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ms*

1998
SECOND
QUARTER
REPORT

"SLDN has repeatedly forced the Pentagon not just to take notice but to change."

Deb Price, *The Detroit News*, April 25, 1998



SERVICEMEMBERS: Under Article 31 of the Uniform Code of Military Justice, you have the right to remain silent and to consult with a defense attorney if you are investigated. Say Nothing. Sign Nothing. Get Legal Help. Call SLDN at (202) 328-FAIR.

ABOUT SLDN

SLDN is the sole legal aid and watchdog organization for men and women harmed by "Don't Ask, Don't Tell; Don't Pursue." SLDN is a 501(c)(3) organization. All contributions are tax deductible.

Servicemembers Legal Defense Network

P.O. Box 65301, Washington, DC 20035-5301
(202) 328-3244 • (202) 797-1635 fax • sldn@sldn.org • www.sldn.org

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RESULTS AT A GLANCE 1998 SECOND QUARTER

Profit/Loss (\$1,000)				
Revenue		156		
Expenses		238		
Net Income		(82)		
4th Q Ret'd Earnings		236		
Total Equity		154		
Budget Report (\$1,000)				
	1995	1996	1997	1998
Income	390	472	796	886
Expenses	304	515	646	789
Change in Net Assets	86	(43)	150	97
Net Assets Beginning of Yr	63	149	106	256
Net Assets End of Year	149	106	256	353

New Cases. SLDN opened 70 new cases this past quarter. SLDN maintained an average of 123 open cases each day.

Pentagon Issues Report Responding to SLDN Findings.

In April, the Secretary of Defense made public a year-long study of "Don't Ask, Don't Tell, Don't Pursue" ordered as a direct result of SLDN's Third Annual Report on the policy, released in February 1997. While their report has numerous shortcomings, it contains a number of promising recommendations that respond directly to SLDN's concerns including:

Reissue Guidance on Anti-Gay Harassment and Lesbian-Baiting.

This responds to SLDN's documented reports of increased harassment and evidence that the services failed to distribute the Dorn memo on anti-gay harassment and lesbian-baiting obtained by SLDN last year. The Chief of Naval Operations has already implemented this recommendation.

Cease Use of Pre-trial Agreements to Ferret Out Gays.

The Pentagon adopted a new policy to end the use of pre-trial agreements to cajole service members facing criminal penalties into snitching against suspected gay service members in exchange for more lenient treatment. The Pentagon's promise comes in response to SLDN's work the past two years on the case of the Hawaii 17. In that case, the Air Force agreed to reduce the sentence of an airman from life to twenty months on the sole condition that he accuse others as gay. The airman accused 17 members. The Air Force discharged all of those named in its service.

Clarify That Health Care Providers Are Not Required To Turn In Gays.

The Department of Defense stated for the first time that health care providers are not required to turn in gay people. The promise is a small step forward in SLDN's

attempt to stop the military from using private conversations as a basis for investigation or discharge. The Pentagon's move comes in response to a number of SLDN cases including that of former Marine Corporal Kevin Blaesing, who was turned in by his Navy psychiatrist simply for asking questions about homosexuality.

Navy Drops Appeal of McVeigh Case. In an historic breakthrough, the Navy agreed to settle the case of Master Chief Petty Officer Timothy R. McVeigh on his terms. The settlement allows McVeigh to retire with full pension benefits. Importantly, it also preserves the first and only federal court precedent that the military services must obey the limits to investigations under "Don't Ask, Don't Tell, Don't Pursue" and federal privacy law under the Electronic Communications Privacy Act. SLDN has assisted McVeigh since last September and served as co-counsel to Chris Wolf at Proskauer, Rose, LLP in federal court.

McVeigh Is Promoted. Weeks before the Navy dropped its appeal of McVeigh's case, officials agreed to promote McVeigh, as he deserved, from Senior Chief to Master Chief Petty Officer, the highest enlisted rank.

