



Servicemembers Legal Defense Network

THE SURVIVAL GUIDE

A COMPREHENSIVE GUIDE TO "DON'T ASK, DON'T TELL" AND RELATED MILITARY POLICIES

FIFTH EDITION 2007



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DEDICATION

To those who have served and continue to serve faithfully in enforced silence to secure for America the freedom that is denied to them.



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SERVICEMEMBERS LEGAL DEFENSE NETWORK



A VISION.

Freedom to Serve

A MISSION.

SLDN is a national, non-profit legal services, watchdog and policy organization dedicated to ending discrimination against and harassment of military personnel affected by *Don't Ask, Don't Tell* and related forms of intolerance.

GOALS FOR FREEDOM.

Lift the ban preventing gays, lesbians and bisexuals from serving openly and honestly in the military.

Provide free legal services to service members harmed by *Don't Ask, Don't Tell* and related, discriminatory policies.

Protect service members from harassment based on perceived sexual orientation or gender identity.

Advocate for policies and practices that improve the lives of service members.

Support service member and veteran pride as lesbian, gay, bisexual or transgender persons.

Strengthen organizational capacity to assure the freedom to serve in the most cost-effective, strategic fashion.

Please send comments, additions and suggestions about this guide to legal@sldn.org

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I. ABOUT THE SURVIVAL GUIDE



The Servicemembers Legal Defense Network (SLDN) writes and publishes this Survival Guide. SLDN is the leading legal aid, lobbying and watchdog organization devoted to repealing the military's gay¹ ban and to representing members of the military impacted by "Don't Ask, Don't Tell, Don't Pursue, Don't Harass" ("Don't Ask, Don't Tell") and related discriminatory policies and regulations. SLDN provides confidential legal assistance to service members impacted by "Don't Ask, Don't Tell" at no charge to service members, their families, partners or friends.

This Survival Guide explains the "Don't Ask, Don't Tell" law and how it is being used in the field. "Don't Ask, Don't Tell" is also known within the United States military as the "Homosexual Conduct Policy." This Survival Guide provides survival tips for lesbian, gay, bisexual and transgender service members, and practical information for advocates and friends of gay and transgender service members.

Information in this guide may help service members make informed decisions about how to lead their lives, to protect themselves, and to respond if they are targeted under "Don't Ask, Don't Tell" and related military policies. **This guide does not, however, provide comprehensive counseling for service members, nor is it a substitute for seeking help from a military defense attorney, civilian attorney familiar with military law, or an SLDN attorney.** Each service member's situation is different and must be evaluated and handled based on its own facts.

Every service member should know the information contained in this guide, because, in practice, all service members are impacted by "Don't Ask, Don't Tell." "Don't Ask, Don't Tell" is

often used as a means to retaliate against people, regardless of their sexual orientation. This is particularly true for women, who are investigated and discharged at rates higher than men and who are often accused of being gay in retaliation for resisting sexual advances, harassment or assault. Uninformed investigators and commanders also may assume that transgender service members are gay and wrongly attempt to discharge them under "Don't Ask, Don't Tell," or under other military regulations and policies also addressed in this Guide.

This Survival Guide includes an overview of "Don't Ask, Don't Tell." Subsequent sections correspond with the major provisions in the Department of Defense (DoD) directives implementing "Don't Ask, Don't Tell" and with service members' most common questions about the law. Regulations of the individual services generally mirror the DoD directives with some minor differences. It is important to review the entire guide before studying the individual sections. This will provide a sense of the overall law and policies, which is necessary to understand each of the sections and how they work together, on paper and in practice.

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II. SERVICE MEMBER'S LEGAL RIGHTS

If you gain nothing else from this guide, please know that service members have certain legal rights under Article 31 of the Uniform Code of Military Justice (UCMJ). If questioned about their personal lives or sexual orientation by anyone in the military, service members have the right to:

Say Nothing Sign Nothing Get Legal Help

These rights are extremely important. Any time a service member faces questions about his or her personal life or sexual orientation, regardless of whether the questions come as part of a formal, informal, or criminal investigation, the service member should exercise these rights. One wrong word can mean the difference between staying in and being discharged, retaining pension or educational benefits and forfeiting them, even the difference between freedom and prison. Signing the wrong line could mean a waiver of legal rights.

Under Article 31, investigators and commanders should stop questioning and allow service members to see an attorney if they ask to consult with one. Article 31 rights are similar to the Miranda warning given by civilian police to suspects; therefore, just like on TV cop shows, service members have the right to remain silent and the right to speak with a defense attorney.

If service members choose to give up these rights, anything they say can be used against them.

While service members are supposed to be advised of their rights prior to any questioning, they often are not and need to be prepared to assert their rights even before being advised of them. Some commanding officers, senior non-commissioned officers, inquiry officers and criminal investigators will go so far as to tell a service member things will be much easier for them if they just waive these rights or just answer a few questions – in reality, this is usually NOT the case. Some investigators and commanders may have trouble accepting service members invoking their rights. Service members must be prepared to be respectful but firm. **Service members should consult with a defense attorney before agreeing to waive any legal rights.**

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III. FREE LEGAL HELP

For free, confidential legal counseling, please contact:

Servicemembers Legal Defense Network (SLDN)

(202) 328-3244 (voice) • (202) 797-1635 (fax)
legal@sldn.org (e-mail) • www.sldn.org (web site)
P.O. Box 65301 • Washington, D.C. 20035-5301

The military also offers free legal counseling. **If you choose to take advantage of this benefit, make sure that you clarify that the military attorney with whom you are consulting is a defense attorney and that your conversation is confidential.** The appropriate service offices are listed below:

ARMY

Trial Defense Service (TDS)
Centralized Web Site: <https://www.jagcnet.army.mil>

AIR FORCE

Area Defense Counsel (ADC)
No Centralized Web Site
Air Force Legal Services Command is located at Bolling AFB,
Washington DC.
(202) 767-4297

MARINE CORPS

Navy Legal Service Office (NLSO)
Centralized Website:
<http://www.jag.navy.mil/FieldOffices/NLSO3.htm>

COAST GUARD

Navy Legal Service Office (NLSO)
Centralized Website:
<http://www.jag.navy.mil/FieldOffices/NLSO3.htm>

NAVY

Navy Legal Service Office (NLSO)
Centralized Website:
<http://www.jag.navy.mil/FieldOffices/NLSO3.htm>

Generally, Marines and Coast Guardsmen will need to seek representation through the closest NLSO office. There are fewer Marine and Coast Guard defense attorneys and they often work in a NLSO office.

Other resources of interest to service members are listed in the back of this guide.

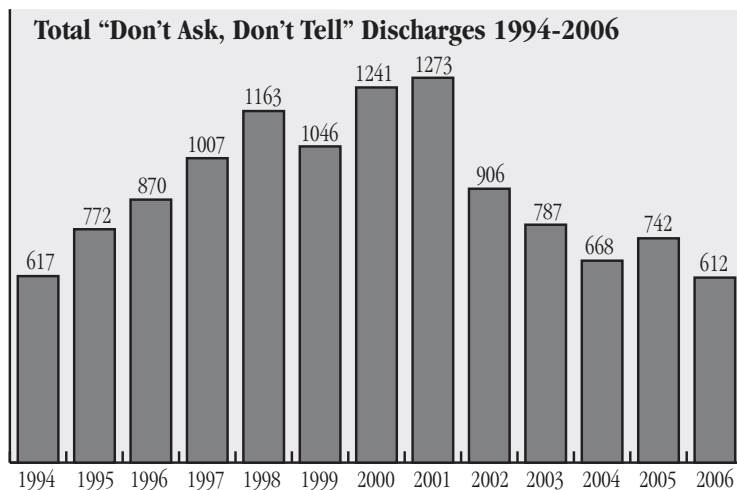


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IV. AN OVERVIEW OF “DON’T ASK, DON’T TELL”



“Don’t Ask, Don’t Tell” is a legal ban on lesbians, gays and bisexuals serving in the military—similar to the policies banning service that had been in place for the previous fifty years.² “Don’t Ask, Don’t Tell” is the only law in the land that authorizes the firing of an American for being gay.³ There is no other federal, state or local law like it. Indeed, “Don’t Ask, Don’t Tell” is the only law that punishes gays merely for “coming out.” Many Americans view “Don’t Ask, Don’t Tell” as a benign gentlemen’s agreement with discretion as the key to job security. That is simply not the case. **An honest statement of a service member’s sexual orientation to anyone, anywhere, anytime – even if not related to military service and made outside of the workplace – may lead to discharge.**



Source: Department of Defense, U.S. Army, U.S. Air Force, U.S. Navy, U.S. Marine Corps, U.S. Coast Guard and Unofficial Congressional Sources

A. The History of the Law

“Don’t Ask, Don’t Tell” is the result of a failed effort by President Bill Clinton to end the regulatory ban on gays in the military. Spurred in part by the brutal 1992 murder of Seaman Allen Schindler, then-candidate Clinton proposed ending the ban by issuing an Executive Order overriding the Department of Defense (DoD) regulations that barred gays from serving. Congress, however, intervened and the regulatory ban was made law, theoretically preventing action by future Commanders in Chief.

“Simply put, asking, pursuing and harassing have continued since the law was passed.”

This law was, however, different from prior bans on service in three respects. First, Congressional and military leaders acknowledged, for the first time in 1993, that lesbians, gays and bisexuals serve our nation and do so honorably.⁴ Second, while homosexual conduct is a bar to military service, the law states that sexual orientation alone is not.⁵ Third, President Clinton, Congress and military leaders made promises that the law would be implemented differently than the prior regulations. They agreed to end intrusive questions about service members’ sexual orientation⁶ and to stop the military’s infamous investigations to search out suspected lesbian, gay and bisexual service members.⁷ They agreed to take steps to prevent anti-gay harassment.⁸ They agreed to treat gay service members even-handedly in the criminal justice system, instead of criminally prosecuting them in circumstances where they would not prosecute heterosexual service members.⁹ They agreed to implement the law with due regard for the privacy and associations of service members.¹⁰ The law became known in 1993 as “Don’t Ask, Don’t Tell, Don’t Pursue” to signify the new limits to investigations and the intent to respect service members’ privacy.

Small steps were made to keep some of these promises. Questioning on sexual orientation at induction stopped. After an initial rise in the early 1990s, criminal prosecutions have decreased and witch-hunts appear to have declined. President Clinton issued an Executive Order ending discrimination in

the issuance of security clearances.¹¹ The DoD issued guidelines on anti-gay harassment

and limits on investigations. However, despite these improvements and the provisions supposedly shielding gay service members, harassment and discrimination continues on the basis of perceived sexual orientation.

The reality of harassment and discrimination was highlighted in 1999 when PFC Barry Winchell was murdered by fellow soldiers at Fort Campbell, Kentucky because those fellow soldiers believed he was gay. In the wake of this murder, the DoD issued new guidance on prohibiting anti-gay harassment. President Clinton issued an Executive Order providing for sentence enhancement under the UCMJ for hate crimes,¹² as well as a limited psychotherapist-patient privilege regarding admissions of sexual orientation.¹³ In February 2000, Pentagon officials added “Don’t Harass” to the popular name of the law. The Pentagon conducted a DoD survey on anti-gay

harassment in 2000, finding it was widespread in the military.¹⁴ Thereafter the Pentagon formed a working group which ultimately issued a 13-point action plan to address anti-gay harassment.¹⁵ Unfortunately, the plan remains largely unimplemented in the services.

The limited steps, described above, made towards the protection of service members perceived to be gay have done little to fulfill the promises made when the law was created. Intrusive questioning continues. Harassment continues largely unabated. Little regard for service member privacy has been shown during the life of this law. Simply put, asking, pursuing and harassing have continued since the law was passed.

B. The “Don’ts” in “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass”

Don’t Ask. “Don’t Ask” means that service members are not supposed to be asked about their sexual orientation.¹⁶ **The prohibition against asking is not in the language of the law itself but is in the DoD’s implementing regulations.** Currently, the military does not ask about a potential service member’s sexual orientation when he or she is enlisting in the military. Experience has shown, however, that once a service member is in the military, coworkers, supervisors and commands often ask, usually part of everyday questions, such as “where did you go this weekend?” “who do you live with?” “who just called your cell phone?” Some commanders, inquiry officers and investigators continue to officially ask service members about their sexual orientation, despite rules to the contrary. Service members are not required to reveal their sexual orientation if they are asked about it. Gay service members who answer and reveal their orientation are likely to be discharged, even though they were not supposed to be asked in the first place. Honest answers to questions can be used as a basis for separation from the military. Lying in response to questions could lead to punishment or criminal charges. Therefore, gay service members being questioned about their sexual orientation should invoke their Art. 31 rights to not answer questions and ask to speak to a defense attorney. Refusing to answer questions is not evidence that a service member is gay.

Don’t Tell. Under “Don’t Tell,” gay service members face discharge if they disclose their sexual orientation.¹⁷ Prior to the passage of the law, the “Don’t Tell” provision was promised to only target public declarations of sexual orientation. Lawmakers made assurances that service members would be left alone as long as they kept their orientation a “personal and private” matter. As the law has been implemented, however,

there is no real privacy for service members. If a military commander finds out that a service member under his/her command has confided his/her sexual orientation to anyone – from online profiles to parents, psychologists or chaplains¹⁸ – the service member will likely face discharge. Being out to anyone, anywhere and at anytime can result in discharge. There are two exceptions to this rule. First, truthful statements about sexual orientation or activities made during security clearance interviews are not supposed to be used as a basis for discharge.¹⁹ Second, “Don’t Tell” also does not affect the attorney-client privilege a service member has with a military defense attorney. Military defense attorneys are required to keep conversations with their clients confidential but this privilege only exists with defense attorneys and not with prosecutors or command side attorneys.

Don’t Pursue. The “Don’t Pursue” provision of the regulations was intended to stop the infamous witch-hunts against gay service members. More than a dozen specific investigative limits laid out in DoD instructions and directives comprise “Don’t Pursue.” It is the most complicated and least understood component of the implementing regulations. These investigative limits establish a minimum threshold to start an inquiry and restrict the scope of even properly initiated inquiries.

A commander may initiate an investigation upon receiving credible information from a reliable source that a service member has engaged in the following activities defined as homosexual conduct:

- 1) made a statement that he/she is lesbian, gay or bisexual;
- 2) engaged in physical contact with someone of the same-sex for the purposes of sexual gratification; or
- 3) married, or attempted to marry, someone of the same-sex.²⁰

Only a service member’s commanding officer may initiate an inquiry into homosexual conduct,²¹ and the inquiry can only occur if the credible information was received from a reliable source.²² Actions that are associational behavior, such as having gay friends, going to a gay bar, attending gay pride events and reading gay magazines or books, are never to be considered credible information of sexual orientation or of homosexual conduct.²³ In addition, a service member’s report to his/her command regarding harassment or assault based on perceived sexuality should never be considered credible evidence.²⁴

If a service member’s commanding officer has determined that credible information exists; the commander may initiate two types of investigation into the alleged conduct: a “limited inquiry” or a “substantial investigation.” That limited inquiry is limited in two primary ways. First, the command may only investigate the factual circumstances directly relevant to the specific allegation(s).²⁵ Second, in circumstances where a service member has made a statement about his or her sexual orientation, the command may only question the service member, witnesses and anyone that the service member suggests.²⁶ Any investigation into an alleged statement going beyond these restrictions should be considered a “substantial investigation.”²⁷ In order to conduct a “substantial investigation,” the service member’s command must request prior authorization from the service secretary of the relevant military department.²⁸ Requests for authorization to conduct a “substantial investigation” are very rare and few, if any, have been granted. As with a “limited inquiry,” only a service member’s commanding officer has the authority to request permission to conduct a “substantial investigation.”²⁹

Finally, in most statement cases, no investigation is necessary.³⁰ In situations involving private sexual acts between consenting adults, the cases should be dealt with administratively, and criminal investigators should generally not be involved.³¹

Don’t Harass. The “Don’t Harass” component of the regulations was added in an attempt to address rampant anti-gay harassment in the military. Officially, “[t]he Armed Forces do not tolerate harassment or violence against any service member, for any reason.”³² In 2002, the Pentagon issued a 13-point Anti-Harassment Action Plan intended to reduce harassment in all of the services. As of 2007, this plan has not been fully implemented and the other existing anti-harassment regulations are not well enforced. Therefore, anti-gay harassment remains a serious problem. Harassment can take different forms, ranging from a hostile climate rife with anti-gay comments, to direct verbal and physical abuse, to death threats.

C. The Three Things That Will Get You Discharged

Under “Don’t Ask, Don’t Tell,” service members may be discharged for “homosexual conduct.” The military defines “homosexual conduct” very broadly to include 1) a statement that one is gay, 2) a homosexual act, attempted act or solicitation of an act, and 3) a marriage or attempted marriage to someone of the same-sex.³³

1. Statements.

Statements are admissions, such as “I am gay.” There are, however, many other statements or words not as direct as “I am gay” that may form a basis for discharge under current regulations.

For example, a reference to one’s same-sex partner can be a statement that the speaker is gay, or a service member’s personal website mentioning his or her sexual orientation is a statement. Additionally, behavior, or words that a so-called “reasonable person” would believe were intended to mean that the person making the statement is gay, are now considered statements. **For example, carrying a gay pride banner that states “Lesbians in the military say lift the ban” could be interpreted as a statement of the carrier’s sexual orientation.**

Under “Don’t Ask, Don’t Tell,” service members do not have any real privacy and they have little chance of defending themselves if someone alleges they “came out.” “Don’t Ask, Don’t Tell” presumes that service members who state they are gay engage in, intend to engage in, or have a propensity (likelihood) to engage in homosexual acts. Discharge is mandatory for service members who state that they are gay unless they rebut (disprove) this presumption, usually at an administrative discharge board. Rebutting the presumption has proven to be a nearly impossible task. Gay service members should not state their sexual orientation hoping that they can rebut the presumption and keep their careers since such a statement almost always results in discharge if the service member’s command pursues discharge.

“Rebutting The Presumption” is Nearly Impossible

In a surprise victory during the early years of “Don’t Ask, Don’t Tell,” Navy Reserve Lieutenant Zoe Dunning successfully fought her discharge from the reserves by “rebutting the presumption:” she argued that her lesbian status did not necessarily dictate she would violate military law by *acting* upon her sexual orientation. The separation board agreed with her, but, as a result of her retention, then DoD General Counsel Judith Miller issued a memorandum on August 18th, 1995 prohibiting further use of the “status versus conduct” defense. In addition, the Miller memorandum instructed officers to investigate whether service members who had made admissions of homosexual status had *ever* engaged in a sexual relationship with a person of the same-sex—in direct contradiction with the stated “Don’t Pursue” component of “Don’t Ask, Don’t Tell.” Although the Miller memorandum prohibited her defense for future service members, Zoe Dunning continued to serve until her retirement in 2007.

2. Acts.

The military defines homosexual acts more broadly than having sex with someone of the same-sex. According to the law, a “homosexual act” means any bodily contact, actively undertaken or passively permitted, between members of the same gender for the purpose of satisfying sexual desires, and any bodily contact that a reasonable person would understand to demonstrate a propensity or intent to engage in a homosexual act.³⁴ **Kissing, hugging and hand-holding have all been viewed as homosexual acts under this law.**

The regulations treat attempts and solicitations of “homosexual acts” the same as acts, putting members at risk of being discharged for attempted hugging or solicitation of a kiss.³⁵

Discharge for homosexual acts is mandatory under “Don’t Ask, Don’t Tell.” There is, however, one long-standing exception to this rule for service members who can prove, among other criteria, that their homosexual acts were a departure from their customary behavior and will not occur again and that their retention is in the best interest of the service. Service members should be warned that, in practice, there is very little chance of being retained under this exception, which is sometimes called the “Queen for a Day” defense.

The regulations state that the “preferred method” of handling allegations of homosexual acts occurring in private between consenting adults is in the administrative system, through commanders’ inquiries and administrative discharge boards.³⁶ This guidance is being followed in most commands.

Some commanders, however, have singled out gay service members for court-martial under the UCMJ. Sodomy (including oral or anal sex, whether heterosexual or homosexual) remains a criminal offense under Article 125 of the UCMJ despite recent federal court decisions questioning the prosecution of such acts. Kissing, hugging and other forms of touching may be charged as crimes under the “general articles,” Article 133 (officers) and Article 134 (enlisted or officers). Conviction under Article 125, 133 or 134 can result in up to five years in prison for each act, dishonorable discharge, reduction in pay grade and fines and forfeitures.³⁷ A more detailed explanation of these UCMJ articles can be found later in this Guide.

While most service members do not face criminal prosecution for homosexual conduct or gay acts, the risks are still very real.

3. Marriage.

Legal marriage between same-sex couples is currently only possible in the state of Massachusetts and in several foreign countries. Regardless, the "Don't Ask, Don't Tell" law prohibits marriage and "attempted marriage" to a person of the same-sex. Some commands have initiated discharge proceedings based on evidence of same-sex commitment ceremonies or civil unions. Domestic partnership registration may also trigger separation under the prohibition on "attempted marriage," and such registration could also be considered a "statement" of sexual orientation.

Grounds for Discharge Under "Don't Ask, Don't Tell"

- 1) Statement = "I am gay."
- 2) Act = Holding hands in a public park.
- 3) Marriage = Getting a civil union in Vermont.

These are only a few examples of conduct that have been used as grounds for investigation and discharge under "Don't Ask, Don't Tell."

D. Important Articles of the Uniform Code of Military Justice (UCMJ)

The UCMJ contains laws under which service members are prosecuted for criminal acts as well as the legal rights that service members are entitled to when under investigation. "Don't Ask, Don't Tell" is a separate law from the UCMJ. Service members need to understand, however, that some conduct in violation of "Don't Ask, Don't Tell" can also be criminally prosecuted by the military under UCMJ articles.

1. Article 31 – Right to Remain Silent

Article 31 of the UCMJ provides protections to service members, including when they are questioned about their sexual orientation, personal life or sexual activities by their command or other members of the military. Under Article 31, any service member exposed to such questioning may refuse to answer questions, provide a statement or sign any document related to the questioning. In addition, Article 31 gives service members

the right to consult with a qualified defense attorney before answering questions or signing any paperwork. Service members may speak with a military defense attorney or a civilian attorney familiar with military law, including SLDN attorneys.

2. Article 125 - Sodomy

Article 125 of the UCMJ prohibits all service members from engaging in sodomy as defined in the UCMJ (primarily oral and anal sex between members of the same or opposite sex). Service members found violating this article can be court-martialed and imprisoned if found guilty. Some confusion about the military's prosecution of sodomy has arisen following the June 2003 United States Supreme Court decision in Lawrence v. Texas.³⁸ In that case, the Supreme Court ruled that a Texas sodomy statute prohibiting two persons of the same-sex from engaging in private consensual sexual conduct, and all similar state laws, are unconstitutional.

Following the decision in Lawrence, there were multiple appeals of consensual sodomy convictions in the military court system challenging the constitutionality of Article 125. In August 2004, the military's highest criminal court, the Court of Appeals for the Armed Forces (CAAF), ruled in United States v. Marcum that while the Lawrence decision does apply to the military, the military could still prosecute consensual sodomy if the conduct fell outside of protections provided under Lawrence, or if the conduct is prohibited because of additional factors solely relevant to the military context.³⁹ In other words, CAAF determined that the military could constitutionally continue to prosecute consensual sodomy under limited circumstances.⁴⁰ In Marcum, the court ruled that because the appellant's involvement was with a subordinate, his conduct was outside of the constitutional protection defined by the Supreme Court and therefore his consensual sodomy conviction was correct. This ruling has resulted in confusion as to when consensual sodomy can be constitutionally punished in the military.

Acts considered non-consensual and acts with a minor remain fully prosecutable under Article 125. Therefore, to be safe, service members should operate under the assumption that they can be arrested and prosecuted if caught engaging in sexual activity falling within the definition of sodomy in Article 125 of the UCMJ.

Convictions under Article 125 can result in up to five years in prison for each act, punitive discharge, reduction in pay and fines and forfeitures.⁴¹ Service members have gone to prison for violating Article 125 of the UCMJ.

2. Articles 133 and 134 – Conduct Unbecoming, General Article

Service members may also be court-martialed for same-sex sexual conduct under Articles 133 and 134 of the UCMJ. Articles 133 and 134 are referred to as the general articles, and serve as a catch-all for conduct that the military wishes to make illegal but has not been specifically outlawed in any of the other articles.

Article 133 outlaws “conduct unbecoming an officer and a gentleman.”⁴² Article 134 outlaws conduct that results in the “prejudice of good order and discipline in the armed forces” as well as conduct that “brings discredit upon the armed forces.”⁴³

Conduct that has been considered a violation of Articles 133 and 134 includes: adultery, fraternization, indecent acts with another and soliciting another to commit an offense.

Although criminal investigations and prosecutions of homosexual conduct are rare under these articles it does not mean that service members should not take the threat seriously. The threat of criminal prosecution for physical conduct with a person of the same-sex is real. Not only sex, but virtually any physical act with another person of the same-sex can be criminally prosecuted, if it can be shown that the act was commit-

ted for a sexual or romantic purpose. Convictions under Article 133 or 134 can, in some cases, result in up to five years of imprisonment for each act, a punitive discharge (Bad Conduct discharge or Dishonorable discharge), reduction in pay-grade and fines and forfeitures.⁴⁴ People have served time in military prison for engaging in homosexual conduct ruled to be in violation of Articles 133 and 134 of the UCMJ.

A Touch of the Hand – Leads to Prison Time

The risk of imprisonment for same-sex conduct seemed remote to Private James Reyes until he faced court-martial for what he thought was innocent romantic conduct. Private Reyes was sentenced to a year in prison by a military judge in Korea for touching another man’s hand during an off-duty conversation. Private Reyes’ alleged “victim” testified at court martial that the touch was merely the result of a misunderstanding, and that he did not feel as though he had been assaulted. Private Reyes spent over a year in prison before SLDN attorneys successfully petitioned for his release through clemency.

V. WHO IS AFFECTED BY “DON’T ASK, DON’T TELL”



“Don’t Ask, Don’t Tell” applies to all members of the armed services.⁴⁵ This includes all regular members of the Army, Navy, Air Force, Marine Corps, Coast Guard and their associated reserve units. In short, all people subject to the UCMJ are subject to “Don’t Ask, Don’t Tell.” This section discusses categories of people connected with the military that may or may not be affected by “Don’t Ask, Don’t Tell.”

Does “Don’t Ask, Don’t Tell” Apply?	
YES	NO
Active Duty	Civilian Air Patrol
Reserves	Military Auxiliaries
National Guard	State Defense Forces
Individual Ready Reserves	Junior Reserve Officer Training Corps
Service Academies	Delayed Entry Program
Reserve Officer Training Corps	Veterans
	National Oceanic and Atmospheric Administration*
	Public Health Service*
	Military Retirees*
	Transgender Persons**

* “Don’t Ask, Don’t Tell” has never been applied to personnel in NOAA, PHS or a military retiree. In very unusual circumstances the law may theoretically be applied. See the specific sections below.

