, although SLDN has had numerous Air Force recoupment cases this year, only one case was procedurally in a position where inappropriate pursuit could and did occur. That case is highlighted below.

SLDN’s Air Force cases show that harassment continues to be a serious issue, and there is growing evidence



of a new trend to “punish” service members for being lesbian, gay or bisexual beyond simple discharge. We also continue to see a trend towards greater

recoupment efforts by the Air Force than by other services. Furthermore, the Air Force appears to be attempting to prevent SLDN from gathering information relevant to its application of the policy.⁵⁹ The Air Force has repeatedly refused to provide SLDN with requested information on its implementation of the policy, suggesting there is information Air Force leaders would rather not make publicly available. SLDN has been told by a source outside the Air Force that the unofficial number of Air Force gay discharges for 2001 has increased to 191. This could be one reason for the Air Force’s reticence in keeping the public informed.

DON'T PURSUE :
THE ANTI-FAMILY FACE
OF DADTDPDH

“If you do not see fit to grant this extension, I must regretfully offer you my resignation because I am lesbian and desire to be with my partner of 14 years while she battles this terrible disease.”

Captain Monica Hill to her Air Force Reserve command requesting an extension in her deferment of active service so she could care for her terminally ill partner.⁶⁰



Capt. Hill

Captain Monica Hill faced the most difficult, and yet easiest, decision of her life. She had just been informed that her

partner of 14 years, Terri, was dying of brain cancer. What made this devastating news even more heart-breaking was the fact that she was scheduled to report to Andrews AFB, more than 1000 miles away

from Terri, in a matter of days, to enter into active duty service as a doctor with the Air Force. After

digesting the news that her partner was dying, Capt Hill was confronted with the reality that in the eyes of the Air Force, Terri was not

legally her “family.” Therefore, Capt Hill had very little standing to seek permission to remain with Terri as she prepared to die.

Desperate to remain with her dying partner, and feeling it was irresponsible to move Terri from her treating physicians, Capt Hill decided to seek permission to delay reporting to Andrews AFB. Hill wrote, “I am very proud of the Air Force and of being an office(r). However, I have been placed in an impossible situation. I cannot care for Terri during the course of her illness and report to active duty at Andrews AFB.” Capt Hill was left with no other option but to explain why she need-

ed the requested deferment and thereby outed herself to the Air Force.

In response to her request, the Air Force cancelled Capt Hill’s orders to report to Andrews AFB but was silent regarding her request for a deferment. Had Capt Hill been heterosexual and her husband diagnosed with a terminal illness, the Air Force would likely have granted the deferment without hesitation.

Several months after her orders were cancelled, and still without any word on her deferment request, the Air Force informed Capt Hill they were initiating discharge proceedings against her based on the revelation of her relationship with Terri, who tragically and unexpectedly died on September 11, 2001. On December 11, 2001, Capt Hill was interviewed by Major S. Peterson as part of the discharge investigation. Violating Air Force regulations, Maj Peterson did not allow Capt Hill’s military attorney to be present during the interview, and he did not inform her of her rights under military law.⁶¹ During his questioning, Maj Peterson insinuated that Capt Hill

was only trying to get out of completing her service commitment when she revealed her sexual orientation in her deferment request. Even when presented with proof of Terri's death and proof that they had rented an apartment near Andrews AFB in preparation for moving there, Maj Peterson continued to question Capt Hill about her sexual activity, motivation for sending the deferment request, commitment to the Air Force, and when Capt Hill became aware that she is a lesbian.⁶²

The Air Force has devastated Capt Hill with its unkind treatment. Not only has Capt Hill lost someone she dearly loved, but she may lose her Air Force career as well. Were it not for the Air Force's harsh and abusive application of DADTDPDH, Capt Hill would have continued on in her career with the Air Force after Terri's death. Instead, Capt Hill is fighting to retain her Air Force career, while grieving for the loss of her partner of 14 years, and searching for a new civilian job.

This heartbreaking story is illustrative of the Air Force's strategy and tactics in cases where recoupment of money could be an issue. The Air Force's desire to recoup the money it spent for her medical school can be the only explanation for the callous way the Air Force has treated Capt Hill since revealing her relationship

with Terri. However, improper pursuits do not occur just in recoupment cases.

"Have you ever been to a gay club?" "Are you currently dating anyone?" "How long has it been since you dated anyone?" "What do you do when you are off work?" "How do you feel about gay people?" "Have you had any visitors since being stationed here from back home or anywhere?" "What are your plans for the weekend?"

Questions asked of Airman Judson Smith by Captain Craig Dumos in violation of "Don't Ask, Don't Tell, Don't Pursue, Don't Harass"⁶³

Airman Judson Smith, an Air Force firefighter/paramedic for more than two years and assigned to Patrick



Airman Smith

AFB, was inappropriately investigated for being gay after his command received an allegation about his sexual orientation from a civilian unknown to the command. Airman Smith's command never should have

begun the investigation because the allegation it was based on did not rise to the level of being credible information from a reliable source, the standard by which commands are required to judge whether or not to begin an investigation. In further violation of DADTDPDH, once the inappropriate investigation began, Airman Smith was subjected to very intrusive questions, some of which are listed above, designed to elicit details about his personal life. The questions violated the "Don't Pursue" element of the policy in that they went far beyond what the civilian is said to have alleged.⁶⁴

Ultimately the Air Force concluded that they did not have enough credible evidence of his sexual orientation to kick him out of the service. Unfortunately, the damage has been done; Airman Smith could not continue to stay in the Air Force constantly looking over his shoulder. Since this investigation occurred, Airman Smith believes he is a marked man and that there will always be people questioning his sexuality or making their own assumptions. Therefore, Airman Smith admitted to his command that he is gay. Despite support from all of his coworkers and immediate supervisors, Airman Smith is being discharged from the Air Force because of his sexual orientation.

THE BUCK STOPS HERE: AIR FORCE CONTINUES TO PURSUE MONEY

According to regulations, the military may seek repayment, or recoupment, of money spent on education and/or recruitment bonuses if a service member *voluntarily* seeks discharge before the end of their commitment or if discharged because of

misconduct.⁶⁵ The Air Force has sought to recoup against gay service members in an effort not equaled by any of the other branches of the military, either in desire or design. Despite a 1994 DoD memorandum instructing the services that a member's statement of sexual orientation does not alone constitute a basis for recoupment, the Air Force continues to aggressively pursue recoupment

against service members who have made statements of sexual orientation by attempting to prove the statements were made for the purpose of avoiding their military commitments.

"[A] member's statement that he or she is a homosexual, though grounds for separation under the current policy. ...

does not constitute a basis for recoupment.... This does not preclude recoupment, however, if... it is determined that the member made the statement for the purpose of seeking separation.”

quote from Deutch Memorandum.⁶⁶

Basing its strategy on “purpose of seeking separation” language, the Air Force specifically crafts its investigations to try to develop information to prove that service members made

statements merely to get out of the Air Force. This strategy is apparent in the way Capt Hill was questioned. SLDN does not anticipate the Air Force will alter its position on recoupment to be more in line with the Deutch directives. The District Court for the Northern District of California recently ruled that the Air Force can continue to recoup against service members in “coming out” cases as long it can find multiple bases on which to conclude that a service member revealed their sexual orientation for the pur-

pose of avoiding service.⁶⁷ It is too early to tell how, or if, this ruling will affect the Air Force’s attitude and strategy towards potential recoupment cases.

While the Air Force maintains that it does not recoup against every gay former Air Force service member where educational benefits or enlistment bonuses have been paid, SLDN has observed that only under extremely unusual circumstances has the Air Force not tenaciously sought recoupment.

**DON’T HARASS:
THEY’LL BE PUNISHED IN THE END**

“What are you a fucking faggot!”

told to an Airman at the Defense Language Institute in Monterey, CA.⁶⁸

According to service members calling SLDN, the Defense Language Institute (DLI) in Monterey continues to be an environment ripe with unchecked anti-gay harassment, as detailed in prior SLDN reports. In fact, the quote listed above comes from one of several clients SLDN had at DLI this year. This particular Airman told his command that he is bisexual because he could not continue to remain silent amid rampant

anti-gay harassment. In addition to being directly called an anti-gay epithet, during a break in one of his

classes the Airman heard a senior Navy enlisted sailor state, “They (homosexuals) disgust me. I don’t

care what they do because they will be punished in the end....” The Airman has since been discharged from the Air Force for revealing his sexual orientation to his command. Unfortunately, this Airman’s story of individual harassment as well as a hostile and harassing environment is typical of SLDN’s Air Force cases. It is also part of a disturbing and ongoing trend at DLI.

More than 18 months after the DoD directed the Services to implement the Anti-Harassment Action Plan’s 13 recommendations, SLDN has yet to discover evidence that the Air Force has implemented a single recommendation.⁶⁹ Only a few of SLDN’s Air Force clients report that they have heard their commands make any statement about not tolerating anti-gay harassment. In contrast, most report that their commands permit a climate hostile to lesbian, gay and bisexual service members. Although SLDN filed a Freedom of Information Act (FIOA) request seeking the Air Force’s training and instructions on anti-gay harassment in the fall of 2001, we have yet to receive a response to that request.⁷⁰

PUNISHED FOR BEING GAY

In addition to overt anti-gay harassment, SLDN has started to uncover evidence of more subtle, institutional harassment in the Air Force. Increasingly, Air Force officers and enlisted members are being “punished,” beyond discharge, for being discovered to be lesbian, gay or bisexual. SLDN has documented several cases during the past year where the Air Force has attempted to “punish”

gay service members. They do so by giving service members incorrect or inappropriate discharges, lower performance evaluations, or refusing to give them the promotions they have been selected to receive. This occurs after service members have revealed their sexual orientation or when their consensual, adult, same-sex sexual conduct is discovered.

One example of such “punishment” is in the case of First Lieutenant

Megan Kuzmich. In October 2000, 1st Lt Kuzmich explained to her commander that she felt she was compromising her integrity as an officer by not telling him she is a lesbian. Following her revelation, 1st Lt Kuzmich’s command investigated her and moved to discharge her from the Air Force. 1st Lt Kuzmich fought the discharge recommendation at every step of the way citing her desire to remain in the Air Force.

Despite her arguments to be retained, in March 2001, a Board of Inquiry found that 1st Lt Kuzmich should be honorably discharged from the Air Force. While 1st Lt Kuzmich was appealing the decision, her command withdrew her name from the promotion list for Captain almost one year after being selected for the list. In a letter to her command responding to her withdrawal from the Captain's list, 1st Lt Kuzmich wrote, "I urge that my removal from the promotion list to Captain be reconsidered as nothing

in my performance supports this action. The outstanding service that I continue to render should be properly recognized with the promotion I was selected for."⁷¹ In fact, 1st Lt Kuzmich had never received a poor performance evaluation in her career.

Shortly thereafter, 1st Lt Kuzmich received a performance evaluation from her command that marked her top-notch in all areas except "Professional Qualities" citing that she "has not complied with DoD/AF homosexual policies."⁷² In

other words, her command lowered her performance evaluation rating solely because she was honest with her command about her sexuality. Ironically, the "Professional Qualities" section of the evaluation lists integrity and honesty as two of the key factors in judging officer performance. 1st Lt Kuzmich lost her battle with the Air Force and was honorably discharged. She never received the promotion to Captain that she had earned and deserved.

DON'T ASK:

...BECAUSE "IF YOU ARE GAY, I'LL TELL."

"If you were raped, you must be gay."

Statements made to an Air Force Airman by a civilian Air Force psychiatrist.⁷³

The Airman was referred to a base psychiatrist who repeatedly attempted to get the service member to reveal his sexual orientation, by asking the service member several leading questions and then the psychiatrist made the ludicrous assertion that he knew the Airman was gay because of what had happened.

While information about the Airman's sexual orientation could have been useful for treatment, current regulations do not allow for psychiatrist-patient confidentiality. Therefore, when his treating psychia-

trist continued to question the Airman about his sexual orientation, he was violating "Don't Ask."

The psychiatrist went on to threaten to "out" the Airman to his command if he stated he is gay which only underscores the precarious position in which service members can find themselves. The Airman did not answer the psychiatrist's questions, requested treatment from another Air Force psychiatrist, and continues to cautiously serve our country in the Air Force.

After being sexually assaulted by a civilian, an Air Force Airman reluctantly sought treatment from a medical clinic on his base where he reported that he had been raped.

RESISTANCE TO DISCLOSING RELEVANT INFORMATION

"Disclosure of this information is not in the public interest."

Air Force response to an SLDN Freedom of Information Act (FOIA) request.⁷⁴

Every year, SLDN formally requests information from the Air Force on a variety of standard issues, such as discharge statistics, reports of inquiry, Inspector General reports of investigation, and other client related materials. This year, more than any past year, and more than any

other service, the Air Force has stalled, delayed, denied and otherwise prevented SLDN from obtaining information in the public interest and on behalf of our clients. As one example, the Air Force has repeatedly thwarted SLDN attempts to obtain data on gay discharges, including breakdowns by base, gender, age, race, rank, etc. All of the other services have complied with similar SLDN requests in due course. The Air Force has not.⁷⁵

Similarly, the Air Force has consistently refused to produce information SLDN requested specifically regard-

ing gay discharges from Lackland AFB for fiscal years 1998, 1999, and 2000.⁷⁶ SLDN has been told, but not confirmed, that gay discharges at Lackland AFB have declined because the base has re-categorized them as entry level separations. If true, this sleight of hand would be of grave concern. SLDN continues to withhold judgment at this time, but the repeated denials of FOIA requests, including "[d]isclosure of this information is not in the public interest," smacks of bad faith.⁷⁷

The second area where the Air Force seems the most reluctant to respond

to FOIA requests is on the issue of recoupment. For example, last year when SLDN filed FOIAs seeking information relevant to two of our clients against whom the Air Force sought recoupment, the Air Force responded in both cases by stating, “The records you have requested are

partially exempt from disclosure. Some documents pertain to the decision making process of the Air Force....”⁷⁸ The information SLDN seeks through these inquiries is directly relevant to our clients’ cases and is not privileged informa-

tion. In light of the tenacity with which the Air Force seeks recoupment against lesbian, gay and bisexual service members, its reluctance to provide this information indicates that recoupment remains a sensitive issue.

AMERICA’S AIR FORCE – WE CAN COME CLOSE

As SLDN has cited in the past, many of the difficulties and policy violations we see could be prevented through better training. The Air Force has not provided SLDN copies of its training materials despite specific requests. Most of SLDN’s clients report that they have not received training within the past year on the policy. Furthermore, when SLDN clients and contacts have received training, many state that the trainers have allowed, encouraged, and led anti-gay harassment during training.