AOL Settles Dispute With McVeigh. McVeigh settled his dispute with America Online. The terms were not disclosed. The day McVeigh arrived in federal court challenging the Navy's attempt to discharge him, AOL released a statement admitting to human error in releasing information about him to the Navy. AOL also published the results of an internal investigation showing that the "Navy deliberately ignored both federal law and well-established procedures for handling government inquiries about AOL members." AOL has subsequently announced new measures to ensure subscriber privacy.

Holmes Wins. A California Superior Court judge ruled on June 18, 1998 that denial of state employment in the California National Guard for being gay violates the State of California Constitution's guarantee of equal protection. The judge also certified as a class all gays, lesbians and bisexuals serving in the California National Guard. The challenge was brought by former Lieutenant Andy Holmes and his counsel at Howard, Rice, Nemerovski, Canady, Falk & Rabkin in San Francisco.

Gay Service Members Retained. SLDN assisted four service members in keeping their careers after they came out to their commanders or were accused of being gay.

SLDN Wish List

- ★ Volunteer with DoD Budget Analysis Experience
- ★ Volunteer with Experience in DoD Grant Process
- ★ Funding to Hire Communications Director
- ★ Small Television with VCR

SLDN Defends Army Wife. SLDN saved another woman's career after she was alleged to have had an affair with another woman. The board agreed that, even if the accusation had been true, a one-time incident of homosexual conduct was an insufficient basis for discharge.

SLDN Helps Overturn Other Than Honorable Discharge. SLDN convinced a Marine Corps commander to change his recommendation of an other than honorable discharge for a Marine who came out to him. The gay Marine will now receive a fully honorable discharge.

SLDN Trains Service Members in Southeast. SLDN staff members Kelly Corbett and Danny Reed, and legal associate Jeff Cleghorn trained service members about their legal rights in Norfolk, VA; Fayetteville, NC; Pensacola, FL; and Atlanta, GA.

Serving With Pride Grows. SLDN held annual "Serving With Pride" events in Miami, FL; Southampton, NY; Chicago, IL; Los Angeles, CA; and Washington, D.C. Many thanks to all who made these events a tremendous success.

Additional Highlights: (1) Dixon and Michelle received the Kevin Larkin Memorial Award for Public Service from the Massachusetts Lesbian and Gay Bar Association; (2) Kelly spoke at Tulane University, the University of North Carolina, the University of Virginia Law School and the Twenties Group in Washington, D.C.; (3) Congratulations to the gay veterans at the Alexander Hamilton Post for settling their discrimination claim against the American Legion before the San Francisco Human Rights Commission; (4) Former Air Force Captain and federal plaintiff, Rich Richenberg, joined SLDN's staff as Director of Information Systems & Administration; and (5) Ann Lipton of Harvard Law School and former sailor Laura Stratton of Golden Gate Law School joined SLDN as summer legal associates.

How You Can Help

- ★ **Contribute Stock.** No capital gains plus a tax break!
- ★ **Make a Bequest.** The way to keep on giving!
- ★ **Obtain Matching Gift From Your Employer.** Double or triple your gift!
- ★ **Designate SLDN in the CFC or United Way Campaigns.** CFC #2259. Please look for us in United Way brochures or write in our name.
- ★ **Join SLDN's E-mail Action Alert list.** Your voice makes a difference!
- ★ **Distribute Schindler Petition Cards.** Annual clemency board in October!
- ★ **Organize Volunteers For Next Year's Pride Days.** Service members need your outreach!



The Data Lounge News <editorial @ datalounge.com>
07/29/98 09:20:30 PM

TO ROSS
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Record Type: Record

To: GLBT-NEWS List <glbt-news-owner @ duh.org>

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Subject: [GLBT-NEWS:DL] Court Reinstates Navy Man Discharged in 1994

NEWS SOURCE: The Data Lounge - <http://www.datalounge.com/>

BACKGROUND OF NEWS SOURCE:

The Data Lounge is about anything and everything gay. Daily news headlines, culture information, and gossip--who's out, who's not, and who should be.

