

A BAN BY ANY OTHER NAME: TEN YEARS OF “DON’T ASK, DON’T TELL”

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I. INTRODUCTION

November 30, 2003 marked the ten-year anniversary of the current law banning military service by lesbian, gay, and bisexual individuals, commonly known as “Don’t Ask, Don’t Tell.”¹ Since 1993, over 10,000 service members have been discharged from the Armed Forces under the law.² Personnel discharged under the policy include representatives from virtually every specialty in every branch of the service. “Don’t Ask, Don’t Tell” deprives the United States of the skills of thousands of people trained at taxpayers’ expense to fill critical military needs for doctors, linguists, intelligence officers, submariners, and scores of other skill sets. The loss in trained military personnel caused by the policy may indeed pale in comparison to the loss of the potential service of thousands of talented and patriotic young lesbian, gay, and bisexual Americans who have chosen not to serve our country in uniform because

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1. 10 U.S.C. § 654 (2000).

2. SERVICEMEMBERS LEGAL DEFENSE NETWORK, CONDUCT UNBECOMING: THE TENTH ANNUAL REPORT ON “DON’T ASK, DON’T TELL, DON’T PURSUE, DON’T HARASS” 13, at http://www.sldn.org/binary-data/SLDN_ARTICLES/pdf_file/1411.pdf (2004) [hereinafter SLDN, TENTH ANNUAL REPORT].

of the additional sacrifices required of them by the ban on gay³ service. At this time in particular, when American security has been threatened by international terrorism and over 365,000 American forces are deployed defending American interests in 120 countries⁴—including in conflicts in Afghanistan and Iraq—a review of the statute prohibiting gay service in the military seems appropriate. This article will chronicle the history and implementation of the “Don’t Ask, Don’t Tell” policy over the course of the last ten years and consider the future of the policy.

II. A VERY BRIEF HISTORY OF THE CURRENT POLICY ON GAYS IN THE MILITARY

There is no shortage of academic and popular literature chronicling the history of gay and transgender persons in the military,⁵ and an article this short cannot do justice to this history. However, for readers who may be new to this subject, the following is a very brief sketch of the treatment of gay persons in the U.S. military prior to the “Don’t Ask, Don’t Tell” era and the provenance of the current policy.

Since World War I, U.S. military laws and regulations have prohibited homosexual conduct in the ranks⁶ based on a wide variety of theories and through the employment of a range of regulatory and, since the advent of “Don’t Ask, Don’t Tell,” statutory means. Despite this fact, countless lesbian, gay, bisexual, and transgender (LGBT) Americans have served in the Armed Forces of the United States honorably and at times heroically, sometimes open about their sexual orientation or gender identity, other times, closeted.⁷ The most celebrated gay figure in U.S. military history is likely Baron Frederich von Steuben,⁸ a well-respected French officer invited to the U.S. by Benjamin Franklin during the Revolutionary War to develop a program of instruction in the art of

3. Throughout this article, the term “gay” may be used at times as a shorthand for lesbians, gay men and bisexual persons.

4. Bill Putnam, *Keane Announces Overseas Unit Rotation Schedule*, Army News Service, at www.army.mil/soldiers/jul2003/rotation.htm (July 23, 2003).

5. For an annotated bibliography on the issue of gays in the military, see J. Paul Lomio, *Annotated Select Bibliography*, at <http://dont.stanford.edu/commentary/ann.bib.html> (last visited Apr. 1, 2004).

6. For a discussion of the history of the ban see NAT’L DEF. RESEARCH INST., *SEXUAL ORIENTATION AND U.S. MILITARY PERSONNEL POLICY: POLICY OPTIONS AND ASSESSMENT 3*, at <http://www.rand.org/MR/MR323/mr323.ch1.pdf> (1993).

7. Gary Gates & The Urban Institute, *Gay Veterans Top One Million*, at <http://www.urban.org/url.cfm?ID=900642> (July 9, 2003).

8. See RANDY SHILTS, *CONDUCT UNBECOMING: LESBIANS AND GAYS IN THE U.S. MILITARY VIETNAM TO THE PERSIAN GULF 10-11* (1993).

military drills and training⁹ for the Continental Army. Von Steuben commanded a division at Valley Forge, and also served as the First Inspector General of the Army.¹⁰ Von Steuben is known today by American soldiers, sailors, airmen, and Marines as the father of modern drill and ceremony.¹¹

Notwithstanding von Steuben's renown, even during the Revolutionary War, there were instances of officers and enlisted personnel being "drummed out" of the military for engaging in same-sex sexual relations. The first widely-cited instance of a "gay discharge" was the case of Lieutenant Gotthold Frederick Enslin, dismissed from the Continental Army "with Abhorrence and Detestation of such Infamous Crimes."¹² Enslin and others like him, however, were not victims of a "gay ban" in the way we think of it today. Until the World War I era, there were no military laws or regulations governing same-sex sexual conduct.¹³ Instead, sodomy—whether same-sex or opposite-sex—was addressed only as a function of civilian law.¹⁴ That is, members of the Armed Forces who engaged in sodomy could be dismissed for having broken civilian criminal laws, but the first prohibition on sodomy under military laws and regulations did not appear until the passage of the Articles of War of 1916.¹⁵ This was a criminal prohibition on homosexual conduct, versus an administrative prohibition on service by persons inclined toward same-sex sexual conduct.

The first administrative prohibition on military service by lesbian,

9. *See id.* at 8.

10. *See id.* at 10.

11. *See generally* BRUCE ADELSON & ARTHUR MEIER, *BARON VON STEUBEN: AMERICAN GENERAL (REVOLUTIONARY WAR LEADERS)* (2001).

12. *See* SHILTS, *supra* note 8 at 11-12.

13. *See id.* at 15; David F. Burrelli, *An Overview of the Debate on Homosexuals in the U.S. Military*, in *GAYS AND LESBIANS IN THE MILITARY* 17, 17 (Wilbur J. Scott & Sandra Carson Stanley eds., 1994).

14. *See* Burrelli, *supra* note 13, at 17.

15. *See generally id.* at 17-31.

U.S. military law prior to World War I did not specifically address homosexuality. Although commanders had great discretion in the control and disciplining of their troops, specific laws, regulations, or policies addressing homosexuality did not exist. The Articles of War of 1916 (effective March 1, 1917) restricted consideration of sodomy to cases of assault with "intent to commit" sodomy. Following the end of World War I, Congress enacted the Articles of War of 1920 (June 4, 1920), which first named sodomy (Article 93) as a specific offense. The 1921 Manual for Courts Martial addressed the issue of consent as it pertained to the sodomy laws enacted by Congress (para. 443, sec. XI): "Both parties are liable as principals if each is adult and consents." This language pertained to both homosexual and heterosexuals.

Id. at 17 (citations omitted).

gay, and bisexual persons came about during World War II, when psychologists influenced by Freud's teachings began to develop theories about homosexuality as a condition incompatible with military service.¹⁶ Psychiatric professionals opined that gay people were unsuitable for military service because of their inaptitude for combat and lack of trustworthiness.¹⁷ A prohibition on military service by gay, lesbian and bisexual Americans was incorporated into military regulations during World War II.¹⁸

For the next forty years, this regulatory prohibition persisted, and homosexuality itself—regardless of conduct—served as a disqualifier for military service.¹⁹ Questions regarding same-sex sexual tendencies were included as a routine matter on enlistment forms and accessions paperwork for officers as a means of screening out lesbian, gay, and bisexual applicants, and anyone discovered to be gay during the course of his or her service could be disciplined or even discharged.²⁰

Despite the official prohibitions on gay service, hundreds of thousands of LGBT persons served in the U.S. military throughout this forty-year period.²¹ They served despite the prohibitions for a number of reasons. For example, many were not aware of their sexual orientation until after having joined the military, and therefore did not foresee any conflict at the time of their enlistment or accession. For others, the decision to join the military was made in the hopes of affirming particular notions of sexual orientation or gender identity.²² However, for the majority of LGBT persons who served in the military during this period, aspirations

16. See generally GARY LEHRING, OFFICIALLY GAY: THE POLITICAL CONSTRUCTION OF SEXUALITY BY THE U.S. MILITARY 84-90 (2003); SHILTS, *supra* note 8, at 16; David Burrelli, *Homosexuals and U.S. Military Policy: Current Issues*, CRS Issue Brief, at <http://www.fas.org/man/crs/96-029.htm> (last updated Dec. 12, 1996).

17. See generally GAYS IN UNIFORM, THE PENTAGON'S SECRET REPORTS 15-17 (Kate Dyer ed., 1990); SHILTS, *supra* note 8, at 16-17; Burrelli, *supra* note 13, at 18; COMING OUT UNDER FIRE (Los Angeles, Calif. Deep Focus Productions 1994).

18. See generally ALLEN BERUBE, COMING OUT UNDER FIRE: THE HISTORY OF GAY MEN AND WOMEN IN WORLD WAR TWO 2, 9-21 (1990).

19. See generally Burrelli, *supra* note 13, at 17; BERUBE, *supra* note 18, at 2.

20. See generally Burrelli, *supra* note 13, at 18-20; BERUBE, *supra* note 18, at 12-21.

21. See Gates, *supra* note 7, at <http://www.urban.org/url.cfm?ID=900642>; see generally BERUBE, *supra* note 18, at 3.

22. It is not uncommon for gay men, and to a greater extent, male-to-female transsexual veterans, to report among their varied motivations to join the military a desire to "become a man" or live out certain notions of masculinity. See, e.g., Rachel Goss, *Documenting Courage: Veterans Speak Out*, at

<http://www.hrc.org/Template.cfm?Section=Home&CONTENTID=13226&TEMPLATE=/ContentManagement/ContentDisplay.cfm> (last visited Mar. 30, 2004) (indicating "I tried to be the man that men are taught to be. What better way than to join the Air Force?").

to military service had no relation to the question of sexual orientation or gender identity. Rather, motivations to serve included feelings of patriotism, a sense of adventure, a desire to escape small town America and “see the world,” an interest in gaining job skills or earning money for college, or any one of a number of reasons Americans give for joining the military.²³

The success with which LGBT service members were able to negotiate the regulatory restrictions on homosexuality and the criminal prohibitions on same-sex sexual conduct during the post-World War II and pre-“Don’t Ask, Don’t Tell” years varied enormously, as it does under the current ban. Many LGBT persons served honorably and were never discovered or subjected to disciplinary actions or separation based on their sexual orientation.²⁴ Some LGBT service members even served openly, refusing or feeling no compunction to hide their sexual orientation in military units where the environment was relatively relaxed or where leaders made clear that sexual orientation would not be an issue.²⁵ Others were subjected to terribly invasive, career-shattering and life-shattering witch hunts and investigations, or lived in constant fear of being the subject of such an inquiry.²⁶ Violence against persons perceived to be gay was a problem in some places in the services, while in other places, heterosexual service members prided themselves in taking care of their gay buddies and ensuring no one gave them any trouble.²⁷ The stories of those who served during this period are extraordinarily varied and include successes and tragic failures alike.

Perhaps the only unifying factor with respect to the application of regulations barring gay people from serving in the Armed Forces during this period, however, was the trend toward a decrease in gay discharges whenever the United States went to war.²⁸ Consistently in times of war, restrictions on service by LGBT Americans have been loosened,²⁹ a

23. See *id.*; BERUBE, *supra* note 18, at 1-7; see generally Goss, *supra* note 22, at <http://www.hrc.org/Template.cfm?Section=Home&CONTENTID=13226&TEMPLATE=/ContentManagement/ContentDisplay.cfm> (last visited Mar. 30, 2004).