To this point, the only evidence we have of any compliance by the Air Force with DoD anti-harassment guidance is a March 2000 memorandum issued by General Michael Ryan, Chief of Staff for the Air Force, entitled a “Policy Statement on Homosexual Conduct in the Air Force.”⁷⁹ This memo emphasized that harassment based on perceived homosexual orientation will not be tolerated and anti-harassment training was required. It also promised the distribution of additional materials on harassment once completed. SLDN urges the Air Force to:

- ★ Systematically train on the DADTDPDH policy, emphasizing appropriate investigative procedures, and implement regulations instructing that the training occur yearly;
- ★ Create and distribute anti-harassment training materials and implement regulations instructing that anti-harassment training occur yearly;
- ★ Clearly identify safe places for airmen to report anti-gay harassment; and
- ★ Hold harassers accountable for their actions. This is important no matter the rank of the harasser.

In addition to emphasizing anti-harassment training, General Ryan’s memo emphasized the need for more extensive, and regular, training on DADTDPDH. It further stated that training should occur annually, and First Sergeants should be encouraged to attend supervisor training. SLDN urges the Air Force to:

- ★ Follow through with General Ryan’s recommendation regarding training on the policy and especially encourage the inclusion of senior non-

- commissioned officers (NCO) in this training. Senior NCOs are often first in the chain of command to be contacted by a lesbian, gay, or bisexual airman about the issue of sexual orientation;
- ★ Adopt regulations allowing airmen to reveal their sexual orientation to military health care providers during the course of treatment without fear that the information will be used to end their careers; and
- ★ Cease the delay and denial tactics they are employing in a perceived attempt to prevent SLDN from gathering relevant information which is in the public interest.

The Air Force can come closer to complying with DADTDPDH, and with protecting the safety and dignity of all its airmen, through more diligent training and emphasis on a zero-tolerance policy for anti-gay harassment.

No service member, from the lowest enlisted person to the highest commander, should be allowed to bring their own biases to the work place in a manner that humiliates, degrades, and threatens other service members.

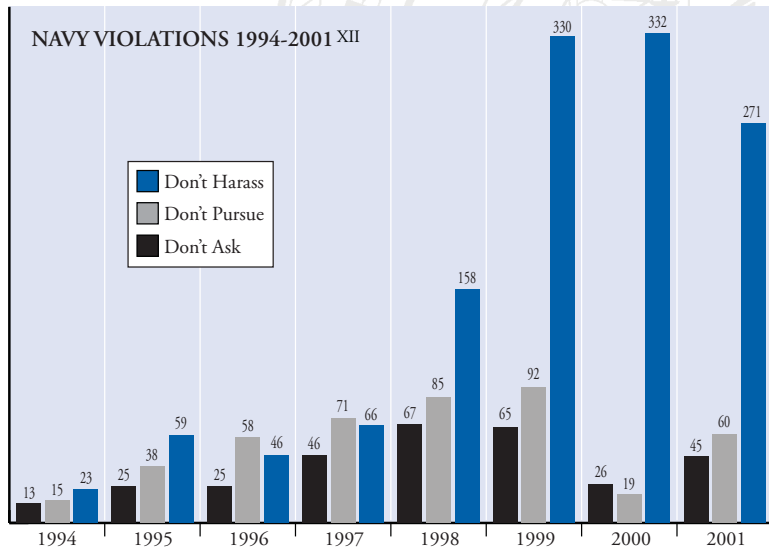
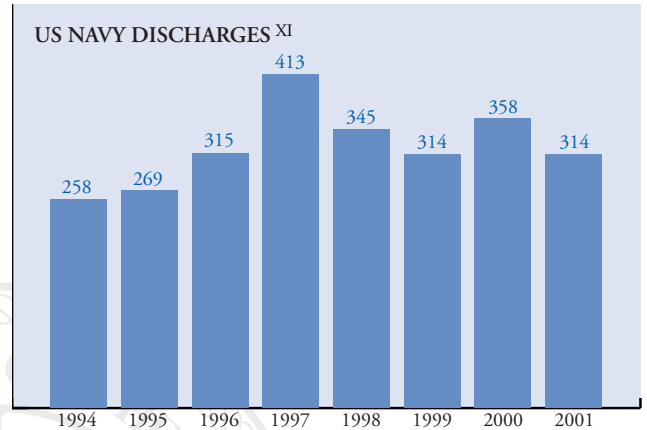


**FAILED LEADERSHIP
HIJACKING DIGNITY & RESPECT**

*"WE TREAT EVERYONE WITH DIGNITY AND RESPECT."
Asst. Sec. Of the Navy (Manpower & Reserve Affairs)⁸⁰*

At every turn, and in every way, the Navy abandoned the Assistant Secretary's commitment to "dignity and respect" in 2001. The Navy fired 314 men and women for being lesbian, gay or bisexual last year. SLDN documented 271 incidents of anti-gay harassment in the Navy during the past year, including

a very public display of anti-gay graffiti on a bomb used in Afghanistan in the war on terrorism. The Navy's harassment undermines its ability to retain qualified, skilled sailors.



**A PICTURE IS WORTH
A THOUSAND WORDS:
THE NAVY'S BATTLE WITH
ANTI-GAY HARASSMENT**

In October, as U.S. troops deployed for the war against terrorism, the *Associated Press* published a stark reminder of the "welcome mat" gay sailors receive in our Navy: **High Jack This Fags** (sic). Scrawled across a United States bomb aboard the *USS Enterprise*, this blatant display of anti-gay animus was quickly dismissed by Navy leaders as a "spontaneous act of penmanship" which should not be repeated.⁸¹



The Navy claimed, “We do... expect... leadership on the scene.”⁸² Nevertheless, accountability for those who wrote the message, and for those who allowed an environment to fester where such behavior was acceptable, was missing in action.

Navy Airman Paul Peverelle knew all too well the leadership’s refusal to adequately deal with anti-gay harassment on the *USS Enterprise*. He came out to his command in April 2001 because he wanted them to “know that this great work – and effort – is coming from a gay man.”⁸³ His command, however, refused to discharge him, believing, without evidence, that Peverelle was simply trying to avoid service. Four weeks later, Peverelle deployed for a six month tour of duty on the *USS Enterprise*. In September, after the terrorist attacks on America, the *USS Enterprise* was ordered to join the forces fighting the war against terrorists in Afghanistan.

Peverelle served his country honorably with one of the F-14 squadrons. Like all of our valued men and women in uniform, Peverelle was an integral part of *Operation Enduring Freedom*.

Peverelle served as an openly gay man. But not by choice. Having deployed after coming out to his command, he, like many gay men, was careful about the people in

whom he confided. Yet, in spite of his own caution, his command outed him. His sexual orientation became common knowledge on board the ship.

When members of his squadron learned that Peverelle had come out, they harassed him, threatening his safety,

teasing him, and calling him derogatory names. Peverelle says, “I actually had two guys in my berthing area call me ‘faggot,’ ‘gay bitch,’ and ‘ass licker,’ threatening to beat my ass the next chance they get.”⁸⁴ Peverelle reported the harassment to his commanding officer, who did nothing.

Shortly thereafter, as captured by the *Associated Press*, the consequences of harassment left unchecked became abundantly clear. **High Jack This Fags.** The Navy characteristically dismissed the epithet as “an isolated incident.”⁸⁵ The incident, however, was not isolated. It was borne of a climate that tolerates harassment from the top down. SLDN is asking the Navy to review the reports of harassment aboard the *USS Enterprise* and take strong, appropriate action now.

The *USS Enterprise* has since returned to Norfolk to a hero’s welcome. SLDN salutes the men and women who serve our country, particularly at this difficult time. The Navy, however, has now discharged Seaman Peverelle for being gay.

Unfortunately, anti-gay harassment in our Navy is far too common . . . and far too often unchecked.

A sailor stationed in Europe, for example, reports hearing daily anti-

gay comments from his fellow sailors. Comments such as “You’re such a poof,” “Quit being such a rainbow warrior,” and “Is your favorite cereal Fruit Loops?” The Navy’s response? “We can’t control what people say.”⁸⁶

Apparently, they cannot protect their men and women in uniform, either. Sonar Technician Third Class (E-4) Brian Moore’s experience with another “spontaneous act of penmanship” and lack of “leadership on the scene” further displays the horror gay Navy personnel face every day.

“Someone wrote in green letters across my bed sheets, FAG,” says Moore. “I was . . . really scared to sleep on this ship. I no longer feel safe here aboard the *USS Curtis Wilbur*. I feel that the environment here is intimidating and dangerous. I hear many anti-homosexuals (sic) comments and jokes everyday.”⁸⁷

Navy leadership appears to be immune to the policy’s “Don’t Harass” provision. A west coast sailor reports to SLDN that, soon after revealing to her command that she is bisexual, she found a threatening note on her pillow. While her command took more than a week to “check it out,” female sailors began shouting derogatory remarks to her. Upon her return from emergency leave, fellow sailors chased the sailor down a pier, and three days later, pushed her from behind, pulled her jacket over her head and kicked her as they laughed.

Shortly after SLDN urgently telephoned her command to secure the sailor’s safety, her department head questioned whether the injuries were “self-inflicted.” Sailors derive no sense of trust in their leaders when they fail to take harassment seriously and, instead, blame the victim. Ultimately, her command transferred her. She has since been discharged, but to SLDN’s knowledge, the Navy

has taken no action to hold accountable those who harassed her or to properly investigate the matter.

Rather than protecting its sailors – rather than complying with Secretary of Defense orders to adhere to the Pentagon’s Anti-Harassment Action

Plan⁸⁸ – the Navy continues to do nothing. Of the thirteen points outlined in the Pentagon’s plan, the Navy has complied with zero.

Steps taken by the Navy to address the policy – outlined in its General Military Training (GMT) – are not

harassment specific and are woefully inadequate. Dignity and respect? Instructions for preventing harassment before it starts? Identifying safe resources for those who are harassed? Holding those who harass accountable? Not on this watch. Not in this Navy’s GMT. Not in this Navy period.

**HAVING IT BOTH WAYS:
NAVY COMMANDERS CONTINUE
TO RETAIN PERSONNEL**

Though the Navy does little to protect gay sailors from harm, it retains them and puts them in harm’s way. SLDN has documented efforts by naval commands to retain gay sailors even after learning of their sexual orientation. While SLDN does not fault naval leaders for wanting to retain qualified, skilled, and motivated men and women, it does point out that doing so, when these sailors happen to be gay, violates federal law – and is dangerous when measures are not taken to protect their safety.

By asking sailors to “prove” their sexual orientation, or by dismissing their statements with a simple “I don’t believe you,” or “I don’t care,” commanders have found creative ways to temporarily retain personnel. Nothing in DADTPDH requires a sailor to prove his or her sexual orientation. Not only is ask-

ing for corroborative evidence prohibited, providing corroborative evidence can lead to criminal prosecution or other disciplinary actions. In fact, Section 125, Uniform Code of Military Justice, prohibits oral and anal sex – both homosexual and heterosexual. Articles 133 and 134, the General Articles, prohibit an even broader range of sexual and affectionate conduct.

If commanders sincerely doubt the truthfulness of a sailor’s coming out statement, they may request permission from the Secretary of the Navy to conduct a “substantial investigation,” defined by Navy policy. To SLDN’s knowledge, this was done only once during the past year in the case of an officer who came out to her command as a lesbian. Her command believed she was coming out simply to avoid deployment. After the officer did deploy for over six months, and was cited for “outstanding seamanship,”⁸⁹ her command withdrew its request for a sub-

stantial investigation, admitting that it had wrongly accused her of making a statement merely to avoid deployment. This officer continues to proudly serve.

Repealing the policy would allow commands to retain valued sailors, such as a west coast sailor SLDN recently assisted. The sailor, whose commanding officer described him as a “top ten percent performer” and “the kind of sailor you want to keep in the Navy,” came out to his command.⁹⁰ The commanding officer, hoping to keep a good sailor, offered to ignore the statement, let the sailor withdraw it, and continue to serve. The sailor considered the offer but ultimately declined. In response, the commanding officer recommended the sailor who was a ‘top ten performer’ receive a general, rather than honorable, discharge. After SLDN intervened, the sailor received an honorable discharge, and the Navy lost yet another valuable member to the shadows of “Don’t Ask, Don’t Tell.”

**YOU’RE BEING WATCHED:
“DON’T PURSUE” VIOLATIONS SOAR**

After a dramatic drop in the Navy’s “Don’t Pursue” violations in 2000, SLDN documented an equally dramatic increase in 2001. Sailors reported 60 “Don’t Pursue” violations last year, compared to just 19 in 2000. This sudden rise seems to be attributable to the Navy’s inability to understand or follow the limits of the policy.

A typical example is that of a young sailor who went on unauthorized absence after receiving two death threats, including one on his car which read, “You’re being watched, watch your ass.” Upon returning from UA and making a statement about his sexual orientation to escape the threats, the sailor was asked a series of illegal questions, including:

Are you seeing anyone?
Have you ever had sex on the ship?

Are there other gay sailors on the ship?
Do you ever go to gay bars in Norfolk?⁹¹

Evidently more interested in the sailor’s sexual activity than in his safety, the command then called the sailor’s parents, asking about his sex life. The command also called the sailor’s previous civilian employer to inquire about his sexual orientation. The “Don’t Pursue” regulations pro-

hibit these questions. Under the policy, commands are not permitted to ask about sexual relationships, to start a witch hunt for other gay sailors, or to probe associations at gay bars. Was it prurience, vengeance, or stupidity that led the command to want to discuss this

sailor's sex life with his parents and civilian employer? It was inappropriate in any case.

While only one example, Navy leaders, particularly junior leaders, frequently take part in pursuits by asking intrusive and illegal questions,

launching investigations without commanding officer approval and asking questions that clearly exceed proper investigative scope. While proper training could greatly reduce these violations, Navy leaders seem too busy invading bedrooms to bother with training programs.

"I GUESS YOU DON'T HAVE TO ANSWER THAT:"
ASKING AS HARASSMENT

Naval personnel largely seem unable to control their urge to illegally ask sailors about their sexual orientation. Peer "asking" is rampant. Speculation and gossip follow sailors who are perceived to be gay. And, despite knowing such questions are inappropriate, Navy leaders simply don't care.

One sailor reports to SLDN that, while at sea, he was asked by a much more senior sailor, "Are you gay? Oh, I guess you don't have to answer that." The statement plainly indicated that the sailor knew he was asking an inappropriate – and illegal – question.

Another sailor at a naval air station received an anonymous phone call, warning the sailor not to show up for work the next day. When he did not, the sailor received a second phone call "[I]t's a good thing you didn't show up," the caller said, "'cause we would've kicked your ass, and you would've gotten fucked up."⁹²

When the sailor's command master chief came to his home to find out why he missed work, the sailor told him of the anonymous calls. The command master chief, completely ignoring both the safety threat and the letter of the law, asked the sailor if he is gay. The threat to his safety went uninvestigated.