Visit their site, and to see the Web version of this article, click below:

<http://www.datalounge.com/pages/sections/news/98/07/29/004.news>

Wednesday, July 29, 1998

Court Reinstates Navy Man Discharged in 1994

WASHINGTON -- In a ruling that could affect a wide variety of cases, the Navy Times reports a federal judge has decreed service members who face discharge on suspicion of being gay or lesbian must be given the chance to prove they should be allowed to remain in uniform.

A Navy panel charged with determining Lt. Steven Kindred's fitness for duty wrongly prevented him from trying to prove that gay experiences earlier in his career would not recur, ruled Judge James T. Turner of the U.S. Court of Federal Claims in a forthcoming (July 8) opinion.

Turner ordered the Navy must reinstate Kindred, a 17-year veteran with prior enlisted service, retroactive to July 29, 1994, the date of his discharge. Any reference to the discharge must be expunged from the officer's record as well, the judge ruled.

The impact of the opinion could force future military juries and boards to consider more carefully service members' contention that they will meet standards for service, under regulations that address the criteria for discharging gays, the Navy Times says.

"It will certainly impact every significant case for which members are being processed for homosexuality," said civilian lawyer David P. Shelton, a former Navy staff judge advocate.

"The Navy has to follow the rules," said C. Dixon Osburn of the Servicemembers Legal Defense Network, an advocacy group has represented hundreds of people charged with violating the 1993 "don't ask, don't tell, don't pursue" regulation.

"Under both 'don't ask, don't tell, don't pursue' and the prior

policy, the services need to provide pretty sound reasons upon which to base the discharge," Osburn said.

"We've complained for the last five years that 'don't ask, don't tell' discharges are pro forma rubber stamps," Osburn told the Navy Times. "Our hope out of this case is that each service will take more care" when they evaluate evidence, he said.

The Justice Department has not yet announced if the government will appeal the decision.

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Servicemembers Legal Defense Network

★ ★ ★ ★ ★

TO BOB WEINER
FR R. COLEMAN

To: SLDN Supporters

From: Michelle M. Benecke, Co-Executive Director
C. Dixon Osburn, Co-Executive Director

Re: *New York Times Magazine* cover story

Date: June 29, 1998

Please find enclosed a copy of the Sunday, June 28, 1998, *New York Times Magazine* cover story on the covert lives and private struggles of gay men, lesbians and bisexuals serving in the military. It details the pain and anguish facing those who serve under "Don't Ask, Don't Tell, Don't Pursue," as well as the pride they have serving our country.

Primary sources for the article included Michelle; SLDN Board Co-Chair and former Marine Corps fighter pilot, Tom Carpenter; two SLDN honorary Co-Chairs, Brigadier General (Ret.) Pat Foote and Major General (Ret.) Vance Coleman; and SLDN clients such as former Senior Airman Sonya Harden.

This is the first piece on gays in the military done by the *New York Times Magazine* since its coverage of the murder of Allen Schindler. And this is one of the most comprehensive articles on gays, lesbians and bisexuals serving our country today.

Thank you for your support.