24. See SHILTS, *supra* note 8, at 12.

25. See generally SERVICEMEMBERS LEGAL DEFENSE NETWORK, CONDUCT UNBECOMING: THE NINTH ANNUAL REPORT ON “DON’T ASK, DON’T TELL, DON’T PURSUE, DON’T HARASS,” at <http://dont.stanford.edu/commentary/9.sldn.2003.pdf> (2003) [hereinafter SLDN, NINTH ANNUAL REPORT].

26. See generally BERUBE, *supra* note 19, at 14-21; Samuel A. Marcossou, *A Price Too High: Enforcing the Ban on Gays and Lesbians in the Military and the Inevitability of Intrusiveness*, 64 UMKC L. REV. 59, 65-69 (1995).

27. See generally SLDN, NINTH ANNUAL REPORT, *supra* note 25.

28. *Id.* at 1; see also SLDN, TENTH ANNUAL REPORT, *supra* note 2, at 1, 22.

29. R.L. Evans, *U.S. Military Policies Concerning Homosexuals: Development, Implementa-*

practice which calls into question the rationales asserted for banning lesbian, gay, bisexual, and transgender persons from the military. That is, if gay people are unsuitable for military service due to their inadequacies as fighters, their untrustworthiness, or their negative impact on unit cohesion, why is it that at the times in which adequate and trustworthy fighters who contribute positively to unit cohesion are most important, gay people are retained at much higher rates?

This contradiction and its implications for the civil rights of LGBT Americans came to the forefront of the American consciousness in the volatile context of the 1992 presidential campaign. Then-presidential candidate Bill Clinton, motivated in part by news of the brutal murder of Petty Officer Allen Schindler at the hands of fellow sailors in an anti-gay hate crime, vowed to end institutionalized discrimination against gay, lesbian and bisexual Americans willing to serve in the Armed Forces by lifting the ban on gay service in the military if he were elected President.³⁰

Following his election and months of politically-charged negotiations, in 1993, President Clinton acted on that campaign promise and moved to lift the ban on gay service by issuing an interim policy which prohibited questioning applicants to military service about their sexual orientation.³¹ On January 29, 1993 he charged then Secretary of Defense Les Aspin with drawing up an executive order to modify the ban on gays in the military by July 15, 1993.³² In the months that followed, Congress considered two bills in response to President Clinton's pledge to lift the ban and the Joint Chiefs vehement and uncharacteristically public opposition to that pledge. The first was a bill offered by then-Senate Minority Leader Bob Dole, which would have required the President to submit for congressional approval any change to existing policy on gays in the military.³³ The second was a bill sponsored by then Senate Majority Leader George Mitchell, which proposed requiring the Secretary of Defense to review existing Department of Defense (DoD) policy on gays in the military and submit any recommended changes to the President and

tion and Outcomes, 11 LAW & SEX. 113, 133-34 (2002).

30. See generally Jerry Roberts, *Clinton Attacks Bush on Family Health Issues: Democrat Calls Perot 'Wrong' on Gays*, SAN FRANCISCO CHRON., May 30, 1992, at A1.

31. *White House Statement on Policy Regarding Homosexuals in the Military*, ON WATCH: NEWSLETTER OF THE NATIONAL LAWYERS GUILD MILITARY LAW TASK FORCE, Mar. 1993, at 2, available at <http://dont.stanford.edu/regulations/statement.pdf>.

32. See JANET HALLEY, DON'T: A READER'S GUIDE TO THE MILITARY'S ANTI-GAY POLICY 21 (1999).

33. See *id.* at 22.

Congress by July 15, 1993.³⁴ The second of these two bills also required that the Senate hold hearings on the issue of gays in the military and whether a change to current policy was warranted. This was the bill Congress ultimately passed.³⁵ These moves by Congress effectively served as an end run around the executive order process President Clinton had initiated in January.

Nonetheless, in July, Secretary Aspin presented the President with a draft executive order representing a compromise position in which military personnel were to be judged based on their conduct versus their status.³⁶ That is, same-sex orientation would no longer be a bar to service, but homosexual conduct would remain grounds for discharge.³⁷ The executive order was never issued, because of the effect of the Mitchell bill. Instead, Congress enacted a new ban into law, creating the first statutory prohibition on gays in the military in American history.³⁸ This law was commonly known as “Don’t Ask, Don’t Tell, Don’t Pursue.” Pentagon officials added “Don’t Harass” to the title of the policy in February of 2000, in response to the murder of Private First Class Barry Winchell in an anti-gay hate crime at Fort Campbell, Kentucky, although the concept had certainly been read into the new policy from its inception.³⁹ The new ban is now known in long form as the “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass” policy governing gays in the military.⁴⁰

34. *See id.*

35. *See id.*

36. *Assessment of the Plan to Lift the Ban on Homosexuals in the Military: Hearings Before the Military Forces and Personnel Subcommittee of the Committee on Armed Services*, 103d Cong. 9-11 (1993) (statement of Les Aspin, Secretary of Defense).

37. *See id.*; HALLEY, *supra* note 32, at 27-33.

38. *See* 10 U.S.C. § 654 (2000).

39. *See generally* SERVICEMEMBERS LEGAL DEFENSE NETWORK, CONDUCT UNBECOMING: THE SIXTH ANNUAL REPORT ON “DON’T ASK, DON’T TELL, DON’T PURSUE, DON’T HARASS” 47-71, *at* http://www.sldn.org/binary-data/SLDN_ARTICLES/pdf_file/21.pdf (2004) [hereinafter SLDN, SIXTH REPORT].

40. *See* DEP’T OF DEF., DIR., 1304.26, QUALIFICATION STANDARDS FOR ENLISTMENT, APPOINTMENT, AND INDUCTION, *at* http://www.dtic.mil/whs/directives/corres/pdf/d130426wch1_122193/d130426p.pdf (5 Feb. 1994) [hereinafter DOD DIR. 1304.26]; DEP’T OF DEF., DIR., 1332.14, ENLISTED ADMINISTRATIVE SEPARATIONS, *at* http://www.dtic.mil/whs/directives/corres/pdf/d133214wch1_122193/d133214p.pdf (21 Dec. 1995) [hereinafter DOD DIR. 1332.14]; DEP’T OF DEF., DIR., 1332.30, SEPARATIONS OF REGULAR AND RESERVE COMMISSIONED OFFICERS, *at* http://www.dtic.mil/whs/directives/corres/pdf/d133230_031497/d133230p.pdf (14 Mar. 1997) [hereinafter DOD DIR. 1332.30]; DEP’T OF DEF., INSTR., 5505.3, INITIATION OF INVESTIGATIONS BY MILITARY CRIMINAL INVESTIGATIVE ORGANIZATIONS, *at* http://www.dtic.mil/whs/directive/corres/archives/i55053_071186/i55053p.pdf (11 July 1986)

“Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass” was intended to be a liberalization of the ban on gays in the military.⁴¹ The new policy theoretically distinguished between “being gay” and “acting on being gay,” allowing gay people to serve in the military provided that they did not engage in homosexual conduct.⁴² Homosexual conduct was defined to include statements of homosexual or bisexual orientation, homosexual acts, and marriage or attempted marriage to a person of the same sex.⁴³ Under the new policy, it was theoretically acceptable to be gay in the military, as long as one did not engage in homosexual conduct as defined above.⁴⁴ New recruits were no longer to be asked if they were gay. Sexual orientation was to be considered “a personal and private matter,”⁴⁵ and witch hunts and invasive questioning were supposed to end.⁴⁶

The public understood this to be a “live-and-let-live” rule, and in the minds of many involved in the development of this compromise position between those who would lift the ban and those who would retain it, that was indeed the intent of the law. However, in practice the new policy turned out to be anything but a *laissez-faire* approach to sexual orientation in the military. “Don’t Ask, Don’t Tell” was insidious; like a wolf in sheep’s clothing, “Don’t Ask, Don’t Tell” turned out to be a ban on gays in the military disguised as a liberalization of the government’s

[hereinafter AFI 5505.3]; DEP’T OF DEF., INSTR., 5505.8, INVESTIGATIONS OF SEXUAL MISCONDUCT BY THE DEFENSE CRIMINAL INVESTIGATIVE ORGANIZATIONS AND OTHER DOD LAW ENFORCEMENT ORGANIZATIONS, at <http://dont.stanford.edu/regulations/dodi5505.8.pdf> (5 Feb. 1994) [hereinafter AFI 5505.8]. For a brief summary of the changes see Memorandum from Les Aspin, the Secretary of Defense, to the Secretaries of the Military Departments, Implementation of DoD Policy on Homosexual Conduct in the Armed Forces, at http://www.sldn.org/binary-data/sldn_articles/pdf (Dec. 21, 1993).

Each branch’s implementation is as follows: U.S. DEP’T OF ARMY, REG., 165-1, Chaplain Activities in U.S. Army para. 1.1 (26 June 2000); U.S. DEP’T OF ARMY, REG. 600-20, ARMY COMMAND POLICY para. 4-19 (12 May 2002); NAVADMIN 033/94 CNO Washington DC 110300Z (3 Mar. 1994); ALMAR 64/94 CMC Washington DC 281600Z (Feb 1994); U.S. DEP’T OF HOMELAND SECURITY, U.S. COAST GUARD, COAST GUARD PERSONNEL MANUAL ch. 12.E (8 Jan. 1988).

41. See generally HALLEY, *supra* note 32, at 27.

42. *Id.*

43. DOD DIR. 1332.14, *supra* note 40, at para. E2.1.7; DOD DIR. 1332.40, *supra* note 40, at para. E1.1.12.

44. HALLEY, *supra* note 32, at 27-28.

45. *Id.* at 28.

46. Senator Sam Nunn, former Chairman of the Senate Armed Services Committee, stated in 1993 that “I do not believe we should have sex squads looking for ways to investigate servicemembers’ private, consensual behavior.” *Representative Frank’s Proposal Concerning Gay Men and Lesbians in the Armed Forces*, 103rd Cong. 4 (1993) (statement of Sam Nunn, Former Senator and Chairman). In the words of General Colin Powell, “Don’t Pursue” means that “We will not ask, we will not witch hunt we will not seek to learn orientation.” *Policy Concerning Homosexuality in the Armed Forces: Hearing Before the Senate Comm. on Armed Services*, 103d Cong. 709 (1993) (statement of Gen. Colin Powell, Chairman, Joint Chiefs of Staff).

stance on gays in the military. In the following pages, this article will review the implementation of the “Don’t Ask, Don’t Tell” ban in its first ten years and discuss the ways in which the new ban has turned out in practice to be even worse than its regulatory predecessors. The article will conclude with a discussion of the future of this failed policy.