** “Don’t Ask, Don’t Tell” applies only to lesbians, gays and bisexuals. The law has been misapplied to heterosexual transgender persons.

A. Active Duty

“Don’t Ask, Don’t Tell” applies to all active duty personnel at all times. Whether on duty or not, on leave or not, a statement to anyone, an act or an attempted marriage can get active duty service members discharged. The standards of conduct for members of the armed forces regulate a member’s life 24 hours a day beginning the moment the member enters military status and doesn’t end until that person is discharged or otherwise separated from the armed forces. Those standards of conduct, including “Don’t Ask, Don’t Tell” and the UCMJ, apply whether the member is on base or off base and whether the member is on duty or off duty.⁴⁶

Some service members believe that “Don’t Ask, Don’t Tell” only applies when in uniform or on base. This is not true. Active duty service members can be investigated and separated for homosexual conduct engaged in while in civilian attire and in a purely civilian setting. Active duty serv-

ice members who are the target of a command investigation should say nothing, sign nothing and ask to speak with SLDN or a military defense attorney.

B. Reserve Personnel

“Don’t Ask, Don’t Tell” applies to all reserve personnel at all times. Members of the Selected Reserve (SELRES) and Active Reserves are those reservists who usually drill one weekend each month and have an annual active duty training period. These individuals are accruing credit towards a reserve retirement whether or not they are in a paid position. They are usually the first reservists mobilized during an emergency either as part of a unit or as an individual augmente.

Some service members believe that “Don’t Ask, Don’t Tell” only applies to reservists when they are in uniform or on base. This is not true.

“‘Don’t Ask, Don’t Tell’ applies to all reserve personnel at all times.”

Homosexual conduct engaged in when not drilling or activated can be used to discharge the

service member. As a general rule, the military takes much longer to process reserve administrative matters than it does active duty force matters, including the application of “Don’t Ask, Don’t Tell.” While the military generally does not look for evidence of homosexual conduct by reservists, the military can, and does, respond when it obtains information about gay reservists or those perceived to be gay. Reservists who are the target of a command investigation should say nothing, sign nothing and ask to speak with SLDN or a military defense attorney.

C. National Guard Members

“Don’t Ask, Don’t Tell” applies to members of the Army and Air National Guard units of the various states. It applies because the members of the Guard may be called to federal service.⁴⁷ The same general rules that apply to active duty personnel under “Don’t Ask, Don’t Tell” apply to Guardsmen for the entire time that they are members of the National Guard. **Just like active duty service members and reservists, Guard members can be investigated and separated for homosexual conduct engaged in while in civilian attire and in a purely civilian setting.** Unlike “Don’t

Ask, Don’t” the UCMJ applies to service members of the Army and Air National Guard only when in federal service.⁴⁸ Be aware that administrative separation processing in the Guard is generally much slower than it is for active duty members. Guard members who are the target of a command investigation should say nothing, sign nothing and ask to speak with SLDN or a military defense attorney.

D. Individual Ready Reserve (IRR)

“Don’t Ask, Don’t Tell” applies to members of the Individual Ready Reserve (IRR). The IRR is a broad manpower pool of individuals who generally are finishing their obligated service, or are continuing to remain in the military, without a mandatory drill commitment and without accruing credit towards retirement. Individuals in the IRR are generally seen as names on a recall list and have very little contact with their command. Therefore, IRR members are unlikely to be separated for homosexual conduct unless a statement, act or marriage is brought to the attention of their IRR command. **Just like active duty service members, reservists and guardsmen, members in the IRR can be investigated and separated for homosexual conduct engaged in while in civilian attire and in a purely civilian setting.** Similar to Reserve and Guard units, “Don’t Ask, Don’t Tell” separations from the IRR are very slow. Individuals in the IRR who are the target of a military investigation should say nothing, sign nothing and ask to speak with SLDN or a military defense attorney.

E. Civil Air Patrol, United States Coast Guard Auxiliary and State Defense Forces

“Don’t Ask, Don’t Tell” does **not** apply to civilian auxiliaries or state defense forces. The Civil Air Patrol (CAP) is the official civilian auxiliary of the Air Force. The United States Coast Guard Auxiliary is the official civilian auxiliary of the Coast Guard. As such, these auxiliaries are not “armed services” and therefore “Don’t Ask, Don’t Tell” does **not** apply to them. Neither auxiliary has an official policy with respect to sexual orientation. Members should expect rules regarding “public displays of affection” to affect heterosexual and homosexual members in an equal manner.

“Don’t Ask, Don’t Tell” does **not** apply to state defense forces because these forces cannot be federalized or called to national active duty.⁴⁹ State defense forces are not the same as the National Guard and they are often referred to as state militias. Not all states have a defense force and those defense forces that

do exist are often quite small in size. Individuals considering joining a state defense force, however, would be well advised to consult a local attorney first, as individual states can enact legislation similar to “Don’t Ask, Don’t Tell” governing their own forces.

F. National Oceanic and Atmospheric Administration (NOAA) and Public Health Service (PHS)

“Don’t Ask, Don’t Tell” does **not** apply to the NOAA Commissioned Corps nor does it apply to the PHS Commissioned Corps. NOAA and PHS are two of the seven “uniformed services” of the Federal government, but they are not “armed services.”⁵⁰ NOAA and PHS officers, however, are subject to “Don’t Ask, Don’t Tell” and the UCMJ “when assigned to and serving with the armed forces.”⁵¹ To date, however, there is no known case of a NOAA or PHS officer being impacted by “Don’t Ask, Don’t Tell.” Under no circumstances does “Don’t Ask, Don’t Tell” apply to non-uniformed employees of NOAA and PHS

In peacetime, PHS officers usually have the ability to decline an assignment to the military and, in turn, avoid any difficulty. In wartime, the ability to decline a post will most likely be overridden by the needs of the service. In addition, the entire PHS can be militarized, but this has not occurred since the Korean War. There is no evidence showing that PHS officers have been pressed into military service since September 11, 2001.

G. Merchant Marines

“Don’t Ask, Don’t Tell” does **not** apply to members of the Merchant Marines. The Merchant Marines is the fleet of ships which carries imports and exports during peacetime and becomes a naval auxiliary during wartime to deliver troops and war material. “Don’t Ask, Don’t Tell” does not apply because the Merchant Marines are not an armed service. Graduates of the U.S. Merchant Marine Academy, however, receive a reserve commission in either the U.S. Navy Reserves or in NOAA. “Don’t Ask, Don’t Tell” will apply to them if they are commissioned into the U.S. Navy Reserves.

H. Students

1. Delayed Entry Program (DEP).

“Don’t Ask, Don’t Tell” does **not** apply to those who have enrolled in the DEP. The DEP is a program by which individ-

uals, often high school students prior to graduation, can commit to the military before they are to report for basic training.⁵² Upon entry into the DEP, members have a contractual obligation to the U.S. military, but are not yet members of the armed forces because they have not yet taken the *official* oath of enlistment. DEP members are not subject to the UCMJ, “Don’t Ask, Don’t Tell,” or other military regulations until they take the official oath of enlistment on the day they actually ship to basic training.⁵³

DEP members have an obligation to report for military service, but they also may be discharged from the delayed entry program—either voluntarily upon written request to the recruiting commander of the local district where the member enlisted, or involuntarily under the DoD’s Enlisted Separation Procedures⁵⁴—for any number of reasons including homosexual orientation (since homosexual conduct is a bar to service), hardship, medical issues, etc.⁵⁵ Upon separation, the DEP member will not receive a DD-214 (discharge paperwork discussed further on in this Guide) because he or she is not yet a member of the armed forces,⁵⁶ but will instead receive an uncharacterized discharge.⁵⁷

2. Service Academies

“Don’t Ask, Don’t Tell” does apply to students attending the service academies—West Point, the Naval Academy, the Air Force Academy and the Coast Guard Academy. Students at these academies, cadets and midshipmen, are members of the active military force. “Don’t Ask, Don’t Tell” and the UCMJ apply to cadets and midshipman at all times, whether the member is in class or out of class, and whether on campus or off. **Cadets and midshipman can be investigated and separated for homosexual conduct engaged in while in civilian attire and in a purely civilian setting.** If a student at any of these academies is discharged under “Don’t Ask, Don’t Tell,” the student will be disenrolled from school and may be asked to repay the military for the money spent on his or her education.

Cadets and midshipmen who are the target of a command investigation should say nothing, sign nothing and ask to speak with SLDN or a military defense attorney.

3. Junior Reserve Officer Training Corps (JROTC)

“Don’t Ask, Don’t Tell” does **not** apply to the Junior Reserve Officer Training Corps (JROTC). The law only applies to active and reserve service members who have taken an official oath

for the branch of the military they are entering.⁵⁸ JROTC programs are for high school age students and exist in many public high schools in this country. Since JROTC students are not eligible to enlist due to their age and therefore cannot officially recite an oath of service, they are not in the armed forces and “Don’t Ask, Don’t Tell” does not apply to them.

4. Reserve Officer Training Corps (ROTC)

“Don’t Ask, Don’t Tell” does apply to the Reserve Officer Training Corps (ROTC). ROTC cadets and midshipmen in college who have signed contracts with the military and who have taken an official oath of enlistment are considered members of the armed forces and “Don’t Ask, Don’t Tell” applies to them. The significance of signing a contract with the military is important because college students who are interested in learning more about the military may take some ROTC classes without committing or obligating themselves to the military. These students are considered non-contract students and “Don’t Ask, Don’t Tell” does not apply to them. Students interested in the Army and Air Force ROTC programs are permitted to take introductory ROTC courses during freshman and sophomore years, but must sign a contract before they may enroll in advanced ROTC courses.⁵⁹

“ROTC students who are the target of a command investigation should say nothing, sign nothing and ask to speak with SLDN or a military defense attorney.”

Students interested in the Navy and Marine Corps ROTC programs may take freshman-level ROTC courses without incurring service obligations

after graduation, but after the freshman year they must sign a contract to serve post-graduation.⁶⁰ Again, once cadets or midshipmen sign a contract and take the oath of enlistment, “Don’t Ask, Don’t Tell” applies to them.

While the military generally does not look for evidence of homosexual conduct by ROTC students, the military can, and does, respond when it obtains information about contract ROTC students engaging in homosexual conduct. If an ROTC student is disenrolled under “Don’t Ask, Don’t Tell,” the student will lose his or her ROTC scholarship, and may be asked to repay the military for the money spent on his or her education. ROTC students who are the target of a command investigation should say nothing, sign nothing and ask to speak with SLDN or a military defense attorney.

Outed in ROTC – Two Promising Careers Ended

Jack Glover and David Hall were model cadets enrolled in Air Force ROTC at the University of Alaska. Both were at the top of their class, eager to serve and generally cautious about revealing details about their private lives. Someone they considered a “friend” outed them to their ROTC command. Despite their stellar records, their command disenrolled them from the ROTC program based on the information provided by this other cadet. As a result, Glover and Hall lost their scholarships as well as the opportunity to serve their country in the Air Force.

I. Transgender Individuals

The term “transgender” is a broad umbrella under which several different groups of individuals may identify themselves, including those seeking partial or full reversal of the gender assigned to them at birth. For the purposes of this guide, we will discuss only those groups that may have difficulties under military rules and regulations.

“Don’t Ask, Don’t Tell” does not address military service by transgender persons. Rather, “Don’t Ask, Don’t Tell” is a ban on military service by gay people. “Don’t Ask, Don’t Tell” may impact a transgender service member if he or she also identifies as gay or is incorrectly perceived to be gay. There are other military regulations that directly apply to transgender service members.

Issues for transgender individuals may come up at the time of enlistment, appointment or commissioning into the Armed Forces, or may arise for personnel already serving in the military. The military has a very binary view of gender; therefore, the rules and regulations, including the language the military uses, reflect this view. Any transgender individual with questions about military service or who is being harassed, or is under investigation based on his or her status as transgender should contact SLDN for assistance.

1. Enlistment / Appointment / Commissioning

To join the military, potential service members are required to undergo a physical examination as part of the induction process. During this examination, the military may disqualify a candidate if the potential service member has had any type of

genital surgery. A history of genital surgery may result in a disqualification for “major abnormalities and defects of the genitalia.”⁶¹ Furthermore, even if the candidate has not had surgery but identifies as transgender, the military considers this to be “sexual gender and identity disorder” and thus, a disqualifying psychiatric condition.⁶² An individual may request a medical waiver of any disqualifying condition from the Department of Defense.⁶³ The availability of medical waivers varies between the service branches. SLDN is not aware of a waiver ever being granted to a transgender service member.

2. Currently Serving Members

Transgender service members who are thinking about becoming more public or who begin to transition while in the military should be aware of a strong bias in some parts of the military against recognizing the standard of care involving hormone therapy, living in the appropriate gender, and surgery. The military medical system does not recognize the World Professional Association for Transgender Health’s Standards of Care for Gender Identity Disorders⁶⁴ and will not provide the medical support necessary for transitioning service members.⁶⁵ As stated above, being transgender is a medically disqualifying condition, and any gender conforming surgery and/or other medical procedures will become known by the military during the service member’s regularly scheduled physical exam. Because the military classifies gender conforming surgery under “major abnormalities and defects of the genitalia,”⁶⁶ once this condition is known by the military, the service member will likely be discharged. Additionally, even if the service member has not had surgery but identifies as transgender, the military considers this to be “sexual gender and identity disorder” and thus, a disqualifying medical condition, which impacts military fitness, and is a basis for discharge.⁶⁷

For those members who seek treatment from civilian providers, be aware that each service has regulations governing military members seeking outside health care which may include reporting requirements.⁶⁸ Failure to abide by these regulations could place a member at risk for criminal (UCMJ) action.

The military strictly regulates uniform and grooming standards by gender.⁶⁹ Wearing clothing the military does not consider gender appropriate is considered to be “cross-dressing” by the military and is generally addressed in regulations governing conduct.⁷⁰ Each service has different regulations, and “cross-dressing” is handled differently depending on the circumstance, the service member’s status as enlisted or officer, active or reserve status or service component. As a practical matter, any “cross-dressing” or perceived “cross-dressing,”

even in the context of following medical protocol in advance of full transition, will most likely be considered by the military to be a violation of regulations and result in discipline or criminal prosecution.⁷¹

Gender non-conforming service members are often perceived as being lesbian or gay by others in the military. These service members are often subjected to anti-gay harassment and are sometimes subjected to inappropriate investigation and discharge under “Don’t Ask, Don’t Tell.”

3. Members of the IRR

More and more inactive reserve military members are being recalled to active duty during the current war on terrorism. Transgender persons in the inactive reserve who are in the process of transitioning may be confronted with the need to halt this process if they are recalled to active duty. Recall to active duty places them directly under the regulatory requirements discussed above. Therefore, these military members may need to consider ceasing or interrupting their transition while they complete their active service requirement. Alternatively, transitioning or post-transitioning reservists may be medically disqualified for continued service once they are called back to active duty and medically examined.

J. Military Retirees and Veterans

As a practical matter, lesbian, gay, bisexual and transgender veterans – to include military retirees – are not at risk of harm from “Don’t Ask, Don’t Tell.”⁷² In fact, there are many gay veterans – including military retirees – who live their lives very openly and suffer no adverse government action related to the law.

Veterans who have been discharged from the armed forces, are not in the IRR and are not military retirees face no legal risk whatsoever from “Don’t Ask, Don’t Tell.” Gay retirees, however, do face a theoretical risk from “Don’t Ask, Don’t Tell.”⁷³ Retirees are, technically speaking, still considered members of the armed forces. Some retirees may be called back into military service in times of national emergency. However, the risk – if it exists at all – is very small. SLDN knows of no military retiree facing any adverse consequence as a result of being open about his/her sexual orientation. To date, no gay or transgender retiree has been recalled to active duty during the life of “Don’t Ask, Don’t Tell.”⁷⁴

Congress enacted “Don’t Ask, Don’t Tell” to apply to active duty, reserve and National Guard military personnel, as evidenced by the extensive congressional hearings on the sub-

ject.⁷⁵ The transcripts of the United States Senate’s 1993 public hearings prior to the passage of “Don’t Ask, Don’t Tell” contain no indication that either Congress or the military intended for the policy to apply to retirees. There are no known cases of a military retiree being targeted under “Don’t Ask, Don’t Tell” in any way.

Retired Flag Officers “Come Out”

In December 2003, three retired flag officers – two Brigadier Generals and a Rear Admiral – publicly came out as gay. In a testament to these men and their records, this news was greeted with interest and respect. BG Virgil Richards, RADM Al Steinman and BG Keith Kerr faced no adverse consequence from “Don’t Ask, Don’t Tell” after “coming out” in the *New York Times* and continue to receive all their retirement benefits.

Some gay and transgender retirees remain concerned about potential prosecution under Articles 125, 133 and 134 of the UCMJ. While retirees remain subject to the UCMJ and may be subject to court-martial jurisdiction while in retired status,⁷⁶ the likelihood of such prosecution is very remote. The military’s application of the UCMJ to retirees is very different from its application to active duty personnel. In theory, if a retiree commits a crime while retired, the military may recall the retiree to active duty for criminal prosecution under the UCMJ. In practice, however, the military usually does not become involved in such situations, preferring to allow civil authorities

to handle allegations of retiree criminal misconduct.

The most likely scenario under which a retiree might be recalled to active duty for UCMJ sanction would be if the retiree is accused of criminal misconduct which publicly embarrassed the military while he or she was still on active or reserve duty.⁷⁷ In such a case, the military may be more likely to invoke UCMJ jurisdiction, although such occurrences are very rare. There are no known instances where the military has prosecuted a retiree under the UCMJ solely because the military learned that he or she is gay or transgender. Again, over the years, many gay and transgender retirees have lived very open lives with their family and friends, at their jobs and in their communities, and – in some instances – have even taken high profile, public positions against “Don’t Ask, Don’t Tell” with no adverse consequences.

K. Civilian Department of Defense Employees

“Don’t Ask, Don’t Tell” does not apply to civilians. Civilian federal employees enjoy much greater protection against discrimination based on sexual orientation. In 1998 President Clinton issued Executive Order 13087 prohibiting discrimination based on sexual orientation in the federal civilian work force.⁷⁸ This order covers all civilian employees of the federal government including those who work for the military services, the Department of Defense and the Department of Transportation. This Executive Order was left intact by President Bush when he assumed office in 2001.

VI. TIPS ON SERVING IN THE CLOSET



Gay individuals have always served in the military and continue to do so. There are more than 65,000 gay people currently serving⁷⁹ and over 1 million gay veterans.⁸⁰ Under “Don’t Ask, Don’t Tell,” like previous bans, these men and women must hide who they are in order to serve. They must serve “in the closet.” Gay service members serve in varying degrees of openness depending on their personal circumstance. No gay service member, however, is safe from discharge under “Don’t Ask, Don’t Tell.”

A. Low Risk Activities and Actions

“Don’t Ask, Don’t Tell” applies to all members of the armed forces at all times. To complicate matters, individual commands are given great discretion in determining what is and is not evidence of homosexual conduct. Service members, therefore, need to judge the risks for themselves of engaging in different activities as they go about their everyday lives. Some activities are less risky than others.

1. Association with “Known Homosexuals”

Service members are allowed to know and socialize with “known homosexuals.” Socializing and hanging out with gay friends, in and of itself, cannot be a basis for investigation or discharge.⁸¹ Despite the regulations, service members should be cautious about associational activities. Co-workers and commanders may become suspicious if they know a service member has gay friends or belongs to gay organizations. This can lead to harassment and/or greater scrutiny. The command may also look more closely at the service member in an

attempt to find a reason to investigate or discharge a service member by using association with “known homosexuals” to support information about alleged homosexual conduct that appears flimsy when viewed on its own.

2. Frequenting Gay Bars, Possessing Gay Publications, Attending Pride and Other Gay Events

In general, service members are allowed to engage in associational activities related to gay people, publications or events. Service members may go to a gay bar under “Don’t Ask, Don’t Tell,”⁸² however, they may not engage in homosexual conduct while at the bar. If someone reports a service member engaging in contact such as kissing, holding hands or dancing with someone of the same-sex while at a bar, the service member is likely to face investigation and discharge. Some commands have attempted to prevent service members from going to gay bars by making such establishments “off-limits.” Service members risk disciplinary action if they violate an “off-limits establishment” order. Service members should check with

their command's "off-limits establishments" designation list to ensure they are not violating orders. It is not appropriate to place a gay bar on the "off-limits" list solely because the bar caters to a gay clientele. "Off-limits" orders restricting service members from going to gay bars should be reported to SLDN and SLDN can address that issue directly with the individual command or with the service branch.

Military Illegally Places Gay Bars on Banned List

Early in 2004, SLDN obtained a copy of a Power Point slide presentation from Randolph AFB in San Antonio, Texas, which depicted five local bars, branding them as "off-limits" to military personnel because of "illicit homosexual activity." The bars had been off-limits since 1990, before DADT became law, and were reviewed and inspected in 2002, but remained on the list because, as the slide show indicated, "We found credible evidence that warrants leaving these facilities on the off-limits list." The inclusion of these five establishments on the off-limits list was in direct conflict with DADT, which states, "associational activities," such as going to a gay bar, are not considered credible evidence for a commanding officer to investigate a soldier for alleged homosexual conduct. In addition to reporting this violation to the Air Force, SLDN released the Power Point presentation to the San Antonio Current, along with the date the ban became effective and a statement indicating the bars were off-limits because of "illicit homosexual activity." On May 20, 2004, the Current reported that "the Air Force lifted the club ban under pressure from SLDN."

Possessing or reading gay focused publications, for example *The Advocate*, is not by itself grounds for investigation or discharge.⁸³ Despite the regulations, some commanders have searched the rooms of service members and started inquiries solely because they had gay magazines or gay-themed videos and books. As a practical matter, keeping gay magazines and literature in barracks rooms, wall lockers or service members' cars raises the risk that service members may come under scrutiny or investigation by their command if these materials are discovered. Service members may attend gay pride parades and festivals, but must wear civilian clothes.⁸⁴ Military members should not wear their uniform or any pieces of their uniform to any gay event, nor should they attend gay events or political rallies while on duty.

It is safest not to carry a sign or wear gay-themed buttons, stickers, T-shirts, etc. at a parade (or anywhere else), particularly if the language suggests that the wearers themselves are gay. Military members must be careful not to make a "non-verbal statement," for example holding a sign saying "Gay and Proud," or engaging in "homosexual acts" such as hugging someone of the same-sex while at the parade, or risk discharge if reported.⁸⁵

Be aware that pride parades are often covered by the media. Service members may want to scan the parade route to make sure they are not being photographed or televised. The risks involved in participating in public gay events should be considered carefully. As a practical matter, others may suspect that service members are gay if they are seen at a gay pride parade or other event.

B. Actions Likely to Result in Discharge

Each of the activities discussed below carries with it the risk of discharge, or more severe punishment, if discovered by the military.

1. Engaging in Homosexual Acts

"Don't Ask, Don't Tell" defines homosexual conduct very broadly and therefore a lot of everyday actions can pose a risk for service members. Homosexual Acts are not just sexual acts. SLDN has seen commands initiate inquiries against service members, regardless of their actual sexual orientation, on the basis of a photograph in which two men simply have their arms around each other, or on the statement of a witness that she observed two women hugging each other.

Physical contact between same-sex service members can also be criminal. The military still criminalizes sodomy and indecent acts, as discussed above. Service members should not take pictures or videos of themselves engaging in sexual acts, even if just for their personal use, as they can be used to criminally prosecute service members.

2. Possessing or Appearing in Pornography

Under certain circumstances, it may be a violation of military regulations for a service member to possess pornography of any type. Depending on the command, individual military installations often have orders prohibiting the possession of pornography. This is especially true when serving in certain countries. If service members are found to possess porno-

graphic materials in violation of such orders, they may be subject to prosecution under the UCMJ.⁸⁶ Service members should never keep same-sex pornography or sexually explicit materials on base. In addition to discipline under local base policies forbidding pornography, commands may attempt to use possession of same-sex pornography as a basis for separation under “Don’t Ask, Don’t Tell.” This applies to viewing online gay pornography as well.

Service members making or appearing in pornography may be criminally prosecuted under UCMJ Article 92, if such activity is found to be a violation of a general order, among other Articles of the UCMJ. The military can and does criminally prosecute service members for appearing in pornography regardless of the sex of the participants. Even if the military decides not to court-martial a service member discovered to have engaged in pornography, if the pornographic acts involved members of the same-sex, this can be used as a basis for separation under “Don’t Ask, Don’t Tell.”

Pornography and the 82nd Airborne

In January 2006, several members of the US Army’s 82nd Airborne were prosecuted under several different Articles of the UCMJ for participation in a same-sex military themed pornographic video. Charges filed included sodomy (prohibited for both gay and heterosexual service members; UCMJ Art. 125), adultery (more than one service member was also married and adultery is prohibited by UCMJ Art. 134), and pandering by arranging or receiving consideration for arranging sexual intercourse or sodomy (under UCMJ Art. 134). All of the soldiers involved in these activities were criminally charged and prosecuted by the US Army. If the Army had chosen not to prosecute these soldiers, it would have been able to discharge them for violating “Don’t Ask, Don’t Tell.” Despite claims of heterosexuality the soldiers would likely have been discharged because they engaged in sexual acts with someone of the same-sex on camera.

3. Inappropriate or Unapproved use of Computers

Broadly speaking, modern technology is presenting new and greater risks for service members under “Don’t Ask, Don’t Tell.” Many service members believe that all of their computer correspondence and online discussions are private. They are not. Statements of sexual orientation and information about gay activities obtained by military officials from computer drives (including personal computers in the barracks), disks,

e-mail or online services have been used to investigate and discharge service members. This can occur during official screening of government computers and accounts as well as when a service member’s email is printed out by a friend or co-worker and turned into the military.

Work computers and government e-mail accounts (.mil addresses) are not confidential. Therefore, military members should never write personal letters or diaries on work computers, including authorized laptop computers used off base, or use .mil email accounts for personal correspondence because both the computers and the accounts belong to the military and can be searched by the military without need for a warrant or permission from the service member. In addition to “Don’t Ask, Don’t Tell” concerns, service members also risk punishment for misuse of government property if they use work computers for personal use, such as to write personal emails, chat online or view non-work-related websites.

Military computers and service members’ government network accounts are routinely screened for security reasons. Investigators have retrieved suspected gay service members’ e-mail and used the information to discharge the service members. Investigators have also used programs to retrieve deleted files in order to search the computers and disks of suspected gay service members.

A service member’s personal computer kept off base generally cannot be searched without a warrant or permission from the service member. A service member should never consent to a search of his/her off-base non-government personal computer without first speaking with a SLDN attorney or a military defense attorney. Again, no warrant or permission is needed to search and/or seize information from a private computer that is on base and/or in the barracks.

Outed On The Internet

Army Specialist Jeff Howe, an artillery specialist who served two tours of duty in Iraq, was discharged under “Don’t Ask, Don’t Tell” when an online profile revealing his sexual orientation was discovered. “I thought I was fine (using online services),” Howe said. “I didn’t realize my personal ad was a violation of the policy.” SLDN has worked on dozens of cases of service members outed to the military through online profiles. Almost every one of these service members was discharged.