**Nathan Glazer
Changes His Mind**
By James Traub

**Medical
Journal Wars**
By Ellen
Ruppel Shell

**Fall Fashion Poll:
The New York
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By Holly Brubach

The New York Times Magazine

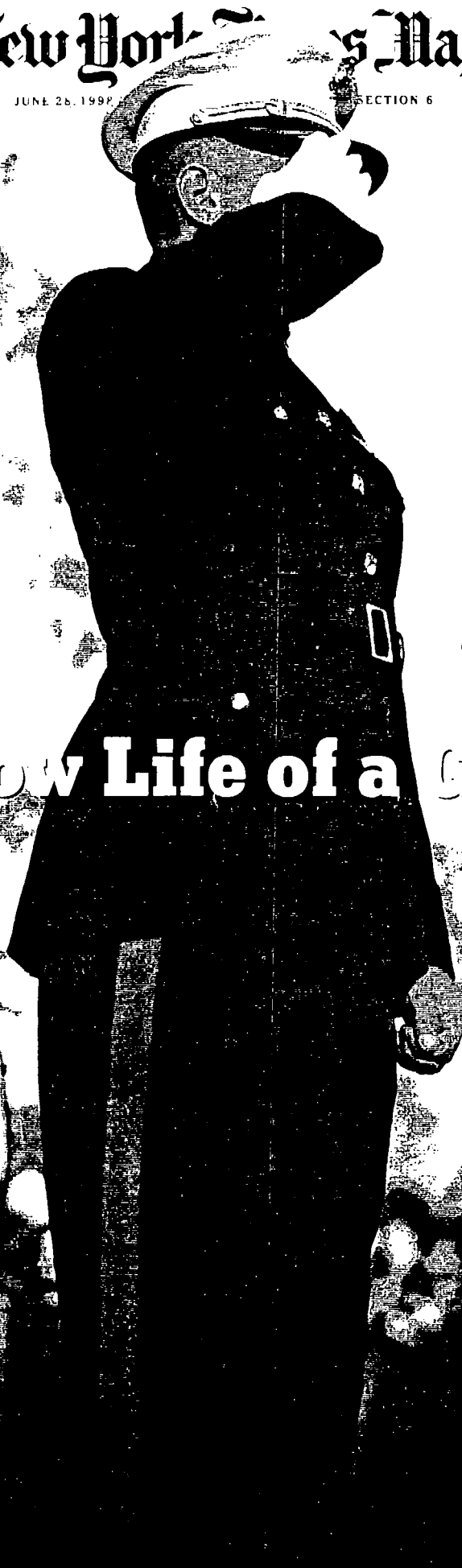
JUNE 25, 1998

SECTION 6

For this officer,
as for countless
other homosexuals
in the military,
'Don't Ask, Don't Tell'
is hell.

The Shadow Life of a Gay Marine

By Jennifer Egan



Don't Ask,
Don't Tell'
has created
a world
of fear and
deceit,
alienating
R. and his
friends from
their fellow
servicemen —
and from the
civilian gay
world too.

Uniforms in the Closet

By Jennifer Egan

Before R., a Marine Corps officer, leaves Camp Pendleton, he changes out of the starched camouflage suit that is the everyday uniform of marines into "civvies" — in R.'s case, jeans and a T-shirt. It is normal for a marine to change clothes before leaving the base; by shedding his "camnies," R. leaves behind the obligation to salute other marines in uniform. But for R., the change is also symbolic: as a marine who is gay, he looks forward to the end of each workday as a reprieve from hiding part of himself from everyone around him.

Most days, the marines in R.'s battalion are not in the field but at their desks in a modest office building, set amid scrubby Southern California coastland, where images of wives and crinkly faced infants smile from picture frames and computer screens. In R.'s office, the décor is strictly military: photographs of his various units over the 12 years he has been a marine, a picture of the general whom he served as an aide — a demanding and highly prestigious job. (R. has also been a commanding officer, bearing ultimate responsibility for a unit.) R. wishes he could place on his desk a photograph of David, a civilian mechanical engineer and his partner of three years, but a man's picture would almost certainly kindle suspicions. Even a personal telephone call from a man might be considered unusual, so David almost never calls R. at his office, where a single phone line serves dozens of marines.

Yet despite these and a multitude of other precautions, he worries that some men in his unit suspect that he is gay — in part because he is over 30 and unmarried; in part because years of hiding have made him deeply paranoid. "Sometimes I feel like they can look at me and just tell," says R., who would speak with me, and allow me into his life, on condition that I refer to him only by one of his initials. (Other gay military personnel I interviewed

Photographs by Matt Mahurin



for this article similarly requested anonymity.)

Driving from Camp Pendleton into San Diego, 40 miles south, R. grows visibly more relaxed. He has a California tan, deep-set eyes and the sturdy build characteristic of marines, along with a large Marine Corps tattoo — eagle, globe and anchor. A vigorous, sociable man, he is full of plans. After work tomorrow, he will make the two-hour drive north to David's house in Los Angeles, as he does each weekend. On Sunday, they will go to brunch at the home of a gay Marine officer. In a couple of weeks, R. will accompany his battalion to "the desert," Twentynine Palms, a Marine base outside Palm Springs where field training exercises are performed. From there he will head into Palm Springs for the annual White Party, a large all-night gay dance.