This corrosive environment undermines unit cohesion and is contrary to the Navy's own Core Values – Honor, Courage, Commitment. Elaborated, these "bedrock principles" affirm in part, that sailors must conduct themselves in the highest ethical manner in all relationships with peers, superiors and subordinates; adhere to a higher standard of personal conduct; show respect towards all people; and treat each individual with human dignity.⁹³ On a daily basis, SLDN sees the Navy's failure and absence of "leadership on the scene" hypocritically making these values appear to be mere "window dressing" or "eye-wash."

FRONT PAGE NEWS:
DISCHARGES DECLINE AT NAVAL
NUCLEAR POWER TRAINING COMMAND

Last year, the Navy's Nuclear Power Training Command (NNPTC), near Charleston, South Carolina, received considerable public attention for its discharge of 72 sailors under DADT-DPDH. The command, which accounted for 23% of all Navy gay

discharges that year, refused to discuss either with SLDN or the media any possible causes for such a high discharge rate. In addition, its commander repeatedly declined SLDN's offers to assist in uncovering why discharges were so high. The NNPTC's discharge numbers captured considerable media attention, including stories from the *Associated Press* and front page coverage in the *Charleston*

Post & Courier.⁹⁴

In 2001, following last year's intense media scrutiny, discharges at NNPTC declined dramatically to 28. SLDN has again asked to meet with the commander to determine whether there are lessons learned that could be shared with other naval commands. Unfortunately, the door remains shut tight.

WHERE DO WE GO FROM HERE?
PROTECTING THE MEN AND
WOMEN OF THE U.S. NAVY

The Navy's inability – or lack of desire – to protect its men and women in uniform is inexcusable. Ten years after the brutal murder of Seaman Allen Schindler, Navy leaders have done

nothing to implement or comply with Pentagon directives to prevent or curb harassment. Navy leaders must immediately implement those directives by issuing orders to commanders:

- ★ to actively and vigorously stamp out anti-gay harassment;
- ★ to clearly inform sailors where they can confidentially

turn to for help; and
★ to hold accountable those who persist in harassing sailors perceived to be gay.

Anything less smacks of indignity and disrespect for those who risk their lives to defend freedoms denied them by their nation.



**“ONCE A MARINE, ALWAYS A MARINE”⁹⁵
EXCEPT IF YOU’RE GAY**

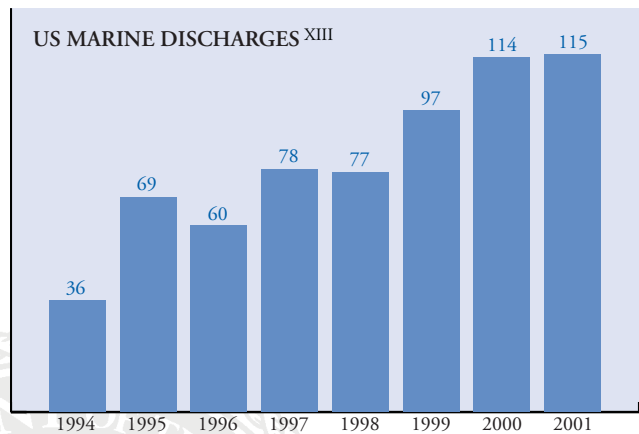
“EACH MARINE IS A NATIONAL ASSET. THEY MUST BE TREATED AS SUCH.... IT IS A TEAM EFFORT.... WE CANNOT PERFORM EFFECTIVELY WITHOUT ALL OF OUR PLAYERS.”

General J. L. Jones, Commandant of the Marine Corps⁹⁶

A bad situation deteriorating was the Marine Corps story in 2001.

Marines have performed admirably in Afghanistan. However, the Marine Corps’ treatment of its lesbian, gay and bisexual members continues a record of ineffective training and a failure to translate Marine policy into day-to-day reality throughout the Corps. The last year showed a dramatic increase in asking, pursuing and harassing of Marines, a direct result of poor training and failure to implement the Anti-Harassment Action Plan.⁹⁷ The increase in pursuit violations pointedly demon-

strates a leadership failure because in pursuit violations, it is the chain of command itself that is the violator. These increased pursuit violations are also disappointing because they indicate that the few positive improvements reported in this area last year were isolated incidents of individual commanders doing the right thing and not a Corps-wide trend.



At a time when every Marine is needed, the Marine Corps continues to discharge willing, able, combat-ready Marines simply because they are lesbian, gay or bisexual,⁹⁸ often conveniently ignoring stellar service records. In FY-2001, the Marine Corps reported discharging 115 enlisted Marines; no officers were separated.

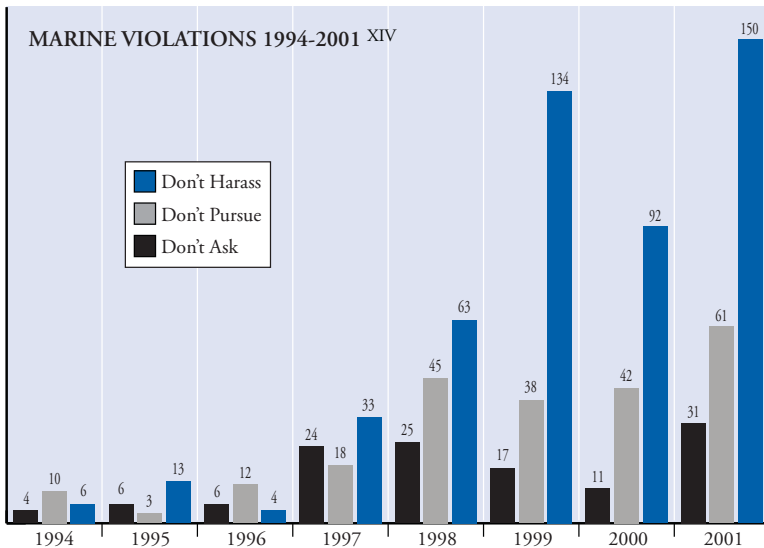
**A FAILURE TO TRAIN
IS A FAILURE TO LEAD**

“[I]n order to ensure [‘Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass’] consistent application, it is imperative that all Marines understand the policy and that all commanders . . . are clear on proper enforcement of the policy.”

Commandant of the Marine Corps⁹⁹

Despite DoD orders to do so,¹⁰⁰ Marine leaders have failed to ensure that DADT-DPDH is properly and uniformly

implemented in the field. This failure must stem from a systemic lack of training. The only other explanations for the leadership failure are gross incompetence or willful disobedience. Improperly trained, or untrained, Marines of all ranks are responsible for the increased asking



and harassment incidents reported to SLDN. More alarming, commands are performing unauthorized “substantial investigations” — reflecting that Marine leaders in the field, tasked with teaching junior Marines on DADTDPDH, do not understand and, therefore, cannot implement the Marine Corps policy.

In 2001, SLDN documented the most Marine Corps policy violations ever reported. “Don’t Ask” violations rose to their highest level, reflecting a

dramatic reversal of a downward trend since 1998 and almost triple the number reported during 2000. “Don’t Pursue” violations increased — reflecting the numerous unauthorized “substantial investigations” being conducted by local commands in clear violation of Marine Corps policy. “Don’t Harass” violations also increased.

Marine Corps recruit training on DADTDPDH is inadequate. The total training new Marines appear to receive consists of a form that must

be signed containing a recitation of the three grounds for discharge with a warning that “[c]ertain homosexual acts are subject to prosecution under the UCMJ.”¹⁰¹ One paragraph addresses harassment, including based on perceived homosexuality, without any guidance on inappropriate conduct.¹⁰² The only other mention of homosexuality appears in a briefing on the UCMJ— stating that a Marine may receive an “other than honorable” discharge for “misconduct involving homosexuality”— without explaining what constitutes misconduct.¹⁰³

Marines contacting SLDN overwhelmingly report that they have not been trained on the policy, particularly in regard to anti-gay harassment, by their commands. Commanders continue to fail to train their Marines that the Corps will not tolerate harassment based on perceived sexual orientation, that certain behavior constitutes harassment, and that harassers will be held accountable. Despite the Commandant’s orders, the policy is not being implemented and commands are not taking their duty to comply with DADTDPDH seriously.

AS A GENERAL RULE:
DON’T PURSUE

“As a general rule, when a service member states that he or she is a homosexual or bisexual and does not contest separation, little or no investigation is necessary.”

Commandant of the Marine Corps¹⁰⁴

“Have you engaged in conduct characteristic of homosexual individuals? If so, what type of activities have you or are you involved in . . . ? When have these occurred? . . . Where have these activities occurred? With Whom? Can any of these individuals be contacted . . . ? Have you been involved with recruits . . . ?”

Questions Asked of SSgt Stacy Strong, a Parris Island Drill Instructor (DI), by 1stLt Shiozawa, Marine Corps Inquiry Officer¹⁰⁵

In January 2000, the Commandant issued new guidance on the Homosexual Conduct Policy providing direction about conducting inquiries and investigations.¹⁰⁶ Despite this guidance, Marine commands continue to conduct improper investigations into the private lives of Marines without receiving authorization from the Assistant Secretary of the Navy (Manpower & Reserve Affairs) (ASN (M&RA)). Further, the Commandant, to SLDN’s knowledge, has not held any commanding officer accountable for these unauthorized investigations.

SLDN is unaware of any case in which authorization for a substantial investigation has been granted in a “statement” situation. This has not stopped commands from expanding the scope of inquiries, questioning the integrity of Marines, contacting family members and co-workers, and labeling unauthorized investigations as permissible inquiries. The Marine Corps, again, has failed to properly train commanders, Judge Advocates and inquiry officers regarding inquiry limitations and has failed to train its leaders that federal law does not require service members to “prove” they are gay.

Parris Island Drill Instructor Improperly Questioned

The “DI” is a legendary Marine Corps figure. Pop culture idealizes the Drill Instructor as the quintessential Marine¹⁰⁷ — the embodiment of Marine values: Honor, Courage and Commitment. The Corps selects these senior non-commissioned officers because of their outstanding leadership and their ability to mold recruits into Marines. Losing one of these elite NCOs is a dual blow to the Corps;

it loses a role model for young recruits and it takes years to groom a suitable replacement.

Staff Sergeant Stacy Strong, a nine-year veteran and Parris Island Drill Instructor, informed her command that she is a lesbian. After coming out, the appointed Inquiry Officer, First Lieutenant Shiozawa, asked SSgt



Strong a series of improper questions about her private sexual activity, and sought to obtain information about the private sexual relationships of civilians, and information about other Marines. Such information could potentially be used to pursue administrative separations or criminal prosecutions — the hallmarks of a witch hunt and well beyond a limited inquiry’s scope. When SSgt Strong refused to answer, 1stLt Shiozawa insinuated that Strong’s lack of cooperation indicated she may be lying about being a lesbian

in order to leave the Marine Corps.¹⁰⁸ 1stLt Shiozawa also doubted her truthfulness because SSgt Strong had never sought counseling before making her statement.¹⁰⁹ This comment ignores the fact that SSgt Strong had no military mental health resources where she could discuss her sexual orientation in confidence.

1stLt Shiozawa’s inquiry report shows that this officer has not been adequately trained. The report’s comments concerning SSgt Strong’s statement and refusal to answer improper questions misstate federal law and Marine DADTDPDH policy. The report indicates that 1stLt Shiozawa was seeking to determine if SSgt Strong’s statement was being made to avoid military service. A properly trained inquiry officer would have known that an investigation into the issue of whether a Marine made a false statement in order to seek separation is appropriately addressed by seeking prior approval from the ASN (M&RA) to conduct a substantial investigation.¹¹⁰

**WHEN MARINE OF THE YEAR IS NOT ENOUGH:
IMPROPER DISCHARGE
CHARACTERIZATIONS: POOR
TRAINING OR INTENTIONAL
RETALIATION?**

Another troubling trend is the tendency of commanders to consider a lesser discharge characterization than a member’s service warrants when a Marine makes a statement about sexual orientation. Marine regulations provide guidance on the proper characterization of service in a statement situation.¹¹¹ However, commanders repeatedly ignore these reg-

ulations, usually recommending general (under honorable conditions) discharges when honorable discharges are clearly warranted. An unwarranted general discharge will cause lesbian, gay and bisexual Marines to lose their Montgomery GI Bill benefits, some of their veterans benefits and may exclude them from some types of civilian employment. This trend reflects either a failure to properly train commanders, or a deliberate retaliatory effort to harm lesbian, gay and bisexual Marines for coming out.

Corporal Paul O’Dell’s story best

demonstrates this situation. O’Dell served for over 11 years in the United States Army, the West Virginia Army National Guard, and the Marine Corps. As a soldier, the Army repeatedly decorated him for meritorious service, selecting him as both



the Soldier of the Month or Soldier of the Quarter for his unit and honorably discharged him. Joining the Marine Corps mainly for its Core Values – Honor, Courage and Commitment¹¹² – Cpl O’Dell continued his stellar performance. In his final assignment, his battalion command selected Cpl O’Dell as the 2000 Marine Support Battalion Marine of the Year.¹¹³

Living in the barracks, other junior Marines repeatedly asked him about his sexual orientation. The harass-

ment included other Marines putting notes such as “cocksucker” and “faggot” on his door. Because of the continuous harassment, and his desire to uphold Marine Corps values, O’Dell finally told his command that he is bisexual.¹¹⁴ Previously, in recommending Cpl O’Dell for Marine of the Year, his company commander wrote, “[s]uperb leadership, military efficiency, professional excellence, and loyal dedication to mission accomplishment characterize [O’Dell’s] action.”¹¹⁵ The battalion com-

mander, Lieutenant Colonel N.C. Davis, having lauded O’Dell as his battalion Marine of the Year in March, recommended only a general discharge and said O’Dell had “no potential for further service” in April.¹¹⁶ LtCol Davis’ recommendation was completely unwarranted and could only be attributed to O’Dell’s coming out as bisexual. With SLDN’s prodding, LtCol Davis’ superiors ignored his recommendation and awarded Cpl O’Dell the honorable discharge his service merited.