4. Internet Usage and Online Profiles

Internet chat rooms and online profiles are very risky for gay service members. Most service members have a false sense of security that their statements of sexual orientation in an internet chat room or on their online profiles are considered to be private. This is not the case. In fact, many service members who run into trouble with the military do so because their activities online are reported to their commands by their co-workers or people they believe to be their friends. In addition, some service members are outed to the military when their ex-girlfriends or boyfriends, or ex-husbands or wives, motivated by anger at the service members, turn in their online profiles or internet chat room discussions to their commands.

Military personnel have gone online to scan for gay military members or to catch suspected gay service members talking about their sexual orientation or activities. In the past, there have also been attempts to bait gay service members. Service members should never assume that someone is who they claim to be when they are online. If you are a gay service member you must be *extremely careful* about revealing your sexual orientation to anyone, regardless of whether that person is in the military or a friend from the civilian or online world. SLDN has had dozens of clients who have been outed to the military because of their online profiles and activities.

5. Use of Non-Confidential Phones, Cellular Phones and Camera Phones

Phone use can raise the risk of investigation and discharge for gay service members under “Don’t Ask, Don’t Tell” for a variety of reasons. One risk is in using military phones for private conversations that include statements of sexual orientation or affection for someone of the same-sex. Military phones may be monitored for security reasons. Service members should not discuss their sexual orientation, activities, relationships or details of their cases from military phones, even with an attorney. The one safe government phone on base is in the military defense attorney’s office.

Private telephones in the service member’s on-base home or barracks room are generally safe so long as the telephone is listed in the service member’s name, the service member is paying the telephone bill and the government is not directly involved in the installation or maintenance of the phone. Personal cell phones are also generally safe but service members should be aware that cell phone signals can be monitored by others.

Service members deployed in combat zones, security areas or other hot spots may find that the only phone available to them is in a base phone bank or call center. Calls from these phone banks are monitored for operational security reasons, and service members making calls from these places are strongly encouraged to be careful about not saying anything that could reveal their sexual orientation while speaking on these monitored lines.

The Do’s and Don’ts of Online Profiles and Chat Rooms

SLDN has received dozens of calls from service members outed to the military because they made statements of their sexual orientation in their online profiles. Remember, under “Don’t Ask, Don’t Tell,” stating that you are lesbian, gay or bisexual to anyone, at any time, can lead to your discharge – this includes statements made online in ads, profiles, chat rooms and networking sites like MySpace and Friendster. The safest course of action is not to make such statements. However, if you choose to identify your sexual orientation in your online profile or in a chat room, some basic rules can help you decrease your chances of facing investigation and discharge:

- **DO** use a pseudonym or screen name to avoid disclosing your identity;
- **DO** make your webpage private or restrict access to it;

- **DO NOT** choose an e-mail handle or screen name that has any sexual connotations or lesbian or gay overtones;
- **DO NOT** use a military e-mail address for your profile;
- **DO NOT** access online personal ads or similar websites through a military computer at any time, or even through a personal computer during duty hours;
- **DO NOT** mention the fact that you are in the military in your personal profile, in chat rooms or other online forums;
- **DO NOT** show photographs – especially not in uniform – or descriptions of tattoos or other identifying information;
- **DO NOT** tell friends in the military that you have an online profile;
- **DO NOT** submit your profile to be a “featured member;” and
- **DO NOT** use online video-chat features.

Camera Phones Raise the Risk of Trouble

Camera phones have increased in popularity in recent years and are more and more of a risk to service members. Service members should not take any pictures with these phones that could raise suspicion concerning their sexual orientation or that could be considered pornographic. This includes taking photographs of enjoyable times in gay bars, pride festivals and interactions with members of the same-sex. Even if a service member has no intention of showing these photographs to anyone else, a risk exists that another service member might see the photos on the phone. SLDN has assisted several clients investigated because of photographs found on a cell phone.

C. Common Situations that Raise Risks for Gay Service Members

Service members living in the closet often face situations that may make them vulnerable to investigation and discharge under “Don’t Ask, Don’t Tell.”

1. Inspections of Rooms, Personal Property and Vehicles

Barracks rooms, lockers, desks and all vehicles that are on base or post are searchable by the military, without warrant or permission. Searches and inspections of some of these areas are routine. Keeping evidence of sexual orientation in barracks rooms, work-spaces, quarters, lockers and privately owned vehicles on base, therefore, can lead to investigation and discharge if discovered. Service members should be careful about bringing *anything* on base or on deployment that could lead to suspicions that they are gay. Photographs, cards, letters, posters, magazines and other materials found during routine barracks inspections, or inadvertently found when a service member is injured or has their clothes laundered, have led to many discharges under “Don’t Ask, Don’t Tell.” Even if the search is inappropriately conducted, the evidence can still be used against the service member in the administrative discharge process.

Further information regarding searches can be found later in this Guide.

2. Daily Conversations and Questions about Private Lives

It is common for coworkers to socialize and discuss their personal lives with each other during casual conversation. Unfortunately, for gay service members, these routine conversations can be dangerous. Gay service members should be cautious and sensible in determining which aspects of their lives they choose to share with their coworkers. Coworkers often innocently ask questions about service members’ personal lives, not realizing that the honest answers to these questions could put service members at risk of discharge. Examples include, “are you dating anyone?” “what did you do this weekend?” “why won’t you go out with Joe?”

Service members should be mindful that any comment to anyone revealing their sexual orientation could be used against them in an investigation and/or discharge proceeding.

3. Facing Anti-Gay Harassment and Threats

Service members perceived as gay may face harassment, threats and even violence. Harassment can take different forms, ranging from a hostile climate filled with anti-gay comments to direct verbal and physical abuse to death threats. Military leaders have stated publicly that they do not tolerate harassment. In fact, Department of Defense Directive 1304.26 says, “[t]he Armed Forces do not tolerate harassment or violence against any service member, for any reason,”⁸⁷ including harassment based on sexual orientation.

“Service members perceived as gay may face harassment, threats and even violence.”

Service members who are the target of harassment have some avenues within the military to try and stop the harassment. For further information on the options available see the [Safely Making Complaints](#) section of this Guide. Prior to reporting harassment, if possible, a service member should consult with a SLDN attorney or a military defense attorney to discuss ways to report the harassment safely. As a first step, service members should report harassment to their command unless the harassment is coming from, or being condoned by, their command. Service members facing the threat of immediate phys-

ical harm should speak to the military police and then seek safety behind the locked door of their chaplain's office, especially on deployed ships where there may be nowhere else to go. Service members should not confide their sexual orientation to a military chaplain or the military police.

In general, it is helpful for service members to document harassment when it occurs. Service members should write down as clearly as possible the facts of what occurred, including the date, time, and place of the incident, the name or description of each harasser and the names of any witnesses who observed the harassment. If service members receive a threatening note, they should handle it as little as possible and place it in a zip-lock bag or other container that will preserve it. Graffiti which may be easily erased, such as anti-gay epithets written on wipe boards or chalk boards, should be photographed and witnessed by a second person. Service members should also, if possible, take photos of any destruction of property they experience or ask people who are trustworthy to look at the destruction so that there are witnesses to it. It is best if service members are able to find witnesses that do not know about their sexual orientation or private lives because this will reduce the risk that the witnesses will unintentionally provide damaging information if questioned by investigators. In addition, service members should make and keep copies of their documentation and any other information they receive.

Important Information to Include When Reporting Harassment:

- Who Harassed You
- What was the Harassment
- When did it Happen
- Where did it Happen
- Who Saw the Harassment
- **DO NOT** Reveal Your Sexual Orientation

When reporting harassment, service members should report the facts of the harassment or threat, but not provide any information about their personal lives to their chain of command. Service members can say, for example, "On this date, this person did this to me..." or, "On this date, I returned from duty and found this threatening note tacked to my door." **Service members should NOT say, "I'm being harassed because I am gay."** Nor should service members answer questions about their sexual orientation or private lives. If

service members are questioned about their personal lives or sexual orientation, they should invoke their rights under Article 31 of the UCMJ, not answer the questions and ask to speak to a defense attorney.

Service members who report anti-gay harassment should consider asking their commands not to reveal the nature of the harassment to other service members. Revealing that a service member has been harassed because he or she is perceived as gay is likely to create and fuel rumors that might further jeopardize the service member's safety, even if the service member is not actually gay.

Physical Harassment and Property Damage are a Reality

After Private Mark Dennis was outed to his command by his online profile, he started to experience significant harassment from other soldiers. This harassment included vandalism of his car resulting in significant damage, including slashing of the interior, defacing the car with anti-gay graffiti, barricading access to it, and contaminating the gas tank. SLDN assisted Private Dennis in reporting the incident to his command and filing a successful claim with the Army to recover his out-of-pocket costs to repair his car.

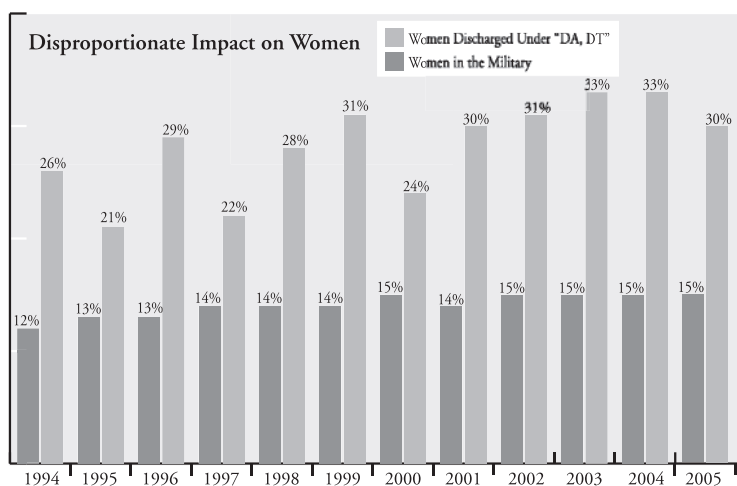
Although gay service members face risks in reporting harassment or threats, they do have some limited protection as the result of a memorandum from former Under Secretary of Defense Rudy de Leon, dated 12 August 1999, entitled "Guidelines for Investigating Threats Against or Harassment of Service Members Based on Alleged Homosexuality."⁸⁸ Referred to as the "de Leon memo," it states, in part:

The fact that a service member reports being threatened or harassed because he or she is said or is perceived to be a homosexual shall not by itself constitute credible information justifying the initiation of an investigation of the threatened or harassed service member. . . . The report of a threat or harassment should result in the prompt investigation of the threat or harassment itself.⁸⁹

Furthermore, there is an Executive Order that permits prosecutors in crimes against service members motivated by anti-gay animus to enhance the sentence for the underlying crime as a hate crime.⁹⁰ The Pentagon has also adopted and is supposed to be implementing a 13-point Anti-Harassment Action Plan. This plan, however, has never been fully implemented.

4. Sexual Harassment of Women

Female service members may face a form of sexual harassment that includes anti-gay comments and accusations that the service member is a lesbian. Women are often called lesbians, regardless of their sexual orientation, for a variety of retaliatory reasons. Some men accuse women of being lesbians when their sexual advances are refused. Other men, accused of sexually harassing women, in turn, accuse the women of being lesbians in an attempt to turn the investigation away from their own misconduct. Others, men and women, accuse female supervisors of being lesbians in retaliation for poor performance evaluations or unpopular orders. Yet others accuse successful women of being lesbians in order to derail their careers. The stereotype remains that women who succeed in traditionally male job fields are lesbians. For these and other reasons, women continue to be disproportionately impacted by “Don’t Ask, Don’t Tell.”⁹¹ Women have been consistently discharged at a rate nearly twice their presence in the services since the implementation of the law.



Service members experiencing sexual harassment can file complaints with their command’s Equal Opportunity (EO) officer. Service members suffering sexual harassment that includes accusations that the service member is lesbian or gay need to be very careful. The EO officer can be a very effective way of addressing sexual harassment. On the other hand, because they do not have authority to handle complaints involving harassment based on perceived sexual orientation, the complaint needs to be carefully worded or the service member may be turned away. In addition, there is the risk that the investigation will focus on the accusations that the service member is gay or lesbian, rather than the harassment.

Service members seeking to report sexual harassment that includes accusations that the service member is lesbian or gay should contact SLDN or a defense attorney to discuss ways to lower the risk of investigation into their sexual orientation once they report the harassment. Just as in reporting anti-gay harassment to the chain of command or to the military police, when a service member reports sexual harassment to an EO officer, she must be careful not to reveal her own sexual orientation if she is indeed a lesbian.

5. Extortion and Blackmail

Service members may be faced with co-workers, other members of the military or civilians who try to take advantage of “Don’t Ask, Don’t Tell” through attempts at blackmail and extortion. Extortion is a criminal offense and therefore can be independently investigated if reported, although reporting extortion linked to a service member’s sexual orientation can be very risky for the service member. Generally, service members

who become the victims of extortion attempts should seek legal help immediately by contacting SLDN or a military defense attorney to discuss ways to lower their risk of investigation if they want to report the extortion or blackmail attempt.

Extortion and blackmail are illegal within the military as well as in civilian society. Article 127 of the Uniform Code of Military Justice (UCMJ) states that a service member who “communicates threats⁹² to another person with the intention thereby to obtain anything of value or any acquittance, advantage, or immunity is guilty of

extortion and shall be punished as a court-martial may direct.⁹³ Service members convicted of extortion risk dishonorable discharge, forfeiture of all pay and allowances and up to three years in confinement.⁹⁴ In the civilian context, anyone found guilty of extortion and blackmail under federal law may be subject to a \$2,000 fine and one-year imprisonment.⁹⁵ However, service members reporting extortion or blackmail to police, whether military or civilian, face significant risks.

Service members who decide to report threats of extortion or blackmail should never reveal their sexual orientation to military police or civilian police. Civilian police reports can be turned over to the command of the reporting service member. Military police are supposed to follow a DoD Directive issued

on 21 December 1993 indicating that gay service members can safely report extortion attempts based on their perceived sexual orientation or associations with known gay people as long as they do not reveal their orientation when making the report.⁹⁶ The hypothetical examples given in that directive are not rules, however, and are not binding on commanders. Additionally, those hypothetical examples do not address extortion attempts based on accusations of gay acts. Nor do they provide any guidance to service members who are blackmailed by people who know their sexual orientation and use this information against them. As a cautionary note, SLDN is unaware of any successful prosecution for extortion or blackmail, either in the military or civilian criminal justice system, of an individual threatening to reveal a service member's sexual orientation.

6. Undergoing a Security Clearance Investigation

The security clearance investigation is one of the most difficult areas in which to counsel gay service members. What is appropriate for one service member may hurt another. The only absolute advice that applies across the board is: **Do Not Lie**. Service members are urged to call SLDN or a military defense attorney for individual counseling based on their situation before going through a security clearance interview.

“The only absolute advice that applies across the board is: Do Not Lie.”

Under former President Clinton's May 1995 Executive Order⁹⁷ and resulting policy changes, questions about sexual orientation or same-sex sexual activities are improper and should not be asked unless they become relevant to resolve a legitimate national security concern. Legitimate security concerns include sexual conduct, whether heterosexual or homosexual, that "could make an individual susceptible to exploitation or coercion, or indicate a lack of trustworthiness, reliability, or good judgment that is required of anyone with access to classified information."⁹⁸

Generally, security clearance investigators are complying with policy and are limiting their questions about sexual orientation or activities. Some investigators, however, are asking questions

concerning sexual orientation and same-sex relationships. Service members are often questioned about persons living with them. Investigators usually ask about the nature of the relationship and for service members who live with their same-sex partner such questions pose risks. Service members in relationships with foreign nationals are especially at risk because relationships with foreign nationals are seen as an independent risk to gaining or retaining a security clearance.

If asked, service members do not have to answer questions regarding sexual orientation. The new policy specifies that an "individual's efforts to follow DoD policy on homosexual conduct in the Armed Forces by not openly acknowledging his or her homosexual orientation do not constitute concealment."⁹⁹ Some advocates take the position that service members also do not have to answer questions concerning sexual activities. Under Article 31 of the UCMJ, service members have the right to remain silent when asked about activities that could be charged as crimes. Some service members have responded to questions about sexual activities by saying that they have never done anything that would subject them to blackmail or hurt national security. Service members should, of course, be sure this is a true statement before considering this approach themselves. Realistically, if service members refuse to answer questions or appear to be avoiding answering questions about their personal lives, they risk having their security clearances denied. Therefore, service members concerned about the security clearance process should contact SLDN or speak with a military defense attorney before answering questions from clearance investigators.

Security clearance investigators should not reveal information about service members' sexual orientation or activities obtained during security clearance interviews to the service members' commanders.¹⁰⁰ According to the regulations governing security clearance investigations, if the information is given to the commanders, those commanders are not supposed to use this information as a basis for discharge. "[I]nformation about homosexual orientation or conduct obtained during a security clearance investigation will not be used by the Military departments in separation proceedings."¹⁰¹ Currently, most commands appear to be following the security clearance regulations and guidelines protecting service members' honest admissions. The risk of investigation still remains. Therefore, if a service member believes that his/her command may have been given information about his/her sexual orientation by the security clearance investigator, he/she should call SLDN or speak with a military defense attorney prior to answering any questions from their command.

7. AWOL (Absence Without Leave) / UA (Unauthorized Absence)

It is never a good idea for a service member to leave the military without permission. Unfortunately, some service members see going AWOL (Absence Without Leave)/UA (Unauthorized Absence)¹⁰² as their only option when faced with threats or harassment because of their perceived sexual orientation. Going AWOL/UA is a violation of Article 86 of the UCMJ.¹⁰³ It is a serious matter that nearly always hurts service members more than it helps.

Civilian Police and AWOL/UA Service Members

Gay service members sometimes consider going AWOL/UA when facing anti-gay harassment or threats. Going AWOL/UA is never the answer. There are almost always better ways for service members to resolve problems or protect against harassment than going AWOL/UA. For example:

- Get legal assistance to make a complaint and utilize options service members have to protect themselves.
- If there is a threat of imminent violence, make a report to the Military Police or ask for protection from a military chaplain.
- “Coming out” is a final alternative to going AWOL/UA, in some cases. (See Survival Guide Section on “Coming Out”.)

Service members who go AWOL/UA may face arrest and face punishment, including restriction, non-judicial punishment (NJP) and even court-martial. This is particularly true for service members who go AWOL/UA and miss a movement or deployment. “Missing movement” is a violation of Article 87 of the UCMJ,¹⁰⁴ a serious offense that can result in court-martial or a less than honorable discharge. Additionally, after being AWOL/UA for more than 30 days, a service member is administratively classified as a deserter which means a federal warrant is issued for the service member’s arrest and the service member could face harsh punishment, including court-martial and prison.¹⁰⁵

By law, civilian advocates may assist AWOL/UA service members as long as they do not “urge” or “counsel” service members to stay away from the military. They are not required to turn in AWOL/UA service members and are not prohibited from

giving information to service members who do not want to return. Advocates may assist a service member in returning to the military, but the decision to go back belongs to the service member.

Procedures for service members returning to the military differ among the services. Prior to taking any action, service members should contact SLDN or a military defense attorney for suggestions on how best to move forward.

Alternatives to Going AWOL/UA

Service members who have been AWOL/UA for 30 days or more are usually declared deserters by the military, and a federal arrest warrant is issued. Civilian police have access to these warrants and will often arrest the service member. Usually, this happens when a service member in a deserter status is stopped for a routine traffic violation. Civilian police sometimes seek out deserters, and service members have been arrested in their homes on federal warrants. Service members arrested by civilian police for desertion should say nothing, sign nothing and ask to speak with a defense attorney because they face potential criminal prosecution under the UCMJ.

8. Safely Making Complaints

Service members have the right to make complaints either through military channels or outside military channels about improper treatment, harassment or violations of “Don’t Ask, Don’t Tell.” Service members should contact SLDN or a military defense attorney before making their complaint. An SLDN attorney or military defense attorney can help them decide the best way to route their complaint, encourage the command or the service to treat the complaint seriously and help to protect against retaliation for making the complaint.

Normally, complaints cannot be used to stop discharge proceedings or disciplinary actions, though they can be useful in bringing the military’s attention to problems in those proceedings. Sometimes commands take a second look at discharge or disciplinary proceedings if they realize that the proceedings are tied to improper or illegal actions.

Some of the more common complaint procedures are:

- 1) Command Complaint. The first line of defense for all service members is their chain of command. Generally speaking, service members should try to use their chain

of command to address issues before attempting to make complaints through other channels. If a service member's chain of command is part of the problem or condones the behavior being complained of, then the service member may need to use other methods to report the mistreatment.

- 2) **Article 138 Complaint.** Article 138 of the UCMJ permits service members to seek redress of a grievance against their commanding officer.¹⁰⁶ Service members may attempt to use this method to right any wrong they feel they have faced, whether or not a law or regulation has been violated. These complaints usually begin with a letter to the commander asking for specific redress (an apology, a training session about the limits of the policy for all personnel, a transfer to get away from harassment,

“Service members should contact SLDN or a military defense attorney before making their complaint.”

etc.). If the commander doesn't grant the request in a reasonable time, a formal complaint may be made to any commissioned officer, superior to the commanding officer, who shall forward the complaint to the officer exercising general court-martial convening authority over the commander. That officer must act on the complaint and report the matter to the Secretary of the Service.¹⁰⁷

- 3) **Inspector General (IG) Complaint.** Service members may complain to the inspector general of their base, service, or the DoD about harassment or violations of regulations.¹⁰⁸ Once they are made, the handling of complaints is generally out of service members' hands. The inspector general's office does not itself have the power to correct problems, but its findings and recommendations may induce action by a command.
- 4) **Equal Opportunity (EO) Complaint.** Each branch of the service has equal opportunity offices or officers to handle complaints of race- and gender-based discrimination and harassment. Complaints regarding anti-gay harassment are not part of EO representatives' mission and service members reporting complaints about anti-gay harassment or violations of “Don't Ask, Don't Tell” will almost always be turned away.

- 5) **“Writing Up.”** Any service member can file charges against another service member for a violation of the UCMJ.¹⁰⁹ Service members can ask their commands to take disciplinary action against other members who violate the UCMJ or punitive regulations. Requests are normally made in writing. Service members cannot demand that offenders be disciplined; it is up to the command to decide whether to take any action. Another practical reality is that a junior service member who attempts to place a senior service member “on report” may be retaliated against by the senior member in ways that are hard to prove—i.e., bad work assignments, weekend duty, assignments to work details, etc.
- 6) **Congressional Inquiry.** Members of the military have the right to communicate with their Members of Congress and to ask their help in resolving problems with the military.¹¹⁰ They do not need command permission to do so, and need not notify their commands. In some cases, congressional inquiries are no more than an exchange of letters between a congressional aide and a liaison officer at the service's headquarters. When presented with concrete evidence and asked for specific types of assistance, however, sympathetic Members of Congress can urge the services or local commands to take action about violations of “Don't Ask, Don't Tell,” such as witch hunts.
- 7) **Media/Press.** Complaining to the press, and using its ability to influence the military, should only be done with legal counsel and only as part of a legal strategy to redress a wrong. The decision to go to the media is not to be taken lightly and should generally be considered only after other avenues of redress have been tried. While the press can be an influential tool, once the story is in the media stream, there is little the service member can do to control it. In addition, the service member may be ordered to not communicate with the press after the initial story runs. In these cases, a defense attorney can represent the service member's interests to the press to protect the service member from getting into trouble for disobeying an order.

These and other complaint procedures can be used to bring attention to harassment and violations of “Don't Ask, Don't Tell.” To help guarantee action will be taken, or an investigation into the complaint initiated, complaints should clearly outline what happened, when the incident happened and who witnessed it besides the service member. It is always helpful to

have legal assistance in evaluating the strength of the evidence and in preparing a complaint. In addition, complaints must normally be supported by documentary evidence, such as witness statements or other evidence. It is helpful, in most cases, to gather statements and other evidence before making a complaint, to avoid the possibility of the offender or his or her friends intimidating witnesses or destroying evidence.

Protection Against Retaliation

Service members who face retaliation for making complaints often have protection under the Military Whistleblower Protection Act (10 U.S.C. § 1034 and DoDD 7050.6, *Military Whistleblower Protection* (2000)). Under the Act, service members who make certain types of complaints are entitled to prompt IG investigations of any adverse personnel action or threatened adverse personnel action taken to retaliate for their complaints.

In addition, if the retaliation results in formal adverse action, service members are also entitled to expedited proceedings before the Board for Correction of Military Records (BCMR) or Board for Correction of Naval Records (BCNR), depending on the service. For example, a service member discharged due to a false allegation of homosexual conduct brought in retaliation for a sexual harassment complaint may petition the BCMR or BCNR to request reinstatement.

9. Doctors and Psychotherapists

As a general rule, conversations between service members and their military doctors, psychologists and other military mental health care providers are not confidential. While there is no regulation that requires health care providers to “out” their patients, there is also no regulation that prohibits them from outing their patients. Some military health care providers wrongly continue to believe that they have a duty to report gay service members to their commands. Other health care providers may report gay members because of anti-gay feelings.

It is also important to understand that military health care providers can be compelled to provide information about a service member to the service member’s command. Anything service members reveal to military health professionals can be used by commands to investigate and/or discharge them. For these reasons, service members should be very cautious in

revealing any information regarding their sexual orientation or sexual activities to military health care providers.

Little Confidentiality in Military Medicine

Kevin Blaesing, a 22-year-old Marine Infantryman, was outed by a Naval psychologist he had sought out for treatment. Blaesing started to ask generic questions concerning homosexuality and what it means to be a homosexual, and the psychologist turned him in to his command. The psychologist told Blaesing it was in his “best interest” to get out of the military.

There is a very limited psychotherapist-patient privilege, added to the UCMJ in 1999, that may prevent disclosure of information that a service member shares with a psychotherapist, or an assistant, during court-martial.¹¹¹ However, this privilege applies only in the criminal context and not in the administrative separation process, which constitutes the majority of cases under “Don’t Ask, Don’t Tell.”¹¹²

Due to the lack of confidentiality with military health care providers, many service members seek medical and mental health treatment in the civilian community. Some military health care providers even counsel service members to seek civilian treatment when the provider suspects that sexual orientation will be an issue. Service members who choose to be treated by civilian practitioners should be aware that the services have regulations which require members to report that they have received medical or mental health treatment outside the military medical system.¹¹³ Should the military learn of such treatment, and the member has not reported it, the member may face UCMJ punishment for failure to obey an order or regulation.¹¹⁴ If a service member lies about receiving treatment, he or she is at risk of violating the UCMJ by making a false statement.¹¹⁵ Service members should contact SLDN about how to safely report civilian medical treatment to the military.