III. “DON’T ASK, DON’T TELL”: TEN YEARS IN REVIEW

A. Understanding the Mandates: “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass.”

It is very clear after ten years of practical application that “Don’t Ask, Don’t Tell” is still a ban on gays in the military. As the Servicemembers Legal Defense Network (SLDN) describes the law in its Ninth Annual Report, “‘Don’t Ask, Don’t Tell’ is the only law in the land that authorizes the firing of an American for being gay.”⁴⁷ Far from a compromise in which gay people can serve in the Armed Forces as long as they are discrete with respect to their sexual activities, the complex maze of “do’s” and “don’ts” that one must navigate in order to comply with the policy makes service by gay persons extremely difficult. Any statement of gay, lesbian, or bisexual orientation, physical contact of a sexual or romantic nature with a person of the same sex, or marriage or attempted marriage to someone of the same-sex constituted grounds for discharge.⁴⁸ Further, compliance with the policy is no defense to the initiation of an administrative discharge; a service member could refrain from all of the aforementioned forms of conduct and still be discharged for homosexuality.⁴⁹ All a commander needs is “credible evidence” of a service member’s homosexuality to begin an investigation and initiate discharge proceedings.⁵⁰

To better understand the complexities of the policy in practice over the last ten years, it is helpful to begin with a brief introduction to the general principles associated with each component of the policy. It is important to note, however, that the meanings and “rules” briefly outlined below constitute our current understanding of the ban, after ten years of practical application. As we will discuss later, these meanings

47. SLDN, NINTH ANNUAL REPORT, *supra* note 25, at 9.

48. *See supra* note 43 and accompanying text.

49. *See* DOD DIR. 1332.13, *supra* note 40, at para. E3.A1.1.8.1.2.2.

50. *See* DOD DIR. 1332.14, *supra* note 40, at para. E3.A1.1.8.1.2.2.5; *see also* SLDN, NINTH ANNUAL REPORT, *supra* note 25, at 10.

were not at all clear during the early years of the new ban, and in fact confusion about the meaning of each of the policy's components was perhaps the defining characteristic of the first few years' of the ban's application. Even today, very few people inside or outside the military have a very clear idea of what, in practice, "Don't Ask, Don't Tell" means for service members and military leaders.

1. Don't Ask

"Commanders or appointed inquiry officials shall not ask, and members shall not be required to reveal, their sexual orientation."⁵¹ On its face, this component of the policy seems clear, but in practice it has nonetheless proven problematic. Inadvertent asking is something the drafters of the new ban likely never considered, however, perfectly innocent questions like "Are you dating anyone?," "Are you bringing a girlfriend to the military ball?," or "How has a nice girl like you managed to stay single this long?" put gay service members in a bind. Answering truthfully constitutes a violation of the "Don't Tell" component of the ban, and evading the question leaves one open to presumptions of homosexuality, leaving fabrication of a fake heterosexual identity the only viable option for many service members.⁵² Further, not-so-innocent military personnel commonly use proxy questions to evade the letter of the "Don't Ask" law, seeking to determine sexual orientation through questions other than "are you gay?" The question "Do you like men?" asked of a male service member is such a question, and more artful forms of the same kind of questioning are commonly used to get around the "Don't Ask" mandate.⁵³

Moreover, there are circumstances in which commanders or investigators may legitimately question service members about sexual orientation without running afoul of the rules. A service member may be asked about his or her sexual orientation in an attempt to corroborate specific, credible information on incidents of homosexual conduct.⁵⁴ However, service members are not required to reveal their sexual orientation if

51. See DOD DIR. 1332.14, *supra* note 40 at para. E3.A4.4.3; DOD DIR. 1332.40, *supra* note 40 at para. E8.4.3.

52. See, e.g., HALLEY, *supra* note 32, at 2-3.

53. See, e.g., SERVICEMEMBERS LEGAL DEFENSE NETWORK, CONDUCT UNBECOMING: THE FIRST YEAR UNDER "DON'T ASK, DON'T TELL, DON'T PURSUE" 9, at http://www.sldn.org/binary-data/SLDN_ARTICLES/pdf_file/164.pdf (1995) [hereinafter SLDN, FIRST ANNUAL REPORT].

54. See DOD DIR. 1332.14, *supra* note 40 at para. E3.A4.4.3; DOD DIR. 1332.40, *supra* note 40 at para. E8.4.3.

they are asked about it.⁵⁵ Lesbian, gay, and bisexual service members who do choose to answer and reveal their orientation are likely to be discharged, leaving them caught between a rock (lying or evading the question) and a hard place (answering truthfully and being discharged).⁵⁶

2. Don't Tell

“A basis for discharge exists if . . . [t]he member has said that he or she is a homosexual or bisexual, or made some other statement that indicates a propensity or intent to engage in homosexual acts”⁵⁷ Under “Don't Tell,” lesbian, gay, and bisexual servicemembers face discharge if they disclose their sexual orientation.

There are a few exceptions to the prohibition on “telling.” The first exception arises in the context of security clearance interviews, during which truthful statements about sexual orientation or activities are not a proper basis for discharge.⁵⁸ A second exception to the “Don't Tell” rule is made in the context of the confidentiality of the attorney-client relationship.⁵⁹ Lastly, there is a limited exception for communications between service members and psychotherapists, in that “telling” in this context may not be used in a court martial. Such communications can and are used to initiate administrative discharge proceedings,⁶⁰ however,

55. DOD DIR. 1332.14, *supra* note 40 at para. E3.A4.4.3; DOD DIR. 1332.40, *supra* note 40 at para. E8.4.3.

56. SERVICEMEMBERS LEGAL DEFENSE NETWORK, CONDUCT UNBECOMING: THE SEVENTH ANNUAL REPORT ON “DON'T ASK, DON'T TELL, DON'T PURSUE, DON'T HARASS” 20, at http://www.sldn.org/binary-data/SLDN_ARTICLES/pdf_file/256.pdf (2001) [hereinafter SLDN, SEVENTH ANNUAL REPORT].

57. DOD DIR. 1332.14, *supra* note 40 at para. E3.A4.3.2, E3.A4.3.2.2; DOD DIR. 1332.40, *supra* note 40 at para. E8.3.2, E8.3.2.2.

58. SERVICEMEMBERS LEGAL DEFENSE NETWORK, SURVIVAL GUIDE: A COMPREHENSIVE GUIDE TO “DON'T ASK, DON'T TELL, DON'T PURSUE, DON'T HARASS” AND RELATED MILITARY POLICIES 48, at www.sldn.org/templates/get/index.html?section=19 (4th ed. March 2003) [hereinafter SLDN, SURVIVAL GUIDE]. President Clinton signed Executive Order No. 12,968, Access to Classified Information, 60 Fed. Reg. 40,250 (Aug. 7, 1995), eliminating sexual orientation as a bar to obtaining a security clearance in the civilian or military context. *Id.* at §3.1. This created a very awkward situation in which asking—and telling—about sexual orientation in the context of the security clearance investigation was allowed and even encouraged, whereas anywhere else in the military experience it was a violation of the law. SLDN, SURVIVAL GUIDE, *supra*. The new regulations made it clear that information about sexual orientation gained in the security clearance investigation process should not provide grounds for initiation of an investigation and discharge proceedings, however in practice, it took several years for this principle to be widely observed by those assigned to do background checks. *Id.* Threats of criminal prosecution and administrative discharge were common in the early years of the executive order, but have subsided generally since then.

59. SLDN, SURVIVAL GUIDE, *supra* note 58, at 12.

60. Exec. Order No. 13,140, 2 C.F.R. 224, 226-28 (Oct. 12, 1999), *available at*

communications with military health care providers, chaplains and anyone else at any time can be used to discharge a service member.⁶¹

As is the case with “asking,” there are numerous ways in which inadvertent “telling” can result in discharge for a gay service member. Diaries have served as the basis for a service member’s investigation and discharge in more than one instance.⁶² Private communications to family members and friends are considered forms of “telling.”⁶³ Regardless of policy-makers promises of a zone of privacy for gay service members into which military officials could not tread, that zone has proven illusory. If a military commander receives credible information that a service member has confided their sexual orientation to anyone—even parents, a psychologist, or chaplain—the service member may be investigated and discharged.⁶⁴ While apparently simple, “Don’t Tell” and the statements which may or may not violate this rule and provide a basis for legitimate investigation have proven to be a particularly tricky area of the law.

3. Don’t Pursue

More than one dozen different DoD directives and instructions make up the rules of “Don’t Pursue.”⁶⁵ These limits define when it is appropriate to conduct an investigation and what the scope of a legitimate investigation may include. Investigations may be conducted only by a commander, upon receipt of credible information that a service member has made a statement that he or she is gay, lesbian, or bisexual, engaged in same sex conduct of a sexual nature, or married or attempted to marry someone of the same-sex.⁶⁶

The meaning of the term “credible information” has been devel-

http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=1999_register&docid=99-26670-filed.pdf.

61. *Id.*; see generally SERVICEMEMBERS LEGAL DEFENSE NETWORK, CONDUCT UNBECOMING: THE FOURTH ANNUAL REPORT ON “DON’T ASK, DON’T TELL, DON’T PURSUE” 14-20, at http://www.sldn.org/binary-data/SLDN_ARTICLES/pdf_file/167.pdf (1998) [hereinafter SLDN, FOURTH ANNUAL REPORT].

62. SERVICEMEMBERS LEGAL DEFENSE NETWORK, CONDUCT UNBECOMING: THE FIFTH ANNUAL REPORT ON “DON’T ASK, DON’T TELL, DON’T PURSUE” 49, at <http://don.t.stanford.edu/commentary/conduct5.pdf> (1999) [hereinafter SLDN, FIFTH ANNUAL REPORT].

63. SLDN, SURVIVAL GUIDE, *supra* note 58 at 5.

64. SLDN, FIFTH ANNUAL REPORT, *supra* note 62 at 37-40.

65. SLDN, NINTH ANNUAL REPORT, *supra* note 25, at 10.

66. See DOD DIR. 1332.14, *supra* note 40, at para. E3.A4.3.1; DOD DIR. 1332.40, *supra* note 40, at para. E8.3.1.

oped through various directives and instructions from the DoD.⁶⁷ Information about a servicemember's associational conduct—such as reading gay magazines or attending gay pride events—may not be considered credible evidence of homosexual conduct.⁶⁸ A service members' complaint about anti-gay harassment also may not serve as credible evidence of homosexual conduct,⁶⁹ nonetheless SLDN has reported a number of cases in which servicemembers reporting anti-gay harassment or even physical threats have been met with investigations and eventual discharge.⁷⁰

Once a commander has determined that he has credible information that a servicemember has violated the homosexual conduct policy, he may initiate a limited inquiry to determine whether the alleged conduct indeed occurred.⁷¹ The commander may only investigate the facts surrounding the specific allegation(s) of homosexual conduct,⁷² and, in cases of statements of gay, lesbian, and bisexual orientation made by the servicemember, may only question the servicemember, his or her chain of command, and persons whom the servicemember suggests to the command.⁷³ Any inquiry which exceeds this scope is known as a "substantial inquiry," and must be justified by the commander⁷⁴ and approved in advance by the relevant Service Secretary.⁷⁵ In cases in which only consensual sexual activity between adults is alleged, criminal investigators should be excluded from the inquiry, and only administrative

67. See generally Servicemembers Legal Defense Network, *About Don't Ask, Don't Tell: What is Don't Ask, Don't Tell, Don't Pursue, Don't Harass?*, at <http://www.sldn.org/templates/dont/record.html?section=42&record=749> (last visited Mar. 3, 2004) [hereinafter SLDN, *About Don't Ask, Don't Tell*].

68. See DOD DIR. 1332.14, *supra* note 40, at para. E3.A4.3.3.4; DOD DIR. 1332.40, *supra* note 40, at para. E8.3.3.4.

69. See DOD DIR. 1332.14, *supra* note 40, at para. E3.A4.3.3.2, E3.A4.3.3.3; DOD DIR. 1332.40, *supra* note 40, at para. E8.3.3.2, E8.3.3.3.