This constant switching between mutually exclusive worlds can have some odd, hallucinatory effects, R. says: "Several times I've met someone on base and wondered, Haven't I seen him at a bar? And then I've seen people at bars and thought I recognized them from the base. When I see someone at the mall, I can't remember where I know them from."

R. joined the Marines as a teen-ager and is fiercely loyal to the Corps, particularly to the enlisted men who answer to him — "my marines," he calls them, and adds, "I'm a marine first and gay second." His career has been stellar; he is what is known in the Corps as a "mustang," an enlisted marine who crossed over to become a commissioned officer. "Now that I've been a commanding officer and a general's aide, sky's the limit," he says. Military retirement, which can begin after 20 years, would allow him to draw half his base pay for the rest of his life. But R. plans to leave the Marines at the end of his current commission. The reason is simple. "I'm fed up," he says, "with having to hide."

It has been more than four years since the policy known as "Don't Ask, Don't Tell, Don't Pursue" went into effect. This policy was a compromise eked out among the White House, Congress and the Pentagon after President Clinton's announcement of his intention to lift the ban on homosexuals in the military — a ban that prohibited homosexuals from serving under any circumstances — set off a firestorm of opposition. Under "Don't Ask, Don't Tell," homosexuals (and bisexuals) may serve as long as they tell no one about their sexual orientation, refrain from "homosexual acts" and forgo homosexual marriage. The policy bars the military from questioning service members about their sexual orientation or investigating them without credible information that they have engaged in homosexual conduct. The stated goal of the policy is to allow homosexuals to serve while preserving mo-

Jennifer Egan, a novelist, has written for The Times Magazine about teen-age fashion models and young women who cut themselves.

Pride and prejudice:
"A marine first
and gay second."
R. (shown with
David) is planning
to end his stellar
military career
because, he says, "I'm
fed up with
having to hide."



rale and unit cohesion, which the military believes would be impaired by the presence of openly gay soldiers. But "Don't Ask, Don't Tell" forces a difficult choice upon homosexuals: in order to serve, they must either do without sex, romance and companionship or live uncelibate lives and lie about it — breaking the law and forfeiting their careers if they are caught.

Two months ago, the Pentagon issued figures indicating that the number of homosexuals discharged — 997 in 1997 — has risen 67 percent since "Don't Ask, Don't Tell" went into effect. Michelle Benecke, co-founder and co-director of Servicemembers Legal Defense Network, a watchdog group that assists military personnel accused under "Don't Ask, Don't Tell," says she believes the rise in discharges indicates that commanders are continuing to seek out homosexuals despite the fact that they are no longer supposed to. "No one has informed commanders of what the new rules are," says Benecke, whose organization has documented 1,379 command violations of the policy in the four years of its existence. "No one has ever told them the intent: to back off."

The Pentagon disagrees, attributing the rise in discharges to an increase in "statement" cases, in which homosexuals — many of them in their first year of service — openly declare that they are gay. But what the military regards as a statement is not always so clear-cut: last November, the Navy tried to discharge a senior chief petty officer named Timothy McVeigh, a nuclear submarine

expert who had been in the service for 18 years, on the basis of what it called his homosexual admittance. McVeigh's so-called admittance was an Internet posting with America Online in which he stated, anonymously, that his marital status was "gay"; a Federal judge ruled in January that the military's investigation of McVeigh was in violation of policy and ordered that McVeigh, who has declined to discuss his sexual orientation, be retained. Earlier this month, McVeigh and the Navy reached a settlement under which he will retire this summer with full benefits and receive a payment of \$90,000 to cover his legal fees.