During security clearance investigations, service members are often asked to identify their civilian mental health providers and the reason for treatment on security clearance questionnaires. Investigators will sometimes press service members to sign an authorization form allowing them to question health care providers. Refusal to allow this access may result in the service member not receiving a security clearance. Investigators occasionally have questioned providers without first seeking service members’ authorization. Most civilian mental health professionals refuse to answer such questions,

but service members should speak with their civilian providers before starting treatment to verify that their conversations are confidential and will not be revealed to security clearance investigators or to the military without their permission. In general, service members should not give civilian providers permission to disclose treatment information to the military without first speaking to an SLDN attorney or a military defense attorney.

10. HIV/AIDS

Members of the military who have tested positive for HIV or have been diagnosed with AIDS face different career outcomes depending on their service status. First, HIV+ persons are prohibited from enlisting in the armed forces.¹¹⁶ Service members are periodically tested for HIV and those who test HIV+ while on active duty are allowed to continue serving, so long as they remain healthy (i.e., “medically fit for duty”). Reserve and National Guard members who test positive are usually administratively separated from the service. Service members testing HIV+ should seek guidance from SLDN or a defense attorney experienced in military law.

“Reserve and National Guard service members who test HIV+ are treated differently than those service members testing HIV+ while on active duty.”

Active duty service members who test HIV+ generally may remain in the military, but face restrictions on their duty assignments and must abide by certain orders and programs. HIV+ service members are provided medical treatment via military medical facilities and their health status is supposed to be, and usually is, treated confidentially. Active duty HIV+ members may face assignment limitations due to their status. DoD no longer maintains a blanket prohibition against HIV+ service members serving overseas but the individual services appear to be continuing their practice of limiting service to the continental United States.¹¹⁷ HIV+ members are also given formal, written “safe sex” orders requiring them to disclose their HIV status to all persons prior to having sexual relations, as well as to always use condoms. Violation of this order may result in the service member’s criminal prosecution under Article 92 of the UCMJ.¹¹⁸

Important Information for HIV+ Service Members

- 1) HIV+ service members cannot be deployed or receive overseas assignments.
- 2) Most reserve and National Guard members testing HIV+ will be discharged due to their non-deployability status.
- 3) Service members testing HIV+ while in the military will be medically evaluated and may be asked to name their past sexual partners (service members should contact SLDN or a military defense counsel before answering these questions).
- 4) HIV+ service members are required to tell all future sexual partners their HIV status and they must use condoms during sexual acts or face potential criminal prosecution.

Whether an active duty service member remains in the military after testing HIV+ is primarily dependent upon the service member’s health status. Active duty personnel who show symptoms of any HIV-related condition are evaluated for medical fitness and, if found unfit for duty, are medically separated from the service. Service members who are medically unfit with at least a 30% disability rating (using the Department of Veterans Affairs “Schedule for Rating Disabilities”¹¹⁹) will likely be medically retired (i.e., retired from active duty with a pension along with access to military health care facilities). Service members who are medically unfit with less than a 30% disability rating usually receive a one-time disability severance payment rather than disability retirement. These members are then eligible for limited health care through VA medical facilities.¹²⁰ In addition, HIV+ active duty service members who are fit for duty may request an administrative separation from the service, but the services are not obligated to approve the request.¹²¹

Reserve and National Guard service members who test HIV+ are treated differently than those service members testing HIV+ while on active duty. HIV+ Reserve and National Guard members are usually separated from the service, without opportunity to apply for disability retirement, unless they are eligible to transfer into an available “non-deployable” billet or they are granted a waiver.¹²² There are relatively few “non-deployable” billets in the National Guard and Reserves, as most National Guard and Reserve billets are required to be available for overseas deployment when activated.

Service members who test HIV+ must go through a vigorous contact tracing process either conducted by military health care workers or by a civilian agency if a member tests positive through screening by a civilian agency. During the contact tracing process, health care workers ask HIV+ service members for names of sexual partners and others who may have been exposed to HIV by the positive service member. Even if a civilian agency performs the required contact tracing the military will sometimes perform their own contact tracing evaluation. The information provided by the HIV+ service member during this epidemiological assessment is not supposed to be used against that member in personnel or legal actions.¹²³ DoD has implemented a policy prohibiting “adverse personnel actions” against those testing HIV+ (including involuntary administrative discharge, court-martial, or unfavorable entries in personnel record) based solely on information obtained during contact tracing.

Despite the protections given during the contact tracing process, it may be better for some service members to refuse to report the names of their past sexual partners and to promise the health care provider that they will notify past sexual partners of their HIV status on their own. This is because not all communications between HIV+ patients and military health care providers are protected. The regulations and policy memoranda concerning contact tracing do not extend protections to military personnel identified as gay as the result of HIV+ service members naming them as sexual partners. HIV+ service members with questions about the contact tracing process and how to answer questions should contact SLDN for assistance.

Service members testing HIV+ may also face harassment. Although military regulations require confidentiality of HIV test results, limiting knowledge of HIV+ status to those that need to know within the military, in reality, HIV+ test results often become widely known. Such medical privacy violations may cause embarrassment and even lead to harassment of HIV+ service members. Male HIV+ service members are also often assumed to be gay which can lead to a greater risk of being harassed because of their perceived sexual orientation.

11. Military Chaplains

Chaplains are an important resource for service members. Unfortunately, chaplains are not always a safe resource for gay service members because guidance regarding confidentiality with chaplains is inconsistent. While the DoD Directives concerning appointment of military chaplains do not explicitly address issues of confidentiality,¹²⁴ the Manual for Court

Martial directs that chaplains must keep conversations confidential when service members seek their spiritual guidance.¹²⁵ But chaplains are not required to keep conversations confidential when service members speak to them for reasons other than spiritual guidance and what constitutes spiritual guidance is not always clear. Individual services also have their own regulations concerning chaplains. For example, the Army advises service members to speak with chaplains as a confidential resource, and an Air Force regulation states that “[Chaplains] will not disclose confidential communications in private or in public.”¹²⁶

Throughout the life of “Don’t Ask, Don’t Tell,” a few chaplains have turned in service members who revealed their sexual orientation. Others have instructed gay service members to turn themselves in. Still others have dropped hints in conversation with commanders that have led to the investigation of gay service members. Some chaplains have carelessly talked about their conversations in enough detail that commanders could figure out the service members involved. A few chaplains have even berated gay service members, telling them that they are “going to hell.”

Army Chaplain in Germany Harasses Lesbian Sergeant

In 2000, while stationed in Heidelberg, Germany, Sergeant Gidonny Ramos was “outed” to her command by her civilian husband. Under orders from her supervisor to seek guidance from the chaplain, Sergeant Ramos went to see Chaplain Leininger, a Major also stationed in Heidelberg. Leininger berated Ramos for being a lesbian and reportedly told her that while some Christian chaplains accepted gays, he did not. Leininger then threatened Sergeant Ramos with “going to hell” and told her “homosexuality is a curable disease.” He urged Ramos to seek information from the “ex-gay ministry” movement and ordered Ramos into compulsory marriage counseling. In mid-August, 2000, in her husband’s presence, Leininger called Sergeant Ramos a “sexual deviant,” stating that “people like [Ramos did] not belong in the Army.” Leininger further called Ramos an “embarrassment to the uniform.” The chaplain reportedly stated he would “remain quiet” about Ramos’ “sexual perversions” if she continued to participate in the marriage counseling sessions. Realizing she was trapped in an untenable situation, Ramos told her command she is a lesbian and subsequently was honorably discharged.

If service members want to speak with military chaplains about issues surrounding sexual orientation, they should investigate what their chaplain's religious denomination says about homosexuality, ask the chaplain if the conversation is confidential, and then cast the conversation in a spiritual light. This should help ensure that the conversation is confidential.

Additionally, like other non-legal personnel, chaplains often misinform service members about what the regulations say and about their legal rights. Do not expect chaplains to know the regulations or answers to legal questions; these are better addressed by SLDN or a military defense attorney.

12. Interactions with Civilian Police

Interactions with civilian police can lead to a service member's sexual orientation being revealed to his/her command and to potential investigation and discharge. Service members may interact with civilian police in a number of different ways. For example, service members may be victims of crimes off-post, they may be suspected of engaging in criminal activity falling into civilian police jurisdiction or they may be a witness to a crime.

In most areas, civilian police routinely turn reports involving service members over to the military. Therefore, information given to civilian police about personal matters can be risky for a gay service member, even if the service member is the victim of a crime. For example, in a domestic dispute between a same-sex couple where the police are called, questions will be asked about the relationship. In those cases, if possible, a serv-

“Interactions with civilian police can lead to a service member's sexual orientation being revealed to their command and to potential investigation and discharge.”

ice member should immediately speak with SLDN or a military defense attorney. With legal assistance, a service member may be able to obtain the help needed from the police without risking discharge. As a general rule, service members should treat civilian police as they would military police and invoke their legal rights to say nothing, sign nothing and consult with an attorney if questioned about their private lives.

Domestic Violence Reports to Civilian Police Risk Officer's Career

During the Spring of 2005, an active duty Lieutenant Colonel assigned to the Pentagon called civilian police after being physically assaulted by his same-sex partner. Even though he was fearful that he might be discharged from the Army if information about this incident was turned over to his command, the Lieutenant Colonel came forward because of his injuries and because his partner continued to remain a threat to his safety. Luckily, this case was handled by the DC Police Gay and Lesbian Liaison Unit who addressed the situation in a way that protected the Lieutenant Colonel from being inadvertently outed to the Army and they assisted him in safely seeking civilian medical treatment for his injuries.

Problems may arise in emergencies where service members face an immediate threat of harm. If there is a real need to talk to police or other law enforcement officials and there is no time to seek legal help first, service members should stick to recounting the facts as they have occurred. Service members should avoid making any statement about their own sexual orientation or private life, if at all possible. Afterward, service members should speak with SLDN or a defense attorney as soon as possible.

Generally speaking, civilian police will rarely request to search a service member's off-post home unless they have probable cause to believe a crime has been committed. Whether or not civilian police have a warrant, the service member should state that he or she objects to the search,¹²⁷ but, with or without a warrant, the service member should not interfere with a search. A service member who physically tries to prevent a search runs the risk that the police will respond roughly or charge the service member for interfering with police activities. After stating the objection to the search, it is best to leave further argument to an attorney.

D. Family Situations - Parents, Partners and Children

Engaging in intimate relationships and building families presents specific difficulties for gay service members. If the military discovers the service member has a same-sex partner, the service member is likely to face investigation and discharge. Similarly, the addition of a child to the service member's household can potentially lead to investigation and dis-

charge. Gay service members have taken a variety of approaches to cope with having a family under “Don’t Ask, Don’t Tell.” Some service members have protected their careers by totally separating their home lives. Other service members pass off partners as “friends” or “cousins.” One officer brought her partner to official functions at her last duty station by telling co-workers the partner was in fact her “nanny,” caring for her children from a prior marriage. Some service members simply bring their partners to functions and are silent about the nature of the relationship.

Service members who are considering listing their partner or children on military paperwork, marrying their partner or having or adopting children should contact SLDN for advice on how to minimize the risk of discharge.

Death of a Same-Sex Partner Leads to Discharge

In early summer of 2001, Air Force physician Dr. Monica Hill’s long-term partner was diagnosed with terminal cancer. Dr. Hill, eager to serve, requested a deferment of her scheduled activation from the reserves in order to care for her partner during the last months of her life. Dr. Hill was effectively required to “out” herself in making the request and instead of receiving the deferment, Dr. Hill was discharged under “Don’t Ask Don’t Tell.” During the discharge proceedings, Dr. Hill was forced to provide a copy of her partner’s death certificate to the inquiry officer who intimated that he did not believe the situation leading to her deferment request was real.

1. Records of Commitment and Marriage

Any public or legal affirmation of a same-sex relationship is grounds for discharge. While recent judicial decisions and legislative actions have opened doors for same-sex couples to have their relationships legally recognized, this recognition is risky for military members.¹²⁸

Same-sex couples can now be legally married in the state of Massachusetts¹²⁹ and some foreign countries. Same-sex couples can also have their relationships legally recognized through civil unions or domestic partnerships in other states such as Vermont, Connecticut, California, and New Jersey.¹³⁰ These states give partners an opportunity to legally commit to each other and gain certain rights, but they also create a public record that could be used to discharge a service member. This record can be accessed by any member of the general

public and could potentially “out” a service member. Domestic partnership registration or a civil union can be used to separate a service member as either an attempted marriage or as a statement of sexual orientation.

Some civilian companies offer domestic partner benefits for same-sex couples. If a service member’s partner works at such a company, careful consideration should be given to registering for the benefits at the company. Registration would create a paper trail of the same-sex relationship that could potentially end a service member’s career.

Service members considering marriage, domestic partner registration or civil unions with someone of the same gender should consult with SLDN to discuss the risks.

In addition, some gay service members marry individuals of the opposite sex in order to protect themselves from being discovered as gay. This can be very risky. Service members can be criminally charged with fraudulent marriage. Further, intimate relationships outside of a marriage can lead to criminal charges. Service members in this situation or considering this step should consult with SLDN.

2. Emergency Situations

The military does not recognize same-sex partners of service members. Indeed, if a same-sex relationship is discovered the service member can be discharged. This creates challenges for service members and their families to ensure communication in emergencies – especially when service members are deployed.

Service members are required to keep an emergency data sheet updated so that family can be notified in case of an emergency or if the service member becomes killed in action (KIA), wounded in action (WIA), missing in action (MIA) or is taken as a prisoner of war (POW). The form allows service members to list primary next of kin (PNOK) and “interested persons” to contact. PNOK’s are notified first in case of an emergency. The regulations define who can be listed as the PNOK, and a service member’s same-sex partner cannot be listed as a PNOK. Service members, however, can list anyone they choose as a person to be notified in an emergency as an “interested person.”¹³¹ While the military will not notify the “interested person” as quickly as they would a PNOK, the military will make the notification.¹³²

The first DoD memorandum on the new “Don’t Ask, Don’t Tell” law, dated 19 July 1993, states, “The listing by a service member of someone of the same gender as the person to be

contacted in case of emergency... or in a similar context, does not provide a basis for separation or further investigation.”¹³³ While the subsequent implementing regulations did not directly address this issue, commanders would be hard pressed to classify an emergency contact listing as grounds for discharge. Service members should be warned, however, that such a listing may result in suspicion and close scrutiny of their lives.

In case of an emergency back home, the Red Cross traditionally provides notification to military members if a family member has a medical emergency or dies while the service member is deployed. Often the member will be granted emergency leave to attend to the situation if the service member's presence is requested. If a service member's same-sex partner needs to pass a message to the service member while the service member is deployed, he or she may do so under the Red Cross Armed Forces Emergency Services messaging system through the partner's local Red Cross chapter.¹³⁴

Using the Red Cross in Case of Emergency

If the partner or family of a gay service member needs to contact the service member in case of an emergency, they should contact the Red Cross for assistance. In order to help, the Red Cross will need the following information about the service member:

- Service member's full name
- Rank/Rating
- Branch of Service
- Social Security Number
- Military Address
- Information about the deployed unit and the home base unit

The Red Cross has fairly rigidly defined what kinds of messages can be passed; however, the organization will allow same-sex partners to send the message if it otherwise qualifies for the message service.¹³⁵ The Red Cross will not reveal the nature of the relationship to the military, and will send a message via the military to the service member.

Messages regarding an emergency concerning a same-sex partner may be treated differently than messages related to a

death or emergency in the service member's blood-related family. Notification to the service member about an emergency concerning a blood-related family member is treated with a higher priority than the notification about an emergency concerning a same-sex partner who will be considered a “close friend.” Because it comes with less priority, the military is less likely to allow the service member emergency leave to attend to the situation. Service members will have to make a difficult decision about how much information to share.

Service members or their partners should contact SLDN if they have questions about receiving notification in an emergency or contacting each other.

Service Member in Iraq Denied Emergency Leave after Partner's Death

A senior NCO stationed in Iraq during Operation Iraqi Freedom was refused leave time in order to return to the U.S. for the funeral of his civilian partner because he could not “tell” his commander whose funeral it was. While service members can return home for the funeral of a spouse of the opposite sex or other family members, they are generally not granted leave for the funeral of a “best friend.” Devastated that he was not able to be there for the funeral to say goodbye or to support his partner's family, this enlisted leader was merely granted a day off by his commander to sit in his tent alone to grieve.

3. Insurance Beneficiaries

The only military benefit that active duty service members can provide to their same-sex partners is to name them as a beneficiary of their Servicemember's Group Life Insurance (SGLI). Service members should be able to list persons of the same gender as their insurance beneficiaries without risk of investigation or discharge.¹³⁶ As a practical matter, service members are sometimes questioned about why they are listing a non-relative of the same-sex as a beneficiary. If a service member is questioned about the relationship to the same-sex beneficiary, he or she should not explain the nature of the relationship and is not required to do so.

Recently, the Department of Defense has streamlined many administrative forms, and service members may now be able to update their SGLI information online. If available to them, this online process would allow service members to avoid questions about their choice of beneficiary. Although service members may no longer need to go through their administration section

to update this information, these forms become part of the service member's records and are therefore still accessible to commanders, prosecutors and investigators. If service members have questions about naming a same-sex beneficiary, they should contact SLDN.

4. Pregnancy and Adoption

Service members in same-sex relationships who want to have children or adopt children face many obstacles. It is important for service members who are considering these steps to contact SLDN.

All service members are required to notify the military of any legal dependents they have, including children.¹³⁷ Service members adopting a child, either their partner's child or jointly adopting a non-biological child with their partner, are obligated to inform their command of this change in dependent status.¹³⁸ Failure to report a dependent to the military could result in a criminal conviction under Article 92 of the UCMJ (Failure to Obey Order or Regulation). That conviction could result in a dishonorable discharge and two years in military prison.¹³⁹

“Service members adopting a child, either their partner's child or jointly adopting a non-biological child with their partner, are obligated to inform their command of this change in dependent status.”

After notifying the military of their new dependents, service members then must register their children in the Defense Enrollment Eligibility Reporting System (DEERS). DEERS is a computerized database of service members, known as sponsors, and their minor dependents as well as their spouses.¹⁴⁰ The DEERS database is used to confirm the eligibility for those individuals applying for and receiving benefits through the military because they are a dependent of a U.S. service member. Currently, updating some parts of DEERS can be accomplished online. Unfortunately, this does not include registering a newly adopted child. To register a newly adopted child, service members must present appropriate documentation to their nearest ID Card Facility or personnel office.

The requirement that service members provide adoption certificates to register their children as dependents raises several risks for gay service members who have adopted. Specifically, an adoption form listing the names of two people of the same-sex as co-parents of a child could be considered grounds for investigation and possible discharge under “Don't Ask, Don't Tell.” Therefore, a service member thinking of second-parent adopting his or her partner's child should see if the jurisdiction where they are adopting will issue an adoption certificate with only their name listed as the adopting parent.¹⁴¹ In cases where a same-sex couple decides to adopt a child together or jointly, the adoption paperwork almost always must list the names of both adopting parents and therefore, service members jointly adopting with their partner face even greater risks. The listing of same-sex parents on a joint adoption certificate may create suspicions on the part of military administration personnel and could be a basis for investigation and potential discharge.

Air Force Officer Chooses Children Over Career

The four children of Air Force Major Scott Hines, an intelligence officer and Air Force Academy graduate, have all received different treatment by the military. Shiloh and Eden, Hines' biological children from a previous marriage to a woman, were recognized by the military as his dependents. Louis and Sage, Hines' other two children who he jointly adopted with his same-sex partner of six years, were not recognized by the military because Hines could not notify the military of their existence without fear of dismissal under “Don't Ask, Don't Tell.” As time went by, Hines felt increasingly torn between his family and his career. Hines attended many unit picnics alone, without his partner or his children. Hines saw that while he was raising his children to be honest, “Don't Ask, Don't Tell” was forcing everyone in his family, including himself, to be dishonest. Ultimately, Hines resigned from the Air Force in 2005 after more than ten years of service because he felt “Don't Ask, Don't Tell” was not fair to himself, his partner or his children.

Female service members who decide to have children without being married to someone of the opposite-sex also face risks because of these reporting requirements. Lesbian service members choosing to have children outside of an opposite-sex relationship or marriage open themselves up to the risk that

the military will perceive them as gay. If the service member does have a same-sex partner, she should be cautious having her partner present at medical appointments. If the child is born at a military hospital, the couple must be careful not to say or do anything that gives the appearance that they are a couple to avoid violating “Don’t Ask, Don’t Tell.”

Another hurdle faced by gay service members with children is the requirement that they maintain a Family Care Plan explaining how their dependents will be cared for if the service members are suddenly deployed. Among other things, these plans must include:

- A responsible caregiver for their child
- A statement from that caregiver acknowledging and accepting responsibility for the child
- Financial arrangements including a power-of-attorney
- A statement signed by the caregiver and the service member acknowledging that the caregiver knows of the power-of-attorney and any financial matters that must be attended to concerning care for the child
- A will¹⁴²

All units require that these Family Care Plans be reviewed by a service member’s chain of command. While service members are free to choose the person to whom they delegate so much responsibility, commands may ask questions if the designated guardian is a person of the same-sex who is not an immediate family member. Service members are not required to explain the relationship of their designated guardian but the command may request to see any legal paperwork service members have obtained making the guardianship legal.¹⁴³ Therefore, if possible, if service members decide to designate their same-sex partner, the language used in that legal paperwork should not indicate the nature of the relationship between the service members and the designated guardian.

Service members with questions about building a family should contact SLDN. If a service member comes under investigation, the service member should refuse to answer questions and immediately call SLDN.

5. Breaking Up

Ending a relationship can raise significant risks to the careers of the gay service member involved. Regardless of the sex of

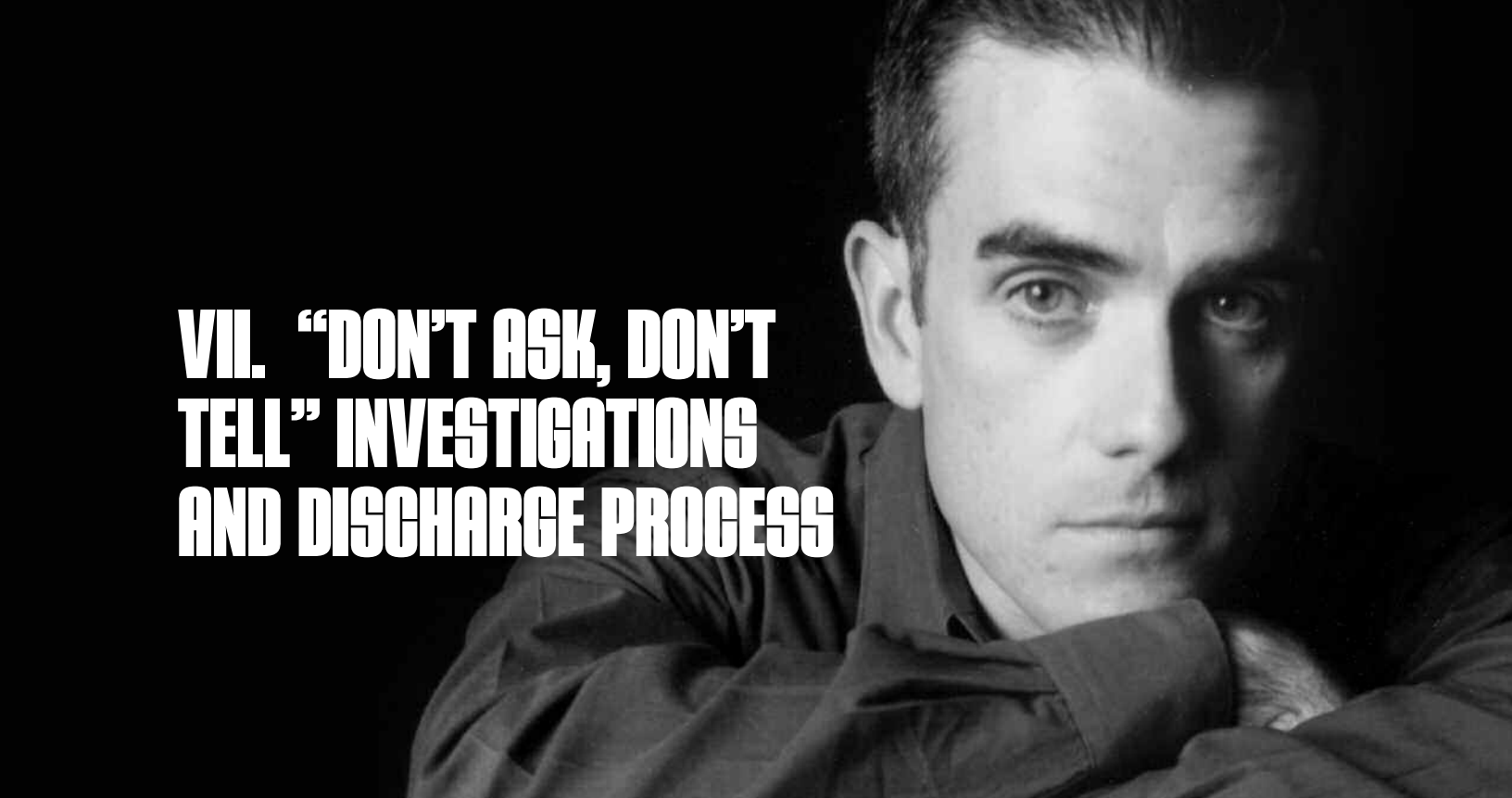
the former partner, service members should know that their former partner might threaten to damage their career. Sadly, SLDN has often seen cases where angry ex-partners threaten to out or, in other cases, actually succeed in outing the gay service member. Service members concerned about such threats should review the earlier section in this Guide on “Extortion and Blackmail.” In addition, service members who are faced with threats by former partners or spouses should contact SLDN to discuss such options as obtaining restraining orders or protective orders from the civilian court system.

“Ending a relationship can raise significant risks to the careers of the gay service member involved. Regardless of the sex of the former partner, service members should know that their former partner might threaten to damage their career.”

If the relationship that is ending involved children and/or large assets, civilian court proceedings may be required to resolve those issues. For example, if a service member was married to someone of the opposite sex, then divorce proceedings in court must occur to officially end the relationship. If the opposite-sex marriage included children, a court will need to be involved to establish the custody and support of the children. Where the service member was involved in a same-sex relationship, disputes over significant assets or the custody of children may also end up in court.

If a break up goes to court, the service member’s sexual orientation may become an issue in the proceeding. Generally court records are open to the public. To protect themselves, service members should request that court records be sealed, preventing access to the records by the public. Do not assume that the court will automatically seal the records. Many states leave the closure of such records optional and at the court’s discretion. If service members do not specifically request closure the resulting court records could be searched by any member of the military or public.

Service members facing these situations during the break up of their relationship should contact SLDN for guidance on ways to lower the risk to their career.



VII. “DON’T ASK, DON’T TELL” INVESTIGATIONS AND DISCHARGE PROCESS

Service members under investigation for violating “Don’t Ask, Don’t Tell” are entitled to certain rights and to a specific administrative separation process under the service regulations. Service members should be aware that many commands do not understand the rules and regulations regarding “Don’t Ask, Don’t Tell” investigations and the separation process. As stated throughout this guide, the most important thing for service members to remember if they believe they are under investigation for alleged homosexual conduct is that under Article 31 of the UCMJ, they have the right to protect themselves from forced self-incrimination. Article 31 is similar to the civilian Miranda rights, or the “right to remain silent.” This means if the military is investigating a service member’s personal life or sexual orientation, the service member has the right to say nothing, sign nothing and ask to speak with a defense attorney. It is important for service members to remember and invoke these rights.