70. See generally SLDN, THIRD ANNUAL REPORT, *infra* note 85, at 17-21.

71. SLDN, *About Don't Ask, Don't Tell*, *supra* note 67, at <http://www.sldn.org/templates/dont/record.html?section=42&record=749> (last visited Mar. 3, 2004).

72. See DOD DIR. 1332.14, *supra* note 40, at para. E3.A4.1.3; DOD DIR. 1332.40, *supra* note 40, at para. E8.1.3.

73. See generally OFFICE OF THE UNDER SECRETARY OF DEFENSE, REPORT TO THE SECRETARY OF DEFENSE: REVIEW OF THE EFFECTIVENESS OF THE APPLICATION AND ENFORCEMENT OF THE DEPARTMENT'S POLICY ON HOMOSEXUAL CONDUCT IN THE MILITARY, at <http://www.defenselink.mil/pubs/rpt040798.html> (Apr. 1998); see also 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, at http://www.Defenselink.Mil/releases/1999/b08131999_b+381-99.html (Aug. 12, 1999).

74. See SLDN, SEVENTH ANNUAL REPORT, *supra* note 56, at 46.

75. *Id.*

proceedings should be commenced.⁷⁶ Generally speaking, in cases of statements of gay, lesbian, or bisexual orientation, no investigation is warranted prior to the commencement of separation proceedings.⁷⁷

As complex as these rules are on paper, they are even more difficult to apply in practice. The large number of directives and instructions in which the “Don’t Pursue” rules are articulated and the piecemeal way in which the rules have developed make for patchy understanding among military commanders, JAG officers, and criminal investigators.⁷⁸ “Don’t Pursue” is perhaps the trickiest of all the policy components in practice.

4. Don’t Harass

The “Don’t Harass” component was added to the title of the policy in February 2000 as the result of the murder of PFC Barry Winchell in a hate crime which followed months of anti-gay harassment.⁷⁹ Nonetheless, the concept was implicit in the policy from day one. According to DoD Directive 1304.26, “The Armed Forces do not tolerate harassment or violence against any service member, for any reason.”⁸⁰ A memorandum from then-Undersecretary of Defense Rudy de Leon dated August 12, 1999, entitled “Guidelines for Investigating Threats Against Service Members Based on Alleged Homosexuality,” instructs commanders not to investigate service members based on their reports of anti-gay harassment.⁸¹ The Pentagon also adopted a thirteen Point Anti-Harassment Action Plan (AHAP) on July 21, 2000, requiring training on anti-gay harassment, more effective avenues of reporting anti-gay harassment, enforcement of the anti-harassment directives, and measurement of the effectiveness of the steps taken.⁸² Unfortunately, very little of this plan has been implemented thus far.

76. See DOD DIR. 5505.8, *supra* note 40, at para. A.

77. See generally 10 U.S.C. § 654 (b)(2) (2000); SLDN, SURVIVAL GUIDE, *supra* note 58, at 16-19.

78. See SLDN, NINTH ANNUAL REPORT, *supra* note 25, at 10.

79. SLDN, SEVENTH ANNUAL REPORT, *supra* note 56, at 18.

80. SLDN, SIXTH ANNUAL REPORT, *supra* note 39, at 47.

81. Memorandum from Rudy De Leon, Guidelines for Investigating Threats Against or Harassment of Service Members Based on Alleged Homosexuality (Aug. 13, 1999), at <http://www.defenselink.mil/releases/1999/b081399.html>.

82. SLDN, *About Don’t Ask, Don’t Tell*, *supra* note 67, at <http://www.sldn.org/templates/dont/record.html?section=42&record=749> (last visited Mar. 3, 2004).

B. Ten Years of “Don’t Ask, Don’t Tell”

The first decade of the “Don’t Ask, Don’t Tell” version of the ban on gays in the military is perhaps best understood in four phases. The first period may be described as the early years of the policy, in which military leaders struggled to understand the new mandates “Don’t Ask,” “Don’t Tell,” “Don’t Pursue,” and, perhaps to a lesser degree, “Don’t Harass.” Opponents of gays in the military rebelled against the new law, and political backlash and confusion about how the policy should work in practice ensued.⁸³ Discharges for homosexuality increased dramatically, as did invasive investigations and witch-hunts.⁸⁴ Anti-gay harassment rose to the level of sport inside the military, and vocal disapproval of President Clinton and his new policy on gays in the military was the rule rather than the exception.⁸⁵ Constitutional challenges to the law were argued and lost during this period, which began with President Clinton’s election in 1992 and persisted into the mid-1990s.⁸⁶

The second period took shape in the mid to late 1990’s, after the dust began to settle, the new regulations were issued, and the DoD had issued guidance on how to implement the new law.⁸⁷ During this time period, the “rules” associated with the implementation of the ban became clearer, although violation of these rules through inappropriate investigations and tolerance of anti-gay harassment at all levels remained rampant.⁸⁸ Gay discharges continued to rise, although witch-hunts became somewhat less common.⁸⁹ This period ended in the tragic death of PFC Barry Winchell at the hands of fellow soldiers in a brutal anti-gay hate crime at Fort Campbell, Kentucky.

The third period began after the death of PFC Winchell. During this period, the DoD developed and conducted a survey across the Services to measure the level of anti-gay harassment experienced by service-members.⁹⁰ The survey found widespread anti-gay harassment through-

83. See generally HALLEY, *supra* note 32, at 19-26.

84. See generally, e.g., SLDN, SIXTH ANNUAL REPORT, *supra* note 39, at 30-34.

85. See generally SERVICEMEMBERS LEGAL DEFENSE NETWORK, CONDUCT UNBECOMING: THE THIRD ANNUAL REPORT ON “DON’T ASK, DON’T TELL, DON’T PURSUE,” at <http://dont.stanford.edu/commentary/conduct3.pdf> (1997) [hereinafter SLDN, THIRD ANNUAL REPORT].

86. See generally Burelli, *supra* note 16.

87. See, e.g., DOD DIR. 1332.14, *supra* note 40, at para. E3.A1.1.8.

88. See generally SLDN, SIXTH ANNUAL REPORT, *supra* note 39.

89. *Id.* at 8.

90. Dep’t. of Def., *Department of Defense Issues Anti-Harassment Guidelines* (July 21, 2000), at http://www.defenselink.mil/news/jul2000/5072/2000_bt432-00.html (last visited Mar. 30, 2004).

out the services, although little was accomplished to combat the harassment.⁹¹ September 11th may well be said to mark the “beginning of the end” of this period, and the start of a transition into a new era for the ban in terms of public opinion.

The fourth stage of the ban’s ten-year history began when the United States went to war on terrorism. Since conflicts in Afghanistan and Iraq have created an urgent need for qualified manpower, discharges have dropped significantly.⁹² Notwithstanding this fact, the high profile discharges of a number of Arabic and Korean linguists shot the issue of gays in the military to the forefront of the public consciousness once again.⁹³ During this period, virtually every major newspaper in the country ran editorials calling for an end to the ban, and public opinion began to dramatically shift toward an end to discrimination against gays in the military.⁹⁴ This period represents a sea change in terms of public sentiment on the issue of gays in the military.

The following pages will examine the first ten years of “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass” using these four periods to facilitate the analysis.

1. The Early Years

The early years of the “Don’t Ask, Don’t Tell” law were marked by backlash and confusion. Conservatives within the military, veterans organizations, and conservative advocacy groups around the country dug in their heels in protest against a President they did not respect.⁹⁵ The announcement of the new policy galvanized anti-gay sentiment in the military ranks, serving as a flash point for the anti-Clinton sentiment

91. See SERVICEMEMBERS LEGAL DEFENSE NETWORK, CONDUCT UNBECOMING: THE EIGHTH ANNUAL REPORT ON “DON’T ASK, DON’T TELL, DON’T PURSUE, DON’T HARASS” 2, at http://www.sldn.org.binary-data/SLDN_ARTICLES/pdf_file/473.pdf (2001) [hereinafter SLDN, EIGHTH ANNUAL REPORT].

92. SLDN, NINTH ANNUAL REPORT, *supra* note 25, at 1.

93. *Id.* at 7.

94. See *infra* note 198 and accompanying text.

95. For example, Gary L. Lehring states the following:

Pressure groups, both pro and con, organized White House and congressional telephone and letter-writing campaigns. Even the Joint Chiefs of Staff, in efforts that bordered on insubordination and the subversion of civilian authority over the military, entered the political process unabashedly, lobbying members of Congress behind the scenes and opening up their phone lines for public comment.

GARY L. LEHRING, OFFICIALLY GAY: THE POLITICAL CONSTRUCTION OF SEXUALITY BY THE U.S. MILITARY 137 (2003).

which pervaded the military during the early 1990s.⁹⁶ Anti-Clinton servicemembers, which were by far the majority, transferred their disdain for the President to more accessible targets in the form of servicemembers believed to be gay or even gay-friendly through witch-hunts and severe anti-gay harassment.⁹⁷ Confusion about the rules associated with the new law complicated the problem, and training on the new law was almost nonexistent.⁹⁸ Constitutional challenges to the law failed, but the “out” gay plaintiffs of those cases met with overwhelming acceptance from their military peers, creating an even stranger situation for military personnel trying to make sense of the new landscape.⁹⁹ Through all of this turmoil, the people who bore the brunt of the backlash, the confusion, and mixed messages from all sides were the lesbian, gay, and bisexual service members of the early 1990s.

The military’s retrenchment in the early years after the new law was enacted manifested itself in many ways to the detriment of service members perceived to be gay. Witch-hunts persisted, and discharges for homosexuality eventually increased over pre-“Don’t Ask, Don’t Tell” levels.¹⁰⁰ One of the more flagrant examples of the forty-three witch-hunts¹⁰¹ uncovered by the SLDN during just the first two years of the law’s implementation included the investigation of sixty female service

96. *Id.* at 126-27.

97. Janet Halley describes the trepidation even straight, gay-friendly service members experience if they dare to speak out against anti-gay harassment or the ban in her book, *DON’T: A READER’S GUIDE TO THE MILITARY’S ANTI-GAY POLICY*:

Doing things that make your commander think you are gay—like making pro-gay statements, or cutting your hair a certain way, or not fitting the gender stereotype of the sex you belong to—can be the basis for an inference that you have engaged in or might someday engage in homosexual conduct; and once your commander draws that inference you can be discharged from the military unless you can prove that you have *no propensity* to engage in such conduct. Of course, most heterosexuals will be able to prove no propensity, not by proving specific acts of erotic conduct but by bringing in evidence of their heterosexuality more generally. . . . That’s not as easy as you might think, particularly when the ultimate goal is to prove a negative . . . Indeed, since they can never be quite sure what their commander will think creates an inference that they are gay, they can never be entirely confident that they’ll never fall into this danger. Servicemembers who really are heterosexual lost a great deal of security when the 1993 revisions were adopted.

HALLEY, *supra* note 32, at 2-3.

98. SERVICEMEMBERS LEGAL DEFENSE NETWORK, *CONDUCT UNBECOMING: THE SECOND ANNUAL REPORT ON “DON’T ASK, DON’T TELL, DON’T PURSUE”* iv, at <http://www.dont.stanford.edu/commentary/conduct2.pdf> (1996) [hereinafter SLDN, SECOND ANNUAL REPORT].

99. *See generally* Burrelli, *supra* note 16, at 6-9.

100. *See generally* SLDN, SECOND ANNUAL REPORT, *supra* note 98, at i-ii.

