

# Conduct Unbecoming

THE SEVENTH ANNUAL REPORT ON

“DON'T ASK, DON'T TELL,

DON'T PURSUE, DON'T HARASS”

by

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## **ACKNOWLEDGMENTS**

The authors would like to gratefully acknowledge the assistance of the entire SLDN staff in producing and distributing *Conduct Unbecoming: The Seventh Annual Report on “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass.”* We especially thank Patrick D. Moloughney, Paula M. Neira, Sharra E. Greer, Larry Rowe, Steve Ralls, and Layton Mitchell for their exceptional dedication and hard work. We would also like to acknowledge Kathi S. Westcott and Michelle M. Benecke for their contributions to this report.

## **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”**

*Table of Contents*

**Volume 1**

**SLDN FINDINGS** .....i

**SLDN RECOMMENDATIONS** .....iv

**EXECUTIVE SUMMARY**.....1

***Pentagon Fails To Issue Anti-Harassment Rules  
As Anti-Gay Hostility Continues Unabated***..... 2

***While Asking and Pursuits Decrease, Air Force Pursuits  
Increase In Recoupment Cases, and Navy Pursuits  
Decrease as It Attempts to Retain Openly Gay Sailors*** ..... 4

***What is “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass?”*** ..... 6

**DON’T ASK**.....8

***Army “Don’t Ask” Violations Decrease Due to Good Training*** ..... 10

*Fort Knox Commanding General Sets Leadership Example*..... 10

*Examples of Army “Don’t Ask” Violations* ..... 10

***Army “Don’t Ask” Summary***..... 11

***Air Force “Don’t Ask” Violations Increase Sharply;  
Weak Training Likely Responsible***..... 11

*Ongoing “Don’t Ask” Violations at the Defense Language  
Institute, Monterey*..... 12

*Additional Examples of Air Force “Don’t Ask” Violations* ..... 13

***Air Force “Don’t Ask” Summary***..... 13

***Navy “Don’t Ask” Violations Decrease Sharply Despite  
Weak Training*** ..... 14

*Examples of Navy “Don’t Ask” Violations*..... 14

***Navy “Don’t Ask” Summary***..... 16

***Marine Corps “Don’t Ask” Violations Decrease, but  
Policy Training Weak*** ..... 16

*Examples of Marine Corps “Don’t Ask” Violations* ..... 16

***Marine Corps “Don’t Ask” Summary***..... 17

<b>Coast Guard “Don’t Ask” Violations .....</b>	<b>17</b>
<b>“Don’t Ask” Conclusion.....</b>	<b>17</b>
<b>DON’T TELL.....</b>	<b>19</b>
<b>Military Health Care Providers Continue to “Out” Gay Patients .....</b>	<b>21</b>
<i>Army Doctors Directed to “Out” Gay Patients.....</i>	<i>22</i>
<i>Goodfellow Air Force Base (AFB) Doctor Outs Patient .....</i>	<i>22</i>
<i>Keesler AFB Psychotherapist “Outs” Bisexual Patient .....</i>	<i>23</i>
<b>Some Military Chaplains “Tell” and Harass.....</b>	<b>24</b>
<i>USS Dubuque Navy Chaplain “Tells” .....</i>	<i>25</i>
<i>Army Chaplain in Germany Harasses Lesbian Sergeant .....</i>	<i>25</i>
<i>Fort Benning Chaplain Berates Gay Soldier .....</i>	<i>27</i>
<b>The Story Behind “Telling:” Gays “Tell” to Escape</b>	
<b>Harassment and Live with Integrity.....</b>	<b>28</b>
<i>Coming Out to Escape Harassment .....</i>	<i>28</i>
<i>Coming Out for Reasons of Integrity.....</i>	<i>29</i>
<i>Many Gays Have Not Fully Accepted Their Sexuality Upon</i> <i>Entering Military Service.....</i>	<i>29</i>
<b>Core Military Values of Honesty and Integrity are Harmed by “Don’t Tell” .....</b>	<b>30</b>
<b>“Don’t Tell” Conclusion.....</b>	<b>33</b>
<b>DON’T PURSUE.....</b>	<b>34</b>
<b>“Don’t Pursue” Violations Decrease .....</b>	<b>34</b>
<b>Fishing Expeditions, Witch Hunts and “Prove It” Reports Continue .....</b>	<b>34</b>
<b>Army “Don’t Pursue” Violations Decrease .....</b>	<b>36</b>
<i>Army Drops Discharge Action Against First Lieutenant Steve May .....</i>	<i>37</i>
<i>Army First Sergeant Conducts Improper Investigation of New Recruit .....</i>	<i>38</i>
<i>Army Expands Scope of Investigation into Officer’s Sexual Orientation.....</i>	<i>39</i>
<i>Inquiry Officer Conducts Substantial Investigation Without Secretarial</i> <i>Approval.....</i>	<i>40</i>
<b>Army “Don’t Pursue” Summary.....</b>	<b>41</b>
<b>The Air Force Continues to Lead the Way in “Don’t Pursue” Violations .....</b>	<b>41</b>
<i>The Air Force Wrongly Pursues and Seeks Recoupment</i> <i>from Keesler AFB Officer .....</i>	<i>42</i>