During a recent interview, Kenneth H. Bacon, the Pentagon spokesman, told me: "Obviously, there are many people serving in the armed forces who have gay relationships, but they're discreet. They aren't pursued, and they may not even be known about." This suggests a split between the letter and the spirit of "Don't Ask, Don't Tell": the letter says, Don't do it; the spirit says, It's O.K. to do it as long as you are discreet. But this double message leaves homosexuals on queasy middle ground: theoretically, they are allowed to serve, but their private lives are illegal and will cost them their careers — if they get caught. But then, no one is supposed to be trying to catch them. When I raised this notion of the policy's murkiness with Rudy de Leon, Under Secretary of Defense for Personnel and Readiness, he said, "I think we're at the heart of some of the conflicts that are built into the policy, which tries to balance many competing interests."

'I know very little about gay culture,' R. says. On a gay cruise he and David took recently with some other military friends, R. was mystified by a drag spoof of 'Whatever Happened to Baby Jane.'

If, as the Pentagon says, some homosexuals are outing themselves with the knowledge that they will be discharged, it may be that for them, the pressures and risks of serving under "Don't Ask, Don't Tell" are too intense to bear.

R. IS PART OF A SPRAWLING social network of gay marines and sailors, men and women, based in and around San Diego, where the shoreline bristles with dull gray ships and the sky is full of lumbering choppers and S-3's, anti-submarine-warfare planes that honk like gigantic geese as they fly. On this unseasonably cool spring evening, I accompany R. to a 6:30 dinner at the home of a Navy doctor near Hillcrest, a gay neighborhood north of downtown San Diego. The group tonight includes a tank officer who was one of the first to enter Kuwait during the gulf war, where he earned a bronze star; a Navy helicopter pilot, and several noncommissioned officers, or N.C.O.'s — enlisted men who have worked their way up through the ranks. The off-duty mingling of officers and enlisted people of different ranks is prohibited because of its potential to break down the chain of command, but the fact that gay personnel are forced underground creates a bond among them that transcends military hierarchy. None of these friends work together; they met socially and communicate mostly by E-mail, using a code that eliminates gender-specific pronouns, since the military can monitor any E-mail exchanges that take place on a base. (Most of R.'s friends say they have never met a gay person on duty; even when they suspect that a fellow sailor or marine might be gay, they rarely approach — the risk of being wrong is too great.)

Like a number of his friends, R. joined the military believing he was heterosexual. Reared and educated in a strict Southern Christian community, he was profoundly homophobic. "I would say, 'AIDS is God's judgment on homosexuals' — I really felt that," he says. He was drawn to the Marines by the camaraderie, by the promise of adventure — and also by the largely single-sex environment. "I would think, I'm going to be with all these men — that's kind of exciting," he says. "But I didn't know why I was excited."

Some of R.'s friends, aware of their homosexual inclinations, joined in hopes that the military — the Marines in particular — would "cure" them. "Everybody knows that there are no fags in the Marines," says a former infantryman. Over pizza, R.'s friends talk of other motivations for joining the military, including the de-

sire to get away from home and the hope of proving themselves to a disapproving world. "I'm supposed to be that one guy that can't survive in this environment," says one powerfully built man, an operations officer in the Marine air wing. "I'm the guy that's supposed to be filtered out, the weak one who can't carry the pack."

This officer goes on to tell me that his homosexuality is an open secret. "I know that in my command there are marines who work for me that assume I'm gay," he says. But he is clearly the exception. A logistics officer I'm introduced to at dinner has a dedicated "stunt babe" — a woman who poses as his girlfriend at military events and whose picture he keeps on his desk. The annual Marine Corps Ball, I learn, is the biggest command performance of this sort; R. usually brings a date with whom he has collaborated on a complex romantic history while David stays home, watching TV. It isn't enough to say nothing about your private life; unless you give the appearance of being heterosexual, people will start to wonder — especially now that "Don't Ask, Don't Tell" has alerted them to the fact that there may be homosexuals in their midst.