UN-CHRISTIAN TENDENCIES: A CORPS OF HARASSMENT

“Mistreatment of any Marine is incompatible with our core values and is unacceptable conduct”

Commandant of the Marine Corps¹¹⁷

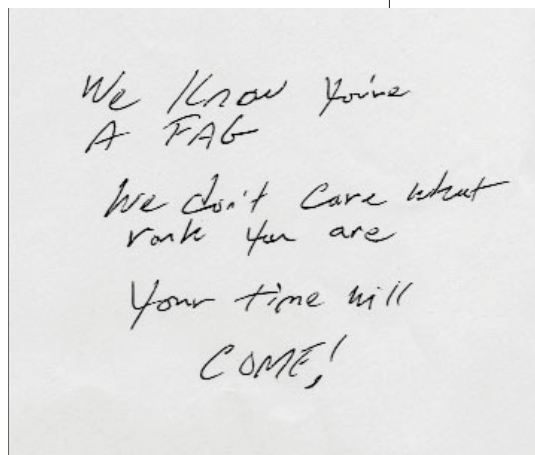
Almost unanimously, the Marines contacting SLDN during 2001 report an anti-gay climate permeating the Marine Corps. Junior Marines constantly ask and gossip about each other’s sexual orientation and cheer anti-gay comments or jokes. A 20 year-old private had Marines making sexual gestures at him, blowing kisses, making anti-gay jokes about him, and directing anti-gay slurs at him.¹¹⁸ Other Marines constantly hear the use of “fag” and “gay” as a derogatory term for anything considered inferior or weak. Death threats and threats of physical assault continue to be made. Even officers feel free to use anti-gay slurs without fear of accountability.

A Marine sought help from a chaplain. Instead of providing support, the chaplain called the Marine a “sinner” and suggested that the Marine needed counseling for “un-Christian tendencies.” When a chaplain’s personal religious beliefs

prevent him or her from providing assistance to lesbian, gay or bisexual service members, the chaplain has an obligation to bring in another chaplain who can help. Religious beliefs do not justify abusing a Marine because of his or her sexual orientation.

Marines is the ongoing struggle of a Marine whose story appeared in last year’s report.¹²⁰ After informing his new command about past anti-gay harassment he had experienced, this Marine was verbally harassed anew and a note containing a death threat was left on his car. When he reported the threat, his commander did nothing to investigate or protect him. When he sought medical help, his doctor harassed him for disclosing his sexual orientation. Having been

harassed at a second assignment, having seen his commander ignore his reports of harassment, having been harassed by a military doctor, this Marine felt he had no other option but to leave without permission. Upon his voluntary return, instead of investigating the reasons for his leaving and investigating the allegations of anti-gay



Note left on a Marine’s car¹¹⁹

Another example of Marine commanders’ willingness to ignore anti-gay harassment and retaliate against perceived lesbian, gay or bisexual

harassment, his battalion commander punished him.¹²¹

When officers are the harassers, when harassment is reported and the

chain of command does nothing, or when a chaplain or doctor, tasked to help Marines in crisis, instead harasses them, it is of little surprise

that an anti-gay climate permeates the Corps. The lack of training fuels this behavior, as does the widespread belief that the Corps will

not hold an anti-gay harasser accountable.

**UNACCEPTABLE VALUES:
ASKING AS HARASSMENT**

One area that definitely did not impact the past reduction in asking violations was improved training.

are also being asked. This constant asking, often rising to the level of harassment, forces Marines either to lie, challenging the Marine Corps Core Values, or to segregate themselves from their fellow Marines in vain attempts to avoid questioning, impeding the bonding needed for unit cohesion. By failing to teach Marines that asking is unacceptable and, in fact, threatens combat readiness, Marine leaders are ignoring their responsibilities to uphold regulations and care for all of their people.

“We do not ask whether a Marine is heterosexual, homosexual or bisexual”

Commandant of the Marine Corps¹²²

No training nurtures a belief among Marines that asking about a peer’s sexual

orientation, directly or indirectly, is acceptable conduct. Direct questions like “[a]re you gay?” or harassing questions such as “[a]re you a fag?” or “[a]re you a homo?” are commonplace in the barracks. Other indirect questions, such as asking a male Marine, “Where’s your boyfriend?”

During 2001, “Don’t Ask” violations reported to SLDN tripled. While SLDN noted that “Don’t Ask” violations in the Marine Corps had decreased during 2000, whatever factors that may have led to the reduction appear to have lost effect.

**THE TIME IS NOW:
BUILDING STRONG FORCEFUL
LEADERSHIP**

The Commandant of the Marine Corps must provide strong, forceful leadership. He must correct the training problem that exists throughout the force and must fully implement the Anti-Harassment Action Plan as he was directed to do more than eighteen months ago. Unless the Marine Corps leadership backs up its rhetoric with concrete action — proper training and accountability — the situation facing lesbian, gay and bisexual Marines will only continue to deteriorate. In order to halt further deterioration and fully comply with the Anti-Harassment

Action Plan, the Commandant must:

- ★ ensure that his Judge Advocates are properly trained and have the ability, and command support, to terminate unauthorized investigations;
- ★ task the Inspector General of the Marine Corps to investigate the status of training throughout the chain of command;
- ★ ensure that rank-appropriate training is being conducted annually at all levels in the chain of command;

- ★ hold commanders accountable for conducting DADT-DPDH training, particularly addressing anti-gay harassment;
- ★ clearly identify the proper channels to report anti-gay harassment;
- ★ clearly identify with whom Marines can discuss their sexual orientation in confidence (i.e. chaplains and defense attorneys); and
- ★ hold accountable those who violate Marine Corps policy.



**ANOTHER YEAR OF
SEMPER FORGOT US**

“WE CLEARLY SHARE THE COMMON GOAL OF ELIMINATING HARASSMENT BASED UPON SEXUAL ORIENTATION.... I BELIEVE THAT WE CANNOT REST IN OUR EFFORTS TO CONTINUALLY IMPROVE OUR TRAINING.”

RADM F. L. Ames, Assistant Commandant for Human Resources, after meeting with SLDN representatives November 2001¹²³

The play on words of the Coast Guard motto¹²⁴ describes the attention that the Coast Guard has paid to training and harassment under DADTDPDH.

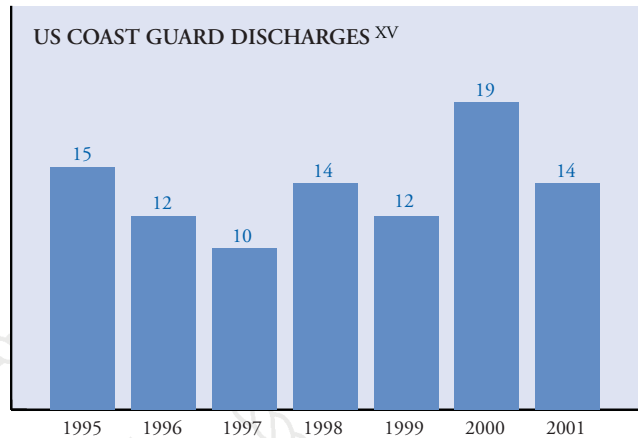
There is hope that Rear Admiral Ames’ recent pledge to eliminate anti-gay harassment bodes well for 2002. However, especially after September 11th, one cannot escape the conclusion that DADTDPDH is an anachronism in the Coast Guard.

September 11th changed the landscape for the Coast Guard, the smallest military service.¹²⁵ Before the attacks on America, the Coast Guard focused on its usual peacetime missions - law enforcement, water safety, search and rescue, environmental protection and security. Since September 11th, the Coast Guard has dramatically shifted its

priorities to homeland defense.¹²⁶ This increased

operational tempo has put an immense burden on resources and personnel.¹²⁷ To meet these demands, the Coast Guard has been authorized to mobilize its entire reserve force and has already recalled over one-third of its reserve strength.¹²⁸ Additionally, it has increasingly relied on the Coast Guard Auxiliary, 34,000 civilian volunteers, to meet its non-military commitments.¹²⁹

Despite the need to retain every member to meet increased operational requirements, the Coast Guard continues to discharge experienced, capable members simply because of their sexual orientation. During FY-2001, the Coast Guard



discharged 14 members.¹³⁰ While this is a reduction from FY-2000,¹³¹ the number of FY-2001 discharges is still higher than the average number of Coast Guard homosexual discharges recorded between 1995-1998.¹³²

The ban on allowing openly lesbian, gay and bisexual patriots from serving in uniform is not justified in any of the services. However, in the Coast Guard it seems even more absurd. Almost as many Team Coast Guard members (active duty and reserve military personnel, federal civilian employees, and civilian volunteers) are protected from anti-gay discrimination by Executive Order as are subject to DADT-

DPDH. Coast Guardsmen every day serve alongside openly gay people as they protect our nation: civilian employees, Auxiliarists, countless federal, state and local law enforcement and emergency services personnel, and private-sector employees. All credible evidence suggests the Coast Guard would enhance mission readiness by being free of DADTDPDH's bonds.

"[Kilmer] clearly lives our core values, demonstrates the highest professional skills and has the personal qualities we value and demand in our officer corps."

CAPT Philip M. Sanders¹³³



Petty Officer First Class Michael Todd Kilmer's story best exemplifies the untenable situation the services face when

forced to follow a discriminatory federal law. YN1 Kilmer, a 14-year Coast Guard veteran, stationed in Seattle, is described as "a leader in every sense of the word."¹³⁴ As a junior seaman, Kilmer performed as well as senior non-commissioned officers.¹³⁵ As a young petty officer, he worked as well as a seasoned commissioned officer.¹³⁶ He was the 1997 District Thirteen Enlisted Person of the Year and had been nominated by his superiors to be the Coast Guard Enlisted Person of the Year. Due to his outstanding performance, the Coast Guard selected him to be commissioned as an officer. While obtaining his college degree prior to reporting to Officer

Candidate School, he was selected as the University of Washington-Tacoma's 2000/2001 Student Leader of the Year. He was on the "fast-track" to a superior career as a Coast Guard "Mustang."¹³⁷

Petty Officer, soon to be Ensign, Kilmer exhibited "all of the qualities that the Coast Guard looks for in its officer leadership."¹³⁸ However, Kilmer is gay and reached a point where he could no longer lie about himself. Asking to serve as an openly gay officer, Kilmer wrote, "I would like to pursue a fulfilling career as a commissioned officer in the United States Coast Guard and live the Coast Guard's core values of honor, respect, and devotion to duty. Unfortunately, the 'Don't Ask, Don't Tell' policy does not permit me to serve the Coast Guard with integrity."¹³⁹

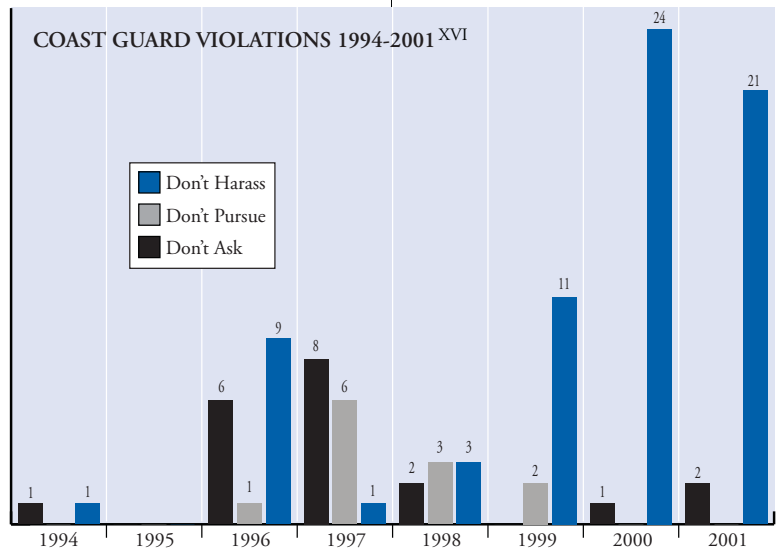
Simply because YN1 Kilmer is gay, the Coast Guard immediately started the discharge process. The Coast Guard lost fourteen years of leadership experience and a potentially outstanding officer. The Coast Guard did not want to lose Kilmer, but the policy gave it no choice. Michael Kilmer's commanding officer encouraged him to apply for a

civilian position in the same command — working with the same people, doing essentially the same job he had been doing as a military member. He was asked to join the Coast Guard Auxiliary in the district where he worked as a petty officer. His command plainly felt that serving in the same command would not have any effect on Coast Guard morale, unit cohesion, or good order and discipline.¹⁴⁰ Kilmer, however, declined as a matter of principle.

"Faggot." "Fag." "Dyke." "Carpet muncher." "We'll take care of business if we find out someone is gay." "Lock your door at night, [they] might try to crawl into bed with you because [they're] gay."

Examples of anti-gay slurs and comments reported to SLDN by Coast Guardsmen during 2001

The Coast Guard, for the eighth year in a row, leads all the services in its more humane treatment of its lesbian, gay and bisexual members. That is not to say that the Coast Guard is without its problems and cannot improve. Coast Guardsmen reported 23 policy violations to SLDN in 2001. For the second year



in a row, no “Don’t Pursue” violations were reported. “Don’t Ask” violations doubled – 2 incidents were reported in 2001; only 1 in 2000. Harassment reports fell to 21 – still almost double the number of harassment incidents reported in 1999.

Only 14 harassment incidents were reported between 1994-1998.¹⁴¹

Harassment continues to be the Coast Guard’s major issue in 2001. This on-going problem is fueled by a continued lack of clear, proactive

leadership condemning anti-gay harassment from the Secretary of Transportation and the Commandant to all Coast Guard personnel. There is no service-wide training on anti-gay harassment or DADTDPDH.

THE FRUITS OF POOR TRAINING - CONTINUED ANTI-GAY HARASSMENT AND DISTRUST OF THE CHAIN OF COMMAND

“The Coast Guard mandates that all members of Team Coast Guard . . . are to be treated fairly, with respect, dignity, and compassion.”

Coast Guard statement on Civil Rights¹⁴²

“When it comes to convincing your organization that you are serious . . . there is simply no substitute for keeping the issue on your front burner”

Admiral James M. Loy, Commandant of the Coast Guard, stressing the importance of diversity.¹⁴³

While Admiral Loy has been very forceful in expressing support for racial and ethnic diversity, he has not placed a similar emphasis on clearly stating to Team Coast Guard his intolerance of anti-gay harassment and support for properly training Coast Guardsmen on DADTDPDH. Though he has privately expressed that anti-gay harassment is not tolerated, 2001 passed without ADM Loy taking any concrete action to reduce anti-gay harassment or to mandate continued training in the Coast Guard. This occurred despite the DoD working group’s Anti-Harassment Action Plan recommendations¹⁴⁵ and SLDN’s

encouragement to make an unambiguous policy statement to his force, similar to ones issued by the other service chiefs.¹⁴⁶

The Coast Guard conducts DADTDPDH and anti-gay harassment training only at its accession points – Cape May, New Jersey and New London, Connecticut. The training is included as part of the Equal Opportunity Basic Human Awareness and Sexual Harassment curriculum.¹⁴⁷ The anemic amount of information on this complex policy that is presented to Coast Guardsmen at the beginning of their careers, with no requirement for unit-based refresher training, is clearly inadequate. In fact, the Coast Guard is not providing the most basic understanding necessary for its personnel to properly implement the policy and address the anti-gay harassment that is ongoing at the junior enlisted levels of the chain of command.