<i>Command Criminally Prosecutes Threatened Airman at Shaw Air Force Base</i> .....	44
<i>The Air Force Asks More than 100 Wide-Ranging Questions in Unauthorized Substantial Investigation</i> .....	45
<i>Lieutenant Pursued without Credible Evidence</i> .....	46
<b><i>Air Force “Don’t Pursue” Summary</i></b> .....	<b>47</b>
<b><i>Navy “Don’t Pursue” Violations Drop Significantly</i></b> .....	<b>48</b>
<i>USS Dubuque Captain Engages in Witch Hunt for Gay Sailors</i> .....	49
<i>Officer Wrongfully Pursued and Accused of Sodomy</i> .....	50
<i>Naval Criminal Investigative Service Pursues Service Members at Gay Friendly Establishments</i> .....	51
<i>Navy Uses Boards of Inquiry to Dig up Dirt on Officers</i> .....	52
<i>Legal Office Prevents Investigation Based on Photograph in Gay Newspaper</i> .....	53
<b><i>Navy “Don’t Pursue” Summary</i></b> .....	<b>54</b>
<b><i>Marine Corps “Don’t Pursue” Numbers Increase</i></b> .....	<b>54</b>
<i>Command Retains Marine Improperly Pursued by CID Agents</i> .....	55
<i>Command Halts Improper Pursuit of Marine Visiting Gay Friendly Business</i> .....	56
<i>Commanding Officer Asks Marines to Prove It and Expands Scope of Inquiry</i> .....	57
<i>New River Personnel Violate “Don’t Pursue” by Expanding Investigation</i> .....	58
<i>Commanding Officer Witch Hunts Marine Corps Woman</i> .....	59
<b><i>Marine Corps “Don’t Pursue” Summary</i></b> .....	<b>60</b>
<b><i>No Coast Guard “Don’t Pursue” Violations</i></b> .....	<b>60</b>
<b><i>“Don’t Pursue” Conclusion</i></b> .....	<b>60</b>
<b>DON’T HARASS</b> .....	<b>61</b>
<b><i>Pentagon Finally Acknowledges Anti-Gay Harassment Problem</i></b> .....	<b>62</b>
<i>Inspector General Finds Pervasive Anti-Gay Harassment</i> .....	62
<i>Working Group Issues Anti-Harassment Action Plan</i> .....	63
<b><i>Army “Don’t Harass” Violations Drop as Leaders Begin Training the Troops</i></b> .....	<b>64</b>
<b><i>Reports of Army Leaders “Doing What’s Right” on the Rise</i></b> .....	<b>65</b>
<i>New 101<sup>st</sup> Airborne Division’s Commanding General Dresses-Down Anti-Gay Captain</i> .....	65
<i>Other Good Examples of Army Leaders’ Efforts to “Do What’s Right”</i> .....	66
<b><i>Some Army Leaders Continue to Tolerate, and Sometimes Participate in, Harassment</i></b> .....	<b>67</b>
<i>Fort Jackson, South Carolina, Soldier Physically Assaulted</i> .....	67
<i>Fort Totten, New York, Reserve Commander Harassed</i> .....	68