101. *See* SLDN, FIRST ANNUAL REPORT, *supra* note 53, at 11; SLDN, SECOND ANNUAL REPORT, *supra* note 98, at 9-10.

members suspected of being lesbians on the USS Simon Lake, ported at Sardinia in Italy in 1995.¹⁰² In another example, a female soldier was criminally charged after she reported several male soldiers for assaulting her. She was also threatened with prison unless she turned over the names of other women suspected of being lesbians.¹⁰³ The largest witch-hunt of the first year of the law occurred in Okinawa, Japan, where twenty-one sailors and Marines were questioned about their sexual orientation and the sexual orientation of other servicemembers.¹⁰⁴ Neither the Navy, the Marine Corps, nor the Army took steps to stop these illegal investigations once notified of them.¹⁰⁵

Anti-gay harassment was rampant during this period,¹⁰⁶ and death threats against service members perceived to be gay skyrocketed. In the first year of the policy alone, SLDN worked on ten cases in which service members received death threats targeting them for their sexual orientation,¹⁰⁷ likely a fraction of the actual cases. In most cases, however, the anti-gay harassment was virulent and demeaning, but did not rise to the level of death threats. Anti-gay jokes, cadences, and teasing rank among the more common forms of harassment endured by gay servicemembers throughout this period, and tolerance of this kind of harassment at all levels was virtually uniform.¹⁰⁸

Confusion combined with the backlash described above to create a volatile situation which was, in many ways, much worse than that which existed prior to 1993.¹⁰⁹ Even those who wanted to adhere to the mandates of the law experienced great difficulty deciphering its “do’s and don’ts.”¹¹⁰ This confusion and pandemic misapplication of the policy were due in part to the inherent complexity of the policy and the negative attitudes toward the law held by many inside the military, but it was worsened by the issuance of guidance from DoD and the individual services, which clearly conflicted with the intent of the policy as articulated by the President and senior military officials in 1993.¹¹¹

102. SLDN, SECOND ANNUAL REPORT, *supra* note 98, at 12.

103. *Id.*

104. *Id.* at 16.

105. *Id.* at 12.

106. See SLDN, FIRST ANNUAL REPORT, *supra* note 53, at 8, 11; SLDN, SECOND ANNUAL REPORT, *supra* note 98, at 21-26; SLDN, THIRD ANNUAL REPORT, *supra* note 85, at 16-25.

107. See generally SLDN, FIRST ANNUAL REPORT, *supra* note 53, at ii.

108. See generally Christin M. Damiano, *Lesbian Baiting in the Military: Institutionalized Sexual Harassment under “Don’t Ask, Don’t Tell, Don’t Pursue,”* 7 AM. U. J. GENDER SOC. POL’Y & L. 499 (1998-1999).

109. SLDN, SECOND ANNUAL REPORT, *supra* note 98, at i.

110. *Id.* at 5-6.

111. *Id.* at 6.

For example, then-Chairman of the Joint Chiefs of Staff Collin Powell said about the law in 1993, “We will not ask, we will not witch-hunt, we will not seek to learn orientation.”¹¹² President Clinton promised in 1993 that the new law would offer “a decent regard for the legitimate privacy and associational rights of all service members.”¹¹³ Yet time after time, official guidance on the implementation of the new ban directed commanders and inquiry officers to engage in the very interrogations military and political leaders promised would be prohibited.

An Air Force memorandum from the office of the Judge Advocate General, dated November 3, 1994, specifically instructed inquiry officers to question the parents, family members, and civilian friends and mentors of suspected gay airmen, to obtain information which could be used against those airmen in an administrative discharge proceeding.¹¹⁴ A memorandum from DoD General Counsel Judith Miller on August 18, 1995, instructing commanders to investigate to determine whether any service member making a statement of homosexuality has ever been in a sexual relationship with a person of the same gender, similarly flew in the face of General Powell’s promise.¹¹⁵

Any “zone of privacy” which may have been envisioned under the policy rapidly disintegrated during its first few years, as practical application made clear that all statements of homosexual orientation—regardless of the forum in which they were made—could serve as grounds for discharge.¹¹⁶ A memo from the DoD’s General Counsel’s office instructed military psychologists to turn in patients who sought counseling on sexual orientation-related issues,¹¹⁷ and the Navy’s Gen-

112. *Policy Concerning Homosexuality in the Armed Forces: Hearings Before the Senate Comm. on Armed Services*, 103d Cong. 709 (1993).

113. William J. Clinton, Remarks by the President at National Defense University, at <http://clinton6.nara.gov/1993/07/1993-07-19-presidents-remarks-on-changes-to-the-gay-ban.htm> (July 19, 1993).

114. See SLDN, FIRST ANNUAL REPORT, *supra* note 53, at 10.

115. See SLDN, SECOND ANNUAL REPORT, *supra* note 98, at 6; see also Memorandum from Judith A. Miller, General Counsel for the Department of Defense, to the General Counsels of the Military Departments, *Policy on Homosexual Conduct in the Armed Forces*, at <http://dont.stanford.edu/regulations/memo18aug1995.pdf> (Aug. 18 1995).

116. See generally Samuel A. Marcossan, *A Price Too High: Enforcing the Ban on Gays and Lesbians in the Military and the Inevitability of Intrusiveness*, 64 UMKC L. REV. 59, 65-69 (1995); see also SLDN, NINTH ANNUAL REPORT, *supra* note 25, at 24.

117. See SLDN, FIRST ANNUAL REPORT, *supra* note 53, at 20, 22. This memorandum resulted in a number of “outings” by psychologists and psychiatrists of military members. *Id.* at 20. A particularly well-known case from this time period involved Marine Corporal Blaesing, whose psychologist informed the command that he was asking questions about sexual orientation in his counseling sessions with her. *Id.* at 22. While Blaesing’s commander at the time did not act on the information to discharge Blaesing, his successor in command did. *Id.* Despite the psychologist’s

eral Medical Officer Manual specifically instructed doctors to report patients they discovered to be gay, lesbian, or bisexual to their commands.¹¹⁸ Criminal prosecution for adult, consensual same-sex sexual relations continued despite promises that private conduct would not be targeted.¹¹⁹ Time and again, guidance from DoD and the services contradicted the basic mandates of the law, leaving commanders confused and people who opposed the liberalization of the policy on gays in the military armed with new ammunition to hunt out and discharge gay servicemembers.

Not surprisingly, training on the law and the rules associated with it was severely lacking in its early years, and this has remained a problem throughout the entire ten-year period of "Don't Ask, Don't Tell." In 1997, SLDN reported that the majority of its clients reported had never received any training on "Don't Ask, Don't Tell," and inspector general reports corroborated this finding.¹²⁰ What little training was provided during these years tended to focus more on how to get around the mandates of the law than it did on how to comply with its spirit.¹²¹

While the confusion and backlash of the first three to four years of the policy ensued inside the military, in the civilian courts, servicemembers challenged the new ban on constitutional grounds in the hopes of earning the right to serve openly.¹²² One by one, each constitutional challenge met with failure.¹²³

A number of cases were brought during the mid-1990s challenging the new ban on First Amendment free speech grounds.¹²⁴ The Second

testimony that Blaesing merely asked questions and did not actually reveal his sexual orientation to her, Blaesing was ultimately discharged. *Id.*

118. See SLDN, FIFTH ANNUAL REPORT, *supra* note 62, at 35-37 (citing U.S. DEP'T OF NAVY, NAVMED P-5134, GENERAL MEDICAL OFFICER MANUAL (May 1996)).

119. See generally SLDN, THIRD ANNUAL REPORT, *supra* note 85.

120. SLDN, FOURTH ANNUAL REPORT, *supra* note 61, at 3.

121. See SLDN, THIRD ANNUAL REPORT, *supra* note 85, at 28.

122. See David F. Burrelli, *Homosexuals and U.S. Military Policy: Current Issues*, CRS ISSUE BRIEF, at <http://www.fas.org/man/crs/96-029.htm> (last visited Feb. 9, 2004).

123. See generally, e.g., *Able v. United States*, 155 F. 3d 628 (2d Cir. 1998); *Holmes v. California Army Nat'l Guard*, 124 F.3d 1126 (9th Cir. 1997); *Philips v. Perry*, 106 F.3d 1420 (9th Cir. 1997); *Richenberg v. Perry*, 97 F.3d 256 (8th Cir. 1996); *Thomasson v. Perry*, 80 F.3d 915 (4th Cir. 1996); *Selland v. Perry*, 905 F. Supp. 260 (D. Md. 1995), *aff'd without opinion*, 10 F.3d 950 (4th Cir. 1996); *Thorne v. United States Dep't. of Def.*, 945 F. Supp. 924 (E.D. Va. 1996). Note that this list only includes challenges brought against the 1993 law, and does not include the large number of cases brought throughout the 1970s through the early 1990s challenging regulatory prohibitions on service by gay, lesbian and bisexual Americans.

124. See, e.g., *Able*, 155, F.3d at 631 (challenging the ban under both First and Fifth Amendments); *Holmes*, 124 F.3d at 1130; *Philips*, 106 F.3d at 1424, 1429; *Thomasson*, 80 F.3d at 921; *Selland*, 905 F. Supp. at 263, 267; *Thorne*, 945 F. Supp. at 925 (First Amendment).

Circuit, in *Able v. U.S.*, found that “Don’t Ask, Don’t Tell” and the prohibition on homosexual acts did not violate gay, lesbian, and bisexual service members’ right to free speech because the prohibitions on speech furthered the government’s interest in preventing homosexual conduct in the military.¹²⁵ In *Thomasson v. Perry*, and *Philips v. Perry*, the Fourth and Ninth Circuits, respectively, analyzed the “statements” prong of the “Don’t Ask, Don’t Tell” statute and found that discharges based on statements did not violate the First Amendment, because the statements were evidence of a propensity to act and the discharges were based on that propensity, not the statements themselves.¹²⁶

Equal protection arguments were also a staple of the constitutional challenges to “Don’t Ask, Don’t Tell.”¹²⁷ Both the “acts” component of the policy and the “statements” component were unsuccessfully challenged on Fifth Amendment Equal Protection grounds. In *Philips v. Perry* the Ninth Circuit rejected a challenge to the “acts” component, finding the Navy’s justifications for the policy—the maintenance of unit cohesion, preservation of personal privacy, and the reduction of sexual tension, among others—were legitimate government interests rationally related to the policy of discharging persons who engaged in homosexual acts.¹²⁸ Equal protection challenges to the “statements” component of the law failed as well in *Holmes v. California Army National Guard*, *Richenberg v. Perry*, and *Philips v. Perry*. The rebuttable presumption of an intent to act implied in a statement of homosexual orientation was found to be rationally related to the legitimate government interest of preventing homosexual conduct in the ranks.¹²⁹

125. *Able*, 88 F.3d at 1296.

126. *Philips*, 106 F.3d at 1430; *Thomasson*, 80 F.3d at 931.

127. See generally *Able* 155 F.3d 628; *Holmes*, 124 F.3d 1126; *Philips*, 106 F.3d 1420; *Richenberg*, 97 F.3d 256; *Thomasson*, 80 F.3d 915.

128. *Philips*, 106 F.3d at 1424-26.