By failing to properly train its personnel that anti-gay harassment will not be tolerated and by failing to teach what constitutes harassment – threats, assault, anti-gay slurs, anti-gay jokes and comments, lesbian baiting, repeatedly asking peers if they are gay, and spreading rumors about an individual’s sexual orientation – the Coast Guard perpetuates a climate that tolerates it.

“Sincerity in leadership can be established only through consistency and attentiveness.”

Admiral Loy¹⁴⁸

Over 18 months ago, the DoD directed the Services to implement the Anti-Harassment Action Plan’s thirteen recommendations.¹⁴⁹ To date, the Coast Guard, which follows the DoD’s lead on matters pertaining to its homosexual conduct policy, has implemented none of them. The lack of command training sends a subtle, troubling message to members: commands are not sincere about curtailing anti-gay harassment and holding harassers accountable. The lack of command attention fosters a climate where young, junior enlisted personnel – the most common target of anti-gay harassment – are afraid to report anti-gay harassment. Their fear arises because they do not trust the chain of command to investigate their allegations, protect them from retaliation, and prevent them from becoming the target of an investigation into their sexual orientation. Coast Guardsmen also do not know to whom they can speak in confidence. Fear of losing a military career simply because an honest admission of sexual orientation was made to the wrong person stifles the open communication needed to report harassment to the chain of command.

2002: A NEW HOPE

There is hope that Coast Guard training will improve dramatically in 2002. In November 2001, SLDN representatives met with RADM F. L. Ames, the Assistant Commandant for Human Resources. In the wake of a frank and productive meeting, RADM Ames directed his staff to develop a DADTDPDH Coast Guard-wide training syllabus for initial and refresher training, to review current sexual harassment training, and specifically tasked that the training address:

- ★ harassment based on sexual orientation;
- ★ where members can go for confidential counseling; and
- ★ how to report anti-gay harassment.¹⁵⁰

RADM Ames's proactive leadership and willingness to address the shortcomings in Coast Guard training about DADTDPDH and anti-gay harassment is very encouraging. SLDN looks forward to working

with him and his staff on the common goals of correcting long-standing Coast Guard training shortfalls and ensuring that all Coast Guardsmen are treated with dignity and respect.

2001 was another year in which the Coast Guard failed to adequately address its problems with anti-gay harassment and poor training. SLDN is hopeful that 2002 will show an improvement in Coast Guard training. There must be proactive leadership to communicate to the uniformed members of the Coast Guard that anti-gay harassment will not be tolerated and those who harass or condone harassment will be held accountable. This proactive leadership will be demonstrated by:

- ★ a communication from the Commandant to his force addressing respect and dignity for all Coast Guardsmen, and stating, in unmistakable terms, that harassment based on perceived sexual orientation is not tolerated;

- ★ completing the overhaul of current anti-gay harassment training;
- ★ producing the Coast Guard-wide syllabus on DADTDPDH;
- ★ promulgating the newly developed training;
- ★ clearly identifying those individuals with whom Coast Guardsmen can speak in confidence about their sexual orientation (i.e. defense attorneys, chaplains);
- ★ designating the proper channels to report anti-gay harassment;
- ★ mandating annual, unit-based training; and
- ★ holding harassers and commanders who fail to address anti-gay harassment in their commands accountable.

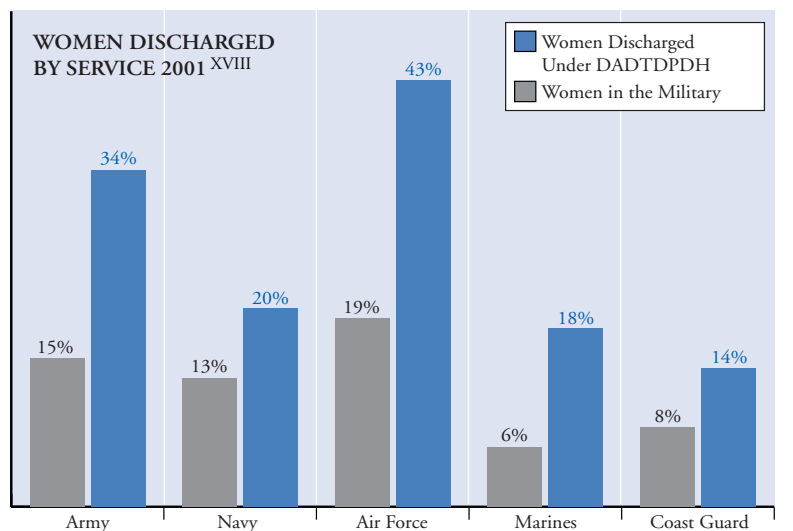
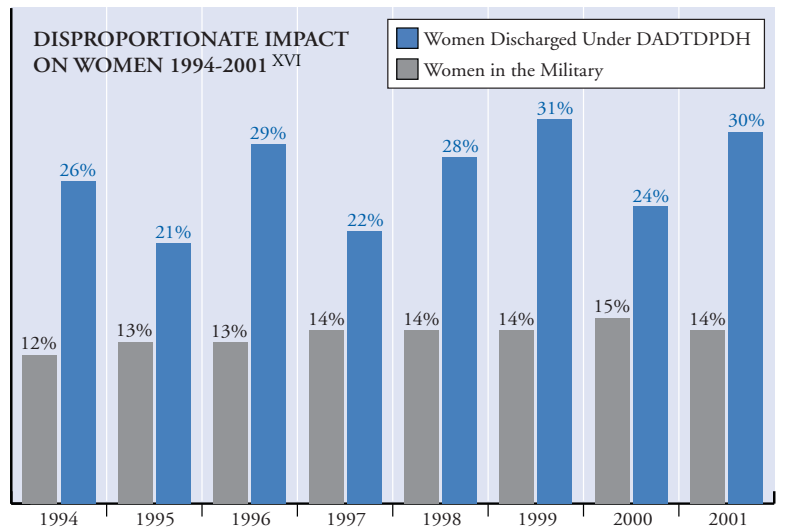
DISPROPORTIONATE IMPACT
ON WOMEN AND YOUTH

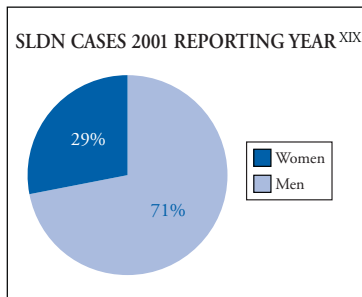


SLDN has long reported on the disproportionate impact of DADTDPDH on women and youth. This year is no exception.

Women have been consistently discharged at a rate nearly twice their presence in the service. This disproportionate impact is also borne out by SLDN cases. While women comprise approximately 14% of the total force strength, 29% of SLDN clients for the 2001 reporting year were women. Most alarming is the unofficial information SLDN has received that 43% of the Air Force's 191 discharges are women. This is extremely concerning since women only comprise 19% of the Air Force's total strength.

Women continue to be disproportionately impacted by DADTDPDH because of lesbian baiting and gender bias.¹⁵¹ Lesbian baiting is a form of anti-gay harassment as well as a form of sexual harassment. Women are often called lesbians, regardless of their sexual orientation, for a variety of retaliatory reasons. Some men accuse women who refuse their sexual advances of being lesbians. Other men who sexually





harass women accuse them of being lesbians when the women report the sexual harassment, in an attempt to turn the investigation away from their own misconduct. Others, men and women, accuse female superior officers of being lesbians in retaliation for poor performance evaluations or unpopular orders. Yet others accuse successful women of being lesbians to derail their careers. The stereotype remains that women in non-traditional job fields are viewed, as many have noted, as “dykes.”

“I am proud to have served my nation selflessly for five years.... At Fort Hood ... I am essentially forced to sit in silence, absorbing the disparaging [anti-gay] remarks without reply. These irresponsible and cruel episodes have eroded my morale and diminished my ability to perform my duties.”

Sergeant Tracy Cade, Fort Hood, Texas¹⁵²

Sergeant Tracy Cade is an example of what strong, high performing women can encounter in the military. SGT Cade was a military policewoman with five years of outstanding service and experience. After encountering daily harassment – largely from male soldiers who believed she was not feminine enough – SGT Cade felt compelled to come out and report the harassment. SGT Cade also filed an Inspector General complaint based on Fort Hood “leaders participating

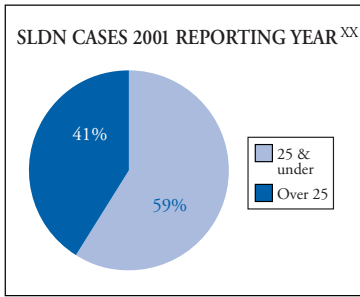


SGT Cade

in and tolerating incidents of sexual harassment and anti-gay harassment.” SGT Cade reports a climate where anti-gay epithets and mistreatment of soldiers perceived as gay is widespread. She reports “hearing a dozen or more anti-gay comments each day” and that “[Captain] Steven Curso directly

participates in the anti-gay harassment. [Captain] Curso frequently used the term ‘faggot’ in front of Soldiers ...” Cade further reports, “[m]ale soldiers frequently talk publicly about their interest in female-on-female sexual acts. These conversations take place in front of NCOs and ...[t]he NCOs do not correct the misconduct, allowing it to continue unabated.”¹⁵³

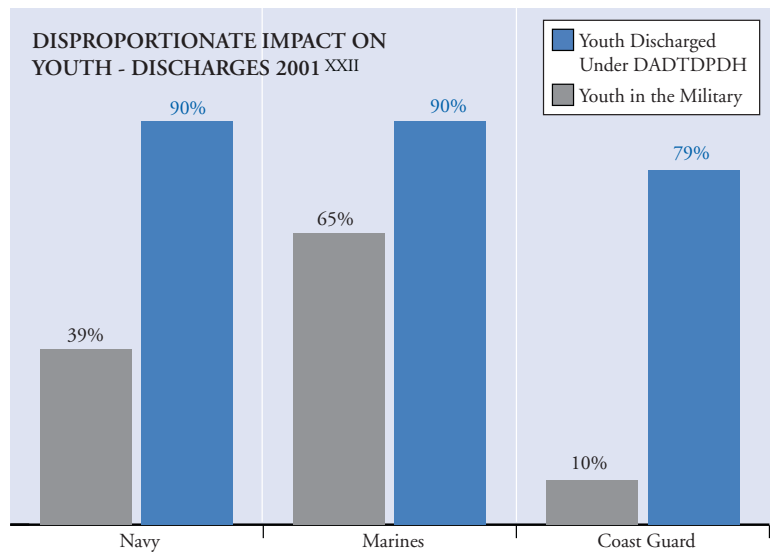
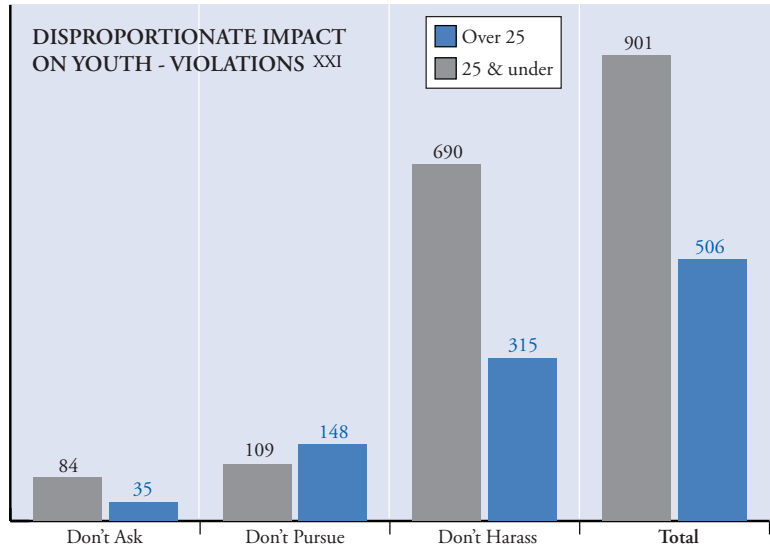
SGT Cade’s experience is not unusual. Women face an uphill battle while serving our country, battling enemies foreign and domestic, while also combating gender discrimination, lesbian baiting and sexual harassment. SLDN is gravely concerned by reports that DoD is considering dismantling one of the chief champions of women in the military – the Department of Defense Advisory Committee on Women in the Services, known as DACOWITS. Established in 1951 by Secretary George Marshall, DACOWITS has played an important role in military preparedness.¹⁵⁴ SLDN urges the DoD not to shirk its commitment to gender equality so essential to national security by maintaining DACOWITS.



DADTDPDH also heavily impacts young adults aged 18-25. While young adults comprise only approximately 42% of the armed forces, they comprised 90% of the Marine Corps and Navy discharges for FY 2001 and 79% of the Coast Guard's gay discharges.¹⁵⁵ Similarly, youth comprise a disproportionate number of SLDN's cases. Young adults comprised 59% of SLDN clients for reporting year 2001.

The vast majority of DADTDPDH violations were reported to SLDN by youth. Even more alarming, 64% of all harassment violations were reported to SLDN by youth. The DoD Inspector General has also found that the majority of anti-gay harassment is inflicted by junior enlisted men on other junior enlisted men, most of whom are young adults aged 18 and 25.¹⁵⁶

The military is the largest employer in the United States, with three million members on active duty and in the reserves. The military is also the largest employer of youth in our country, with more than one million of the active and reserve population between the ages of 18 and 25. The



service members most affected by the policy are young men and women. The military is a means by which young people move up and out of poverty, gain education and

life experience, and save themselves from family or community violence. To deny or cut short opportunities for young lesbians, gays and bisexuals who want to serve our country is wrong.

WHY DO SERVICE MEMBERS MAKE “STATEMENTS?”



“Don’t Tell” is commonly viewed as the opposite side of the coin from

“Don’t Ask.” While a service member cannot “ask” another service member about his or her sexual orientation, lesbian, gay and bisexual service members cannot “tell” the military about their sexual orientation.

Current policy, however, does not prohibit “telling” in all circumstances. It allows for gays to “tell” defense attorneys,¹⁵⁷ chaplains,¹⁵⁸ security clearance personnel¹⁵⁹ and, in limited circumstances, doctors who are treating patients for HIV.¹⁶⁰ The Army has also indicated that “Don’t Tell” applies to spousal communications.¹⁶¹ The “Don’t Tell” privacy rules do not explicitly state whether statements of sexual orientation in other private contexts are permitted.