Other Examples of Harassment and Threats of Violence Towards Gay Soldiers .....	69
<b>Lesbian Baiting Remains an Army Problem.....</b>	<b>70</b>
Army ROTC Cadet Called “Not Feminine Enough” .....	70
<b>Army “Don’t Harass” Summary.....</b>	<b>71</b>
<b>Air Force “Don’t Harass” Violations Remain Alarming High,     Leadership Lacking.....</b>	<b>71</b>
<b>Positive Indicators of Air Force “Don’t Harass” Adherence.....</b>	<b>72</b>
Langley Air Force Base Harassment Report Taken Seriously; Reporting of Anti-Gay Threats and Harassment Remains Difficult Challenge .....	72
Other Good Reports on the Air Force “Don’t Harass” Front .....	74
<b>Air Force “Don’t Harass” Violations Continue.....</b>	<b>74</b>
Shaw Air Force Base Airman Receives Death Threats.....	74
<b>Defense Language Institute Harassment Problem Continues .....</b>	<b>75</b>
Airman First Class Firpo Reportedly Harassed by DLI Chaplain and Civilian Language Instructors .....	76
Airman First Class Harassed by DLI Doctor.....	76
Harassment at Kelly Air Force Base and Texas A&M University.....	77
<b>Air Force “Don’t Harass” Summary.....</b>	<b>78</b>
<b>Navy “Don’t Harass” Violations Increase, Again Navy is Most Hostile Service .....</b>	<b>78</b>
<b>Despite Serious Navy “Don’t Harass” Problems, There are Some     Hopeful Signs of Progress .....</b>	<b>79</b>
San Diego Based Sailor Safely Reports Harassment.....	79
<b>High Rate of Navy “Don’t Harass” Violations is Alarming .....</b>	<b>80</b>
USS Dubuque Commanding Officer Ignores Sailor’s Report of Harassment; Sailor then Physically Assaulted and Threatened.....	80
Other Navy “Don’t Harass” Violations.....	81
<b>Navy “Don’t Harass” Summary.....</b>	<b>83</b>
<b>Marine Corps “Don’t Harass” Violations Decrease Despite Lack of Training .....</b>	<b>83</b>
<b>Although Infrequent, Some Reports of Marine Corps     “Don’t Harass” Compliance Received.....</b>	<b>84</b>
Marine Corps Holds Anti-Gay Lieutenant Colonel Melton Accountable.....	84
Camp Lejeune, North Carolina, Commanding Officer Takes Swift Action After SLDN Report of Anti-Gay Harassment .....	84
Other Good Reports of Marine Corps “Don’t Harass” Application .....	85
<b>Many Marine Corps Leaders Continue to Ignore “Don’t Harass” Policy.....</b>	<b>86</b>
Lance Corporal Lesbian-Baited at Twenty-Nine Palms, California .....	86
Other Marine Corps “Don’t Harass” Violations .....	86
<b>Marine Corps “Don’t Harass” Summary.....</b>	<b>88</b>
<b>Coast Guard “Don’t Harass” Violations Rise Sharply.....</b>	<b>88</b>

<i>Gay Sailor Assaulted Onboard CGC Northland</i> .....	89
<i>Coast Guard “Don’t Harass” Violations</i> .....	89
<b><i>Coast Guard “Don’t Harass” Summary</i></b> .....	<b>90</b>
<b><i>“Don’t Harass” Conclusion</i></b> .....	<b>90</b>

## 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, 2000<sup>1</sup>

*“There have been some setbacks in terms of [the policy’s] full implementation....”*  
--Secretary of Defense William Cohen, March 12, 2000<sup>2</sup>

*“Treatment of all individuals with dignity and respect  
is essential to good order and discipline.”*  
--DoD Anti-Harassment Action Plan, July 21, 2000<sup>3</sup>

“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.<sup>4</sup> 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.<sup>5</sup>

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-gay<sup>6</sup> abuses and harassment destroy good order, discipline, and morale.

SLDN believes the days of DADTDPDH are numbered.<sup>7</sup> Nevertheless, DADTDPDH is the current law and military leaders must rise to the occasion to ensure that it is properly

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<sup>1</sup> *Excerpts from the Debate Among G.O.P. Candidates*, N.Y. TIMES, Jan. 7, 2000, at A15.

<sup>2</sup> Richard Whittle, Interview, *Secretary of Defense William Cohen*, DALLAS MORNING NEWS, Mar. 12, 2000, at 1J.

<sup>3</sup> Department of Defense Working Group, *Anti-Harassment Action Plan* (July 21, 2000).

<sup>4</sup> 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.*

<sup>5</sup> 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.

<sup>6</sup> Whenever “gay” is used throughout this report, it is used as an all-inclusive term for gay, lesbian, and bisexual.

<sup>7</sup> 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.<sup>8</sup>

### **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.<sup>9</sup> While “Don’t Harass” violations decreased by 10%, from 968 reported violations in last year’s report to 871 this year,<sup>10</sup> 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?<sup>11</sup>

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.”<sup>12</sup> 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

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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](http://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.