While investigators and commanders are supposed to advise service members accused of homosexual conduct of their rights prior to any questioning, they sometimes do not. Therefore, service members must be prepared to assert their legal rights before they are advised of them by expressly telling investigators and commanders that they do not wish to say or sign anything and that they wish to consult with an attorney. Service members may need to be respectful but firm when invoking their rights.

› Say Nothing

Service members have the right to remain silent and in almost all cases they should. Investigators sometimes promise leniency or threaten harsh treatment to extract confessions or names

of other suspected gay people. These promises and threats are hollow. Usually, giving in to them will only make things worse, not better.

Sometimes, investigators engage service members in seemingly casual conversations, attempting to lull service members into divulging damaging information. Service members should not chat with investigators.

Service members can say that they have been told that it is best to speak with an attorney first, regardless of the circumstances. Service members may also ask investigators and commanders to write their questions down on paper. They can then review those questions with SLDN and/or a military defense attorney and discuss with the attorney how to proceed.

› Sign Nothing

Service members do not have to sign or initial anything during an investigation and generally should not do so without first consulting with SLDN or a military defense attorney.

Often, service members will be asked to waive their legal rights. Some service members have been led to sign blank or partially completed sworn statement forms, only to find that investigators have filled them out later with incriminating information.

Service members can inform investigators that they must show the papers to an attorney and seek the attorney's guidance before deciding whether to sign or initial the paperwork.

› Get Legal Help

Service members have the right to consult with SLDN and/or a military defense attorney and should do so before giving up any rights and before making any statements. Investigators and commanders are required to stop all questioning and allow service members to see an attorney if they ask to consult with one. Sometimes, however, questioning does not stop after service members invoke their right to counsel and service members should continue to refuse to answer questions until they are allowed to speak with an attorney.

A. “Don’t Ask, Don’t Tell” Inquiries and Investigations

Under “Don’t Ask, Don’t Tell,” service members may be investigated and administratively discharged if they commit one of the following acts: 1) make a statement that they are lesbian, gay or bisexual; 2) engage in physical contact with someone of the same-sex for the purposes of sexual gratification; and 3) marry, or attempt to marry, someone of the same-sex.¹⁴⁴ Inquiries are administrative investigations that are conducted by the commanding officer or an officer appointed by the commander. They are also called fact-finding inquiries or commanders’ inquiries, and are the preferred way of handling alleged violations of “Don’t Ask, Don’t Tell.” Criminal investigators may not be employed in these investigations barring evidence of sexual misconduct. Only a service member’s commanding officer may initiate an inquiry into homosexual conduct.¹⁴⁵

In order to begin an inquiry, the commanding officer must receive credible information from a reliable source that a service member has engaged in homosexual conduct.¹⁴⁶ “Credible information exists when the information, considering its

source and the surrounding circumstances, supports a reasonable belief that there is a basis for discharge.”¹⁴⁷

If a commander chooses to conduct an inquiry, he may choose between two types. The first investigative type is called a “limited inquiry.” During a “limited inquiry,” which is the investigation almost always used, the command may only investigate the facts surrounding the alleged homosexual conduct, and in the case of a service member making a statement of sexual orientation, the command may only question the service member and anyone that the service member suggests.¹⁴⁸

The second type of inquiry is called a “substantial investigation.” By definition, a “substantial investigation” in a statement case is anything that extends beyond a limited inquiry.¹⁴⁹ In order to conduct a “substantial investigation,” the commander must seek permission from the Secretary of that service.¹⁵⁰ SLDN knows of only a handful of cases where a substantial investigation has been requested and none where the request has been granted.

Whether an inquiry is a “limited inquiry” or a “substantial investigation,” service members should be told of the acts that they are alleged to have committed and informed of their legal rights under Article 31 of the UCMJ. Service members should invoke their rights and say nothing, sign nothing and request an attorney.¹⁵¹ Under no circumstances should a service member lie. Lying, or making a false official statement, is a criminal offense for which service members can be court-martialed.¹⁵²

B. Further Investigative Limits

In both the administrative and criminal context, there are limits to the investigative process and techniques the military is allowed to use. These limits are present in the “Don’t Ask, Don’t Tell” implementing regulations as well as in the Manual for Courts Martial and the Military Rules of Evidence.

1. Limits in Administrative Inquiries

Actions that are associational behavior, such as having gay friends, going to a gay bar, attending gay pride events and reading gay magazines or books, are never to be considered credible evidence of a service member’s sexual orientation, nor is it evidence of homosexual conduct.¹⁵³ In addition, a service member’s report to his or her command regarding harassment or assault based on perceived sexuality is never to be considered credible evidence of the service member’s sexual orientation or homosexual conduct.¹⁵⁴

Inquiries must be “limited to the factual circumstances directly relevant to the specific allegations.”¹⁵⁵ During an administrative inquiry, “[a]t any given point of the inquiry, the commander or appointed inquiry official must be able clearly and specifically to explain which grounds for separation he or she is attempting to verify and how the information being collected relates to those specific separation grounds.”¹⁵⁶ This means the command is not supposed to use one allegation as an excuse to try to dig up additional allegations against the service member or to start a witch hunt for other suspected gay troops.

Finally, asking about a service member’s sexual orientation is strictly prohibited.¹⁵⁷ Inquiry officers are only allowed to ask about the alleged conduct, for example, “did you say you were gay?” but not about sexual orientation, for example, “are you gay?”

In practice, many commanders and inquiry officers are unaware of or ignore these limits. Commanders often rush to launch inquiries without evaluating whether accusations are credible and, in numerous cases, despite indications that the accusations are untrue. Inquiry officers routinely attempt to expand the scope of inquiries beyond the original allegations, and to question service members about their sexual orientation and activities, as well as those of their co-workers. Service members need to be aware that information obtained in violation of these limits can still be used to discharge them. If a service member answers an inappropriate question, the answer can still be used against them. Service members always need to remember and assert their Art. 31 right to say nothing, sign nothing and get legal help.

2. Limits in Criminal Investigations

Criminal investigations into homosexual conduct are rare. Most criminal investigations occur because there is an allegation that sexual misconduct occurred: such as fraternization, through coercion or use of force, in public, or with a minor. Only commanders or principal deputies of investigative agencies may begin an investigation into sexual conduct considered to be criminal in nature. Heads of criminal investigative agencies must also evaluate whether it is “an appropriate use of investigative resources” to initiate an investigation.¹⁵⁸ Individual investigative agents may not start such investigations on their own. In any criminal investigation, the investigation should be conducted in an even-handed manner, regardless of whether the alleged activities are homosexual or heterosexual.¹⁵⁹

US Military is Still Prosecuting Consensual Same-Sex Intimacy

- Article 125 – Sodomy: Prohibits all service members from engaging in sodomy as defined in the UCMJ (primarily oral or anal sex between members of the same or opposite sex). Service members found violating this article can be arrested, court-martialed and imprisoned if found guilty. There has been some confusion about the military’s prosecution of sodomy following the June 2003 United States Supreme Court decision in Lawrence v. Texas. (See Section on Art. 125). To be safe, service members should operate under the assumption that they can be arrested and prosecuted if caught engaging in sexual activity falling within the definition of sodomy in Article 125 of the UCMJ.
- Article 133 and 134 – Conduct Unbecoming, and General Article: States that service members may be arrested, court-martialed and imprisoned for same-sex intimate and sexual conduct. The threat of criminal prosecution for physical conduct with a person of the same-sex is real. Not only sexual activity, but virtually any physical act with another person of the same-sex can be criminally prosecuted, if it can be shown that the act was committed for a sexual or romantic purpose. For example, SLDN has seen service members charged under these general articles for conduct that includes such things as touching another service member’s hand and brushing another service member’s pants in the groin area.

The Military Rules of Evidence (MRE) provide additional protections to service members in criminal investigations. MRE 305(c), for example, states that accused service members must be informed of the nature of the accusation, advised of their right to remain silent and advised that any statement may be used as evidence against them in court-martial before they are questioned. Under MRE 305(f)(2), “questioning must cease until counsel is present” when a service member “chooses to exercise the right to counsel.” Therefore, any service member under investigation should refuse to answer questions and should request to speak with a defense attorney. MRE 304 provides for exclusion, in certain circumstances, of statements or other evidence from court-martial in cases where the military obtained such information in violation of the rules of evidence.

Service members should be aware, however, that the Military Rules of Evidence do not apply in administrative discharge proceedings. Even if investigators break the rules during an administrative or criminal investigation, any evidence they obtain can and will likely be used against the service member in an administrative separation. Gay service members do not have to, and should not, answer questions regarding their sexual activities during any type of investigation or inquiry and should request to speak with a defense attorney.

C. Legal Representation

Service members who are under investigation for violating “Don’t Ask, Don’t Tell” are entitled to speak with a defense attorney before signing any paperwork or answering any questions. Defense attorneys can either be military attorneys or civilian attorneys. Whether civilian or military, defense attorneys serve as advisors to service members. Their role is to provide legal guidance and help service members by pointing out the pros and cons and generally recommending a course of action that presents the least risk of legal harm to the service member client.

All attorneys are bound by professional ethics to help their clients; however, attorneys cannot assist clients in committing crimes. Attorneys are under NO duty to assist a client in committing fraud (e.g., assisting a service member to make a false statement about sexual orientation). Furthermore, there are limited circumstances in which a service member’s conversation with a defense attorney may not be confidential. For example, attorneys are not supposed to keep threats by their client to kill or maim another person confidential. Under certain circumstances, the presence of a third person during a conversation may keep it from being confidential. Also, not all military attorneys are defense attorneys. Therefore, before speaking with a defense attorney about a pending investigation or about sexual orientation issues, service members should ask the attorney if he or she is a defense attorney and if their conversation will be kept confidential.

1. Military Attorneys

Each service has attorneys, officers in the Judge Advocate General Corps, detailed to assist members with legal defense. These defense attorneys have ethical obligations to be zealous advocates for their clients and will keep client information confidential unlike command attorneys. Command legal officers, prosecutors and “recorders” (attorneys or other officers who represent the government in administrative discharge

boards), however, have no obligation to keep conversations with service members confidential. Anything service members say to these officers can be used against them. Therefore, service members should never talk to any military attorney about their case without asking two key questions: “Are you a defense attorney?” and “Is our conversation confidential?” If the answer to both questions is “YES” then the service member should talk with that attorney. If the answer to either question is “NO” then the service member should NOT speak to the attorney about his or her case.

Service members have the right to consult with a military defense attorney if they are questioned either formally or informally by their chain of command or by a military investigator.¹⁶⁰ In nearly all gay cases, service members should invoke that right before answering any questions. If a service member requests to consult with a defense attorney, the questioning official is supposed to stop asking questions and allow the service member to speak with an attorney.¹⁶¹ Some services or bases allow service members to consult with a military attorney at any time, even if they are not being questioned, but it is often difficult to see a military defense attorney until there is an interrogation or a formal case.¹⁶² Typically, a service member may not be represented by a military defense attorney until after an investigation has been conducted and either criminal charges have been filed or the command has started discharge proceedings (such as when a service member has been given written notice that he or she is being discharged).¹⁶³

Service members are usually assigned the first available defense attorney. If the service member is unhappy with the assigned attorney, the service member may ask for a different attorney, called “individual military counsel,” instead of the attorney assigned or detailed to represent the service member.¹⁶⁴ Service members are required to ask for a new attorney by name and the attorney must be in an assignment that allows representation of individual service members; his or her command must agree that the attorney is “reasonably available;”¹⁶⁵ and, normally, he or she must be nearby. Service members who do not have the name of another attorney can ask their assigned attorney for help in getting another attorney or contact SLDN. Service members should consider requesting different military counsel if they feel their assigned attorney is uncomfortable or ill-prepared to handle their case.

2. Civilian Attorneys

Service members also have the right to a civilian attorney but must arrange for one on their own.¹⁶⁶ SLDN is staffed by civilian attorneys experienced with the military and provides free

legal services to service members impacted by “Don’t Ask, Don’t Tell.” Service members can also hire a civilian attorney. Having a civilian attorney, including an SLDN attorney, does not prevent service members from also requesting a military defense attorney. Civilian attorneys can, and often do, work with assigned military defense attorneys.

Civilian attorneys also have a duty of confidentiality and must keep conversations with service members confidential, unless the service member gives them permission to do otherwise. Civilian attorneys can often do things that military defense attorneys may be restricted from doing, such as assist service members during an investigation, before questioning occurs, before charges or discharge paperwork are filed, and they can also help service members contact Congress or utilize the media if service members wish to do so.

Since the military administrative and justice system differs from civilian administrative process and criminal prosecution, it is important for a service member seeking the assistance of a civilian attorney to ensure that the attorney knows about military law and practice. Hiring a civilian attorney without military practice experience can potentially raise additional problems and may place the service member at a real disadvantage in the discharge process.

D. Administrative Separation Boards and Boards of Inquiry

“Don’t Ask, Don’t Tell” discharges are administrative in nature, not criminal, and therefore, service members being discharged under “Don’t Ask, Don’t Tell” are entitled to a set administrative process. The rights granted to a service member under this process are listed on the notice forms the military is required to give service members when they are being recommended for separation. Service members should never waive their rights listed on this notice form without reviewing the paperwork with a SLDN attorney or a knowledgeable defense attorney.

One of the rights afforded to service members as a part of this process is the right to appear before an administrative separation board or a board of inquiry. Enlisted service members who are processed for discharge under “Don’t Ask, Don’t Tell” have the right to a hearing before an administrative separation board (also known as an administrative discharge board).¹⁶⁷ Non-probationary officers have the right to a board of inquiry.¹⁶⁸ Depending on the service branch, probationary officers (those with less than five years of service) may not be entitled to a board of inquiry.¹⁶⁹ All of these boards are considered

administrative and are therefore non-judicial adversarial hearings.

The two principal purposes for a service member to appear at these boards is to fight for retention or to fight for a better discharge characterization than the command is recommending (which may be essential for obtaining benefits such as the GI Bill and separation pay, or avoiding recoupment). Service members should strongly consider pursuing an administrative board if they have been wrongly accused, the evidence against them is weak, their accuser is not credible, the command is recommending a discharge characterization other than honorable or the service member is concerned about benefits or recoupment. In these hearings, service members can exercise the following rights:

- i. to have a military defense attorney represent them, and also to have civilian legal counsel arranged by them at no cost to the government;
- ii. to bring their own witnesses;
- iii. to introduce statements and other evidence;
- iv. to ask the government to produce witnesses (though these requests are not always granted);
- v. to cross-examine witnesses called by the military; and
- vi. to testify under oath or make an unsworn statement on their own behalf.¹⁷⁰

An administrative separation board usually has three officers¹⁷¹ and/or senior enlisted members (in the case of enlisted personnel)¹⁷² who hear evidence from the service member and from the military. The theoretically impartial board members¹⁷³ are instructed to weigh evidence by the “preponderance of the evidence” standard.¹⁷⁴ Under this standard, the military must produce evidence that is of greater weight, or more convincing, than the service member’s evidence in order to persuade the board to decide in favor of the military and against the service member. The slightest edge in the military’s favor is enough for it to win. This is an easier standard for the military to meet than the standard used at court-martial, where the government must prove a service member’s guilt “beyond a reasonable doubt.”

Evidence that would not be allowed in a court-martial is allowed in administrative separation boards. The only restriction on evidence that may be introduced at an administrative separation board is that the evidence must be “relevant” to the alleged homosexual conduct.¹⁷⁵ Administrative separation boards may consider hearsay, rumors and circumstantial evi-

“Service members who waive the right to a hearing without legal consultation may be giving up the most valuable way of challenging a discharge...”

dence if considered relevant. Some boards may view the investigative limits contained in “Don’t Ask, Don’t Tell” as non-binding. Indeed, the implementing regulations state that the investigative limits create no “procedural or substantive rights.”¹⁷⁶

Administrative separation boards are required to make findings of fact about whether service members have engaged in homosexual conduct (statements, acts or marriages). When board members find that homosexual conduct has occurred, with very few exceptions, they have to recommend discharge and make a recommendation about the appropriate discharge characterization.

In cases where homosexual acts are alleged, the service member may attempt to defend themselves by showing that this

conduct was not in the usual and customary behavior of the service member. Service members must argue each of the required five retention criteria in order to stay in the military. Some service members, on rare occasions, have successfully been retained using this defense by presenting truthful evidence of a heterosexual life or of unusual circumstances leading to the homosexual act. For example, service members have presented testimony about heterosexual relationships; evidence of stressful circumstances at the time of the homosexual conduct (e.g., the death of a spouse or parent, a divorce or trauma from an abusive heterosexual relationship); and witnesses who say they have never seen the service member exhibit homosexual behavior. Expert witnesses such as psychologists and sexologists have been called by service members to testify, for example, that the service members are not predisposed to homosexual activity and that the incidents in question are the kind of incidents that are due to unusual circumstances. These are just examples, not an exhaustive list. Although the chances of being retained are low, service members facing discharge under “Don’t Ask, Don’t Tell” for allegedly engaging in homosexual acts should ask their attorney about using this defense if they think they can meet the five retention criteria.¹⁷⁷

5 Retention Criteria

Service members who have been accused of engaging in homosexual acts may fight for retention through the administrative separation board, or board of inquiry process. In order to be retained in the military despite evidence of homosexual acts, both officers and enlisted service members must demonstrate to the board that:

- Such acts are a departure from [their] usual and customary behavior;
- Such acts [. . .] are unlikely to recur;
- Such acts were not accomplished by the use of force, coercion, or intimidation;
- Under the particular circumstances of the case, the [service] member’s continued presence in the Armed Forces is consistent with the interest of the Armed Forces in proper discipline, good order, and morale of the Service; and
- The [service] member does not have a propensity or intent to engage in homosexual acts.

The board, after reviewing all of the evidence presented, makes its determinations. If retention is recommended, the case is closed.¹⁷⁸ Otherwise, the case goes before a Board of Review, which may either authorize retention or recommend separation to the Secretary of that service.¹⁷⁹

Command legal officers and other command representatives often tell service members that administrative boards will do them no good, will only prolong the separation process, will cause the command to pursue UCMJ proceedings, or will result in a worse discharge characterization. These “scare tactics” are designed to coerce service members into waiving their right to a hearing. Service members should never take such “advice” from the command that wants to discharge them. Instead, they should contact SLDN or a military defense attorney for the information they need to make an informed decision. Service members who waive the right to a hearing without legal consultation may be giving up the most valuable way of challenging a discharge recommendation or inappropriate discharge characterization. Therefore, service members should elect their right to a board until they have an opportunity to discuss their case with SLDN or a defense attorney.

VIII. “DON’T ASK, DON’T TELL” DISCHARGES AND AFTERMATH



A “Don’t Ask, Don’t Tell” discharge has both immediate and lasting effects. This section provides information on some of those effects. A service member’s entitlement to future benefits and separation pay, as well as protection from recoupage, are directly affected by the service member’s discharge characterization. Furthermore, the service member’s final paperwork will state the reason for separation, which may impact his or her future employment options, and a negative reenlistment code will prohibit the service member from ever reenlisting in any branch of the military.

A. Discharge Paperwork: DD-214

Any time service members are discharged from the military they receive discharge paperwork called a DD Form 214.¹⁸⁰ If a service member is discharged under “Don’t Ask, Don’t Tell,” his or her DD-214 will state that as the reason for discharge. The form may say, “Homosexual Admission,” “Homosexual Statement,” “Homosexual Act,” or generally, “Homosexual Conduct.” Many civilian employers are aware that service members receive this form when they are discharged. Future civilian employers may request to see a copy of a service member’s complete DD-214 before they hire the service member. This, in essence, requires the service member to be “out.”

The DD-214 will also contain a “reenlistment code” indicating whether the service member may re-join the military. SLDN regularly receives calls and e-mails from former service members who were discharged under “Don’t Ask, Don’t Tell” who would like to reenlist. Unfortunately, service members discharged under “Don’t Ask, Don’t Tell” are given a reenlistment code that bars them from ever serving in any branch of the military.

B. Discharge Characterizations

Every service member discharged from the military receives a discharge characterization, or short description of his or her service. If a service member is discharged under “Don’t Ask, Don’t Tell,” there are several discharge characterizations he or she could receive depending on their service. Service members being discharged with fewer than 180 days of service and a good service record may receive an Entry Level Separation (ELS) with an uncharacterized discharge.¹⁸¹ After 180 days of service, service members who are discharged administratively may receive one of only three types of discharges: Honorable, General (Under Honorable Conditions), or Other Than Honorable (OTH). Service members often believe that discharges under “Don’t Ask, Don’t Tell” are Bad Conduct Discharges (BCD) or Dishonorable Discharges (DD). This is not the case. A BCD or DD can only be determined by court-martial following criminal prosecution.¹⁸²

The standard for what discharge characterization a service member should receive under “Don’t Ask, Don’t Tell” is the

same as for enlisted service members who come to the end of their term of service (ETS/EAOS) or officers who resign their commission under routine circumstances. Service members should receive an Honorable or a General (under honorable conditions) discharge characterization based on their overall record unless “aggravating circumstances” are present or the service member is “dual processed” for homosexual conduct and another reason for discharge such as misconduct.¹⁸³ In other words, just the fact that a service member has “come out” should not negatively impact the service member’s discharge characterization. If the service member is being discharged because of a “homosexual act,” however, an aggravating factor could lead to a lower discharge characterization, including an OTH.

Aggravating Circumstances Leading to OTH Discharge

Service members can be given an “other than honorable” discharge by the military if they are found to have engaged in a homosexual act considered to be under aggravating circumstances. “When the sole basis for separation is homosexual conduct, a characterization Under Other Than Honorable Conditions may be issued only if . . . there is a finding that during the current term of service the member attempted, solicited, or committed a homosexual act in the following circumstances:

- By using force, coercion, or intimidation;
- With a person under 16 years of age;
- With a subordinate in circumstances that violate customary military superior-subordinate relationships;
- Openly in public view;
- For compensation;
- Aboard a military vessel or aircraft; or
- In another location subject to military control under aggravating circumstances noted in the finding that have an adverse impact on discipline, good order, or morale comparable to the impact of such activity aboard a vessel or aircraft.”

Some commanders recommend a lower discharge characterization than the service member’s service record merits, usually recommending a general (under honorable conditions)

characterization even when an honorable discharge is warranted. The service member must decide whether to contest the command’s recommendation. As a general rule, if a service member merits an honorable discharge, he or she should fight for one, usually by requesting an administrative separation board, or a Board of Inquiry for officers. Some commands have tried to persuade service members to accept a general discharge by saying it can be easily corrected later. This is not true. **There is no “automatic” upgrade of a general discharge to an honorable after six months under any circumstance.**

Discharge characterizations determine eligibility for veterans’ benefits and have an impact on civilian employment opportunities. The fact that the discharge is under “Don’t Ask, Don’t Tell” does not impact eligibility for veterans’ benefits. An Honorable discharge entitles veterans to all veterans’ benefits for which they are eligible,¹⁸⁴ and it is mandatory for educational benefits under the Montgomery G.I. Bill programs.¹⁸⁵ A General discharge entitles veterans to almost all other benefits but a General discharge may raise some questions among some civilian employers about a veteran’s work performance. Service members with OTH discharges risk losing most, if not all, veterans’ benefits; the Veterans Administration (VA) is supposed to make a case-by-case decision when a veteran with an OTH discharge requests assistance. Veterans with OTH discharges also face substantial prejudice in civilian employment and, in many states, an OTH discharge bars collection of unemployment compensation when they are discharged from the military. The uncharacterized ELS discharge alone should not affect entitlements to benefits. Veterans who served for less than 180 days, however, will be eligible for few benefits.

C. GI Bill

Receiving Montgomery GI Bill educational benefits after discharge is not automatic, even if service members have contributed money towards it while in the service. In order to be eligible to receive the G.I. Bill after discharge, a service member must have contributed the full required amount, received an Honorable discharge, and have completed two or three years of a service commitment (depending on the service member’s enlistment contract). If a service member does not meet these requirements, the service member will NOT receive the GI bill after discharge.¹⁸⁶ Service members who have served more than one enlistment period should contact the VA to ask if they are entitled to the GI Bill if they have received a less than Honorable discharge from any of those enlistment periods. Also, service members cannot receive a refund of the money contributed to the GI Bill.

D. Separation Pay

Service members with at least six years of honorable active duty service who are involuntarily discharged from active duty for homosexual conduct are entitled to separation pay. Regulations limit the payment to one-half of the separation pay that would normally be received.¹⁸⁷ The member generally must meet three criteria in order to be eligible for half-separation pay:

- (1) be involuntarily discharged from active duty;
- (2) have at least six years of active duty service; and
- (3) receive an Honorable discharge.¹⁸⁸

A service member who voluntarily requests separation is not eligible for separation pay.¹⁸⁹ Therefore, service members who may otherwise be eligible for separation pay may not receive it if they “come out” to their command and the command uses that statement as a basis for their discharge under “Don’t Ask, Don’t Tell.”

E. Recoupment of Scholarships and Bonuses

Recoupment is a military demand for repayment of a prorated portion of scholarships, bonuses or special pay from service members who are discharged before they have completed their service obligation. Whether or not the military can recoup against a service member depends on a number of factors including the type of special pay or bonus involved the voluntariness of the discharge and the service member’s discharge characterization.

“Military members who owe a service obligation because of funded education, bonuses or special pay should expect to repay the military.”

It is safe to say that if the military determines either that the service member is being “voluntarily” discharged or that the service member’s service was less than honorable, the military may then ask for repayment of money the military has spent on them for school or through bonuses.¹⁹⁰ The service member will receive a bill from the military for the entire pro-rated portion of money at discharge. The service member then may arrange a payment plan with the Defense Finance and Accounting Service (DFAS).

Statements = Recoupment

In almost every instance when a service member tells the chain of command that he or she is gay, the military will require the service member to repay their scholarship, bonus or special pay. Military members who owe a service obligation because of funded education, bonuses or special pay should expect to repay the military. This is because the military usually views statements of sexual orientation as voluntary. The resulting discharge is then considered voluntary thereby opening the service member up to recoupment responsibility. The military considers many factors when determining the voluntariness of the statement. Some of these factors include:

- When the statement was made;
- Whether the service member provides proof of homosexuality with his or her statement (ie., a list of people who can confirm the service member is gay);
- Evidence that the service member took action knowing that the natural consequence could or would be separation from the military;
- Whether the service member sought legal advice before “coming out” to the military; and
- How old the service member was when he or she discovered that he or she is gay.