The policy allows all service members to associate with gay friends, participate in gay-friendly organizations and read gay publications.¹⁶² Further, the policy states that “sexual orientation is a personal and private matter.”¹⁶³ SLDN believes that gay service members should be able to

talk openly and honestly with psychotherapists, physicians, law enforcement officials, family and friends. Our view is supported by those who helped craft the current policy, former Under Secretary of Defense Edwin Dorn¹⁶⁴ and Northwestern University military sociologist Charles Moskos.¹⁶⁵

However, SLDN’s interpretation is not reflected in current application of the policy. While some good commands do not punish service members who disclose their sexual orientation in private, discharge actions against other service members who make disclosures in similar contexts are routine. The reality is that service members who come out to anyone, anywhere, anytime risk discharge.

The Pentagon has suggested that gays are “voluntarily” coming out. The Pentagon has admitted, however, that it has no evidence to support its theory.¹⁶⁶ There is no such thing as a “voluntary discharge” under DADT-DPDH as gay service members who face discharge cannot elect to stay in service. They have no choice. However, most of the discharges under the policy are characterized as “statement” cases – where a service member has told someone about

their sexual orientation. This raises the question - why are service members making statements?

There are numerous reasons why service members decide to make statements to their commands about their sexuality. Some choose to make statements because they are being harassed; some choose to make statements because they are being threatened or blackmailed; some choose to make statements because they cannot lie about their lives any longer; and some choose to tell their commands about their sexuality because they believe, as Capt Monica Hill believed, that they have no other option.

“I, Captain Monica R. Hill... write this letter requesting a two year deferment in my report for active duty due to hardship. I am prepared to fulfill my ADSC, however, on July 14, 2001, my partner and dependent, Ms. Terri Cason, was diagnosed with terminal cancer.”

Capt Monica Hill to her Air Force Reserve command requesting an extension in her deferment of active service so she could care for her terminally ill partner.¹⁶⁷

In August 2001, Capt Hill and her partner of 14 years, Terri, were preparing to move near Andrews Air Force base, where Capt Hill was to begin her active duty service with the Air Force. Then, Terri was diagnosed with terminal brain cancer. Since it would have been irresponsible to move Terri from her treating physicians, Capt Hill sought to delay reporting to Andrews. If Capt Hill had been straight and Terri had been her husband, the Air Force would likely have granted her deferment request. But the Air Force could not grant a deferment request without good reason. Capt Hill had to explain why she needed the deferment, and thereby came out. The Air Force changed Capt Hill's orders – and has now begun an inquiry into possible separation. Were it not for DADTDPDH, Capt Hill would be serving our country even after the death of her partner on September 11, 2001. Instead, Capt Hill must fight to retain her Air Force career, grieve for her partner, and look for a new civilian job.

ARMY: *"Integrity: Do What's Right, Legally and Morally"*

United States Army Core Values¹⁶⁸

AIR FORCE: *"Integrity First"*

United States Air Force Core Values¹⁶⁹

NAVY: *"Honor: Be honest and truthful in our dealings with each other."*

United States Navy Core Values¹⁷⁰

Each of the services stresses the virtue of integrity. However, if lesbian, gay or bisexual service members "tell" anyone – military or civilian – their careers may be in jeopardy. Therefore, to protect against harm to their military careers, les-

bians, gays and bisexuals are forced to lie. For many service members, compromising their personal integrity is too much. Consequently, they are honest and "tell."

"The 'Don't Ask, Don't Tell' policy restricts my ability to be honest with my shipmates and prevents me from building the bonds with them that is necessary for unit cohesion."

Former Air Traffic Controller Second Class (E-5) Eric Lekberg¹⁷¹

There is a misperception that it is an easy thing not to "tell." Service members work closely with one another, often times living with one another. It is part of basic human interaction to discuss your life – what you do on the weekends, whom you are dating, whom you love. Lesbian, gay and bisexual service members are barred from having such simple communications with their co-workers. The strain is often unbearable. This prohibition against discussing basic information about one's life is harmful to combat readiness. It sows the seeds of distrust among service personnel and erodes the bonds of trust and camaraderie necessary for effective military units.

The issue of lesbian, gay and bisexual service members "telling" is further complicated by the very nature of human sexual development. Most men and women join the armed forces at a very young age. With few exceptions, lesbian, gay and bisexual youth have not fully internalized and accepted their sexual orientation at the point when they enlist or are commissioned in the service. SLDN's cases reflect this reality. Many young gay service members contact SLDN only after they have reached a comfort level with who they are. Once lesbians,

gays and bisexuals reach this level of self-acceptance, they find it more difficult to balance the requirements of "Don't Tell" with their need to lead healthy lives.¹⁷² Further, young lesbians, gays and bisexuals have far more examples of healthy role models today than ever before. Because lesbian, gay and bisexual service members see greater acceptance of homosexuality within society at large, it is understandably difficult for them to reconcile the contradictions inherent under "Don't Tell."

Another part of the explanation as to why so many discharges are for "statements" is the problem of service members being "outed." Sometimes people inform commands of a service member's sexual orientation – often as a way to get back at or punish the service member. SLDN believes that in most circumstances commands should ignore such information – and the motives of those providing the information to the commands be questioned. Unfortunately, such "outings" generally result in discharge.

There are two other areas of particular concern. In the past, SLDN has documented continued instances in which health care providers and chaplains reportedly turned in or threatened to turn in gay service members who sought their help in dealing with anti-gay harassment or the stresses imposed by DADTDPDH. These "outings" are often considered "statements." This year we have recorded only a few instances of this, one of which is described in the Air Force section another in the Marine Corps section, but it continues to be an issue of great concern.

Issues involving sexual orientation are central to the provision of adequate health care, but health care providers are often reluctant to "ask" out of well-placed concern not to

out gay service members. Service members are reluctant to “tell” for fear of being outed. While President Clinton’s Executive Order providing that communications with mental health professionals cannot be used as evidence in criminal proceedings was a step in the right direction, it has only limited value for gay service members who, for the most part, face administrative discharge proceedings, rather than criminal prosecutions.¹⁷³ While the DoD could extend this privilege to the administrative context, making it clear that private statements to health care providers are not the kind of statements that form a basis for discharge, it has failed to do so.

The Under Secretary of Defense’s clarification in the April 1998 report to the Secretary of Defense that health care providers are not, in fact, required to turn in gay service members was also a step in the right direction.¹⁷⁴ However, this clarification has not made it to the field – nearly four years later. Nor does it adequately address the problem, as it allows individual health care providers to turn in military members, whether required to or not, depriving service members of the ability to trust health care providers.

Military chaplains can be an invaluable resource for service members who are lesbian, gay or bisexual. While most chaplains keep the confidences of gay service members, some do not.¹⁷⁵ Others continue to give bad legal advice, such as directing service members to turn themselves in, rather than sending service members to a military defense attorney for advice about the

policy. Still others tragically berate gay service members, telling them they are sick, going to hell, and deviant. As in past *Conduct Unbecoming* reports, SLDN has again documented such cases including that described in the Marine Corps section. Telling gay soldiers to trust the chaplain on the one hand, and having a chaplain violate that trust undermines confidence. Sadly, such situations harm faith in the Chaplain Corps, harm lesbian, gay and bisexual service members, and – most importantly – harm military readiness.

SLDN has long recommended that chaplains receive specific instructions not to turn in gay service members who seek their help and to treat these conversations as confidential, per the chaplain-penitent privilege. Further, chaplains must be willing to recommend another chaplain if their personal beliefs preclude them from adequately counseling gay service members. As staff officers, chaplains should not engage in behavior that gay service members would likely perceive as harassment, in violation of the policy’s “Don’t Harass” component. Chaplains should assist commands in combating anti-gay harassment. The Pentagon should initiate policy training programs tailored for the unique duties of chaplains in serving the needs of lesbian, gay and bisexual service members.

In conclusion, why service members make statements is a complicated question to answer. However, the solutions are simple. Many lesbian, gay and bisexual service members are compelled to “tell” as their only recourse to escape harassment, including threats of physical vio-

lence. The solution lies in the hands of military leaders – stop anti-gay harassment in the ranks.

Some service members are outed to their commands by people they know in order to get them discharged. The solution again lies in the hands of military leaders – include specific guidance in the investigative limits. Reports to commands about service members’ sexual orientation should not automatically be credited and the motive behind the report should be questioned.

Some military therapists, physicians and chaplains out or harass gay service members. Combat readiness is harmed when gays and lesbians in uniform are denied safe access to health care and spiritual counseling. The solution again lies in the hands of military leaders – extend the privilege of mental health care providers and patients to the administrative context; make clear that health care providers and chaplains are not to turn in service members; properly train health care providers and chaplains and hold them accountable when they violate a service member’s confidence.

Lastly, many service members make statements because of the enormous ethical dilemma created by the policy or, like Capt Monica Hill, because they feel they have no other recourse. **Congress and military leaders should stop the hypocrisy and tension created when lesbian, gay and bisexual service members are required to lie about their sexual orientation in violation of their “core values.” End the ban on lesbians, gays and bisexuals serving in the armed forces.**

END NOTES

¹ Remarks by President Bush to Troops At Travis Air Force Base (CA) [10/17/01 - 1:30pm] available at <http://www.whitehouse.gov/news/releases/2001/10/20011017-20.html>

² See Electronic Message from Commandant of the Marine Corps to MARADMIN, *Stop-Loss Policy for Personnel Within C-130 Community* (Jan. 7, 2002) (CMC WASHINGTON DC//MRA// 070805Z JAN02 (MARADMIN 012/02)) (allowing for continued processing of involuntary separations including those based on sexual orientation) [hereinafter MARADMIN 012/02]; see also U.S. Total Army Personnel Command, *MILPER, TACP-PDT-PM, Message No. 02-064, Suspension of Voluntary Separation of Officers and Enlisted Soldiers from the Active Army (Stop Loss) in Selected Specialties* (Jan. 3, 2002), available at <http://perscomnd04.army.mil/MILPERmsgs.nsf/webframeset?OpenFrameSet.html> (last visited Feb. 1, 2002); Electronic message from Chief of Naval Operations to NAVOP, *Suspension of Provisions of Law and Navy Policy Relating to Retirement or Separation* (Sep. 28, 2001) (CNO WASHINGTON DC//N00// 282013Z SEP 01) (NAVOP 012/01); Electronic Message from HQ USAF/DP to various commands, *Stop Loss Approval and Guidance* (Sep. 22, 2001) (HQ USAF WASHINGTON DC//CC 220135Z SEP 01); Electronic message from HQ USAF/DP to various commands, *Stop Loss Update (For All Active, Reserve, and Air National Guard Personnel)* (Oct. 29, 2001).^c

³ Department of Defense Working Group, *Anti-Harassment Action Plan* (Jul. 21, 2000) [hereinafter *Anti-Harassment Action Plan*].^c

⁴ Whenever "gay" is used throughout this report, it is used as an all-inclusive term for lesbian, gay and bisexual.

⁵ SLDN's reporting year is February 16, 2001 to February 2, 2002. It is referred to in this report as the 2001 reporting year.

⁶ See *Anti-Harassment Action Plan*, *supra* note 3; Memorandum from Under Secretary of Defense (Personnel & Readiness) Bernard Rostker to the Secretary of the Army, Secretary of the Navy, Secretary of the Air Force, Chief of Staff of the Army, Chief of Naval Operations, Chief of Staff of the Air Force, and Commandant of the Marine Corps, *Approval and Implementation of the Action Plan Submitted in response to the DoD Inspector General's report on the Military Environment With Respect to the Homosexual Conduct Policy* (Jul. 21, 2000) (directing that the proposed action plan "be forwarded to the Services for implementation") [hereinafter Under Secretary of Defense (P&R) Bernard Rostker 2000 Implementation Memo].^c

⁷ Letter from Condoleezza Rice to SLDN (Feb. 20, 2001).^c

⁸ Remarks by President Bush at O'Hare International Airport (IL) (Sep. 27, 2001), available at <http://www.whitehouse.gov/news/releases/2001/09/20010927-1.html>.

⁹ C. Dixon Osburn, *A Policy in Desperate Search of a Rationale: The Military's Policy on Lesbians, Gays and Bisexuals*, 64 UMKC L. Rev. 199 (1995).

¹⁰ *Policy Concerning Homosexuality in the Armed Forces: Hearings Before the Senate Comm. On the Armed Services*, 103d Cong., 707 (1993) (statement of General Colin Powell) [hereinafter Powell Statement]. "[H]omosexuals have privately served well in the past and are continuing to serve well today." *Id.*

¹¹ DEP'T OF DEFENSE DIRECTIVE NO. 1332.14, *Enlisted Administrative Separations* E3.A1.1.8.1.1 (1994) [hereinafter DoDD 1332.14]; DEP'T OF DEFENSE DIRECTIVE NO. 1332.40, *Separation Procedures for Regular and Reserve Commissioned Officers* E2.3 (1997) [hereinafter DoDD 1332.40]. "A member's sexual orientation is considered a personal and private matter, and is not a bar to continued service . . . unless manifested by homosexual conduct . . ." *Id.*

¹² Powell Statement, *supra* note 10, at 709. "We will not witch hunt. We will not chase. We will not seek to learn orientation." *Id.*

¹³ DEP'T OF DEFENSE DIRECTIVE NO. 1304.26, *Qualification Standards for Enlistment, Appointment, and Induction: Applicant Briefing Item on Separation Policy*, addendum (1993). "The Armed Forces do not tolerate harassment or violence against any service member, for any reason." *Id.*

¹⁴ Memorandum from Secretary of Defense Les Aspin to the Secretaries of the Military Departments, *Implementation of the DoD Policy on Homosexual Conduct in the Armed Forces* (Dec. 21, 1993).^c "[The new policy] provides that investigations into sexual misconduct will be conducted in an evenhanded manner, without regard to whether the alleged misconduct involves homosexual or heterosexual conduct." *Id.*

¹⁵ President William J. Clinton, *Text of Remarks Announcing the New Policy*, WASH. POST, Jul. 20, 1993, at A12. President Clinton pledged that the policy would provide for "a decent regard for the legitimate privacy and associational rights of all service members." *Id.* Then Senator William Cohen understood that the "small amount of privacy under the current policy was intended to prevent the military from prying into people's private lives." *Policy Concerning Homosexuality in the Armed Forces: Hearings Before the Senate Comm. On Armed Services*, 103d Cong. 788 (statement of Senator William Cohen).

¹⁶ DoDD 1332.14, *supra* note 11, at E3.A4.1.4.3; DoDD 1332.40, *supra* note 11, at E8.4.3.

¹⁷ DoDD 1332.14, *supra* note 11, at E3.A4.1.3.2.2; DoDD 1332.40, *supra* note 11, at E8.3.2.2.

¹⁸ See DoDD 1332.14, *supra* note 11, at E3.A1.1.8.1.1; DoDD 1332.40, *supra* note 11, at E2.3.

¹⁹ See DoDD 1332.14, *supra* note 11, at E3.A4.1.1.1; DoDD 1332.40, *supra* note 11, at E8.1.1.