<sup>8</sup> SLDN has assisted more than 2,600 service members in the past seven years who have been harmed by the policy.

<sup>9</sup> 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.

<sup>10</sup> 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.

<sup>11</sup> Letter from Private First Class Chapman to his family (Sept. 2000). Chapman’s experience is discussed fully in the “Don’t Harass” section.

<sup>12</sup> 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 1999<sup>13</sup> – 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.<sup>14</sup> In March 2000, the DoD Inspector General released a report on its survey of 75,000 service members.<sup>15</sup> 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.<sup>16</sup> 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.

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<sup>13</sup> 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.

<sup>14</sup> 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.

<sup>15</sup> See Department of Defense Working Group, *Anti-Harassment Action Plan* (July 21, 2000).

<sup>16</sup> 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 members<sup>17</sup> 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.”<sup>18</sup>

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.<sup>19</sup> 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,

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<sup>17</sup> 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.

<sup>18</sup> 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].

<sup>19</sup> 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.<sup>20</sup> 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.<sup>21</sup> Second, the policy also states sexual orientation is no longer a bar to military service.<sup>22</sup> 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.<sup>23</sup> They agreed to take steps to prevent anti-gay

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<sup>20</sup> 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).

<sup>21</sup> *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.*

<sup>22</sup> 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.*

<sup>23</sup> 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.<sup>24</sup> 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.<sup>25</sup> They agreed to implement the law with due regard for the privacy and associations of service members.<sup>26</sup> 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 DADTDPDH with fairness and compassion. Today is the first day for the new Administration to demonstrate its resolve.

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<sup>24</sup> 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.*

<sup>25</sup> 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.

<sup>26</sup> 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 Directive<sup>27</sup>

*“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 Army<sup>28</sup>

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.<sup>29</sup> 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.<sup>30</sup> 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

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<sup>27</sup> DODD 1332.14 , *supra* note 22, at E3.A4.1.4.3; DODD 1332.40, *supra* note 22, at E8.4.3.

<sup>28</sup> 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.

<sup>29</sup> 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].

<sup>30</sup> 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 investigators<sup>31</sup> 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.”<sup>32</sup> 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.’”<sup>33</sup>

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.

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<sup>31</sup> 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).

<sup>32</sup> 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.

<sup>33</sup> 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 Staff<sup>34</sup>

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).

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<sup>34</sup> 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 Aushach, 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 DADTDPDH. 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 Staff<sup>35</sup>

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<sup>35</sup> 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.<sup>36</sup> 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]lmost 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.

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<sup>36</sup>See 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 Operations<sup>37</sup>

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.”<sup>38</sup> 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).

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<sup>37</sup> 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].

<sup>38</sup> 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 Corps<sup>39</sup>

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?”

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<sup>39</sup> 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)<sup>40</sup>

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 DADTDPTH.

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.

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<sup>40</sup> 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 Defense<sup>41</sup>

***“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 Neurosurgeon<sup>42</sup>

“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,<sup>43</sup> chaplains,<sup>44</sup> security clearance personnel<sup>45</sup> and, in limited circumstances, doctors who are treating patients for HIV.<sup>46</sup>

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,

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<sup>41</sup> Under Secretary of Defense (P&R) 1998 Report , *supra* note 29, at 2.

<sup>42</sup> 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).

<sup>43</sup> See MIL. R. EVID. 502.

<sup>44</sup> See MIL. R. EVID. 503.

<sup>45</sup> 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).

<sup>46</sup> 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.<sup>47</sup> Military and Congressional leaders have acknowledged that gays serve our country and serve well.<sup>48</sup> Further, the policy clearly states that “sexual orientation is a personal and private matter.”<sup>49</sup>

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 Dorn<sup>50</sup> and Northwestern University military sociologist Charles Moskos<sup>51</sup> (Exhibits 18 & 19).<sup>52</sup> 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

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<sup>47</sup> 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.

<sup>48</sup> 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].

<sup>49</sup> DODD 1332.14, *supra* note 22, at E3.A1.1.8.1.1; DODD 1332.40, *supra* note 22, at E.2.3.

<sup>50</sup> 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.*

<sup>51</sup> 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.*

<sup>52</sup> 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.<sup>53</sup> 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 Defense<sup>54</sup>***

***“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.<sup>55</sup>***

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.

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<sup>53</sup> Under Secretary of Defense (P&R) 1998 Report, *supra* note 29, at 2,5.

<sup>54</sup> *Id.* at 10.