F. Discharge Upgrades

Service members who receive less than fully Honorable discharges may be able to upgrade their discharge characteriza-

There are No Automatic Discharge Upgrades

Contrary to persistent misinformation, there is no such thing as an “automatic” upgrade after six months that will change a General (Under Honorable Conditions) discharge to an Honorable. Service members who have received a discharge characterization lower than what they believe they deserve based on their service record must use the Discharge Review Board or the Board for Correction of Military or Naval Records (BCMR/BCNR) process to request an upgrade. This process is time consuming and service members must show that the discharge characterization they received was due to “injustice or error.”

tions by applying to the Discharge Review Board or the Board for Correction of Military or Naval Records (BCMR/BCNR) for their branch of service. The standard of review at these boards is high, to correct an “inequitable” discharge, and receiving an upgrade is not guaranteed.¹⁹¹ If a command recommends a lower discharge characterization than what is merited by a member's service record, service members are advised to con-

test the characterization at an administrative separation board or board of inquiry for officers.

While a full discussion of discharge upgrades is beyond the scope of this guide, interested service members may want to contact one of the organizations listed in the "Selected Resources for Service Members" section of this Guide for possible assistance with discharge upgrades.

IX. “COMING OUT” TO THE MILITARY



“Coming out” – openly acknowledging being lesbian, gay or bisexual – is usually a very personal, sometimes traumatic, experience. Ideally, being open about sexual orientation should be a non-issue in the military. Under “Don’t Ask, Don’t Tell,” however, “coming out” to the military has many legal risks and it may have an impact on a service member’s civilian life after discharge. “Coming out” should never be seen as an easy way to get out of the military or to avoid a service obligation. Many people who “come out” to their commands are not immediately discharged, and some are not discharged at all. This section of the Guide discusses what can happen when a service member “comes out” to his or her command, including the risks and potential negative impacts of that decision.

According to the law, “coming out” to the military (or anyone) – usually by making a statement – creates a “rebuttable presumption” that the service member engages in, intends to engage in or has a propensity to engage in homosexual acts. If

“Any service member considering ‘coming out’ to his or her command should consult with SLDN or a military defense attorney before making a statement.”

the service member does not rebut (disprove) this presumption, a task that is nearly impossible, “Don’t Ask, Don’t Tell” generally requires the military to discharge the service member.¹⁹²

Any service member considering “coming out” to his or her command should consult with SLDN or a military defense attorney before making a statement.

A. Common Reasons for “Coming Out” Directly to the Military

1. Integrity

Honor is a core value in the military.¹⁹³ The requirement under “Don’t Ask, Don’t Tell” that gay service members live in the closet, lying and hiding their sexual orientation from peers, superiors and subordinates, directly conflicts with the services’ basic values. Many service members see “coming out” as a matter of honor and integrity.

2. Harassment

Another major reason cited by gay service members for “coming out” is to escape anti-gay threats and harassment, or because gay service members find they are unable to serve in a homophobic environment. While recognizing that anti-gay harassment undermines unit cohesion and combat readiness, the military has been inconsistent in taking action to end anti-gay harassment, hold harassers accountable and address the wide-spread tolerance of anti-gay comments, slurs and “jokes.” For further information on dealing with harassment, please see the section on “Harassment” earlier in this Guide.

3. Difficulties With Partners or Children

Gay service members may “come out” in response to challenges related to their family and/or relationships. Illness, legal trouble, or pressures from a partner can lead a gay service member to decide he or she must “come out” to his or her command. Additional information on dealing with issues associated with spouses and children can be found in the “Serving in the Closet” section of this Guide.

B. Risks in “Coming Out”

1. A Statement Does Not Always Equal Discharge

A common misconception among service members is that if they simply tell the military they are lesbian, gay or bisexual they will be discharged almost immediately. Increasingly, this is not the case. Commands may not believe the service member’s statement or may not care that the service member is gay. If a command does decide to discharge the service member for stating that he or she is gay, the discharge process could take as long as three to six months. In some cases, it can take much longer.

Commanders may have more questions if a service member claims to be bisexual. Under “Don’t Ask, Don’t Tell” a bisexual is “a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual and heterosexual acts.”¹⁹⁴ The law provides that a member who makes a statement that he or she is bisexual shall be separated from the armed forces.¹⁹⁵ Despite what the law says, there is a tendency on the part of some commanders to doubt members who “come out” as bisexual. Often commanders feel that this statement is made only as a way to seek separation. Commanders are increasingly asking gay service members to offer “proof” of their sexual orientation. This is even more common in bisexual statement situations. This is particular-

ly true if the service member is married or currently involved in an opposite-sex relationship.

Because of the potential criminal consequences that can come from providing proof of homosexual acts, service members are strongly warned against trying to prove their orientation. The best advice for any service member is to contact SLDN or a military defense attorney.

“A common misconception among service members is that if they simply tell the military they are lesbian, gay or bisexual they will be discharged almost immediately.”

2. Commands May Inappropriately Investigate

Under the “Don’t Ask, Don’t Tell” implementing regulations, commands are allowed to investigate service members who have “come out” as gay. The service member’s command may search anything the service member has on-base, including barracks room, locker, and car, without the service member’s permission. Although there are regulations limiting the extent to which commands can investigate, some commands ignore those limits. Information about limits on investigations is found earlier in this Guide in the section titled “‘Don’t Ask, Don’t Tell’ Investigations.” Occasionally commands will inappropriately broaden an investigation with the intent of finding evidence of criminal conduct or evidence that could be used to lower the service member’s discharge characterization. Service members under investigation for “coming out” to the military should contact SLDN or a military defense attorney before answering any questions about their sexual orientation or private life.

3. Discharge Paper Work Will Say “Homosexual” and Will Prohibit Reentry

As outlined previously in this guide, all discharged service members receive discharge paperwork, a DD-214, when they leave the military.¹⁹⁶ If a service member is discharged for “coming out” to the military, the DD-214 will list “Homosexual Admission,” “Homosexual Statement,” “Homosexual Conduct” or something similar as the reason for

discharge. Future employers may request a copy of a service member’s complete DD-214 before hiring the service member and will then be aware of the reason for discharge. Finally, service members who have been discharged because they “came out” to the military will receive a negative reentry code on their DD-214’s preventing them from ever rejoining any branch of the service.

4. Benefits May be at Risk

Service members who have been discharged are often eligible for an array of benefits once they leave the military. Some of those benefits, including the Montgomery G.I. Bill educational benefits and separation pay, may be at risk if a service member “comes out” to the military and is discharged based on that statement.

As outlined earlier in this Guide, service members must meet certain requirements in order to be eligible to receive the GI Bill after discharge.¹⁹⁷ Generally speaking, the service member must have contributed the full required amount, received an Honorable discharge and have served a minimum number of years (usually 2 or 3 years, depending on the enlistment contract). Service members who do not meet these requirements will not receive a refund of the money they invested in the program and will lose G.I. Bill benefits.

Service members who have served honorably for at least six years may also be eligible to receive separation pay. Service members who “come out” to the military, however, are likely to lose that eligibility. As discussed previously in this Guide in the section on “Separation Pay,” an important requirement for receiving separation pay is that the discharge must be considered involuntary. Therefore, any active duty service member with more than six years of active service and a good record who is considering “coming out” to the military should contact SLDN or a military defense attorney before taking any action.

5. Discharge Characterizations May be Lowered

Every service member who leaves the military receives a discharge characterization. If discharged for “coming out” to the military, a service member may receive a discharge that is Honorable, General, or under some circumstances Other than Honorable (OTH). If the service member receives a less than Honorable discharge, the service member risks losing some VA benefits, GI Bill eligibility, and may face added challenges in finding civilian employment. Although service members dis-

charged for “coming out” should receive an honorable discharge as long as the service member’s military record is good, some commands still try and improperly award lower discharge characterizations than a service member deserves just because he or she made a statement of sexual orientation.

6. Military May Ask for Money Back - Recoupment

As explained earlier in this Guide, service members who “come out” to the military and have not served their entire commitment to the military should expect that the military will require repayment of a pro-rated portion of any scholarships, bonuses, or special pay they may have received.¹⁹⁸

7. False Statements Equal Criminal Offenses

If the military determines that a “coming out” statement is false or a lie, the military may retain the service member in the service and may also prosecute the service member criminally for providing a false official statement to the government.¹⁹⁹ While this has rarely, if ever, been seen, the risk still exists.

8. Increased Command Scrutiny

After “coming out” to the military, a service member’s commander may keep very close tabs on the service member’s actions in order to judge the truthfulness of his or her statement. Service members who “come out” to the military, should be aware that their commander may also be looking for an opportunity to potentially lower their discharge characterization or to bring criminal charges against them for homosexual acts.

9. Criminal Prosecution

Under “Don’t Ask, Don’t Tell” service members are no longer to be criminally prosecuted simply for being gay. Gay service members who have “come out” to their commands risk potential prosecution for such things as fraudulent marriage, failure to obey orders, fraternization, and even consensual sodomy. Service members are sometimes charged with fraud for collecting marital benefits while involved in opposite sex marriages if they are not sharing the benefits with their spouse.²⁰⁰ Some commanders have also threatened charging service members with failure to obey orders (Article 92)²⁰¹ for making statements about sexual orientation after being ordered not to make such statements. Some commanders have also been quick to charge

gay service members for fraternization in circumstances where straight service members are not likely to be charged.²⁰² Lastly, it is rare, but possible, for service members who “come out” to the military to be investigated for criminal acts related to their sexual orientation, such as sodomy (oral or anal sex, whether heterosexual or homosexual) or violation of the “general articles,” Article 133 (officers) or Article 134 (enlisted or officers), for kissing, hand-holding or other forms of touching.

10. Privacy Regarding Your Statements

The Privacy Act, which is a federal law, prohibits service members’ personal information from being shared with anyone except those who need to know in the chain of command.²⁰³ There is, however, no guarantee that a service member’s statement will be kept confidential. Co-workers often quickly find out that the service member has “come out.”

C. “Coming Out” to the Military

Service members deciding that it is necessary to “come out” to the military despite the risks listed above should take several steps to lower the risks of problems. First, service members should consult with SLDN or a military defense counsel. Second, service members should make their statement in writing, addressed to the commander, and provide an explanation about why they feel it necessary to “come out” to the military now. This may include information about harassment or an explanation of how the law is compromising the service member’s integrity. The letter should not contain references to sexual acts or relationships because this opens service members up to broader investigation and places the service members at risk for possible criminal prosecution.

The “coming out” letter should not be viewed as an opportunity to air other grievances about co-workers, the military or government policy. Lists of grievances or negative issues will result in a greater likelihood that the commander will view the “coming out” statement as being made for the purpose of leaving the military.

It is also important to know that if the letter clearly states that the service member “came out” solely to avoid military service, the military does not have to discharge the service member.²⁰⁴ The “Don’t Ask, Don’t Tell” law contains a provision intended to prevent straight service members from claiming to be gay in order to miss a deployment or get out of the military. This clause has also been used by commanders to keep gay service members in the military. It is often referred to as the “Corporal Klinger Provision.”

D. Possible Outcomes of “Coming Out” to the Military

The command may react in one of many ways to a service member “coming out.” The command may begin the process of discharge; issue a counseling statement to the service member; present the service member with a memorandum stating that an inquiry or investigation will be initiated; tell the service member, formally or informally, that it does not believe the “coming out” statement and it will take no further action; say nothing at all and take no action on the statement; or begin and investigation without telling the service member until issuing a formal Notice of Administrative Separation.

Common Command Responses to “Coming Out” Statements – Separation Not Automatic

- The Commander May Do Nothing
- The Commander May Deem the Statement as One Made to Avoid Service
- The Commander May Start a Limited Inquiry.
- The Commander May Move Forward with Separation/Discharge

Since September 11, 2001, commanders are increasingly rejecting “coming out” statements, particularly during or shortly before deployment. This occurs most often in cases where: (1) the service member has tried to resign or leave the military in the past for other reasons; (2) the service member’s command knows that the service member has had an opposite sex relationship (wife, husband, etc.); (3) the service member’s command views the service member as valuable, does not care that the service member is gay, and is willing to allow the service member to continue serving; or (4) the statement comes close to a deployment.

Even if a command is reluctant to believe a service member’s statement, a service member should NOT provide “proof” of homosexual acts under any circumstance. Despite what a command may claim, the law does not require proof that a service member is gay and providing proof of homosexual acts can open the service member to criminal prosecution or it could be used to lower the service member’s discharge characterization. In cases where the command believes that the service member “came out” to avoid service and/or deployment the service member may want to provide a list of “references” who

can support the truthfulness of the service member’s statement. These people should attest to knowing the service member is gay but should avoid providing any intimate details of a sexual or romantic nature. This list should not include the names of other service members because of the precarious position this would put them in and under NO circumstances should current or former lovers or partners be listed as references because of the possibility of sexual activity being divulged. Civilian friends or people known prior to entering the service are the best choices for references. Service members should consult with SLDN or a defense attorney before providing references to a command.

No matter what reaction a service member’s “coming out” statement causes, it is important for the service member to remember his or her legal rights. Under Article 31, service members have the right to say nothing, sign nothing, and get legal help if they are questioned about their sexual activities. This is especially important for any service member being asked to “prove” his or her sexual orientation. If asked for “proof” of sexual orientation, service members should immediately ask to speak with a military defense attorney.

“No matter what reaction a service member’s “coming out” statement causes, it is important for the service member to remember his or her legal rights.”

E. What to Expect if the Command Moves for Separation

After a service member has “come out” to his or her command and the command has made the decision to process the service member for discharge under “Don’t Ask, Don’t Tell,” the command will notify the service member of this intent in writing. As discussed earlier in this Guide, this written notice should include the reason for discharge, the least favorable discharge characterization possible and the service member’s rights in the separation or discharge process. It is also important for the service member to check to make sure that this notification lists “homosexual statement” or “homosexual admission” as the reason for separation and not any other reason. Service members should never waive any of the rights given to them in this notice without first speaking to a defense attorney.

If recoupment (repayment of scholarships, bonuses or special pay) is not an issue, the service member is willing to be discharged, and the command recommends a discharge characterization consistent with the service member’s overall record, the discharge proceedings are usually relatively simple. However, if the command recommends a lower discharge characterization than the member’s record supports, dredges up other reasons for discharge, seeks recoupment, or the service member wants to fight discharge, the member should generally contest the discharge action at an administrative discharge board (for enlisted) or Board of Inquiry (for officers).

Criteria for “Rebutting the Presumption” in Statements Cases – Nearly Impossible

In homosexual admission cases, if the service member who allegedly made the statement wants to remain in the military, he or she must “rebut the presumption” of homosexual conduct raised by such a statement. What this means is that after the military shows the board that a service member made a statement of his or her sexual orientation the burden is then on the service member to disprove the assumption that because the service member made a statement that he or she then “engages in, intends to engage in or has a propensity to engage in” gay acts. For the service member to be retained, he or she must try to prove this is not the case. A board may consider nearly any information to determine if a service member has successfully “rebutted the presumption.” This includes:

- whether a service member has engaged in homosexual acts,
- the service member’s credibility,
- testimony from others about the service member’s past conduct, character and credibility,
- the nature and circumstances of the service member’s statement, and
- any other evidence relevant to whether the service member is likely to engage in homosexual acts.

The regulations specifically point out that this list is not exhaustive. Rebutting the presumption has proven to be a nearly impossible task for gay service members. Service members should not “come out” with the hope that they can rebut the presumption and continue their military careers.

If, after “coming out” to the military, a service member decides that he or she would like to fight to stay in the military, the service member must prove at an administrative separation board he or she does not have the propensity to engage in gay acts.²⁰⁵ The service member must “prove” his or her case by the preponderance of the evidence standard.²⁰⁶ This defense is called “rebutting the presumption” and a board may consider

nearly any relevant information to determine if a service member has successfully disproved the presumption.²⁰⁷ Service members should understand that it is nearly impossible for gay service members to successfully “rebut the presumption.” Service members should not “come out” on the hope that they can rebut the presumption and continue their military careers.

X. NON-LEGAL HELP FOR GAY SERVICE MEMBERS



Gay service members are often in need of help and support in dealing with the stress of serving in the closet. It can often be very helpful and reassuring for a service member affected by “Don’t Ask, Don’t Tell” to have someone to talk to. This section of the Guide suggests people service members can talk to and discusses how service members should protect themselves when seeking support locally or nationally.

A. Confiding in a Civilian

Service members always face some risks in talking to anyone about their sexual orientation. If a gay service member wants to confide in someone about the problems he or she is having, it is safest to talk to someone who is not in the military. Telling another service member puts that service member in the difficult position of feeling like he or she is withholding information from the command. In addition, other service members could be questioned by their commanders or other members of the military and they must answer those questions truthfully.

Realistically, there is less of a risk, although some risk will always be there, that information about a gay service member will get back to the military if that service member is confiding in a trusted civilian. Military investigators have no jurisdiction over civilians. While military investigators may attempt to question civilian friends and family members in an effort to obtain information about suspected gay service members, civilians have no obligation to answer questions or to let military investigators search their homes without a search warrant. Military investigators may bring civilian police officers with

them when they try to question civilians. Even if a civilian police officer is present, civilians still have the right not to answer questions and to object to a search of their homes without a search warrant.²⁰⁸ Civilians may tell military investigators (and civilian police who come with them) to leave. If the investigators refuse to leave, civilians may obtain help by calling a defense attorney.

B. Confiding in Another Service Member

Often times the practical reality is that the only people around for service members to talk to about their problems are other service members. A gay service member must be very careful when talking with other service members. SLDN has heard many stories where service members have told other service members they trusted about their situation only to find that this information was then reported to the command and/or other members of the military resulting in investigation and discharge. There is no prohibition against “outing” a fellow service member. Service members who learn another service member is gay, however, are not legally required to report that information to the military.

Under all circumstances, gay service members should avoid talking about specific sexual acts they have engaged in or people they may have dated. If gay service members tell another person about specific sexual experiences, they open themselves up to potential criminal prosecution under the UCMJ as well as discharge from the military.

C. Counseling Services Available to LGBT Service Members

Service members interested in seeking counseling or support have very limited options. Military counselors and mental

health professionals are **NOT** a confidential resource for service members. Gay service members can turn to civilian health care professionals (although service members have a duty to report some treatment provided by civilian health care professionals),²⁰⁹ gay community centers near their base, or churches that are welcoming. Recently, the Military Community Services Network (MCSN) was established to serve as a support for service members and families affected by this issue. MCSN states that any information service members provide will not be shared outside of MCSN without the prior written consent of the service member. A list of resources, including MCSN, is located at the end of this Guide.

XI. POLITICAL ACTION

Service members can participate in political activities but face more restrictions than military veterans, retirees and civilians. These restrictions cover general political activities as well as actions which could raise suspicions about a service member's sexual orientation. In general, service members should never take any political action which will reveal their sexual orientation and service members should never take any political action that makes it look like they are representing the military when expressing a personal political opinion.

A. Risks Under “Don’t Ask, Don’t Tell”

Gay service members can become involved in the fight to end the military's discriminatory policies. Gay service members, however, must be careful about how they become involved in political activism. For example, military members must be careful not to make a “nonverbal statement,” such as holding a sign saying “Lesbians in the military say, ‘Lift the Ban!’” or engage in “homosexual acts” such as hugging someone of the same-sex while at the political event, or risk discharge.²¹⁰ When talking to others about why “Don’t Ask, Don’t Tell” should be overturned, gay service members should make sure they do not talk about their own personal experiences as gay services member in a way that would reveal their sexual orientation.

B. Restrictions Under Other Regulations

Although service members may not run into problems with the “Don’t Ask, Don’t Tell” law, it also does not mean that they are free to engage in political activism of any kind. Under

Department of Defense Directive 1344.10, all service members on active duty, or in the Guard or Reserves (including the Individual Ready Reserves), regardless of sexual orientation, are restricted in the forms of political actions they can take.

According to the Directive, a service member may:

1. Make monetary contributions to a political organization.
2. Attend political meetings, rallies and conventions as a spectator when not in uniform.
3. Lobby a Member of Congress on his or her own time and not in uniform.
4. Vote.
5. Join a political organization and attend its meetings while not in uniform.
6. Sign a petition for the repeal of “Don’t Ask, Don’t Tell,” as long as this action is done as a private citizen and not as a member of the armed forces.

7. Write a letter to the editor of a newspaper expressing the service member's personal views on public issues and political candidates.
8. Display a bumper sticker on his or her private vehicle calling for the repeal of "Don't Ask, Don't Tell."

A service member may not:

1. Participate in partisan political campaigns (partisan political activity includes advocating for a *candidate* or a *political party*).
2. Speak publicly at a rally calling for the end of "Don't Ask, Don't Tell."
3. Participate in a radio or television program calling for the end of "Don't Ask, Don't Tell."
4. Use contemptuous words against military or elected officials.

5. Display a large political sign, banner, or poster (as distinguished from a bumper sticker) on the top or side of a private vehicle.
6. Sell tickets for, or otherwise actively promote, political dinners and similar fundraising events.
7. Attend political events as an official representative of the armed forces.
8. Engage in any political activity while in uniform.
9. Engage in any other activity that will be viewed as associating the Department of Defense or the Department of Homeland Security directly or indirectly with partisan political activity.

If a service member does not know if the political activity he or she wishes to engage in is a violation of Department of Defense Directive 1344.10, that service member should contact SLDN to help determine if the activity can be legally engaged in without risk.



XII. ADDITIONAL SELECTED RESOURCES FOR SERVICE MEMBERS

SERVICE RELATED RESOURCES

General Legal Assistance

JAG Military Legal Information Portal

www.jagcnet.army.mil/legal

The military legal information portal is sponsored by the U. S. Army Judge Advocate General's Corps to inform military members on personal legal affairs and preventive law. Information about military legal assistance services, offices, and general information and links to help prevent personal legal problems is provided. General information related to legal matters military members frequently encounter and seek legal assistance about is provided.

ABA Standing Committee on Legal Assistance for Military Personnel

www.abanet.org/legalservices/lamp

The ABA Standing Committee on Legal Assistance for Military Personnel sponsors the ongoing project Operation Enduring LAMP. It is a consortium of state and local bar associations that have made a commitment to recruit volunteer attorneys, and in many cases offer training and facilities to volunteers, in order to assist military legal assistance providers with civil law matters affecting service members.

Military Law Task Force

<http://www.nlgmltf.org>

The National Lawyers Guild Military Law Task Force assists those working on military law issues as well as military law counselors working directly with GIs. It updates changes in military law and policy.

National Institute for Military Justice

www.nimj.org

The National Institute of Military Justice (NIMJ) is a District of Columbia non-profit corporation organized in 1991 to advance the fair administration of military justice and foster improved public understanding of the military justice system. NIMJ is not a government agency.

LGBT Military Advocacy Organizations

Alexander Hamilton Post 448

www.post448.org

The Alexander Hamilton Post 448 of the American Legion is the only post whose membership is predominantly Gay, Lesbian, Bisexual and Transgendered honorably discharged veterans who have successfully served in the United States Armed Forces during a period when our nation was at war. Organized in 1984, we are recognized locally, statewide and nationally for our activism pertaining to the welfare of all vet-

erans and, especially, our efforts to end the present homophobic discrimination of the United States Military.

American Veterans for Equal Rights, Inc. (AVER)

www.aver.us

AVER is a non-profit, chapter-based association of active, reserve and veteran LGBT service members dedicated to full and equal rights and equitable treatment for all present and former members of the U.S. Armed Forces. It offers opportunities to speak out and advocate for the end of Don't Ask, Don't Tell.

Military Community Service Network (MCSN)

www.mcsnfamilies.org

MCSN has been created to work in collaboration with existing community support structures, individual volunteers and organizations to meet the social service needs of the LGBT military community. MCSN provides contacts with confidential mental health counseling services as well as transition assistance to those seeking career development or education after separation.

Military Equality Alliance (MEA)

www.militaryequality.org

The Military Equality Alliance employs grassroots organizing tactics to advocate for the Military Readiness Enhancement Act, which is currently a congressional bill seeking to repeal Don't Ask, Don't Tell. MEA works mainly through training to facilitate people who want to become activists on this issue.

New England Gay, Lesbian, Bisexual & Transgender Veterans Inc.

www.newengland-glbvets.com

Founded in Boston, Massachusetts in 1985, the New England Gay, Lesbian, Bisexual & Transgender Veterans, Inc., is a not-for-profit 501 (c)(3) "grass roots" membership based, support organization for homosexual, lesbian, bisexual, and transgendered and heterosexual, active duty, reserve and veteran members of the United States Armed Forces, their families, friends and supporters.

Service Academy Gay & Lesbian Alumni (SAGALA)

<http://sagala.net>

Given this military's current stand on sexual minorities in the armed forces, locating fellow academy graduates through some of the obvious routes will be difficult if not impossible. SAGALA is designed to help service academy graduates locate and network with other GLBT graduates.

Transgendered American Veterans Association (TAVA)

www.tavausa.org

TAVA was formed to address the growing concerns of fair and equal treatment of transgender veterans and active duty service members.

USNA Out

www.usnaout.org

USNA Out is an organization of over one hundred LGBT US Naval Academy alumni, their supporters and their friends. They provide a connection for LGBT alumni who have been disassociated from the academy and the USNA Alumni Association as a result of their sexuality or gender identity.

Military News Sources

Air Force Times

www.airforcetimes.com

Air Force Times is part of the Military Times Media group, consisting of Army Times, Navy Times, Air Force Times and Marine Corps Times.

Army Times

www.armytimes.com

Army Times is part of the Military Times Media group, consisting of Army Times, Navy Times, Air Force Times and Marine Corps Times.

DefenseLink (Department of Defense Homepage)

www.defenselink.mil

The mission of DefenseLink is to support the overall mission of the Department of Defense by providing official, timely and accurate information about defense policies, organizations, functions and operations. Also, DefenseLink is the single, unified starting point for finding military information on-line.

Marine Corps Times

www.marinecorpstimes.com

Marine Corps Times is part of the Military Times Media group, consisting of Army Times, Navy Times, Air Force Times and Marine Corps Times.

Navy Times

www.navytimes.com

Navy Times is part of the Military Times Media group, consisting of Army Times, Navy Times, Air Force Times and Marine Corps Times.

Research Organizations

The Michael Palm Center (previously Center for the Study of Sexual Minorities in the Military)

www.palmcenter.org

The Center promotes the interdisciplinary analysis of lesbian, gay, bisexual, transgendered and other marginalized sexual identities in the armed forces. It offers a large number of academic papers regarding LGBT issues in the military.

Stanford University's 'Don't Ask, Don't Tell' Project

<http://dont.stanford.edu>

The Don't Database contains primary materials on the U.S. military's policy on sexual orientation, from World War I to the present, including legislation; regulations; internal directives of service branches; materials on particular service members' proceedings (from hearing board transcripts to litigation papers and court decisions); policy documents generated by the military, Congress, the Department of Defense and other offices of the Executive branch; and advocacy documents submitted to government entities.

Service Directives, Instructions & Publications

DoD Directives System – DoD Issuances

www.dtic.mil/whs/directives/index.html

The DoD Directives System was established to provide a single, uniform system of DoD issuances and directive-type memorandums used to convey DoD policies, responsibilities, and procedures. The DoD Directives System provides for the orderly processing, approval, publication, distribution, internal review, and records management of DoD Directives, DoD Instructions, and DoD Publications.