²⁰ See DoDD 1332.14, *supra* note 11, at E3.A4.1.1.1; DoDD 1332.40, *supra* note 11, at E8.1.1.

²¹ See DoDD 1332.14, *supra* note 11, at E3.A4.1.3.3.4; DoDD 1332.40, *supra* note 11, at E.8.3.3.4.

²² See Memorandum from Rudy de Leon, Under Secretary of Defense (P&R), to the Secretaries of the Military Departments, *Guidelines for Investigating Threats Against or Harassment of Service Members Based on Alleged Homosexuality* (Aug. 12, 1999) [hereinafter Under Secretary of Defense (P&R) Rudy de Leon 1999 Implementation Memo].^c

²³ See DoDD 1332.14, *supra* note 11, at E3.A4.1.1.3; DoDD 1332.40, *supra* note 11, at E8.1.3.

²⁴ See Office of the Under Secretary of Defense (Personnel and Readiness), Report to the Secretary of Defense: *Review of the Effectiveness of the Application and Enforcement of the Department's Policy on Homosexual Conduct in the Military*, Apr. 1998 at 11,12. [hereinafter Under Secretary of Defense (P&R) 1998 Report]^c; Under Secretary of Defense (P&R), Rudy de Leon 1999 Implementation Memo, *supra* note 22.

²⁵ See Under Secretary of Defense (P&R) 1998 Report, *supra* note 24, at 11.

²⁶ See DEP'T OF DEFENSE INSTRUCTION 5505.8, *Investigations of Sexual Misconduct by the Defense Criminal Investigative Organizations and Other DoD Law Enforcement Organizations*.

²⁷ See DoDD 1332.14, *supra* note 11, at E3.A4.1.1.3; DoDD 1332.40, *supra* note 11, at E8.1.3.; Under Secretary of Defense (P&R) 1998 Report, *supra* note 24, at 11,12; Under Secretary of Defense (P&R), Rudy de Leon 1999 Implementation Memo, *supra* note 22.

²⁸ See Under Secretary of Defense (P&R) 1998 Report, *supra* note 24, at 12.

²⁹ See *id.*

³⁰ See Under Secretary of Defense (P&R) Rudy de Leon 1999 Implementation Memo, *supra* note 22.

³¹ See Under Secretary of Defense (P&R) 1998 Report, *supra* note 24, at 12.

³² DEP'T OF DEFENSE DIRECTIVE 1304.26, *Qualification Standards for Enlistment, Appointment and Induction, Applicant Briefing Item on Separation Policy* (Dec. 21, 1993).

³³ The Army reported 615 "Don't Ask, Don't Tell" discharges for active duty enlisted personnel during fiscal year 2001. The Army Reserve Personnel Command reported one enlisted 2001 gay discharge. The resulting total, of 616, therefore does not include 2001 discharges for active duty officers, officer and enlisted National Guard personnel, ROTC Cadets, officers and enlisted personnel in other Army Reserve components. The 616 figure, therefore, under-represents the true number of Army lesbian, gay and bisexual discharges during fiscal year 2001. SLDN has requested the additional discharge data via Freedom of Information Act (FOIA) channels. As of the date of this report going to print, the Army has not provided the requested information.

³⁴ Memorandum from Department of the Army, Office of the Vice Chief of Staff, to Distribution, *Well-Being Strategic Plan* (Jan. 5, 2001), available at <http://www.odcsper.army.mil/directorates/vsb/well-being/stratplan.doc>

35 See Electronic Message from Headquarters, Department of the Army to ALARACT, *Homosexual Conduct Policy* (Jan. 10, 2000) (HQDA WASHINGTON DC 101700ZJAN 00) (ALARACT).^e

36 See *id.*; see also Electronic Message from Headquarters, Department of the Army, to ALARACT, *Dignity and Respect for All* (Jan. 10, 2000) (HQDA WASHINGTON DC 101800Z JAN 00) (ALARACT 008/00) [hereinafter ALARACT 008/00].^e

37 See *id.*

38 *Id.*

39 According to information obtained by SLDN from meetings with Army personnel in the Office of the Deputy Chief of Staff for Personnel (ODC-SPER) and Office of the Inspector General (IG).

40 Department of the Army Inspector General Fort Campbell Task Force, *DAIG Special Assessment/ Investigation of Allegations of Violations of the DoD Homosexual Conduct Policy at Fort Campbell A-1*, 5 (Jul. 2000) (Copies available from SLDN upon request) [hereinafter IG Fort Campbell Task Force Report].

41 Memorandum from Brigadier General Thomas J. Romig, Assistant Judge Advocate General of the Army, to SLDN (Oct. 2, 2001).^e Major General Romig has since been promoted and is now the Judge Advocate of the Army.

42 See ALARACT 008/00, *supra* note 36.

43 Memorandum from Major General Richard A. Cody to SLDN (Jan. 3, 2001).^e

44 Memorandum for Record from Fort Campbell, *Policy Letter #2 – Respect for All Soldiers* (undated).^e

45 Letter from Private Keagan Smith to Captain Fegley (Dec. 19, 2001).^e

46 See Memorandum from SLDN to Major General Cody, Commanding General of Fort Campbell, *SLDN Recommendations on Fort Campbell HCP Issues* (Dec. 13, 2001).^e

47 IG Fort Campbell Task Force Report, *supra* note 40.

48 Memorandum from Lieutenant General Dan K. McNeill, Ft. Bragg Commanding General, to SLDN (Oct. 4, 2001).^e

49 Letter from Staff Sergeant Leonard “Wayne” Peacock to Captain Jackson (Nov. 13, 2001).^e

50 Letter from Sergeant Carlos Torres to Captain Raymond (Oct. 4, 2001).^e

51 See Notification from United States Army to Staff Sergeant Leonard W. Peacock, *Certificate of Release or Discharge from Active Duty (Form DD-214)* (Dec. 3, 2001);^e Notification from United States Army to Sergeant Carlos Torres, *Certificate of Release or Discharge from Active Duty (Form DD-214)* (Dec. 21, 2001);^e

52 Letter from Private Mike Wooten to Captain Teague (Sep. 4, 2001).^e

53 Memorandum from Major Richard L. French to Chief of Staff, Fort Carson, Colorado, *AR 15-6 Investigation: Allegation of Soldier Harassment Based on Suspected Sexuality and the Threatening of Life by a Noncommissioned Officer* (Sep. 18, 2001).^e

54 United States Army, *The Army Training and Leader Development Panel Officer Study: Report to the Army* para. OS-19 (2001) (Copies available from SLDN upon request).

55 See United States Army Regulation 600-20, *Army Command Policy* § 4-19 (Jul. 15, 1999) (titled “Homosexual Conduct Policy”).

56 Letter from Specialist Orlando Estrella to Captain Davis (May 4, 2001).^e

57 Sworn Statement of Orlando Estrella, *DA Form 2823* (May 29, 2001).^e

58 See Confidential communication from an overseas Air Force member (Dec. 17, 2001).

59 See Letter from Rhonda Jenkins, Chief, Document Information & Services Branch USAF to SLDN (Jun. 14, 2001); Letter from Evan E. Cooper, CAPT, USAF to SLDN (Sept. 10, 2001); Letter from Angelica Cordero, Freedom of Information Act Manager, HQ AFPC/MSIMD to SLDN (Dec. 10, 2001); Letter from Isaac J. Nehus, Major, USAF, Acting Judge Advocate to SLDN (Aug. 9, 2001); and Letter from Ronald R. Chalecki, Acting Director, Communications and Information, HQ AFMC/SC to SLDN (Aug. 9, 2001).^e

60 Letter from Captain Monica Hill to her command (Jul. 22, 2001).^e

61 See *Guidelines for Fact-Finding Inquiries into Homosexual Conduct*, in IC 2000-1 to Air Force Instruction 36-3206, *Administrative Separation of Commissioned Officers A2.4.4* (Mar. 10, 2000) [hereinafter AFI 36-3206]. “Commanders or appointed inquiry officials may ask members if they engaged in homosexual conduct. But the member must first be advised of the DoD policy on homosexual conduct (and rights under Article 31, UCMJ, if applicable).” *Id.*

62 See E-mail from Captain Hill to SLDN (Dec. 11, 2001).^e

63 Email from Airman Smith to SLDN (Dec. 17, 2001).^e

64 See *Guidelines for Fact-Finding Inquiries into Homosexual Conduct*, in IC 2000-1 to Air Force Instruction 36-3208, *Administrative Separation of Airmen A4.1.3* (Mar. 10, 2000) [hereinafter AFI 36-3208]. “Inquiries shall be limited to the factual circumstances directly relevant to the specific allegations.” *Id.*

65 See Air Force Instruction 36-3207, *Separating Commissioned Officers* 1E.1.18 (Jul. 1, 1995). “Only certain homosexual conduct constitutes a basis for recoupment of educational assistance, special pay, or bonuses. Homosexual conduct constitutes a basis for recoupment if a characterization of UOTHC is authorized, or if conduct is punishable under the UCMJ (provisions governing sexual conduct).” *Id.* “If the officer voluntarily separates. The officer is subject to recoupment of a portion of education assistance, special pay, or bonus money received.” AFI 36-3206, *supra* note 61, at 4.37.2.2.

66 Memorandum from John M. Deutch, Deputy Secretary of Defense to the Secretaries of the Military Departments, *Recoupment of Education Assistance Funds, Bonuses and Special Pay from Persons*

Disenrolled or Separated on the Basis of Homosexual Conduct (May 17, 1994) [hereinafter Deutch Memorandum].^e

67 See *Hensala v. Department of the Air Force*, 148 F. Supp. 2d 988 (N.D. Cal. 2001).

68 Confidential email communication from Airman to SLDN (Jun. 20, 2001).

69 See Anti-Harassment Action Plan, *supra* note 3.

70 See Letter from SLDN to Air Force Department of Personnel, Attn: FOIA Officer (Nov. 5, 2001).^e

71 Memorandum from 1st Lt Megan Kuzmich to her command (Apr. 5, 2001).^e

72 Company Grade Officer Performance Report from Colonel Ricky Ales for 1st Lt Megan Kuzmich (Apr. 26, 2001).^e

73 Confidential telephone communication from Airman to SLDN (Dec. 21, 2001).

74 Letter from Angelica Cordero, Freedom of Information Act Manager, Headquarters Air Force Personnel Center, HQ AFPC/MSIMD, to SLDN (Dec. 10, 2001) [hereinafter Cordero letter].^e

75 See Letter from SLDN to Air Force Department of Personnel, FOIA Officer (May 3, 2001);^e Letter from SLDN to Rhonda M. Jenkins, Documentation Information & Services Branch (Jul. 23, 2001);^e Letter from SLDN to Air Force Department of Personnel, FOIA Officer (Nov. 1, 2001);^e Letter from SLDN to Air Force Department of Personnel, FOIA Officer (Jan. 8, 2001).^e

76 See Letters from SLDN to Barbara Strayer, FOIA Officer at Lackland AFB (Aug. 6, 2001);^e Letter from SLDN to Air Force Personnel Center, FOIA Officer at Randolph AFB (Nov. 5, 2001).^e

77 See Cordero letter, *supra* note 74; Letter from Captain Evan E. Cooper, Flight Commander, Air Force Education and Training Command, to SLDN (Sept. 10, 2001).^e

78 Letter from Major Isaac J. Nehus, Acting Staff Judge Advocate, Headquarters 88th Air Base Wing (AFMC), to SLDN (Aug. 9, 2001); see also Letter from Ronald R. Chalecki, Acting Director, Communications and Information, to SLDN (Aug. 9, 2001).^e

79 Memorandum from Michael E. Ryan, General, USAF, Chief of Staff, to ALMAJCOM-FOA/CC, *Homosexual Policy Guidance* (Mar. 10, 2001).^e

80 “Assistant Secretary of the Navy (M&RA) Vision, Mission, and Guiding Principles,” available at http://www.chinfo.navy.mil/navpalib/people/assist-secnav/asn_mra/mra_vmgp.html.

81 Letter from RADM. S. R. Pietropaoli, Chief of Navy Information, to Elizabeth Birch, Executive Director, Human Rights Campaign (Oct. 17, 2001) [hereinafter Pietropaoli letter].^e

82 *Id.*

83 E-mail from Paul Peverelle to SLDN (Nov. 6, 2001).^e

84 *Id.*

85 Pietropaoli letter, *supra* note 81.

86 Confidential communications between client and SLDN.

87 Letter from Brian Moore to his command (Jan. 7, 2002).^e

88 See Anti-Harassment Action Plan, *supra* note 3.

89 Confidential communications between client and SLDN.

90 Confidential communications between client and SLDN.

91 Confidential communications between client and SLDN.

92 Confidential communications between client and SLDN.

93 United States Navy, *Core Values of the United States Navy*, available at <http://www.chinfo.navy.mil/navpalib/traditions/html/corvalu.html> (last visited Jan. 3, 2002).

94 Tony Bartelme, *81 Gays Left Local Navy Sites*, THE POST & COURIER, Jun. 13, 2001, at 1A.

95 The Motto of the Marine Corps League. See, e.g., Marine Corps League, *Marine Corps League Northwestern Division*, available at <http://www.scn.org/civic/marines/> (last visited Jan. 22, 2002).

96 Electronic Message from General J.L. Jones, Commandant of the Marine Corps, to ALMAR, *Concern Over Senseless Fatalities* (Oct.18, 2001) (CMC WASHINGTON DC//CMC// 181715Z OCT 01 (ALMAR 051/01)) (addressing off duty injury and death).^e

97 See Anti-Harassment Action Plan, *supra* note 3.

98 See MARADMIN 012/02, *supra* note 2.

99 Electronic Message from Commandant of the Marine Corps to MARADMIN, *Homosexual Conduct Policy* (Jan.7, 2000) (CMC WASHINGTON DC//MP// 070800Z JAN 00 (MARADMIN 014/00)) (modified by MARADMIN 025/00) [hereinafter MARADMIN 014/00].^e

100 See Under Secretary of Defense (P&R) Bernard Rostker 2000 Implementation Memo, *supra* note 6.

101 United States Marine Corps, *Article 137, UCMJ Phase I Training Homosexual Conduct Policy* (undated) (forwarded by Letter from LtCol. J.R. West to Larry Rowe, SLDN Staff Attorney (Dec.12, 2001) (responding to FOIA request for Marine training material).^e

102 See *id.*

103 United States Marine Corps, Instructional Training Company, Support Battalion, Recruit Training Regiment, Marine Corps Recruit Depot, San Diego, California, *Lesson Plan, Article 137 UCMJ Phase II Training, Uniform Code of Military Justice 12* (Jan. 2001) (forwarded by Letter from LtCol. J.R. West to Larry Rowe, SLDN Staff Attorney (Dec.12, 2001) (responding to FOIA request for Marine training material).^e

104 MARADMIN 014/00, *supra* note 99.

105 Facsimile from SSgt Stacy Strong to Sharra E. Greer, Legal Director, SLDN (May 15, 2001) (forwarding 1stLt Shiozawa's questions).^e

106 See MARADMIN 014/00, *supra* note 99.

107 Several movie and television portrayals of Marine DT's include Jack Webb in *The DT*, Louis Gossett Jr. in *An Officer and a Gentleman*, R. Lee Ermey in *Full Metal Jacket*, and even, humorously, Frank Sutton in *Gomer Pyle USMC*.