<sup>55</sup> 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” 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 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."<sup>56</sup>

*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."<sup>57</sup>

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<sup>56</sup> *Id.*

<sup>57</sup> 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 Pamphlet<sup>58</sup>

Military chaplains can be an invaluable resource for service members of faith who are gay, lesbian or bisexual.<sup>59</sup> While most chaplains keep the confidences of gay service members, some do not.<sup>60</sup> 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.<sup>61</sup>

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.<sup>62</sup> 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.

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<sup>58</sup> *Don’t Ask, Don’t Tell: Army Homosexual Conduct Policy*, HOT TOPICS: CURRENT ISSUES FOR ARMY LEADERS 8 (Winter 2000).

<sup>59</sup> 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).

<sup>60</sup> 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.

<sup>61</sup> 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.

<sup>62</sup> 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."<sup>63</sup>

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

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<sup>63</sup> 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.”<sup>64</sup> He reportedly urged Ramos to seek information from the “ex-gay ministry” movement<sup>65</sup> (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.<sup>66</sup>

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.<sup>67</sup> 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.<sup>68</sup> Misconduct like that engaged in

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<sup>64</sup> 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).

<sup>65</sup> 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](http://www.psych.org/pract_of_psych/copptherapyaddendum83100.cfm) (last visited Mar. 6, 2001).

<sup>66</sup> 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).

<sup>67</sup> *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.”).

<sup>68</sup> 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, Georgia<sup>69</sup> 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.<sup>70</sup> 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.

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<sup>69</sup> Private First Class Burgess reports three other soldiers threatened him with violence in August 2000.

<sup>70</sup> 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 Neurosurgeon<sup>71</sup>

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.”

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<sup>71</sup> 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.<sup>72</sup>

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.”<sup>73</sup>

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,<sup>74</sup>

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<sup>72</sup> Mazur, *supra* note 33, at 693.

<sup>73</sup> *Id.* at 723

<sup>74</sup> 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.<sup>75</sup>

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. Edney<sup>76</sup>

### ***ARMY: “Integrity: Do What’s Right, Legally and Morally”***

- United States Army Core Values<sup>77</sup>

- “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

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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).

<sup>75</sup> 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.”

<sup>76</sup> 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.

<sup>77</sup> 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 Values<sup>78</sup>

- “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 year<sup>79</sup> 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

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<sup>78</sup> 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](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).

<sup>79</sup> 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 Values<sup>80</sup>

- “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).

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<sup>80</sup> 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 Neurosurgeon<sup>81</sup>

“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.

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<sup>81</sup> Naff letter, *supra* note 57.

## DON'T PURSUE

*“In most of these cases, little or no investigation should be conducted.”<sup>82</sup>*

-- 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 allegation<sup>83</sup> 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.

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<sup>82</sup> Under Secretary of Defense (P&R) 1998 Report, *supra* note 29, at 11.

<sup>83</sup> 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.”<sup>84</sup> The Department of Defense reiterated its orders in a 1999 policy memorandum.<sup>85</sup> 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.”<sup>86</sup> 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.”<sup>87</sup>

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.<sup>88</sup> 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.<sup>89</sup>

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

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<sup>84</sup> Under Secretary of Defense (P&R) 1998 Report, *supra* note 29, at 11.

<sup>85</sup> See Under Secretary of Defense (P&R) Rudy de Leon 1999 “Implementation” Memo, *supra* note 18.

<sup>86</sup> *Id.*

<sup>87</sup> Under Secretary of Defense (P&R) 1998 Report, *supra* note 29, at 12.

<sup>88</sup> 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).

<sup>89</sup> 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,<sup>90</sup> 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.<sup>91</sup> 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."***<sup>92</sup>

-- 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.<sup>93</sup> The new Army

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<sup>90</sup> See discussion *infra* pp. 79-84.

<sup>91</sup> In 1992, Seaman Allen Schindler was brutally beaten to death by fellow shipmates for being gay.

<sup>92</sup> Electronic Message from Headquarters, Department of the Army, to ALARACT, *Homosexual Conduct Policy* (Jan. 10, 2000) (HQDA WASHINGTON DC 101700Z JAN 00).

<sup>93</sup> 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.<sup>94</sup> 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."<sup>95</sup> 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.<sup>96</sup> 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

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<sup>94</sup> 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.*

<sup>95</sup> *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.*

<sup>96</sup> *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,<sup>97</sup> and (2) an inquiry officer may not fish for additional evidence against a soldier, thereby impermissibly expanding the scope of the inquiry.<sup>98</sup>

The First Sergeant asked the Private a number of improper questions from a pre-typed form (Exhibit 38).<sup>99</sup> 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.