129. *Holmes*, 124 F.3d at 1132; *Thomasson*, 80 F.3d at 929; *Richenberg*, 97 F.3d at 260; see also Center for the Study of Sexual Minorities in the Military, ‘Open Gays’ Can Serve Military Well, *Study Says*, WASHINGTON BLADE (Dec. 7, 2001), available at http://www.gaymilitary.ucsb.edu/PressCenter/coverage12_7_01.htm. A notable deviation from the general principle that conduct could be inferred from status under “Don’t Ask, Don’t Tell” was seen in the case of Zoe Dunning, a Navy Reserve Lieutenant who successfully fought her discharge using the argument that an intent to act upon her sexual orientation could not be inferred from her public statement acknowledging her status as a lesbian. *Id.* Dunning’s administrative separation board determined that status does not necessarily indicate conduct or intended conduct, and recommended her retention in the Navy Reserves. *Id.* Dunning still serves today, and has reached the rank of Commander. *Id.* Shortly after Dunning’s victory before her administrative separation board, the Department of Defense issued a memorandum prohibiting administrative separation boards from retaining gay personnel based on the status/conduct distinction. Memorandum from Judith A. Miller, *supra* note 115.

During the course of these cases and others initiated before the 1993 law challenging the regulatory ban, most of the plaintiffs served openly gay in their military units, meeting almost uniformly with support and acceptance from their peers and leaders.¹³⁰ The positive reaction to those who fought for the right to serve was striking.

Petty Officer Keith Meinhold, who won his case before the Ninth Circuit Court of Appeals . . . “has not only been tolerated by the majority of his colleagues—he has been embraced by them.” Meinhold’s flight crew was recently named the most combat effective in the Pacific fleet. Colonel Margarethe Cammermeyer has also received strong support: after she won her court case in June 1994, she immediately received calls from her unit welcoming her back to the Washington State National Guard. Petty Officer Mark Phillips was given a chocolate cake by his crewmembers on the one-year anniversary of his coming out to his unit. And, Captain Rich Richenberg’s co-workers threw a surprise birthday party for him in February 1995 as he continues to fight to stay in the military. These servicemembers are only a handful of those who have been serving openly for the past one to three years, and who, as clear documentation shows, have had a positive impact on their unit’s good order, discipline and morale.¹³¹

Despite support from their military colleagues, these lesbian and gay Americans fighting for the right to serve found no relief from anti-gay discrimination in the courts.¹³² At the end of the series of constitutional challenges, the result was a judicial consensus that the ban was indeed constitutional, and the next several years would see the reality of life under the new ban taking shape.

2. The Formative Years: The New Ban Comes into Its Own

The years 1996-1998 witnessed more of the same kinds of violations of the “Don’t Ask, Don’t Tell” law that were seen in the first several years of the policy, but the more outrageous witch-hunts and illegal investigations became somewhat less common as the regulations and instructions defining the contours of the law started to filter down to commanders in the field.¹³³ In accordance with DoD guidance, which was slowly beginning to work its way into the field by this period, criminal

130. See SLDN, FIRST ANNUAL REPORT, *supra* note 53, at 1.

131. See *Id.*

132. *Id.* at 13-14.

133. SLDN, FOURTH ANNUAL REPORT, *supra* note 61, at 3-5.

investigations became less common, and fewer-command directed pursuits occurred as the limits on administrative investigations became more broadly disseminated.¹³⁴ Nonetheless, during this period, SLDN documented striking exceptions to this trend, in which military officials utilized heavy-handed tactics in both the criminal and administrative contexts to retaliate against gay service members. Discharges continued to rise, and by 1998 approximately three people per day were discharged for homosexuality.¹³⁵ Harassment reached its highest levels yet—reports of anti-gay harassment received by SLDN more than doubled from 1997 to 1998.¹³⁶ Increasingly, gay, lesbian, and bisexual service members made coming out statements to escape anti-gay harassment and threats, finding discharge for homosexuality preferable to tolerating violence and harassment from peers and superiors.¹³⁷ Those who attempted to report anti-gay harassment were often investigated themselves, creating a situation in which servicemembers were reluctant to report harassment unless they were willing to risk discharge.¹³⁸

Three years into the new ban, the expectations for commanders were becoming somewhat clearer, although most commands still lacked a full understanding of its consequences.¹³⁹ In early 1998, SLDN reported that it still regularly fielded requests from military attorneys and commanders for copies of the service regulations implementing “Don’t Ask, Don’t Tell.”¹⁴⁰ As the 1994 DoD guidance prohibiting the use of criminal investigators in virtually all cases of alleged homosexual conduct¹⁴¹ became more widely distributed, criminal investigations became rarer. Limits on administrative investigations imposed by new regulations¹⁴² also became somewhat more widely known, and fewer large-scale witch-hunts ensued.

134. SLDN, FIFTH ANNUAL REPORT, *supra* note 62, at 2.

135. SLDN, SIXTH ANNUAL REPORT, *supra* note 39, at 2.

136. SLDN, FIFTH ANNUAL REPORT, *supra* note 62, at 1.

137. *See generally* SLDN, SURVIVAL GUIDE, *supra* note 58, at 17; SLDN, NINTH ANNUAL REPORT, *supra* note 25, at 48. For examples of coming out statements made in response to anti-gay harassment, see the case of Hospitalman Roy Hill, and the cases of Petty Officer Jason Reilly and Airman Apprentice Jason Hiatt. NINTH ANNUAL REPORT, *supra*, note 25, at 28-31.

138. *See* SLDN, THIRD ANNUAL REPORT, *supra* note 85, at 16-21.

139. *See generally id.*

140. *See* SLDN, FOURTH ANNUAL REPORT, *supra* note 61, at 63.

141. DOD INSTR. 5505.8, *supra* note 40, at 2.

142. *See generally* DOD DIR. 1304.26, *supra* note 40; DOD DIR. 1332.14, *supra* note 40; DOD DIR. 1332.30, *supra* note 40. For a brief summary of the changes, see Memorandum from Les Aspin, the Secretary of Defense, to the Secretaries of the Military Departments, “Implementation of DoD Policy on Homosexual Conduct in the Armed Forces” (Dec. 21, 1993), at http://www.sldn.org/binarydata/SLDN_ARTICLES/pdf_file/1101.pdf.

Nonetheless, SLDN continued to document egregious violations of the policy during this period.¹⁴³ In many commands, military officials continued to use heavy-handed tactics to retaliate against service members believed to be gay.¹⁴⁴ In 1997 alone, SLDN documented thirty-four cases in which

inquiry officers and investigators threatened adverse action against service members if they failed to “cooperate” by admitting that they are gay, confessing to gay conduct or accusing others as gay. Threats used in this context included threats of criminal charges, confinement, forced polygraphs, non-judicial punishment, retaliatory personnel actions, outing service members to family and friends and unwarranted Other Than Honorable discharge characterizations.¹⁴⁵

Examples of such violations during this period are numerous. The Navy made headlines in 1997 when it unlawfully requested the personal information of an AOL account user, Senior Chief Petty Officer Timothy McVeigh, and used that information as the basis for his discharge.¹⁴⁶ A federal judge ordered McVeigh’s reinstatement when the investigation was challenged, resulting in the first instance of a service being held accountable for an illegal investigation under “Don’t Ask, Don’t Tell.”¹⁴⁷ The 1995 case of Air Force Major Debra Meeks was another glaring exception to the trend away from illegal investigations and heavy-handed tactics in the criminal context.¹⁴⁸ Major Meeks was held past her retirement date and subjected to a court martial for allegedly having an affair with another woman.¹⁴⁹

Perhaps the most striking example of a violation of the criminal investigation regulations was documented at Hickam Air Force Base in Honolulu, Hawaii in 1997, where Air Force officials entered into a pre-

Each branch’s implementation as follows: U.S. DEP’T OF ARMY, REG. 165-1; U.S. DEP’T OF ARMY, REG. 600-20, para. 4-19 (12 May 2002); NAVADMIN 033/94 CNO Washington DC 110300Z (3 Mar. 1994); ALMAR 64/94 CMC Washington DC 281600Z (Feb 1994); U.S. DEP’T OF HOMELAND SECURITY, U.S. COAST GUARD, COAST GUARD PERSONNEL MANUAL ch. 12.E (8 Jan. 1988).

143. See generally, e.g., SLDN, THIRD ANNUAL REPORT, *supra* note 85; SLDN, FOURTH ANNUAL REPORT, *supra* note 61.

144. SLDN, THIRD ANNUAL REPORT, *supra* note 85 at 1-2.

145. SLDN, FOURTH ANNUAL REPORT, *supra* note 61, at 68.

146. See *id.* at 24; Associated Press, *Judge to Navy: Reinstate Sailor*, (Jan. 29, 1998), available at <http://legalminds.lp.findlaw.com/list/queerlaw-edit/msg01558.html>.

147. Associated Press, *Judge to Navy: Reinstate Sailor*, (Jan. 29, 1998) (indicating that AOL admitted that providing the information to the Navy investigator represented a violation of its own privacy policy.), available at <http://legalminds.lp.findlaw.com/list/queerlaw-edit/msg01558.html>.

148. SLDN, FIFTH ANNUAL REPORT, *supra* note 62, at 9.

149. *Id.*

trial agreement with an airman convicted of raping another man.¹⁵⁰ The pre-trial agreement reduced the airman's sentence from life to twenty months in exchange for his agreement to turn over the names of all military men with whom he had engaged in consensual sex.¹⁵¹ The airman provided seventeen names, and all seventeen men were discharged.¹⁵² An Air Force Inspector General investigation of the case found that these events did not constitute a witch-hunt.¹⁵³

In addition to the hardball tactics described above, the practice of "recoupment," that is, billing a service member discharged for an admission of homosexuality for the cost of his or her education or the value of his or her enlistment bonus, became a favorite tactic of the Air Force during this period. While the May 1994 memorandum from Deputy Secretary of Defense John Deutch¹⁵⁴ prohibited recoupment in statements cases except when the admission was made to avoid service, the Air Force ignored this guidance and made a policy of seeking recoupment in virtually all cases of service member statements of homosexuality.¹⁵⁵ The sister services, in contrast, generally complied with the Deutch memo, at least until a U.S. District Court ruling in *Hensala v. Department of Air Force* gave credence to the more aggressive Air Force reading of the law.¹⁵⁶

A particularly jarring example of the injustice of recoupment is seen in the example of Air Force physician Captain Monica Hill.¹⁵⁷ In July of 2001, Captain Hill was faced with a horrific choice when her partner of fourteen years was diagnosed with terminal brain cancer three weeks prior to Captain Hill's report date: leave her partner in her final days, or ask the Air Force for a delay in her report date, risking discharge when the reason for the delay was revealed.¹⁵⁸ Cognizant that honesty with the Air Force could cost her career, Captain Hill nonetheless wrote to her command asking for a delay in her report date to see

150. SLDN, FOURTH ANNUAL REPORT, *supra* note 61, at 28.

151. *Id.*

152. *Id.*

153. *Id.* at 29.

154. Memorandum from Deputy Secretary of Defense John Deutch 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).

155. *See generally* SLDN, FOURTH ANNUAL REPORT, *supra* note 61; SLDN, FIFTH ANNUAL REPORT, *supra* note 62; SLDN, SIXTH ANNUAL REPORT, *supra* note 39.

156. *See generally* *Hensala v. Dep't. of Air Force*, 148 F. Supp. 2d 988, 1004 (N.D. Cal. 2001) (finding that there was "[s]ubstantial evidence support[ing] . . . the Secretary's decision to recoup the costs of plaintiff's medical education . . .").

157. *See* SLDN, EIGHTH ANNUAL REPORT, *supra* note 91, at 22-23.