108 Letter from 1stLt L.A. Shiozawa USMCR to Commanding Officer, Fourth Recruit Training Battalion, *Preliminary Inquiry Into the Circumstances Surrounding the Self Admission of Homosexuality by Staff Sergeant Stacy D. Strong* (May 17, 2001) [hereinafter Shiozawa Report].^e

109 See *id.*

110 See Electronic Message from Commandant of the Marine Corps, to ALMAR, *U.S. Marine Corps Implementation of DoD Homosexual Conduct / Administrative Separation Policy for Officers* (Feb. 28, 1994) (CMC WASHINGTON DC//MP// 281600Z FEB 94 (ALMAR 64/94)); MARADMIN 014/00, *supra* note 99.

111 See UNITED STATES MARINE CORPS MCO P1900.16F, *Marine Corps Separation and Retirement Manual (MARCORPSEPMAN) ¶6207* (May 30, 2001).

112 See Memorandum from Corporal Paul O'Dell, USMC, to CWO4 Carl J. Adams, Jr., Commanding Officer, Headquarters Company, Marine Support Battalion (Apr. 1, 2001) [hereinafter O'Dell Memo].^e

113 Electronic Message from LtCol. N.C. Davis, USMC, to Various Subordinate Commands (Mar.1, 2001) (MARSPTBN FT GEORGE G MEADE MD 011542Z MAR 01).^e

114 See O'Dell Memo, *supra* note 112.

115 Letter from Commanding Officer, Headquarters Company, to Commanding Officer, Marine Support Battalion, *Nomination for Marine Support Battalion Marine of the Year ICO Corporal Paul H. O'Dell* (Feb. 8, 2001).^e

116 Letter from Commanding Officer, Marine Support Battalion, to Commanding Officer, Marine Corps Base, Quantico, VA, *Recommendation for Administrative Separation By Reason of Homosexual Conduct in the Case of Corporal Paul H. O'Dell USMC* (Apr. 5, 2001).^e

117 MARADMIN 014/00, *supra* note 99.

118 See E-mail from Marine private to Patrick Moloughney, SLDN staff paralegal (May 31, 2001).^e

119 Letter from Jeffrey Cleghorn, SLDN Staff Attorney, to Major General Edward Hanlan, Jr., USMC, (Apr. 17, 2001).^e

120 See STACEY L. SOBEL ET AL., CONDUCT UNBECOMING: THE SEVENTH ANNUAL REPORT ON "DON'T ASK, DON'T TELL, DON'T PURSUE, DON'T HARASS" 86-87 (2001).

121 See *supra* note 119.

122 See MARADMIN 014/00, *supra* note 99.

123 Letter from RADM F.L. Ames, Assistant Commandant for Human Resources to Larry R. Rowe, Staff Attorney, Servicemembers Legal Defense Network (Nov. 8, 2001).^e

124 The Coast Guard motto is *Semper Paratus* (Always Ready).

125 "Team Coast Guard" consists of approximately 35,000 active duty personnel, 8,000 reservists, 8,000 civilian employees, and 34,000 civilian auxiliary members. See United States Coast Guard, *Personnel Statistics*, available at <http://www.uscg.mil/hq/g-cp/comrel/factfile/Factcards/PersonnelStats.html> (last visited Jan. 2, 2002); see also United States Coast Guard, *Out of Uniform - Civilians in the Coast Guard*, available at http://www.uscg.mil/hq/g-cp/history/h_cgcv.html (last visited Jan. 3, 2002); David Vergun, *Homeland Defense Begins at the Water's Edge - On Patrol With the U.S. Coast Guard*, SEA POWER, Dec. 2001, at 50.

126 See Richard R. Burgess, *U.S. Strikes Terrorist, Taliban Sites; Sea Services Mobilize for Long War - Coast Guard Plays Key Role in Homeland Security Strategy*, SEA POWER, Nov. 2001, at 24 (citing RADM Terry M. Cross, Assistant Commandant for Operations).

127 See William Booth, *A Changed America / Ports - Where Sea Meets Shore, Scenario for Terrorists - Nation's Vulnerable Ports Revamp Defense*, WASH. POST, Jan. 3, 2002, at A6 (reporting that reserve recall "is costing \$1 million a day") (quoting CAPT J.M. Holmes, Coast Guard Commanding Officer for Long Beach-Los Angeles, "Frankly? This is not sustainable. It wears down our resources, and it wears down our people.").

128 See Vergun, *supra* note 125, at 50.

129 See *id.*

130 See E-mail from Chelle Price, Computer Specialist, Management Information Services, Coast Guard Human Resources Service & Information Center, to Larry R. Rowe, Staff Attorney, SLDN (Nov. 2, 2001).^e

131 See Letter from Ensign D.J. Kennedy, United States Coast Guard Personnel Command, to Sharra E. Greer, Legal Director, SLDN (May 22, 2001).^e

132 See C. DIXON OSBURN ET AL., CONDUCT UNBECOMING - THE SIXTH ANNUAL REPORT ON "DON'T ASK, DON'T TELL, DON'T PURSUE" tbl. "Annual Gay Discharges Under "Don't Ask, Don't Tell, Don't Pursue" (1999) [hereinafter 6TH ANNUAL REPORT].

133 Letter from CAPT P.M. Sanders, Commander, Thirteenth Coast Guard District (o), to Commander, Coast Guard Personnel Command (CGPC) (Feb. 24, 1999) (endorsing YN1 Kilmer's application for PPEP and recommending his selection).^e

134 Letter from CAPT W.W. Peterson to President, PPEP Selection Panel (Feb. 25,1999) (recommending YN1 Kilmer's selection).^e

135 See Letter from YN1 Michael Todd Kilmer to Coast Guard Personnel Command (CGPC-epm) (Dec. 19, 2001) (quoting YNCM Borders, Supervisor D13 (a), CG-3307 of May 30,1990).^e

136 See *id.* (quoting Captain Losser, Division Chief, D13 (a), CG-3307 of Jun. 9, 1992).

137 Mustang is military slang for an officer who has been promoted from the enlisted ranks.

138 Letter from CAPT J.J. Hathaway to President, PPEP Selection Panel (Feb. 23, 1999).^e

139 Letter from YN1 Michael Todd Kilmer to CAPT Philip M. Sanders (Aug. 30, 2001).^e

140 Telephone interview by Paula M. Neira with YN1 Michael Kilmer (Jan. 2, 2002).

141 6TH ANNUAL CONDUCT UNBECOMING REPORT, *supra* note 132, at tbl. "'Don't Harass' Violations by Service 1994-1998."

142 United States Coast Guard, *Civil Rights*, available at [http://www.uscg.mil/hq/g-cp/comrel/factfile/Factcards/Civil Rights.html](http://www.uscg.mil/hq/g-cp/comrel/factfile/Factcards/Civil%20Rights.html) (last visited Jan. 2, 2002).

143 Admiral James M. Loy, Address at NNOA National Conference (Jul. 18, 2001), available at <http://www.uscg.mil/Commandant/Speeches/Diversity%20Taming%20the%20Tiger%20071801.html> (last visited Jan. 2, 2002).

144 Letter from Thomas F. Fisher, Office of the Commandant, United States Coast Guard, to Larry R. Rowe, Staff Attorney, Servicemembers Legal Defense Network, (Jul. 17, 2001).^e

145 See Anti-Harassment Action Plan, *supra* note 3.

146 See STACEY L. SOBEL ET AL, CONDUCT UNBECOMING - THE SEVENTH ANNUAL REPORT ON "DON'T ASK, DON'T TELL, DON'T PURSUE" AT 90 (2000).

147 Letter from RADM F. L. Ames, Assistant Commandant for Human Resources to Larry R. Rowe, Staff Attorney, Servicemembers Legal Defense Network (Sep. 17, 2001).^e

148 See *supra* note 143.

149 See Anti-Harassment Action Plan, *supra* note 3.

150 See *supra* note 123.

151 See Michelle M. Benecke and Kirsten S. Dodge, *Military Women: Casualties of the Armed Forces' War on Lesbians and Gay Men*, in GAY RIGHTS, MILITARY WRONGS: POLITICAL PERSPECTIVES ON LESBIANS AND GAYS IN THE MILITARY 71-108 (Craig A. Zimmerman, ed., 1996).

152 Letter from Sergeant Tracey Cade to Captain Timothy Smith (Jul. 26, 2001).^e

153 Letter from SLDN to Inspector General, Ft. Hood, (Oct. 2, 2001) (filing an Inspector General report on behalf of Tracey Cade).^e

154 DoD News Briefing, Wednesday, October 22, 1997 - 1:30 p.m., Dr. Judith Youngman, Chair, DACOWITS, available at http://www.defenselink.mil/news/Oct1997/t10301997_tacowits.html (last visited Jan. 29, 2002).

155 SLDN does not have the 2001 discharge numbers by age for the Army or the Air Force.

156 OFFICE OF THE INSPECTOR GENERAL DEPARTMENT OF DEFENSE, *Report on the Military Environment with Respect to the Homosexual Conduct Policy*, Report No. D-2000-101, 18 (Mar. 16, 2000).

157 See MIL. R. EVID. 502.

158 See MIL. R. EVID. 503.

159 See DEP'T OF DEFENSE DIRECTIVE NO. 5200.2, *DoD Personnel Security Program* encl. 3.7 (1997); see also DEFENSE INVESTIGATIVE SERVICE MANUAL, DIS-20-1-M, encl. 18.C (1993).

160 See DEP'T OF DEFENSE DIRECTIVE NO. 6485.1, *Human Immunodeficiency Virus-1 (HIV-1)* encl. 3.2.1.9 (1991). "Information obtained from a Service member during, or as a result of, an epidemiological assessment interview may not be used against the Service member (in adverse criminal or administrative actions)." *Id.*

161 United States Army, *TRADOC Common Core TSP 181-A-0001, Identify the Legal Implications of the Homosexual Conduct Policy*, app. 4, fig. 4, available at <http://www.adtdl.army.mil/cgi-bin/atdl.dll/cctsp/181-a-0001/181-a-0001.htm> (last visited Nov. 2, 2001).

162 See DoDD 1332.14, *supra* note 11, at E3.A4.1.3.3.4 (stating "[credible information does not exist when] the only information known is an associational activity such as going to a gay bar, possessing or reading homosexual publications, associating with known homosexuals . . ."); DoDD 1332.40, *supra* note 11, at E.8.3.3.4.

163 DoDD 1332.14, *supra* note 11, at E3.A1.1.8.1.1; DoDD 1332.40, *supra* note 11, at E.2.3.

164 See Letter from Edwin Dorn to The Honorable Carol DiBattiste, Under Secretary of the Air Force (May 1, 2000).^e "Recent reports have indicated that physicians, EEO personnel, inspectors general and law enforcement personnel believe that they are obliged to turn in service members who reveal their sexual orientation when they report anti-gay harassment, or who are discovered to be gay during an investigation into the reported harassment. If these practices occur, then they have the effect of punishing the victim. This is not what I anticipated or intended when I was involved in the development of DoD's 1997 anti-harassment guidance." *Id.*

165 See Letter from Charles Moskos, Professor, Northwestern University, to The Honorable William S. Cohen, Secretary of Defense, (Apr. 12, 2000).^e "In my opinion, military members who reveal their sexual orientation during private medical treatment

sessions or in the course of reporting harassment and threats are not 'telling' in a manner contemplated under the policy. It is appropriate for officials to assist these service members, not turn them in. Indeed, it is the 'outing' of service members to their units that triggers concerns about unit cohesion." *Id.* Our view is further supported by former Reagan Administration defense official Lawrence Korb (Mr. Korb is now with the Council on Foreign Relations); see Letter from Lawrence J. Korb to The Honorable Carol A. DiBattiste, Undersecretary of the Air Force (May 8, 2000).^e "My primary concerns are the on-going harassment of service members by their supervisors and peers, and the lack of safe places for service members to turn within the military if they are facing harassment, medical or mental health problems or seeking spiritual guidance." *Id.*

166 Under Secretary of Defense (P&R) 1998 Report, *supra* note 24, at 2, 5.

167 Letter from Captain Monica Hill to her command (Jul. 22, 2001).^e

168 United States Army, *Army Values: Integrity*, at <http://www.dtic.mil/armylink/graphics/integrity.jpg> (last visited Mar. 4, 2001).

169 United States Air Force, *The Core Values of the Air Force*, available at http://www.af.mil/news/speech/current/The_Core_Values_of_the_Air_.html (reporting a speech given by The Honorable Sheila E. Widnall, then Secretary of the Air Force, to Air Force Academy Cadets, at Colorado Springs on Apr. 18, 1996) (last visited Mar. 4, 2001).

170 See *supra* note 93.

171 Letter from AC2 Eric Lekberg to his command (May 27, 2001).^e

172 See Vivienne Cass, Ph.D., *Sexual Orientation Identity Formation: A Western Phenomenon*, in TEXTBOOK OF HOMOSEXUALITY AND MENTAL HEALTH 227, 231-47 (Robert P. Cabaj & Terry S. Stein, eds., 1996).

173 See Exec. Order No. 13140 (Oct. 7, 1999).

174 Under Secretary of Defense (P&R) 1998 Report, *supra* note 24, at 2, 5.

175 See generally Army Regulation 165-1, *Chaplain Activities in the United States Army* (1998) "A privileged communication is defined as any communication to a chaplain [including those made as a matter of conscience]." *Id.* at 4.4.m(1).

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I "Total Gay Discharges," Source – Department of Defense, United States Army, United States Navy, United States Air Force, Unofficial Source Outside the Air Force for FY 2001, United States Marine Corps, United States Coast Guard

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III "Total Violations 1994-2001," Source – Servicemembers Legal Defense Network

IV "US Army Discharges," Source – Department of Defense, United States Army

V "Army Don't Harass Violations 1994-2001," Source – Servicemembers Legal Defense Network

VI "Pie Chart of Fort Campbell Discharges," Source – United States Army

VII "Army Don't Pursue Violations 1994-2001," Source – Servicemembers Legal Defense Network

VIII "Army Don't Ask Violations 1994-2001," Source – Servicemembers Legal Defense Network

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