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<sup>97</sup> See Army Regulation 600-20, *Army Command Policy* 4-19(d)(1)(a) (1999) [hereinafter AR 600-20].

<sup>98</sup> See *id.* at 4-19d(1)(c).

<sup>99</sup> 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.”<sup>100</sup> 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;

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<sup>100</sup> 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.<sup>101</sup>

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

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<sup>101</sup> 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.<sup>102</sup> 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.”<sup>103</sup>***

*-- 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

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<sup>102</sup> 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.*

<sup>103</sup> *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.<sup>104</sup> 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.”<sup>105</sup> 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 interview<sup>106</sup> and the member’s immediate supervisory chain of command.”<sup>107</sup> 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.<sup>108</sup> 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

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<sup>104</sup> See *id.* (Exhibit 39).

<sup>105</sup> 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.

<sup>106</sup> “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.

<sup>107</sup> *Id.* at A2.2.6.

<sup>108</sup> 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.<sup>109</sup> 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."<sup>110</sup> 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.<sup>111</sup> At the BOI, Major Shestko proclaimed, "[t]hose rules simply do not apply to the recorder." (Exhibit 40).<sup>112</sup> 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 scholarship<sup>113</sup> 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.*"<sup>114</sup>

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

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<sup>109</sup> "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.

<sup>110</sup> *See id.*

<sup>111</sup> *See id.* at A2.1.5, A2.2.6.

<sup>112</sup> 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).

<sup>113</sup> At the time Pristera went to his board, he had served more than two years of his four-year Air Force commitment.

<sup>114</sup> 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).<sup>115</sup>

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,<sup>116</sup> the Air Force appears to seek recoupment in all cases where educational funds or bonus money may be a factor.<sup>117</sup> 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").<sup>118</sup>

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

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<sup>115</sup> See Memorandum from the Office of the General Counsel Air Force to SAF/OS, *Recoupment in HPSP Homosexual Statement Cases* (Aug. 9, 1999).

<sup>116</sup> 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.

<sup>117</sup> 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](http://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.

<sup>118</sup> 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,<sup>119</sup> 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...?

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<sup>119</sup> 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,<sup>120</sup> and irrelevant to a DADTPDH 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,<sup>121</sup> 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.<sup>122</sup> 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.

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<sup>120</sup> “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*].

<sup>121</sup> First Lieutenant Glenn, a twenty-five-year-old from Florida, attended Duke University on an Air Force ROTC scholarship.

<sup>122</sup> 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.”<sup>123</sup> 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.

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<sup>123</sup> *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.”***<sup>124</sup>

-- 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.<sup>125</sup> 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.<sup>126</sup> 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 DADTPDH 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.”<sup>127</sup> In fact,

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<sup>124</sup> 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].

<sup>125</sup> *See id.*

<sup>126</sup> *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).

<sup>127</sup> 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.<sup>128</sup>

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").<sup>129</sup>

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.<sup>130</sup>

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

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<sup>128</sup> See MILPERSMAN 1910-148, Ch-24, *Separation By Reason of Homosexual Conduct 2* (2000) [hereinafter MILPERSMAN 1910-148].

<sup>129</sup> See discussion *supra* p. 26. See discussion *infra* pp. 81-82.

<sup>130</sup> 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.<sup>131</sup> 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.<sup>132</sup>

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.

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<sup>131</sup> 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.

<sup>132</sup> 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.<sup>133</sup> The policy further allows for all service members to engage in associational activities such as going to gay bars.<sup>134</sup>

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.<sup>135</sup>

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."

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<sup>133</sup> See DODI 5505.8, *supra* note 101, at 2.

<sup>134</sup> See, e.g., DODD 1332.40, *supra* note 22, at E8.3.3.4.

<sup>135</sup> 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.<sup>136</sup> 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

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<sup>136</sup> 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.”<sup>137</sup>

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]”<sup>138</sup> (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.<sup>139</sup> 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

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<sup>137</sup> 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)).

<sup>138</sup> 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.

<sup>139</sup> 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.<sup>140</sup>

### **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.”***<sup>141</sup>

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.”<sup>142</sup> 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.”<sup>143</sup>

Similarly, the Marine Corps’ language limiting substantial investigations follows the Pentagon’s guidance.<sup>144</sup> One difference in the Marine Corps’ guidance states, “[s]uch

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<sup>140</sup>It is important to note that this Navy practice is undermining the military rationale for DADTPDH by retaining openly gay sailors.