Air Force Publications

www.e-publishing.af.mil

Army Publications

www.usapa.army.mil

Coast Guard Publications

www.uscg.mil/ccs/cit/cim/directives

Navy Publications

<http://doni.daps.dla.mil>

Marine Corps Publications

www.usmc.mil/marinelink/ind.nsf/publications

Veterans Benefits

Department of Veterans Affairs (VA) – Veterans Benefits Administration

<http://www.vba.va.gov>

The mission of the Veterans Benefits Administration, in partnership with the Veterans Health Administration and the National Cemetery Administration, is to provide benefits and

services to the veterans and their families in a responsive, timely and compassionate manner in recognition of their service to the Nation.

National Organization of Veterans' Advocates, Inc. (NOVA)

www.vetadvocates.com

NOVA was incorporated as a non-profit corporation to serve attorneys and non-attorney practitioners admitted to practice before the U.S. Court of Appeals for Veterans Claims (CAVC). NOVA recognizes the need to share information and analysis in order to provide successful advocacy for veterans. NOVA provides continuing legal education and support to individuals representing veterans.

National Veterans Legal Services Program (NVLSP)

www.nvlsp.org

NVLSP is an independent, nonprofit, veterans' service organization dedicated to ensuring that the U.S. government honors its commitment to our veterans by providing them the federal benefits they have earned through their service to our country.

The Veterans Consortium Pro Bono Program

<http://www.vetsprobono.org>

The Veterans Consortium Pro Bono Program (Program) was created in 1992, with a dual mission: to recruit and train attorneys in the fledgling field of veterans' law; and to provide assistance to unrepresented appellants at the U.S. Court of Appeals for Veterans Claims

GENERAL LGBT RESOURCES

Family Resources

Children of Lesbians & Gays Everywhere

www.colage.org

Established to engage, connect, and empower people to make the world a better place for children of lesbian, gay, bisexual, and/or transgender parents and families.

Family Diversity Projects

www.lovemakesafamily.org

Love Makes a Family is a museum-quality traveling exhibit including photographs and interviews with families that have LGBT members. Through first-person accounts and positive images, this exhibit seeks to challenge and change damaging myths and stereotypes about LGBT people and their families.

Family Pride Coalition

www.familypride.org

The Family Pride Coalition (FPC) is dedicated to equality for LGBT parents and their families. Headquartered in Washington, D.C., FPC supports nearly 200 membership-based LGBT parenting groups nationwide with a base of 35,000 supporters.

Parents, Families & Friends of Lesbians & Gays (PFLAG)

www.pflag.org

PFLAG is a national non-profit organization with over 200,000 members and supporters and over 500 affiliates in the United States. This vast grassroots network is cultivated, resourced and serviced by the PFLAG national office, located in Washington, D.C., the national Board of Directors and 13 Regional Directors.

General Resources**American Civil Liberties Union - Lesbian & Gay Rights Project**

www.aclu.org/lgbt/index.html

The Lesbian & Gay Rights Project fights discrimination and moves public opinion on LGBT rights through the courts, legislatures and public education.

American Red Cross

www.redcross.org

Today's American Red Cross is keeping pace with the changing military. Using the latest in computer and telecommunications technology, the Red Cross sends communications on behalf of family members who are facing emergencies or other important events to members of the U.S. Armed Forces serving all over the world. These communications are delivered around-the-clock, 7 days a week, 365 days a year.

BiNet USA

www.binetusa.org

BiNet USA is a network of groups, projects and individuals, encouraging dialogue and participation as a way of creating and maintaining a cohesive bisexual community and empowering individuals to feel proud of their bisexuality.

Gay & Lesbian Advocates & Defenders (GLAD)

www.glad.org

GLAD is a New England-based organization dedicated to ending discrimination based on sexual orientation, HIV status, and gender identity and expression. Providing litigation, advocacy, and educational work in all areas of gay, lesbian, bisexual and transgender civil rights and the rights of people living with HIV, GLAD has a full-time legal staff and a network of cooperating attorneys across New England.

Gay & Lesbian Alliance Against Defamation

www.glaad.org

The Gay & Lesbian Alliance Against Defamation (GLAAD) is dedicated to promoting and ensuring fair, accurate and inclusive representation of people and events in the media as a means of eliminating homophobia and discrimination based on gender identity and sexual orientation.

Gay Health

www.gayhealth.com

GayHealth.com is the first health and wellness site dedicated to Lesbian, Gay, Bisexual and Transgender men and women.

Gay, Lesbian & Straight Education Network

www.glsen.org

The Gay, Lesbian & Straight Education Network strives to assure that each member of every school community is valued and respected regardless of sexual orientation or gender identity/expression.

Human Rights Campaign (HRC)

www.hrc.org

The Human Rights Campaign is America's largest civil rights organization working to achieve gay, lesbian, bisexual and transgender equality. HRC advocates for the passage of the Military Readiness Enhancement Act, which would repeal Don't Ask, Don't Tell.

Immigration Equality

www.immigrationequality.org

Immigration Equality is a national grass roots organization that works to end discrimination in U.S. immigration law, to reduce the negative impact of that law on the lives of lesbian, gay, bisexual, transgender and HIV-positive people, and to help obtain asylum for those persecuted in their home country based on their sexual orientation, transgender identity or HIV-status.

Institute for Gay & Lesbian Strategic Studies (IGLSS)

www.iglss.org

The Institute for Gay and Lesbian Strategic Studies is the source for timely and relevant scholarship. An independent think tank answering questions that affect the LGBT communities, IGLSS confronts tough issues -- using credible methodology to assure reliable answers.

International Gay & Lesbian Human Rights Commission (IGLHRC)

www.iglhrc.org

The mission of the International Gay and Lesbian Human

Rights Commission (IGLHRC) is to secure the full enjoyment of the human rights of all people and communities subject to discrimination or abuse on the basis of sexual orientation or expression, gender identity or expression, and/or HIV status. A US-based non-profit, non-governmental organization (NGO), IGLHRC effects this mission through advocacy, documentation, coalition building, public education, and technical assistance.

Lambda Legal Defense and Education Fund

(212) 809-8585

www.lambdalegal.org

Lambda Legal is a national organization committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people and those with HIV through impact litigation, education and public policy work.

Lesbian & Gay Immigration Rights Task Force

www.lgirtf.org

Immigration Equality is a national grass roots organization that works to end discrimination in U.S. immigration law, to reduce the negative impact of that law on the lives of lesbian, gay, bisexual, transgender and HIV-positive people, and to help obtain asylum for those persecuted in their home country based on their sexual orientation, transgender identity or HIV-status.

National Association of Lesbian, Gay, Bisexual, and Transgender Community Centers

www.lgbtcenters.org

The National Association of LGBT Community Centers exists to support and enhance LGBT community centers, which are engines of community organizing and liberation, and crucial to the health and strength of LGBT communities.

National Center for Lesbian Rights (NCLR)

www.nclrights.org

NCLR is a national legal resource center with a primary commitment to advancing the rights and safety of lesbians and their families through a program of litigation, public policy advocacy, and public education. In addition, NCLR provides representation and resources to gay men, and bisexual and transgender individuals on key issues that also significantly advance lesbian rights.

National Gay & Lesbian Task Force

<http://thetaskforce.org>

The National Gay and Lesbian Task Force works to build the grassroots political strength of the LGBT community by training state and local activists and leaders, working to strengthen the infrastructure of state and local allies, and organizing broad-based campaigns to build public support for complete equality for LGBT people.

National Organization for Women (NOW) - Lesbian Rights Homepage

www.now.org/issues/lgbi/index.html

NOW is committed to fighting discrimination based on sexual orientation or gender identity in all areas, including employment, housing, public accommodations, health services, child custody and military policies.

People for the American Way

www.pfaw.org

In times of hardship, in times of crises, societies throughout history have experienced wrenching dislocations in their fundamental values and beliefs... Our purpose is to meet the challenges of discord and fragmentation with an affirmation of "the American Way." By this, we mean pluralism, individuality, freedom of thought, expression and religion, a sense of community, and tolerance and compassion for others. People For the American Way will reach out to all Americans and affirm that in our society, the individual still matters; that there is reason to believe in the future - not to despair of it - and that we must strengthen the common cords that connect us as humans and citizens.

Pride at Work

<http://prideatwork.org>

The purpose of Pride At Work is to mobilize mutual support between the organized Labor Movement and the LGBT Community around organizing for social and economic justice.

HIV/AIDS Resources

Department of Veterans Affairs – National HIV/AIDS Program

www.hiv.va.gov

The VA's goal is to provide excellence in patient care, veterans' benefits and customer satisfaction. The mission of the Public Health Strategic Healthcare Group is to provide the highest quality, comprehensive care to veterans and to have that care recognized as the standard by which all health care in the United States is measured. This includes patient care activities, clinician and patient education, prevention activities, and research directed at continuous improvement of medical and preventive services and delivery of care to veterans.

Gay Men's Health Crisis (GMHC)

www.gmhc.org

Gay Men's Health Crisis offers an array of services for the general public, including workshops, forums, the Hotline, a treatment library, and ear-point acupuncture. They offer further services for registered clients.

The NAMES Project

www.aidsquilt.org

The NAMES Project works to preserve, care for, and use the AIDS Memorial Quilt to foster healing, heighten awareness, and inspire action in the struggle against HIV and AIDS.

National Association of People with AIDS

www.napwa.org

The National Association of People with AIDS is a non-profit membership organization that advocates on behalf of all people living with HIV and AIDS in order to end the pandemic and the human suffering caused by HIV/AIDS. It also offers regional trainings and national conferences on the issue.

National Minority AIDS Council

www.nmac.org

Established in 1987, the National Minority AIDS Council (NMAC) is the premiere national organization dedicated to developing leadership within communities of color to address the challenges of HIV/AIDS.

Political Resources**Gay & Lesbian Victory Fund**

www.victoryfund.org

The Gay & Lesbian Victory Fund provides strategic, technical and financial support to openly LGBT candidates and officials.

Log Cabin Republicans

<http://online.logcabin.org>

Log Cabin Republicans is an organization for LGBT and allied people within the Republican Party. They work to make sure the GOP chooses fairness and freedom over intolerance and exclusion.

National Stonewall Democrats

<http://stonewalldemocrats.org>

The National Stonewall Democrats is a grassroots network connecting LGBT Democratic activists across the nation. With more than 90 chapters across the country, Stonewall is a grassroots force for social change within the LGBT movement and within the Democratic Party.

Republican Unity Coalition (RUC)

www.republicanunity.com

The Republican Unity Coalition is an alliance of gay and straight "Big Tent" Republicans that works to make homosexuality a "non-issue" for the Republican Party.

Professional Resources**Association of Gay and Lesbian Psychiatrists**

www.aglp.org

AGLP is a community of psychiatrists that educates and advocates on LGBT mental health issues.

Gay & Lesbian Medical Association

www.glma.org

GLMA works to ensure equality in health care LGBT individuals and health care professionals. GLMA achieves its goals by using medical expertise in professional education, public policy work, patient education and referrals, and the promotion of research.

Gay Officers Action League NY, *Region 1 New York*

www.goalny.org

The Gay Officers Action League was formed in 1982 to address the needs, issues, and concerns of gay and lesbian law enforcement personnel. Several other chapters have since been established.

LEGAL (Law Enforcement Gays and Lesbians)**International**

<http://members.aol.com/legalint>

Formed to help existing LGBT police and law enforcement groups around the world communicate more effectively with each other and to provide a forum for the sharing of new ideas.

National Lesbian & Gay Journalists Association

www.nlgja.org

NLGJA is an organization of journalists, media professionals, educators and students who work within the news industry to foster fair and accurate coverage of lesbian, gay, bisexual and transgender issues. NLGJA opposes all forms of workplace bias and provides professional development to its members.

National Lesbian & Gay Law Association

<http://nlglaw.org>

NLGLA is a national association of lawyers, judges and other legal professionals, law students, activists, and affiliated lesbian, gay, bisexual, transgender legal organizations. NLGLA promotes justice in and through the legal profession for the LGBT community in all its diversity.

Spiritual Resources

Affirmation: Gay and Lesbian Mormons

www.affirmation.org

Affirmation seeks to meet the needs of persons experiencing frustration or alienation from family, friends, and the Church because of their sexual orientation. In addition to offering assistance during life's occasional struggles, Affirmation provides a life-long opportunity for service, fun, friendship, personal enrichment, and spiritual growth.

DignityUSA (LGBT Catholics)

www.dignityusa.org

DignityUSA works for respect and justice for all gay, lesbian, bisexual, and transgender persons in the Catholic Church and the world through education, advocacy and support.

Lutherans Concerned / North America

www.lcna.org

The ministries of Lutherans Concerned / North America embody, inspire, and support the acceptance and full participation of people of all sexual orientations and gender identities, their families, friends and allies, within the Lutheran communion and its ecumenical and global partners.

Metropolitan Community Churches

www.mccchurch.org

As one of the world's emerging churches, MCC is proclaiming a spirituality that is liberating and sufficiently profound to address the issues of our chaotic and complicated world.

Soulforce

www.soulforce.org

The purpose of Soulforce is freedom for lesbian, gay, bisexual, and transgender people from religious and political oppression through the practice of relentless nonviolent resistance.

Unitarian Universalist Association

www.uua.org

The Unitarian Universalist Association (UUA) represents the interests of more than one thousand Unitarian Universalist congregations on a continental scale. Unitarian Universalism has been on record as supporting the rights of bisexual, gay, and lesbian people since 1970.

United Methodist Reconciling Ministries

www.rmnetwork.org

Reconciling Ministries Network is a national grassroots organization that exists to enable full participation of people of all

sexual orientations and gender identities in the life of the United Methodist Church, both in policy and practice.

The World Congress of Gay, Lesbian, Bisexual and Transgender Jews

www.glbtejews.org

The World Congress of Gay, Lesbian, Bisexual, and Transgender Jews: Keshet Ga'avah consists of around 50 member organizations all over the world. The World Congress wishes: to be the worldwide voice of LGBT Jews; to support, inspire, and strengthen local groups; to foster a sense of community among diverse individuals and organizations; to achieve equality and security for LGBT Jews worldwide.

Transgender Resources

FTM International

www.ftmi.org

FTM International serves the Female-to-Male community by providing support meetings for FTMs and their families in cities around the world.

Gender Education & Advocacy (GEA)

www.gender.org

Gender Education and Advocacy is a national organization focused on the needs, issues and concerns of gender variant people in human society.

Gender Public Advocacy Coalition (GenderPAC)

www.gpac.org

GenderPAC works to end discrimination and violence caused by gender stereotypes by changing public attitudes, educating elected officials and expanding human rights.

National Center for Transgender Equality

www.nctequality.org

The National Center for Transgender Equality is a national social justice organization devoted to ending discrimination and violence against transgender people through education and advocacy on national issues of importance to transgender people.

National Transgender Advocacy Coalition (NTAC)

www.ntac.org

NTAC works for the advancement of understanding and the attainment of full civil rights for all transgendered, intersexed and gender variant people in every aspect of society and actively opposes discriminatory acts by all means legally available.

Transgender Law & Policy Institute (TLPI)

www.transgenderlaw.org

The TLPI brings experts and advocates together to work on law and policy initiatives designed to advance transgender equality.

Transgender Legal Issues

www.transgenderlegal.com

Transgender Legal is the official web site for Phyllis Randolph

Frye, Esq., of Houston, Texas. This site includes most of the two-plus decades of her writings and other items that she has produced in her quest for individual freedom and for freedom of her people.

See Servicemembers Legal Defense Network's website for additional information about "Don't Ask, Don't Tell" and other related topics. www.sldn.org

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XIV. ENDNOTES

¹Whenever “gay” is used throughout this report, it is used as an all-inclusive term for lesbian, gay and bisexual.

²C. Dixon Osburn, *A Policy in Desperate Search of a Rationale: The Military’s Policy on Lesbians, Gays and Bisexuals*, 64 UMKC L. Rev. 199 (1995).

³DADT does not address gender identity. For information on military rules and regulations see the section on transgender issues in this guide.

⁴*Policy Concerning Homosexuality in the Armed Forces: Hearings Before the Senate Comm. On the Armed Services*, 103d Cong., 707 (1993) (statement of Gen. Colin Powell) [hereinafter Powell Statement] (“[H]omosexuals have privately served well in the past and are continuing to serve well today.”). See also Memorandum from Secretary of Defense Les Aspin to the Secretaries of the Military Departments, *Policy on Homosexual Conduct in the Armed Forces* [hereinafter Aspin Policy Memorandum] (Jul. 19, 1993) (“[T]he Department of Defense also recognizes that individuals with a homosexual orientation have served with distinction in the armed services of the United States.”).

⁵“A member’s sexual orientation is considered a personal and private matter, and is not a bar to continued service . . . unless manifested by homosexual conduct . . .” DEP’T OF DEFENSE DIRECTIVE 1332.14, *Enlisted Administrative Separations* [hereinafter DoDD 1332.14], para. E3.A1.1.8.1.1 (1994); DEP’T OF DEFENSE INSTRUCTION 1332.40, *Separation Procedures for Regular and Reserve Commissioned Officers* [hereinafter DoDI 1332.40], para. E2.3 (1997).

⁶See DEP’T OF DEFENSE DIRECTIVE 1304.26, *Qualification Standards for Enlistment, Appointment, and Induction* [hereinafter DoDD 1304.26], para. E1.2.8.1 (1994).

⁷See Powell Statement, *supra* note 4 (“We will not ask, we will not witch hunt, we will not seek to learn orientation.”).

⁸See Aspin Policy Memorandum, *supra* note 4, attachment *Policy Guidelines on Homosexual Conduct in the Armed Forces*; see also DoDD 1304.26, *supra* note 6, attachment *Applicant Briefing Item on Separation Policy* (“The Armed Forces do not tolerate harassment or violence against any service member, for any reason.”); Memorandum from Under Secretary of Defense for Personnel and Readiness [hereinafter (P&R)] Rudy de Leon to the Secretaries of the Military Departments, *Guidelines for Investigating Threats Against or Harassment of Service Members Based on Alleged Homosexuality* [hereinafter de Leon Investigating Harassment Memorandum] (Aug. 12, 1999).

⁹Memorandum from Secretary of Defense Les Aspin to the Secretaries of the Military Departments, *Implementation of the DoD Policy on Homosexual Conduct in the Armed Forces* [hereinafter Aspin Implementation Memorandum] (Dec. 21, 1993) (“[The new policy] provides that investigations into sexual misconduct will be conducted in an evenhanded manner, without regard to whether the alleged misconduct involves homosexual or heterosexual conduct.”).

¹⁰See PUB. PAPERS William J. Clinton, 1993, vol. 1, p. 1111. President Clinton pledged that the policy would provide for “a decent regard for the legitimate privacy and associational rights of all service members.” *Id.* Then-Senator William Cohen understood that the small amount of privacy under the current policy was intended to prevent the military from prying into people’s private lives. See *Policy Concerning Homosexuality in the Armed Forces: Hearings Before the Senate Comm. On Armed Services*, 103d Cong. 787 (statement of Jamie Gorelick, General Counsel, Department of Defense).

¹¹Exec. Order No. 12,968, 60 Fed. Reg. 40,245 (Aug. 7, 1995).

¹²Exec. Order No. 13,140, 64 Fed. Reg. 55,115 (Oct. 12, 1999). See also Manual for Court-martial (2000) rev. [hereinafter MCM], part II, para. 1001(b)(4).

¹³Exec. Order No. 13,140, 64 Fed. Reg. 55,115 (Oct. 12, 1999). See also MCM, part III, para. 513.

¹⁴See Evaluation Report: *Military Environment With Respect to the Homosexual Conduct Policy*, Office of the Inspector General of the Department of Defense, Rep. No. D-2000-101 (Mar. 16, 2000).

¹⁵A copy of this document can be found at www.SLDN.org.

¹⁶DoDD 1332.14, *supra* note 5, para. E3.A4.1.4.3; DoDI 1332.40, *supra* note 5, para. E8.4.3.

¹⁷DoDD 1332.14, *supra* note 5, para. E3.A4.1.3.2.2; DoDI 1332.40, *supra* note 5, para. E8.3.2.2.

¹⁸Communications with medical personnel and chaplains are not confidential. Communications with chaplains regarding “spiritual matters” are meant to be protected. However, discussing sexual orientation may not be considered a spiritual matter. Please see the sections on Doctors and Psychotherapists and on Chaplains in this guide.

¹⁹See DEP’T OF DEFENSE REG. 5200-R, *Personnel Security Program* [hereinafter DoD 5200.2-R], para. C2.4.3.4.3 (1996).

²⁰See DoDD 1332.14, *supra* note 5, para. E3.A1.1.8.1.1; DoDI 1332.40, *supra* note 5, para. E2.3.

²¹See DoDD 1332.14, *supra* note 5, para. E3.A4.1.1.1; DoDI 1332.40, *supra* note 5, para. E8.1.1.

²²*Id.*

²³See DoDD 1332.14, *supra* note 5, para. E3.A4.1.3.3.4; DoDI 1332.40, *supra* note 5, para. E8.3.3.4.

²⁴See de Leon Investigating Harassment Memorandum, *supra* note 8.

²⁵See DoDD 1332.14, *supra* note 5, para. E3.A4.1.1.3; DoDI 1332.40, *supra* note 5, para. E8.1.3.

²⁶See Office of the Under Secretary of Defense (P&R), 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* [hereinafter Under Secretary of Defense (P&R) 1998 Report] 11-12 (Apr. 1998).

²⁷See *Id.* at 12.

²⁸ See *id.*

²⁹ See *id.*

³⁰ See Memorandum from Under Secretary of Defense (P&R) Rudy de Leon to the Secretaries of the Military Departments, *Implementation of Recommendations Concerning Homosexual Conduct Policy* [hereinafter de Leon Implementation Memorandum] (Aug. 12, 1999).

³¹ DEP'T OF DEFENSE INSTRUCTION 5505.8, *Investigations of Sexual Misconduct by the Defense Criminal Investigative Organizations and Other DoD Law Enforcement Organizations* [hereinafter DoDI 5505.8], para. 4.2 (2000).

³² DoDD 1304.26, *supra* note 6, *Applicant Briefing Item on Separation Policy*; see also, Aspin Policy Memorandum, *supra* note 4, attachment *Policy Guidelines on Homosexual Conduct in the Armed Forces*.

³³ See DoDD 1332.14, *supra* note 5, para. E2.1.7; DoDI 1332.40, *supra* note 5, para. E1.1.12.

³⁴ 10 U.S.C. § 654 (f)(3).

³⁵ 10 U.S.C. § 654 (b)(1).

³⁶ See DoDI 5505.8, *supra* note 31, para. 1.2. See also Under Secretary of Defense (P&R) 1998 Report, *supra* note 26, at 9.

³⁷ See MCM, part IV, paras. 51(e)(4), 59(e), and 90(e), respectively.

³⁸ 539 U.S. 558 (2003). In *Lawrence v. Texas* the Supreme Court found that the U.S. Constitution protects the right of all individuals to engage in adult, consensual personal relationships. Furthermore, it overruled a previous decision by the Supreme Court, in *Bowers v. Hardwick*, upholding state laws prohibiting private consensual sexual conduct among homosexuals and heterosexuals.

³⁹ 60 M.J. 198 (C.A.A.F. 2004)

⁴⁰ The *Marcum* Court set out three factors to be used in determining whether or not Article 125 is constitutional as-applied to Defendant's conduct. These factors are, 1) Was the conduct that the accused was found guilty of committing of a nature to bring it within the liberty interest identified by the Supreme Court? 2) Did the conduct encompass any behavior or factors identified by the Supreme Court as outside the analysis in *Lawrence*? 3) Are there additional factors relevant solely in the military environment that affect the nature and reach of the *Lawrence* liberty interest? 60 M.J. 198 (C.A.A.F. 2004).

⁴¹ See MCM, part IV, para. 51(e)(4).

⁴² See MCM, part IV, §933, art. 133.

⁴³ See MCM, part IV, §934, art. 134.

⁴⁴ See MCM, part IV, paras. 59(e), and 90(e), respectively.

⁴⁵ See 10 U.S.C. § 654.

⁴⁶ See *Id.*

⁴⁷ DADT does not apply to state militias and some auxiliary forces;

however, someone considering joining a state organization or auxiliary should consult with a lawyer regarding whether DADT applies.

⁴⁸ See 10 U.S.C. § 802(a)(3); UCMJ, Art. 2.

⁴⁹ 32 U.S.C. § 109(c).

⁵⁰ The United States has seven "uniformed services" as defined by Title 10 of the United States Code. Five of these are also considered "armed services," which includes the United States Army, United States Air Force, United States Navy, United States Marine Corps, and the United States Coast Guard. The remaining two "uniformed services" are the National Oceanic and Atmospheric Administration Commissioned Corps and the Public Health Service Commissioned Corps.

⁵¹ 10 U.S.C. § 802(a)(8); UCMJ Art. 2.

⁵² See generally, 10 U.S.C. § 513 (explaining details and requirements of enlistees in delayed entry programs).

⁵³ 10 U.S.C. § 802(b).

⁵⁴ See DoDD 1332.14, *supra* note 5, para E3.A1.1.5.5

⁵⁵ See USAREC Reg 601-56, Appendix D

⁵⁶ See DEP'T OF DEFENSE INSTRUCTION 1336.1, *Certificate of Release or Discharge from Active Duty*, para. 3.3.1 (2002).

⁵⁷ See DoDD 1332.14, *supra* note 5, para. E3.A1.1.5.5.

⁵⁸ 10 U.S.C. § 802(b).

⁵⁹ See Army ROTC website at http://www.goarmy.com/rotc/training_and_curriculum.jsp; USAF ROTC website at <http://www.afrotc.com/collegelife/courses/desc.php>.

⁶⁰ Telephone Interview with NROTC recruiting command (March 1, 2006).

⁶¹ DEP'T OF DEFENSE INSTRUCTION 6130.4, *Criteria and Procedure Requirements for Physical Standards for Appointment, Enlistment, or Induction in the Armed Forces*, paras. E1.12.10 & E1.13.10 (2000).

⁶² See, e.g., *id.* at para. E1.29; MILPERS 1910-120 § 2.14; AFI 36-3208 § 5.11.10.

⁶³ See, e.g., A.R. 40-501 "Standards of Medical Fitness" 1.

⁶⁴ See http://www.wpath.org/publications_standards.cfm (May 2007).

⁶⁵ See 38CFR17.38 Code of Federal Regulations Title 38, Chapter 17, Section 38.c

⁶⁶ DEP'T OF DEFENSE INSTRUCTION 6130.4, *Criteria and Procedure Requirements for Physical Standards for Appointment, Enlistment, or Induction in the Armed Forces*, paras. E1.12.13 & E1.13.10 (2000).

⁶⁷ See A.R. 40-501 "Standards of Medical Fitness" 29 (stating that sexual and gender identity disorder is grounds for administrative discharge), Marine Corps Separation and Retirement Manual § 6204(2) "Nonmedical", MILPERS 1910-120 "Conditions" § 2.14, AFI 36-3208 "Reasons for Voluntary Separation" § 5.11.10.