As a result, R. and his friends monitor themselves obsessively, aware that a single blunder can lead to exposure, humiliation and a discharge they regard as a disgrace — particularly those, like R., whose families don't know they are gay. A strange car in front of your house, clicks on the telephone line, a summons from the commanding officer — in the life of a gay soldier, any one of these can prompt a flicker of anxiety, even all-out panic. "Say you're out with four or five of your friends at a restaurant, and there goes somebody in your department with his wife," says the Navy doctor who is the host of the pizza party. "You know you're nailed."

Even gay nightclubs can be a hazard, although "Don't Ask, Don't Tell" has discouraged the trolling of clubs by investigators, a formerly common practice. One officer says of a popular San Diego club: "Last time I was there on a gay night, I ran into two of my marines, who were there by mistake. They were like, 'Hey, Sir, what're you doing here?'" Another of R.'s friends, P., was an F-18 fighter pilot who dropped bombs on Iraq during the gulf war before leaving active duty three years ago. (He is still with the Marine reserves.) P. was in a long-term relationship with his civilian "roommate" while in the military, but feigned a romance with a lesbian friend for three years to avoid having to go on any more blind dates set up by the Officers' Wives Club. A fair, soft-spoken man who has retained his marine build and haircut, P. says

his hardest times were the six-month deployments on aircraft carriers, when he and his partner were rarely able to speak, and when P. rationed the letters he sent home out of fear that too many to the same man would draw attention. The letters his partner sent him were unsigned or signed with a female name, sent without a return address and chary on endearments. (During R.'s ship deployment, he asked his partner to have a woman address his letters.)

Each month, P. recalls, a videotape would arrive on his ship, fashioned by the Officers' Wives Club, filled with greetings from loved ones. "Everybody else in the squadron's wife or girlfriend would be in the video saying, 'Hey, honey, how're you doing?'" he says. "And you'd be the only one without anything on that tape."

At the end of the deployment, when the ship was within six or seven days of land, senior pilots with wives or fiancées would get to fly the planes ashore early to be with their loved ones. Though P. was always among the most senior, he, being single, had to wait until the ship docked. "You get off, you have this huge welcome-home party and everyone else is there, except yours," he says. "He could be, except you'd have to stand there and shake his hand: *Thanks for coming, buddy.*" And, of course, being met by a man after six months at sea might well arouse suspicions.

Still, in this crowd it is generally felt that gay enlisted people, not officers, have it the worst. The enlisted are a tighter pack, which makes keeping secrets much harder, and the homophobic atmosphere tends to be far more virulent. Twelve of the homosexuals discharged in 1997 were officers; the remaining 985, enlisted people. J., an N.C.O. who says he has witnessed beatings and harassment of those suspected of being gay, told me he would fear for his life if his subordinates were to discover his secret. He socializes in Hillcrest, but tells subordinates that he goes to bars they can't afford: "I'll say: 'Dude, I met this babe last night. We hit it off!' You have to lie. They're like a pack of dogs — if they smell blood, they're going to go after it. You're dealing with kids, 18 or 19, who are trying to prove their manhood." Homosexual jokes and slurs, he adds, are a constant.

So saturated is the Marine Corps with homophobia that some of R.'s friends agree with the Pentagon that they should not be allowed to serve openly, that it would hinder their ability to lead. R. used to feel this way, but like the majority of gay personnel I spoke with, he has come to believe that although President Clinton had good intentions in seeking to change a draconian policy, "Don't Ask, Don't Tell" amounts to a

The Days of Don't

It isn't enough to say nothing about your private life; unless you give the appearance of being heterosexual, people will start to wonder. R. and his friends monitor themselves obsessively.

step backward. For one thing, it has turned discrimination against homosexuals — formerly just a military policy — into Federal law. And by forcing homosexuals to remain invisible, R. says, the policy deprives gay military people of the chance to prove themselves and begin to dispel the prejudices against them. "The best way to change people's attitudes is the personal one-on-one relationship," he says, and tells of how a close friend, a heterosexual Marine fighter pilot with whom R. used to trade jokes about homosexuals, has completely revised his views since learning that R. is gay. But under "Don't Ask Don't Tell," R. could be discharged simply for having told his friend that he is homosexual.