<sup>141</sup>MARADMIN 014/00, *supra* note 39.

<sup>142</sup>*Id.*

<sup>143</sup>*Id.*

<sup>144</sup>

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.<sup>145</sup>

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

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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.*

<sup>145</sup> 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.<sup>146</sup> Additionally, “Don’t Pursue” prohibits inquiries into a service member’s sexual orientation based on publications that may be considered gay related.<sup>147</sup> Regardless of the motive, the agents violated DADTDPDH because military criminal investigative organizations are prohibited from conducting investigations to determine the sexual orientation of a service member.<sup>148</sup>

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.<sup>149</sup>

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 investigation<sup>150</sup> and that it appeared that the Marine’s First Sergeant investigated the Marine without the required command authorization (Exhibit 53).<sup>151</sup> 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.

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<sup>146</sup> 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.*

<sup>147</sup> See *id.* at E3.A4.1.3.3, E3.A4.1.3.3.4.

<sup>148</sup> 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).

<sup>149</sup> 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.*

<sup>150</sup> 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.*

<sup>151</sup> 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.”<sup>152</sup> 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?

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<sup>152</sup> 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 military<sup>153</sup> and questions related to the timing of a person's sexual awareness are inappropriate. Additionally, the inquiry officer's questions

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<sup>153</sup> 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 DADTDPDH. 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 Harassment<sup>154</sup>

***“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 Chapman<sup>155</sup>

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.”<sup>156</sup>

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<sup>154</sup> Department of Defense Working Group, *Anti-Harassment Action Plan* (July 21, 2000).

<sup>155</sup> Letter from Private First Class Chapman to his family (Sept. 2000). Chapman's experience is discussed fully later in the “Don't Harass” section.

<sup>156</sup> 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,<sup>157</sup> 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 assaults<sup>158</sup> (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” (DADTPDH).

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.<sup>159</sup> Admitting to a problem is the first step in fixing it.

Upon receipt of the IG’s findings, Secretary Cohen commissioned a DoD Working Group<sup>160</sup> to study the IG’s findings and formulate an anti-harassment action plan<sup>161</sup> that built on the anti-gay harassment programs implemented by some services in January and February 2000.

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<sup>157</sup> 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 101<sup>st</sup> 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.

<sup>158</sup> See DoD Inspector General 2000 Report, *supra* note 19, at 4.

<sup>159</sup> See generally News Release, Department of Defense, Secretary Cohen Approves Services Homosexual Conduct Policy Plans (Feb. 1, 2000).

<sup>160</sup> 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.<sup>162</sup> 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.<sup>163</sup> 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.<sup>164</sup>

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.

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<sup>161</sup> 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).

<sup>162</sup> 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).

<sup>163</sup> 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).

<sup>164</sup> 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 Staff<sup>165</sup>

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,”<sup>166</sup> 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.

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<sup>165</sup> ALARACT 008/00, *supra* note 34.

<sup>166</sup> *See id.* (Exhibit 62).

## Reports of Army Leaders “Doing What’s Right” on the Rise

### *New 101<sup>st</sup> 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.<sup>167</sup> 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 responsibility<sup>168</sup> – 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).

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<sup>167</sup> 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.

<sup>168</sup> 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,<sup>169</sup> 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.<sup>170</sup> 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 DADTDPDH policy creates divisions within his unit and causes needless leadership challenges. This Captain is

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<sup>169</sup> Major General Cody replaced Major General Robert T. Clark, who commanded the 101<sup>st</sup> 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 5<sup>th</sup> U.S. Army, at Fort Sam Houston, Texas.

<sup>170</sup> 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.<sup>171</sup> 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.”

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<sup>171</sup> 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 354<sup>th</sup> 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 cohesion<sup>172</sup> – the battalion Sergeant Major rose before the unit. The Sergeant Major proceeded to tell an offensive anti-gay joke.<sup>173</sup> 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 Village<sup>174</sup> 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

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<sup>172</sup> 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.

<sup>173</sup> The “joke” involved a cucumber, broomstick, flashlight, and two gay men.

<sup>174</sup> 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 354<sup>th</sup> 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 175<sup>th</sup> 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 baiting<sup>175</sup> and gender bias.<sup>176</sup> 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.<sup>177</sup>

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<sup>175</sup> 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.