158. *Id.* at 22.

her partner through her terminal illness.¹⁵⁹ Her orders were cancelled, allowing Captain Hill to remain with her partner, who died in September of 2001.¹⁶⁰ In December 2001, the Air Force informed Captain Hill that it had initiated discharge proceedings against her based on her admission that she is a lesbian and that it intended to recoup \$100,000 in educational assistance it had provided to her, despite her willingness to serve and the extenuating circumstances which led her to make her statement to the Air Force.¹⁶¹

Perhaps the defining characteristic of this period, however, was the anti-gay harassment that rose to a feverish pitch during the mid- to late-nineties. SLDN's Seventh, Eighth, and Ninth Annual Reports are full of examples of the particular anti-gay epithets, slurs, and threats gay service members reported during this period.¹⁶² Military leaders who would stand up against anti-gay harassment and demand a climate of tolerance during these years were few and far between. And unfortunately, service members who protested against or reported anti-gay harassment often found themselves under investigation for homosexuality, a trend which has served as a strong disincentive to reporting throughout the ten years of "Don't Ask, Don't Tell."¹⁶³ Although in 1997 Undersecretary Edwin Dorn issued a memorandum instructing commanders not to use reports of anti-gay harassment as the basis for investigating a servicemember,¹⁶⁴ eleven months after the memo was issued, SLDN reported that "[o]f the hundreds of commanders, service members and attorneys SLDN . . . had contact with . . ., not one had even heard of the Dorn memorandum."¹⁶⁵ As had been the case with much of the rest of the official guidance on "Don't Ask, Don't Tell," dissemination of what little guidance there was on anti-gay harassment was lacking.

The tragic culmination of this period of the ban's history was the July 5, 1999 murder of PFC Barry Winchell, beaten to death in his sleep in his barracks at Fort Campbell by fellow soldiers who believed he was gay.

159. *Id.*

160. *Id.*

161. *Id.* at 22-23.

162. See generally SLDN, SEVENTH ANNUAL REPORT, *supra* note 56; SLDN, EIGHTH ANNUAL REPORT, *supra* note 91; SLDN, NINTH ANNUAL REPORT, *supra* note 25.

163. See SLDN, SURVIVAL GUIDE, *supra* note 58, at 32.

164. Memorandum from Undersecretary of Defense Edwin Dorn to Secretaries of the Military Departments, *Guidelines for Investigating Threats Against Service Members Based on Alleged Homosexuality*, at http://www.defenselink.mil/news/Aug1999/b081311999_bt381-99.html (Mar. 24, 1997).

165. SLDN, FOURTH ANNUAL REPORT, *supra* note 61, at 64.

3. The Winchell Years

The 1999 murder of PFC Barry Winchell and the Army's lukewarm response to the systemic problems it manifested represented a low point in the history of "Don't Ask, Don't Tell." Gay service members were terrified by the murder and the fact that, far from serving as a wake-up call for military leaders as to the serious problems of anti-gay harassment and violence in the ranks, the murder became the subject of jokes and provided fodder for further threats to service members perceived as gay.¹⁶⁶ Anti-gay harassment became an even greater problem than it had been in the first six years of the ban, and discharges reached an all-time high.¹⁶⁷

The DoD's reaction and the reaction of the Department of the Army to the murder can be briefly summarized as too little, too late. In the immediate aftermath of the murder, Fort Campbell officials suppressed the anti-gay nature of the murder, describing the death as resulting from an "altercation" in the barracks, despite the fact that the victim was asleep when he was murdered.¹⁶⁸ Two months after Winchell's death, in August 1999, the DoD issued a memorandum re-emphasizing the prohibition on anti-gay harassment,¹⁶⁹ and in 2000 the it conducted a survey to assess the command climate for gay service members around the world.¹⁷⁰

The DeLeon memo, as the DoD's anti-gay harassment memo became known, had virtually no effect at Fort Campbell. Soldiers continued to report anti-gay graffiti and anti-gay cadences in the weeks and months after PFC Winchell's death,¹⁷¹ and assignment to Fort Campbell was dreaded by gay soldiers throughout the Army as the installation's reputation for tolerating anti-gay harassment spread.¹⁷² In 1999, Fort Campbell's gay discharges represented 3.6% of the Army's total, and by

166. See SLDN, SIXTH ANNUAL REPORT, *supra* note 39, at 53; SLDN, NINTH ANNUAL REPORT, *supra* note 25, at 21.

167. See SLDN, SIXTH ANNUAL REPORT, *supra* note 39, at 53; SLDN, NINTH ANNUAL REPORT, *supra* note 25, at 22.

168. SLDN, FOURTH ANNUAL REPORT, *supra* note 61, at 49.

169. Memorandum from Rudy de Leon, Guidelines for Investigating Threats Against or Harassment of Service Members Based on Alleged Homosexuality, at http://www.defenselink.mil/releases/1999/808131999_bt381-99.html (Aug. 12, 1999).

170. OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF DEF., REP. NO. D-2000-101, MILITARY ENVIRONMENT WITH RESPECT TO THE HOMOSEXUAL CONDUCT POLICY 2 (2000).

171. SLDN, SIXTH ANNUAL REPORT, *supra* note 39, at 51-52.

172. Anne Hull, *How 'Don't Tell' Translates: The Military Needs Linguists, But it Doesn't Want this One*, WASH. POST, Dec. 3, 2003, at A12-13.

2000 that number rose to 28%.¹⁷³ Soldiers clearly believed that their safety was not assured in the face of anti-gay violence, and many made statements of homosexual or bisexual orientation as a means of escaping Fort Campbell with their lives.¹⁷⁴

The results of the DoD's survey of the command climate were published in March of 2000.¹⁷⁵ Eighty percent of the servicemembers surveyed reported having heard derogatory anti-gay remarks in the preceding year, and 37% reported that they witnessed or experienced anti-gay harassment.¹⁷⁶ Of those who reported witnessing or experiencing targeted harassment, 19.8% witnessed threats and intimidation and 9% witnessed physical assault.¹⁷⁷ In response to the survey results, in July of 2000, the DoD issued a thirteen-point Anti-Harassment Action Plan (AHAP).¹⁷⁸ The AHAP contained four primary mandates designed to curb anti-gay harassment in the services: anti-harassment training, harassment reporting systems, enforcement of the prohibition on harassment, and periodic AHAP implementation assessment.¹⁷⁹ To date, little has been done to implement the AHAP by DoD or any of the services.¹⁸⁰

A final response to the Winchell murder came on the part of then President Clinton, who issued Executive Order 13140 providing sentence enhancement potential under the Uniform Code of Military Justice for anti-gay hate crimes.¹⁸¹

Fort Campbell may have been one of the worst installations in the Army for anti-gay harassment, but it was not the only place where gay service members had something to fear.¹⁸² Anti-gay rhetoric was rampant throughout the officer corps and among non-commissioned officers and junior enlisted personnel.¹⁸³ SLDN documented an example of the ease with which anti-gay language was used—even by senior officers—when it discovered an email message sent by Marine Lieutenant Colonel

173. SLDN, NINTH ANNUAL REPORT, *supra* note 25, at 22.

174. *Id.*; see also SLDN, SIXTH ANNUAL REPORT, *supra* note 39, at 53; Hull, *supra* note 172, at A12-13.

175. See generally OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF DEF., Rep. No. D-2000-101, *supra* note 170.

176. *Id.* at i-ii.

177. *Id.* at 11.

178. Press Release, U.S. Dep't of Def., Department of Defense Issues Anti-Harassment Guidelines, at <http://www.defenselink.mil/cgi-bin/d1print.cgi?> (July 21, 2000).

179. U.S. DEP'T OF DEF. WORKING GROUP, ANTI-HARASSMENT ACTION PLAN, at <http://www.defenselink.mil/news/Jul2000/plan20000721.htm> (July 21, 2000).

180. SLDN, NINTH ANNUAL REPORT, *supra* note 25, at 2.

181. Exec. Order No. 13140, 2 C.F.R. 224 (1999).

182. SLDN, SIXTH ANNUAL REPORT, *supra* note 39, at 2.

183. *Id.* at 48-49.

Edward Melton three months after the Winchell murder in response to a directive to train on anti-gay harassment.¹⁸⁴

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 responsibility if someone decides to assault the young back-side ranger. Be discreet and careful in your dealings with these characters. And remember, little ears are everywhere.¹⁸⁵

Lieutenant Colonel Melton was reassigned following publication of the email.¹⁸⁶

The Winchell years represented the pinnacle of the anti-gay climate that has plagued the military since “Don’t Ask, Don’t Tell” became law. But in 2001, another series of tragic events set the wheels in motion for a new era in the history of “Don’t Ask, Don’t Tell.”

4. September 11th and Beyond

On September 11, 2001, terrorist attacks on American soil precipitated a war on terrorism that would change the way Americans think about security. The military response was nothing short of Herculean. In the face of our country’s urgent need for qualified military personnel and in an America where attitudes about gay issues have changed markedly since Congress passed “Don’t Ask, Don’t Tell” in 1993, a rethinking of the ban is underway.

The military has discharged almost 10,000 people under “Don’t Ask, Don’t Tell” over the course of the last ten years.¹⁸⁷ Despite the fact that the government justifies the ban with findings that homosexuality is inconsistent with military service and detrimental to unit cohesion,¹⁸⁸ at the times when unit cohesion is most important—in wartime—history shows gay discharge numbers drop.¹⁸⁹ Operations Enduring Freedom

184. *Id.* at 55.

185. *Id.*

186. Press Release, Servicemember’s Legal Defense Network, Marine Corps Lieutenant Colonel Disciplined for Anti-Gay Email, at <http://www.sldn.org/templates/press/record.html?section=2&record=20> (Oct. 4, 2000).

187. SLDN, TENTH ANNUAL REPORT, *supra* note 2, at 13.

188. 10 U.S.C. § 654 (a)(15) (2000).

189. SLDN, NINTH ANNUAL REPORT, *supra* note 25, at 1.

and Iraqi Freedom have proven no different. Since the U.S. went to war on terrorism, gay discharges have decreased roughly forty percent.¹⁹⁰

Notwithstanding the significant drop in discharge numbers, in 2002 and 2003 a series of high profile gay discharges from the Defense Language Institute (DLI) in Monterey, California captured the public's attention. Thirty-seven linguists—many of them trained in Arabic and Korean—were discharged for their sexual orientation.¹⁹¹ Conservatives and liberals alike were outraged to think that Arabic linguists could be discharged during a time of war, and editorial pages, talk shows, and chat rooms teemed with commentary critical of the ban and/or of the Arabic linguists' discharge in particular.¹⁹² The media coverage of the discharged linguists served as a catalyst, sparking renewed debate on the ban and significantly greater support for a movement to lift the ban.

By the end of 2003, dozens of newspapers, including the New York Times,¹⁹³ the Washington Post,¹⁹⁴ USA Today,¹⁹⁵ and the Chicago Tribune¹⁹⁶ had issued editorials calling for an end to the ban. Gallup polls conducted in 2003 suggested an increase in support for gays in the military over the course of ten years under the policy,¹⁹⁷ and even inside the military, attitudes about gays in the military seem to have improved.¹⁹⁸

190. SLDN, TENTH ANNUAL REPORT, *supra*, note 2, at 1.

191. Hull, *supra* note 172, at A12-13; *see also* Press Release, Servicemembers Legal Defense Network, Army & Defense Language Institute Under Fire for Discharging Seven Gay Arabic Linguists, at <http://www.sldn.org/templates/press/record.html?section=2&record=678> (Nov. 18, 2002); Press Release, Servicemembers Legal Defense Network, Military Continues to Discharge Lesbian, Gay & Bisexual Linguists, Despite Critical Shortfall of Trained Personnel, at <http://www.sldn.org/templates/press/record.html?section=2&record=877> (April 16, 2003).