⁶⁸The Air Force requires that service members notify the servicing MTF within three days of seeking civilian medical care. See AFI 41-210, *Patient Administration Functions*, para. 3.9.1. Service members in the Army must obtain approval prior to seeking civilian medical care except in emergency situations. See AR 40-400, para. 10-6. Specific reporting requirements for the Navy and Marine Corps are unavailable online but are listed in NAVMED P-117.

⁶⁹See generally A.R. 670-1; M.C.O. P1020.34G “Wear and Appearance of Army Uniform and Insignia”; Navy Uniform Regulations § 2101.1 “General Information”; AFI 36-2903, Attachment 3 at 132-134 and Attachment 4 at 135-137.

⁷⁰While the UCMJ does not address the issue of “cross-dressing” explicitly, in *U.S. v. Davis*, the United States Court of Military Appeals (CAAF) held that cross-dressing may qualify “as a disorder or neglect to the prejudice of good order and discipline” or as being “of a nature to bring discredit upon the armed forces” in violation of UCMJ Art 134. *United States v. Davis*, 26 MJ 445 (CMA 1998).

⁷¹See UCMJ Article 92 (Failure to obey and order); See UCMJ Article 133 (Conduct Unbecoming).

⁷²SLDN thanks Lara Ballard, Esq., and Bridget Wilson, Esq., for their contributions to our understanding of veterans’ legal issues pertaining to “Don’t Ask, Don’t Tell.” Ms. Ballard is a former Army Captain and member of the American Veterans for Equal Rights (AVER) who lives in Washington, DC. Ms. Wilson is a nationally recognized military law expert who lives in San Diego, CA.

⁷³In other federal statutes dealing with military and veterans’ affairs, the phrase “members of the armed forces” is used in a way that includes retirees. The “Don’t Ask, Don’t Tell” statute, however, does not provide a definition of “members of the armed forces,” therefore the inclusion of retirees under this statute is very much hypothetical.

⁷⁴In fact, the government has not recalled a retired military member to active duty – for purposes of emergency mobilization – since World War II.

⁷⁵See generally, *Policy Concerning Homosexuality in the Armed Forces: Hearings Before the Senate Comm. on the Armed Services*, 103d Cong. (1993).

⁷⁶See 10 U.S.C. § 802(a)(4), (5). A well known case from the 1950’s provides a good example for how UCMJ matters pertaining to retirees and gay “acts” were handled a long while ago. Retired Rear Admiral Selden G. Hooper was convicted of sodomy under Article 125, conduct unbecoming an officer under Article 133, and indecent acts charged under Article 134. He was a retiree and was activated for purposes of court-martial in the Eleventh Naval District, located in San Diego. He was sentenced to dismissal from the Navy and total forfeitures of his retirement benefits. The charged sodomy was consenting adult sodomy. The Article 133 violation was a specification that alleged “publicly associated with persons known to be sexual deviants to the disgrace of the Armed Forces.” *Hooper v. United States*, 326 F.2d 982 (Ct.Cl. 1964), cert. denied, 377 U.S. 977 (1964).

⁷⁷Such cases have included murder, child molestation, and adultery between a General Officer and wife of a subordinate. The government, however, has not invoked its UCMJ jurisdiction to prosecute

consenting adult activities (such as sodomy) against retirees during the past 30 years. Even active duty service members do not normally face criminal prosecution related to consenting, adult, off-base, non-fraternizing, non-paid, non-public conduct (i.e., homosexual acts).

⁷⁸Exec. Order No. 13,087, 3 C.F.R. 13087 (1998).

⁷⁹Gary J. Gates, GAY MEN AND LESBIANS IN THE U.S. MILITARY: ESTIMATES FROM CENSUS 2000 4 (2004), available at <http://www.urban.org/url.cfm?ID=411069>.

⁸⁰*Id.* at 7.

⁸¹See DoDD 1332.14, *supra* note 5, para. E3.A4.1.3.3; DoDI 1332.40, *supra* note 5, para. E8.3.3.4.

⁸²See DoDD 1332.14, *supra* note 5, para. E3.A4.1.3.3.4; DoDI 1332.40, *supra* note 5, para. E8.3.3.4.

⁸³See DoDD 1332.14, *supra* note 5, at E3.A4.3.3.4; See also, DoDI 1332.40, *supra* note 5, at E8.3.3.4, stating that “A member’s sexual orientation is considered a personal and private matter, and is not a bar to continued service . . . unless manifested by homosexual conduct . . .” and DoDD 1332.14, *supra* note 5 at E3.A4.1.3.3.4 (stating “[credible information of homosexual conduct does not exist when] the only information known is an associational activity such as going to a gay bar, possessing or reading homosexual publications, associating with known homosexuals . . .”).

⁸⁴*Id.*

⁸⁵See DoDD 1332.14, *supra* note 5, para. E3.A4.1.3.4.3; DoDI 1332.40, *supra* note 5, para. E1.1.23.

⁸⁶See UCMJ Articles 92, 133 and 134, Uniform Code of Military Justice [UCMJ], 10 U.S.C. §§ 892, 933 and 934 (2000),

⁸⁷DoDD 1304.26, *supra* note 6, *Applicant Briefing Item on Separation Policy*; see also, Memorandum from Assistant Secretary of Defense (P&R) Edwin Dorn to the Assistant Secretaries of the Military Services, *Briefing Armed Forces Applicants* (undated); see also, Aspin Policy Memorandum, *supra* note 4, attachment *Policy Guidelines on Homosexual Conduct in the Armed Forces*.

⁸⁸See de Leon Investigating Harassment Memorandum, *supra* note 8.

⁸⁹*Id.* at 15.

⁹⁰*Id.*

⁹¹See Michelle M. Benecke and Kirsten S. Dodge, *Military Women: Casualties of the Armed Forces’ War on Lesbians and Gay Men*, GAY RIGHTS, MILITARY WRONGS: POLITICAL PERSPECTIVES ON LESBIANS AND GAYS IN THE MILITARY 71-108 (Craig A. Zimmerman, ed., 1996).

⁹²Threats can include but are not limited to “a threat to accuse the person threatened. . . of any crime. . . [or a] threat to expose any secret affecting the person threatened. . .” MCM, part IV, para. 53(c)(2).

⁹³MCM, part IV, para. 53(a).

⁹⁴MCM, part IV, para. 53(e).

⁹⁵ 18 U.S.C. § 873.

⁹⁶ DOD Memo from Asst. Sec. of Defense Edwin Dorn to Asst. Secs. of the Army (Manpower Reserve Affairs), Navy (Manpower and Reserve Affairs), and Air Force (Manpower, Reserve Affairs, Installations, & Environment), Dec. 22, 1993, Attachment “DOD Policy on Homosexual Conduct Training Plan,” subattachment of “Hypothetical Teaching Scenarios,” Situation 11.

⁹⁷ Exec. Order No. 12,968, 60 Fed. Reg. 40,245 (Aug. 7, 1995). A copy of this document can be found at www.SLDN.org.

⁹⁸ Aspin Policy Memorandum, *supra* note 4, attachment *Policy Guidelines on Homosexual Conduct in the Armed Forces*. See also, DoD 5200.2-R, *supra* note 19, app. 8, “Sexual Behavior.”

⁹⁹ Memorandum from Deputy Secretary of Defense to Secretaries of the Military Departments, *Implementation of “Policy Guidelines on Homosexual Conduct in the Armed Forces” in Personnel Security Investigation and Adjudication* (n.d.).

¹⁰⁰ *But*, “Information about an individual’s sexual orientation or statements by an individual that he or she is a homosexual or bisexual, or words to that effect, shall not be referred or reported to law enforcement agencies or to Military Departments (other than consolidated adjudication facilities) for any purpose. If investigative reports containing such information are referred to law enforcement agencies or Military Departments for other reasons, information subject to the limitations in this paragraph will be removed.” DoD 5200.2-R, *supra* note 18, para. C2.4.3.4.3.

¹⁰¹ Aspin Implementation Memorandum, *supra* note 9, attachment *Overview, Directives Implementing the New DoD Policy on Homosexual Conduct in the Armed Forces*.

¹⁰² As referred to in the Navy and Marine Corps.

¹⁰³ The UCMJ states that, “Any member of the armed forces who, without authority— (1) fails to go to his appointed place of duty at the time prescribed; (2) goes from that place; or (3) absents himself or remains absent from his unit, organization, or place of duty at which he is required to be at the time prescribed; shall be punished as a court-martial may direct. UCMJ Article 86.

¹⁰⁴ See UCMJ Art. 87.

¹⁰⁵ See UCMJ Art. 85.

¹⁰⁶ “Any member of the armed forces who believes himself wronged by his commanding officer, and who, upon due application to that commanding officer, is refused redress, may complain to any superior or commissioned officer, who shall forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom it is made.” UCMJ Art. 138.

¹⁰⁷ See MCM, part A2, § 938.

¹⁰⁸ See 10 U.S.C. § 1034(c).

¹⁰⁹ Any person subject to the UCMJ can prefer charges against any other member subject to the Code. MCM, part II, para. 307(a). However, the common practice is only commanders, through the aid of command legal officers, prefer charges.

¹¹⁰ See 10 U.S.C. § 1034.

¹¹¹ MCM, part III, para. 513.

¹¹² Exec. Order No. 13,140, 64 Fed. Reg. 55,115 (Oct. 12, 1999).

¹¹³ The Air Force requires that service members notify the servicing MTF within three days of seeking civilian medical care. See AFI 41-210, *Patient Administration Functions*, para. 3.9.1. Service members in the Army must obtain approval prior to seeking civilian medical care except in emergency situations. See AR 40-400, para. 10-6. Specific reporting requirements for the Navy and Marine Corps are unavailable online but are listed in NAVMED P-117.

¹¹⁴ See UCMJ Art. 92.

¹¹⁵ See UCMJ Art. 107.

¹¹⁶ See DEPT OF DEFENSE INSTRUCTION 6485.01, Human Immunodeficiency Virus [hereinafter DoDI 6485.01], para. 4.1 (2006). For specific service regulations, see generally, SECRETARY OF THE NAVY INSTRUCTION (SECNAVINST) 5300.30D, Management of Human Immunodeficiency Virus-1 (HIV-1) Infection in the Navy and Marine Corps (2006); AR 600-110, *Identification, Surveillance, and Administration of Personnel Infected With Human Immunodeficiency Virus* (2005); AFI 48-135, *Human Immunodeficiency Virus Program* (2004).

¹¹⁷ In 2006, DoDI 6485.01 replaced 32 C.F.R. § 58.6 and DoDD 6485.1 as the controlling regulation concerning service members testing HIV+. While 32 C.F.R. § 58.6 and DoDD 6485.1 had explicitly prohibited overseas service by HIV+ service members, the replacement instruction does not contain that language. Despite this change in language, SLDN has not seen a change in how the services are treating HIV+ service members in practice.

¹¹⁸ Article 92 states that a service member will be punished at a court-martial if he or she violates a lawful order or regulation.

¹¹⁹ See 38 C.F.R. § 4.88b, item 6351.

¹²⁰ See 38 C.F.R. § 17.46.

¹²¹ “Members with serologic evidence of HIV infection shall not be retired or separated solely on the basis of serologic evidence of HIV.” DoDI 6485.01, para 6.2.2. But, it is the policy of DoD to retire or separate active duty or reserve component personnel infected with HIV “who are determined to be unfit for further duty.” DoDI 6485.01, para 6.2.4.

¹²² See, e.g., AR 600-110 para. 5-17.

¹²³ See DoDI 6485.01, para. 6.5.

¹²⁴ DEPT OF DEFENSE DIRECTIVE 1304.19, *Appointment of Chaplains for the Military Departments* (1993).

¹²⁵ “A communication is ‘confidential’ if made to a clergyman in the clergyman’s capacity as a spiritual adviser or to a clergyman’s assistant in the assistant’s official capacity and is not intended to be disclosed to third persons. . . .” MCM, part III, para. 503(b)(2).

¹²⁶ See, e.g., AIR FORCE MANUAL 52-103, *Chaplain Service Readiness Manual*, attachment 10. The quoted language is part of the

Covenant and Code of Ethics for Chaplains of the Armed Forces as prescribed by the National Conference on Ministry to the Armed Forces.

¹²⁷ See U.S. CONST. amend. IV.

¹²⁸ For more information about states that legally recognize same-sex relationships, see Human Rights Campaign, Relationship Recognition in the U.S. (Jan. 2007), <http://www.hrc.org/Template.cfm?Section=Center&CONTENTID=26860&TEMPLATE=/ContentManagement/ContentDisplay.cfm> (listing California, Connecticut, Hawai'i, Maine, Massachusetts, and Vermont as states that provide some form of legal rights to same-sex couples) (last visited Mar. 17, 2007).

¹²⁹ *Goodridge v. Department of Pub. Health*, 440 Mass. 309 (2003).

¹³⁰ In 1999 the Vermont State Legislature passed a civil union law entitling parties to a civil union to all of the state-level spousal rights and responsibilities. While out-of-state residents can obtain civil unions in Vermont, these rights and responsibilities are only recognized for couples who live in the state of Vermont. VT. STAT. ANN. tit. 15, § 1201(4) (2003); VT. STAT. ANN. tit. 15 § 23; Civil unions became available to same-sex couples in Connecticut as of October 1, 2005, providing that the parties to the Civil Union “shall have all the same benefits, protections and responsibilities under [Connecticut] law . . . as are granted to spouses in a marriage. . . .” Civil Union Law, Public Act 05-10, § § 1(1), 14-15; Effective January 1, 2005, the California Domestic Partner Rights and Responsibilities Act of 2003 extends the rights and duties of spouses to couples registered as domestic partners with the California Secretary of State. Cal. Fam. Code § 297-297.5 (2003); On October 25, 2006, the New Jersey Supreme Court ruled same-sex couples must be provided the full and equal rights and benefits of marriage. It gave the New Jersey legislature 180 days to protect New Jersey families and bring equality to same-sex couples. *Lewis v. Harris*, A-68-05 N.J. (2006). In 2004 New Jersey passed a limited domestic partnership law, affording same-sex couples only some of the rights and benefits of marriage. N.J. STAT. ANN. § 26:8A, N.J. STAT. ANN. § 3B:12-1-48; N.J. STAT. ANN. § 3B:1-1; N.J. STAT. ANN. § 3B:5-3-4; N.J. STAT. ANN. § 3B:14-15; N.J. STAT. ANN. § 3B:7-1; N.J. STAT. ANN. § 3B:8-1-3; N.J. STAT. ANN. § 3B:8-5-14; N.J. STAT. ANN. § 3B:8-17-19; N.J. STAT. ANN. § 3A:25-12; N.J. STAT. ANN. § 3A:25-39; N.J. STAT. ANN. § 3B:10-2-4; N.J. STAT. ANN. § 3B:30-2.

¹³¹ See, e.g., DEP’T OF DEFENSE INSTRUCTION 2310.5, *Accounting for Missing Persons*, E5.10 (2000).

¹³² See, e.g., DEP’T OF DEFENSE INSTRUCTION 2310.5, *Accounting for Missing Persons*, E5.10 (2000).

¹³³ See Aspin Policy Memorandum, *supra* note 4, attachment *Policy Guidelines on Homosexual Conduct in the Armed Forces*, para. 6.

¹³⁴ See American Red Cross, *Emergency Communications Services*, at http://www.redcross.org/services/afes/0,1082,0_476_,00.html (August 11, 2006).

¹³⁵ The Red Cross will send messages “following the death or serious illness of a family member or other important events, such as the birth of a child.” *Id.*

¹³⁶ See Aspin Policy Memorandum, *supra* note 4, attachment *Policy Guidelines on Homosexual Conduct in the Armed Forces*, para. 6.

¹³⁷ See DEP’T OF DEFENSE INSTRUCTION 7730.19, *Reporting of Dependents of Active Duty Military Personnel and U.S. Citizen Employees*, para. 4 (1988); DEP’T OF DEFENSE INSTRUCTION 1342.19, *Family Care Plans*, para. 4.7 (1992). The duty to report applies to all active duty service members, reservists, National Guard members and those personnel in the Individual Ready Reserves.

¹³⁸ *Id.*

¹³⁹ MCM, part IV, § 16(e)(1).

¹⁴⁰ See DEP’T OF DEF., INSTRUCTION 1341.2 DEFENSE ENROLLMENT ELIGIBILITY REPORTING SYSTEM (DEERS) PROCEDURES, ¶ 4 (1999).

¹⁴¹ For information on second-parent adoption and a list of states that recognize these arrangements, see generally, National Center for Lesbian Rights, *Second Parent Adoptions: A Snapshot of Current Law*, at <http://www.nclrights.org/publications/2ndparentadoptions.htm> (last updated August 2003); Human Rights Campaign, *Second-Parent Adoption*, at <http://www.hrc.org/> (2004).

¹⁴² See DEP’T OF DEFENSE INSTRUCTION 1342.19, *Family Care Plans*, para. 6 (1992).

¹⁴³ “Failure to produce a family care plan within the period stipulated in subsection 4.8., may result in disciplinary action and or administrative separation . . .” DEP’T OF DEFENSE INSTRUCTION 1342.19, *Family Care Plans*, para. 4.1 (1992).

¹⁴⁴ See DoDD 1332.14, *supra* note 5, para. E3.A1.1.8.1.1; DoDI 1332.40, *supra* note 5, para. E2.3.

¹⁴⁵ See DoDD 1332.14, *supra* note 5, para. E3.A4.1.1.1.1; DoDI 1332.40, *supra* note 5, para. E8.1.1.

¹⁴⁶ See DoDD 1332.14, *supra* note 5, para. E3.A4.1.1.1.1; DoDI 1332.40, *supra* note 5, para. E8.1.1.

¹⁴⁷ See DoDD 1332.14, *supra* note 5, para. E3.A4.1.3.1; DoDI 1332.40, *supra* note 5, para. E8.3.1; see also de Leon Investigating Harassment Memorandum, *supra* note 8.

¹⁴⁸ See Under Secretary of Defense (P&R) 1998 Report, *supra* note 26, at 11-12.

¹⁴⁹ See *id.* at 12.

¹⁵⁰ See *id.*

¹⁵¹ See UCMJ, Art. 31(b).

¹⁵² See MCM, part IV, § 907, Art. 107.

¹⁵³ See DoDD 1332.14, *supra* note 5, para. E3.A4.1.3.3.4; DoDI 1332.40, *supra* note 5, para. E.8.3.3.4.

¹⁵⁴ See de Leon Investigating Harassment Memorandum, *supra* note 8.

¹⁵⁵ See DoDD 1332.14, *supra* note 5, para. E3.A4.1.1.3; DoDI 1332.40, *supra* note 5, para. E8.1.3.

¹⁵⁶ See DoDD 1332.14, *supra* note 5, para. E3.A4.1.4.4; DoDI 1332.40, *supra* note 5, para. E8.4.4.

¹⁵⁷ See DoDD 1332.14, *supra* note 5, para. E3.A4.1.4.3; DoDI 1332.40, *supra* note 5, para. E8.4.3.

¹⁵⁸ See DoDI 5505.8, *supra* note 31, para. 6.3.

¹⁵⁹ See Aspin Implementation Memorandum, *supra* note 9.

¹⁶⁰ See MCM, part III, § 305(d)(1).

¹⁶¹ See MCM, part III, § 305(d)(2).

¹⁶² See, e.g., COMMANDER NAVY LEGAL SERVICES COMMAND INSTRUCTION 5800.1E, § 1103 (2002).

¹⁶³ *Id.*

¹⁶⁴ See MCM, part II, § 506(b).

¹⁶⁵ See MCM, part II, § 506(b)(1).

¹⁶⁶ See MCM, part II, § 506(a).

¹⁶⁷ See DoDD 1332.14, *supra* note 5, para. E3.A1.1.8.4.

¹⁶⁸ See DoDI 1332.40, *supra* note 5, para. E3.2.2.5.

¹⁶⁹ “In cases in which the SCA determines that an honorable or general characterization is appropriate, the SCA may initiate separation action without a Board of Inquiry . . .” *Id.* at E6.1.1.

¹⁷⁰ See DoDI 1332.40, *supra* note 5, para. E5.4.

¹⁷¹ See DoDI 1332.40, *supra* note 5, para. E4.1.

¹⁷² See DoDD 1332.14, *supra* note 5, para. E3.A3.1.3.5.1.

¹⁷³ Members of the board can be challenged for cause, however, if defense counsel can show bias or susceptibility to outside influence. See DoDI 1332.40, *supra* note 5, para. E5.1.

¹⁷⁴ See DoDD 1332.14, *supra* note 5, para. E3.A3.1.3.5.7.2; DoDI 1332.40, *supra* note 5, para. E3.3.3.

¹⁷⁵ See DoDD 1332.14, *supra* note 5, para. E3.A3.1.3.5.5.

¹⁷⁶ See DoDD 1332.14, *supra* note 5, para. E3.A4.1.5; DoDI 1332.40, *supra* note 5, para. E8.5.

¹⁷⁷ See DoDD 1332.14, *supra* note 5, para. E3.A1.1.8.1.2.1; DoDI 1332.40, *supra* note 5, para. E2.3.1.1.

¹⁷⁸ See DoDI 1332.40, *supra* note 5, para. E3.3.4.1.

¹⁷⁹ See *id.* at paras. E3.3.4.2, E3.4.4.

¹⁸⁰ DEP’T OF DEFENSE FORM 214, *Certificate of Release or Discharge from Active Duty*.

¹⁸¹ See DoDD 1332.14, *supra* note 5, para. E3.A1.1.6. Entry level separations are not available for officers.

¹⁸² See MCM, part II, §§ 1003(b)(8)(B)–(C)

¹⁸³ See DoDD 1332.14, *supra* note 5, paras. E3.A1.1.8.3, E3.A2.1.3; DoDI 1332.40, *supra* note 5, para. E7.2.1; see also, Aspin Implementation Memorandum, *supra* note 9, attachment *Overview, Directives Implementing the New DoD Policy on Homosexual Conduct in the Armed Forces*.

¹⁸⁴ See generally, VA Pamphlet 22-90-2, *Summary of Educational Assistance Under the Montgomery GI Bill – Active Duty* [hereinafter VA Pamphlet 22-90-2], Dep’t Veterans Affairs (2001).

¹⁸⁵ *Id.*

¹⁸⁶ See generally, VA Pamphlet 22-90-2, *supra* note 184.

¹⁸⁷ See, e.g., AFI 36-3207, para. A2.2.3.2; SECNAV 1900.7E.

¹⁸⁸ See *id.*

¹⁸⁹ *Id.*

¹⁹⁰ John Hensala, M.D., a Captain in the U.S. Air Force Reserve Medical Corps, was obligated to serve four years as a military doctor upon completion of his medical training. When ordered to report for active duty, he informed his command that he is gay but he still intended to fulfill his service obligation. Hensala was discharged for “coming out” to the military in violation of “Don’t Ask, Don’t Tell” and the USAF sought recoupment of the \$71,000 he had received for his medical education. Hensala filed suit in federal court arguing that he was involuntarily discharged. In its decision, the District Court held that a statement by a service member to the military that he or she is a homosexual can be considered a voluntary act under which recoupment may be sought. This ruling was upheld by the 9th Circuit Court of Appeals. *Hensala v. Department of the Air Force*, 343 F.3d 951 (9th Cir. 2003).

¹⁹¹ DEP’T OF DEFENSE DIRECTIVE 1332.28, Discharge Review Board (DRB) Procedures *and Standards*, para. E3.3.6 (1983).

¹⁹² See 10 U.S.C. § 654(b)(2).

¹⁹³ Each Service puts great emphasis on honor and integrity. The Core Values for the Army, Navy/Marine Corps, Air Force, and Coast Guard are, respectively, Duty, Honor Country; Honor, Commitment, Courage; Integrity First, Service Before Self, Excellence in All We Do; and Honor, Respect, Devotion to Duty.

¹⁹⁴ 10 U.S.C. §654(f)(2).

¹⁹⁵ 10 U.S.C. §654(b)(2).

¹⁹⁶ DEP’T OF DEFENSE FORM 214, *Certificate of Release or Discharge from Active Duty*.

¹⁹⁷ See generally, VA Pamphlet 22-90-2, *supra* note 184.

¹⁹⁸ See Memorandum from Under Secretary of Defense (P&R) Charles S. Abell to the Secretaries of the Military Departments, *Repayment of Unearned Portions of Bonuses, Special Pay, and Educational Benefits or Stipends* [hereinafter Abell Recoupment Memorandum] (Aug. 12, 2005), see also *Hensala v. Dep’t of the Air Force*, 343 F.3d 951 (9th Cir. 2003)

¹⁹⁹ See MCM, part IV, § 907.

²⁰⁰ See MCM, part IV, § 932.

²⁰¹ See MCM, part IV, § 892.

²⁰² See MCM, part IV, § 934. Note that only commissioned or warrant officers may be charged with fraternization. Enlisted members can be charged with violating applicable service regulations. See MCM, part IV, § 16.

²⁰³ Personal information is protected under the Privacy Act of 1975. *See generally*; DEP'T OF DEFENSE DIRECTIVE 5400.11, *DoD Privacy Program* (2004).

²⁰⁴ 10 U.S.C. § 654(e); *see also* DoDD 1304.26, *supra* note 6, *Applicant Briefing Item on Separation Policy*; DoDD 1332.14, *supra* note 5, para. E3.A1.1.8.4.7.2.1; DoDI 1332.40, *supra* note 5, para. E2.3.3.

²⁰⁵ *See* DoDD 1332.14, *supra* note 5, para. E3.A1.1.8.4.5; DoDI 1332.40, *supra* note 5, para. E8.4.6.

²⁰⁶ Preponderance of the evidence means the evidence of greater weight that goes to the truth of the matter. *See* DoDD 5505.8, *supra* note 31, para. E2.2.16.

²⁰⁷ *See* DoDD 1332.14, *supra* note 5, para. E3.A1.1.8.1.2.2; DoDI 1332.40, *supra* note 5, para. E2.3.1.2.

²⁰⁸ *See* U.S. Const. amend. IV.

²⁰⁹ The Air Force requires that service members notify the servicing MTF within three days of seeking civilian medical care. *See* AFI 41-210, *Patient Administration Functions*, para. 3.9.1. Service members in the Army must obtain approval prior to seeking civilian medical care except in emergency situations. *See* AR 40-400, para. 10-6. Specific reporting requirements for the Navy and Marine Corps are unavailable online but are listed in NAVMED P-117.

²¹⁰ DOD Memo from Asst. Sec. of Defense Edwin Dorn to Asst. Secs. of the Army (Manpower Reserve Affairs), Navy (Manpower and Reserve Affairs), and Air Force (Manpower, Reserve Affairs, Installations, & Environment), Dec. 22, 1993, Attachment "DOD Policy on Homosexual Conduct Training Plan," subattachment of "Hypothetical Teaching Scenarios," Situation 6.



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**P.O. Box 65301
Washington, DC 20035-5301
(202) 328-3244
fax: (202) 797-1635
legal@smdn.org
www.smdn.org**