<sup>176</sup> 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).

<sup>177</sup> 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.<sup>178</sup>

### **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."<sup>179</sup> 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 Alarmingly 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 Staff<sup>180</sup>

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.<sup>181</sup> Air Force leaders strengthened "Don't Harass" in January 2000 (Exhibit 73). The directive, entitled "Air Force Policy on Harassment"<sup>182</sup> states, in part, "harassment, threats or ridicule of individuals or groups based

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<sup>178</sup> See generally United States Army, *United States Army Posture Statement FY01, Executive Summary*, at [http://www.army.mil/aps/aps\\_es.htm](http://www.army.mil/aps/aps_es.htm) (last visited Mar. 5, 2001).

<sup>179</sup> ALARACT 008/00, *supra* note 34 (Exhibit 62).

<sup>180</sup> AF *Policy on Harassment* Memo, *supra* note 163.

<sup>181</sup> 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."

<sup>182</sup> 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.”<sup>183</sup>

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.”<sup>184</sup> 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

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<sup>183</sup> *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).

<sup>184</sup> *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 gay<sup>185</sup> (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.<sup>186</sup> Service members further risk the possibility that their sexual orientation will be discovered, against their will, in the course of any harassment investigation.<sup>187</sup>

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.

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<sup>185</sup> 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).

<sup>186</sup> 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).

<sup>187</sup> 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 Institute<sup>188</sup> 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.

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<sup>188</sup> 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,<sup>189</sup> 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.

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<sup>189</sup> 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.<sup>190</sup> 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, reports<sup>191</sup> 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

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<sup>190</sup> 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.

<sup>191</sup> 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.<sup>192</sup>

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).

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<sup>192</sup> 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.<sup>193</sup> 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."<sup>194</sup> 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 Operations<sup>195</sup>

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

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<sup>193</sup> 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).

<sup>194</sup> AF Policy on Harassment Memo, *supra* note 163.

<sup>195</sup> 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.”<sup>196</sup> Although the top Navy leaders have issued these helpful directives, “Don’t Harass” violations remain alarmingly high in the service.<sup>197</sup>

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.<sup>198</sup> 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.

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<sup>196</sup> *Id.*

<sup>197</sup> 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.

<sup>198</sup> 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

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[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.”<sup>199</sup> 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 Corps<sup>200</sup>

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.”<sup>201</sup> “Don’t Harass” violations within the Marine Corps, however, remain a source of grave concern.<sup>202</sup>

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.”

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<sup>199</sup> NAVADMIN 291/99, *supra* note 124.

<sup>200</sup> MARADMIN 014/00, *supra* note 39.

<sup>201</sup> *Id.*

<sup>202</sup> 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 DADTDPDH in the last year. The Marine Corps, although an element of the Department of the Navy, does not appear to have a DADTDPDH 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.<sup>203</sup> Melton’s email mocked the murder of Private First Class Winchell, and referred to gays as “homos” and “back side rangers.”<sup>204</sup>

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

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<sup>203</sup> 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).

<sup>204</sup> 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 8<sup>th</sup> 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.<sup>205</sup>
- 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.

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<sup>205</sup> 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.<sup>206</sup>
- 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, 4<sup>th</sup> 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).

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<sup>206</sup> This is not the first time SLDN has received reports of heterosexuals being targeted under the policy. Under DADTPDH, 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). DADTPDH 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 Guard<sup>207</sup>

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.

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<sup>207</sup> 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!”<sup>208</sup> 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).

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<sup>208</sup> 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 Staff<sup>209</sup>

According to National Security Advisor Condoleezza Rice, President Bush is “committed to a harassment-free environment for all of our military people.”<sup>210</sup> 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.”<sup>211</sup> 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

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<sup>209</sup> Powell statement, *supra* note 21, at 708.

<sup>210</sup> 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).

<sup>211</sup> *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.”<sup>212</sup>

Leaders’ failure to stamp out anti-gay harassment within the ranks allows an atmosphere of distrust and fear to fester.<sup>213</sup> Success in combat hinges upon trust and teamwork.<sup>214</sup> Targeting a segment of service members for ridicule and abuse destroys trust and, therefore, destroys teamwork.<sup>215</sup>

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.<sup>216</sup> 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.

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<sup>212</sup> 10 U.S.C. § 654(a)(7).

<sup>213</sup> 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.

<sup>214</sup> 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.

<sup>215</sup> 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.

<sup>216</sup> See ALARACT 008/00, *supra* note 34.