192. Press Release, Servicemembers Legal Defense Network, Army & Defense Language Institute Under Fire for Discharging Seven Gay Arabic Linguists, *supra* note 191.

193. *Law Schools, Gays and the Military*, N.Y. TIMES, Oct. 5, 2003, at 12.

194. *No Gays, Except . . .*, WASH. POST, Mar. 26, 2003, at A16; *Still No Gay Linguists*, WASH. POST, Apr. 16, 2003, at A26; *Unhappy Anniversary*, WASH. POST, Nov. 30, 2003, at B6.

195. Robin Gerber, *End Decade-Old Don't Ask Policy*, USA TODAY, Nov. 26, 2003, at 25A.

196. *A Self-Inflicted Military Wound*, CHI. TRIB., Dec. 5, 2003, at 24.

197. Darren K. Carlson, *Public OK With Gays, Women in Military*, THE GALLUP POLL, Dec. 23, 2003, at 28-29.

198. The Service Times publication company published a survey of its subscribers in December of 2003, which indicated a slight increase in support for gays in the military. Gordon Trowbridge, *2003 Military Times Poll, Military Backs Bush More than Civilians Do*, FREE REPUBLIC.COM, at <http://www.freerepublic.com/focus/f-news/1052112/posts> (posted Jan. 5, 2004). The Military Times acknowledged that its readership is not representative of the military generally and that subscribers, more often than not, were senior military officers and NCO's. *Id.* Little in the way of empirical information is available about the attitudes of military personnel at any level toward gays in the military, but anecdotal evidence supports the premise that attitudes may be improving. For instance, in recent years individual military commands have issued statements or made decisions that acknowledge the valuable contributions of gay service members. For example, in 2001, the Army dropped its discharge proceedings against openly gay Lieutenant Steve May, an officer

Lending their voices and the credibility of extensive military experience to the debate on gays in the military during the war on terrorism were a number of high-ranking retired military personnel who made public statements in opposition to the ban. In August of 2003, Retired Admiral John Hutson, formerly the Navy's top military lawyer, wrote an article condemning the ban and calling for repeal, arguing, "'Don't Ask, Don't Tell' is virtually unworkable in the military—legally, administratively and socially."¹⁹⁹ After a scathing delivery of his criticism of the policy from his point of view as the former Judge Advocate General of the Navy, Hutson concluded, "The second-class citizenship of gays flies in the face of the Navy core values of honor, courage and commitment."²⁰⁰

Retired four-star general and then-candidate for the Democratic presidential nomination Wesley Clark has spoken out repeatedly against the ban, arguing that the policy is unworkable and must be replaced by new law under which all Americans may serve regardless of sexual orientation.²⁰¹ In November 2003, three gay retired general officers came out in a New York Times article, becoming the highest ranking gay military personnel ever to come out publicly, and adding their personal stories of sacrifice and self-denial under the ban to the public discourse.²⁰² In December 2003, fifteen retired senior military leaders signed an open letter calling for an end to the ban.²⁰³

The change in public opinion has been reflected in the change in the political landscape since the debate of 1993. Members of Congress used the Clark nomination debate in 2002 and 2003 to make statements on the

whose Commander valued his service and did not want to discharge him. SLDN, SEVENTH ANNUAL REPORT, *supra* note 56, at 48; *see also* SLDN, NINTH ANNUAL REPORT, *supra* note 25, at 1 (referencing an April 2002 Marine Corps memorandum at Twenty-Nine Palms that stated, "Homosexuals can and do make some of the best Marines.").

199. John D. Hutson, *Don't Ask, Don't Tell: Retire a bad military policy*, NAT'L L. J., Aug. 11, 2003, at 30.

200. *Id.*

201. Press Release, Human Rights Campaign, Wesley Clark Shares His Views on a Range of Gay Issues, at http://www.hrc.org/Content/Contentgroups/News_Release/20031/Wesley_Clark_Shares_His_View_s_on_a_Range_of_Gay_Issues.htm; Lou Chibbaro Jr., *Clark Vows Leadership on Gay, AIDS Issues* (Jan. 16, 2004), at <http://www.washingtonblade.com/2004/1-16/news/national/clark.cfm> (Nov. 12, 2003).

202. John Files, *Gay Ex-Officers Say "Don't Ask" Doesn't Work*, N.Y. TIMES, Dec. 10, 2003, at A18.

203. Press Release, Servicemembers Legal Defense Network, Senior Retired Military Leaders Call for Dismantling of "Don't Ask, Don't Tell" (Dec. 16, 2003), at <http://www.sldn.org/templates/press/record.html?section=2&record=1335>.

record in opposition to the ban.²⁰⁴ Senator Mark Dayton (D-MN) made a lengthy speech on the floor in which he called for an end to the ban,²⁰⁵ and in the same debate, Senator Jeff Sessions (R-AL) acknowledged SLDN's work to protect gay servicemembers from harassment.²⁰⁶ A conservative U.S. Senator publicly nodding to the fact that gay people not only serve in the military, but in fact deserve protection from anti-gay harassment and violence, speaks volumes about the distance public opinion has come with respect to the issue of gays in the military since 1993. Even in the presidential campaigns of 2000 and 2004, the shift in thinking on this issue was apparent. While President Bush has remained steadfast in his support of "Don't Ask, Don't Tell,"²⁰⁷ every contender for the Democratic nomination since the 2000 election has included support for gay military service in his or her rhetoric.²⁰⁸

In 2004, it would appear as though the days of the ban are numbered. Public sentiment is moving quickly toward elimination of the use of sexual orientation in determining whether someone is qualified to serve in the military, and the key question remaining at this point seems to be how, rather than whether, the ban will cease to be the law.

IV. PERSPECTIVES ON THE FUTURE OF THE POLICY

The ban is most likely to fall through one of two means. Either a constitutional challenge to the ban in light of *Lawrence v. Texas*²⁰⁹ will

204. 149 CONG. REC. S15029-S15045 (daily ed. Nov. 18, 2003).

205. 149 CONG. REC. S15039-S15040 (daily ed. Nov. 18, 2003) (statement of Sen. Dayton).

206. In his defense of Lieutenant General Clark's nomination for promotion, Senator Sessions stated,

This investigation of the command climate found that Major General Clark was not culpable of any dereliction or failure of leadership, as has been alleged by the Service Members Legal Defense Network—SLDN—which is an advocacy group that works to protect and ensure that homosexual soldiers are treated fairly in the military, as they have every right to be treated. They have a right to insist that they be treated fairly.

149 CONG. REC. S15044 (daily ed. Nov. 18, 2003) (statement of Sen. Sessions).

207. Associated Press, *Taxes, Gays Dominate GOP Debate* (Jan. 7, 2000), available at http://www.gaymilitary.ucsb.edu/ResearchResources/PressClips/news1_7_00.htm.

208. See generally ISSUES 2000, *Bill Bradley On Defense*, at http://www.issues2000.org/2000/Bill_Bradley_Defense.htm (last visited Feb. 9, 2004); ISSUES 2000, *Al Gore on Civil Rights*, at

http://www.issues2000.org/Celeb/Al_Gore_Civil_Rights.htm#Gay_Rights (last visited Feb. 11, 2004); HUMAN RIGHTS CAMPAIGN, CAMPAIGN 2004: 2004 PRESIDENTIAL QUESTIONNAIRE RESPONSES, at

http://www.hrc.org/Content/NavigationMenu/HRC/Get_Informed/Campaigns_and_Elections/Presidential_Candidates/Questionnaire_Responses/2004_Presidential_Questionnaire_Responses.htm (last visited Feb. 9, 2004).

209. *Lawrence v. Texas*, 123 S.Ct. 2472 (2003).

result a ruling that the ban is unconstitutional, or Congress will pass new legislation ending the ban.

In light of the June 2003 Supreme Court ruling in *Lawrence*, the Court of Appeals for the Armed Forces is currently considering a constitutional challenge to Article 125 of the UCMJ, the military's sodomy provision.²¹⁰ If the Court of Appeals for the Armed Forces finds Article 125 unconstitutional in light of *Lawrence*, and if that decision is not overturned by the U.S. Supreme Court, the end of the "Don't Ask, Don't Tell" policy may not be far behind. While Article 125 is applicable to gay and straight sex alike, it has posed a symbolic and practical obstacle to advocates seeking an end to the ban on gays in the military. Whereas heterosexual couples may be presumed to have sex which does not violate the UCMJ,²¹¹ virtually any form of physical sexual expression in which gay couples are likely to engage runs afoul of the UCMJ. The effect is therefore similar to the collateral harms caused by Texas' sodomy provision and others like it in American civilian law.²¹² It is hard to underestimate the damage Article 125 does to the effort to repeal the ban.

Regardless of the success or failure of the Article 125 challenges, *Lawrence* may provide a basis for renewed constitutional litigation challenging "Don't Ask, Don't Tell." While the series of cases challenging "Don't Ask, Don't Tell" in the mid-1990s ended without a finding that the ban was unconstitutional, the specter of *Bowers v. Hardwick*²¹³ loomed heavy on those proceedings. In light of the Supreme Court's powerful statements in *Lawrence* as to the invalidity of *Bowers*, Equal Protection and First Amendment challenges to the law would appear to have a much healthier chance of success, and renewed litigation is likely to begin in the coming year.

If the courts do not invalidate "Don't Ask, Don't Tell" on constitutional grounds in the meantime, members of Congress are beginning to show less patience with the ban and an interest in taking legislative action to repeal it.²¹⁴ It seems very likely that at some point in the next session—if not before—Congress will see the introduction of legislation to

210. Brief of Amici Curiae in Support of Appellant on Behalf of ACLU et al. at 8, *Marcum v. U.S. (C.A.A.F. 2003)* (No. 02-0944/AF).

211. A study commissioned by the DoD found that an overwhelming majority (75-79%) of straight men, if in the military, would be in violation of Article 125 by engaging in oral sex on a regular basis. NATIONAL DEFENSE RESEARCH INSTITUTE, *supra* note 6, at 10 n.13.

212. Brief of Amici Curiae Human Rights Campaign et al., at 9-15, *Lawrence v. Texas*, 123 S. Ct. 2472 (2003) (No. 02-102).

213. 478 U.S. 186 (1986), *overruled by Lawrence v. Texas*, 123 S. Ct. 2472 (2003).

214. *Support Falters for Gay Military Ban*, DATA LOUNGE (Dec. 17, 2003), at <http://www.dataounge/news/record.html?record=21124>.

repeal the ban. The likelihood of such legislation moving in a Republican-controlled institution, however, is slim. The situation could become more complex in the event that the Democratic candidate wins the Presidential election of 2004, given that the Democratic platform includes a plank on lifting the ban.

Whether the movement that leads to a repeal of the ban materializes in Congress or in the courts, the role of gay veterans returning from Iraq will be central to the debate. While gay veterans of previous conflicts have withstood the neglect of the American public for generations, the tyranny of the closet is something the younger generation is much less apt to tolerate.

The road ahead leads to a U.S. Army, Navy, Air Force, Marine Corps, and Coast Guard where sexual orientation is irrelevant to one's qualification to serve. This author hopes there will be no article to write on the twentieth anniversary of "Don't Ask, Don't Tell," and that we will have closed by then this sad chapter in our nation's history.