"Clinton thought he was doing us this big favor," R. says, "and all he did was build a brick wall around the closet."

Each time J., the N.C.O., recalls one of his fabrications, he begins, "I told a lie," as if to keep straight in his mind what is a lie and what is the truth. Clearly, so much lying troubles him. He shows me the red plastic Core Values card that every marine must carry. "Honor," begins the text, which also includes the words "Integrity," "Responsibility" and "Accountability."

"Look at those and tell me if a marine who lives by that code can be gay in the military and live with himself," J. says. "They encourage integrity, but they expect us to lie."

Yet none of this seems to have blunted J.'s passion for the military. "If I could do it all over again, I would have gone Air Force," he says. (The Air Force and the air wings of the Navy and the Marines are seen as being less intensely homophobic environments.) "But now that I'm a marine, I'm a marine through and through. It's in my blood."

Still, for gay service members, devotion to the military is fraught with the knowledge that it will turn on them instantly if it learns one of the most basic facts about them. Many are haunted by the story of Lieut. Col. Loren S. Loomis of the Army, winner of two bronze stars and a purple heart in Vietnam, whose homosexuality was exposed in a way few could have imagined. After his house near Fort Hood, Tex., caught fire in 1996, the Fire Department, suspecting arson, took a video camera and a videotape from Loomis's home as part of its investigation. The video showed Loomis engaging in gay sex. Although the Fire Department had removed the video without a search warrant or a subpoena, the district attorney's office nevertheless turned it over to the Army. Loomis offered to retire early, but was discharged instead, and thus deprived of his active-duty pension and retirement bene-

fits. Most chillingly to gay service members, his ouster came just five days before his 20-year retirement eligibility would have begun.

"In flight school, in every school I was in," says P., the former F-18 pilot, "I finished first. In every squadron I was in, I was always the No. 1 guy. But no matter how many times you're No. 1, if they find out you're a homo, you're out."

AFTER DINNER, I HEAD WITH R. and some of his friends to Flicks, a gay bar popular with military men and their civilian admirers, known as "chasers," some of whom emulate the distinctive Marine "high and tight" haircut — shaved almost to the scalp around the sides of the head with a flat wedge of hair along the top. Part of the allure of military men is that they're tested regularly for H.I.V. and thus are perceived as "clean."

Andrew Cunanan, who is believed to have murdered Gianni Versace and others, was a chaser, and Flicks was his bar of choice. His bloody rampage across America has fueled the wariness R.'s crowd already says it feels toward civilian homosexuals; at Flicks, he and his friends are a somewhat insular presence, clean-cut and light drinking — most rise at 5:30 A.M. and are in their offices by 6:30 or 7. They talk among themselves or with the other military men they encounter. The night's entertainment is a performance by a former marine, now a stripper and porn star, but that's not why they're there. Military socialization, with its emphasis on patriotism and war, structure and rank, is conservative and unique; it creates a gap between soldiers and civilians that doesn't disappear simply because both are gay. R. and his friends tend to be leery of "nellie," or effeminate, men, though it is a prejudice of which they are somewhat ashamed.

"I know very little about gay culture," R. says. On a gay cruise he and David took recently with some military friends, R. was mystified by a drag spoof of "Whatever Happened to Baby Jane." "The whole place is going wild, and none of us had seen 'Whatever Happened to Baby Jane,'" he says, and admits to finding the hedonism in some pockets of gay culture — the all-night dance parties, for example, which David enjoys — wearying and empty. As for gay advocates in San Francisco and Washington, many of whom are left-leaning and anti-military, R. says: "I don't think they speak for us. I don't think they understand us."

Part of what they don't understand, of course, is what it's like to function in a world where even saying that you are gay is illegal. After the gay

cruise, R. says: "When I was going back to work, I actually felt sick, nauseous with dread. I go to bars and these people are able to live without fear. It makes me jealous. It puts a barrier between us."

Yet this barrier leaves R. and his friends in something of a no man's land: socialized by the military but divided from it by sexual orientation; bound to gay culture by definition, yet culturally estranged from it. In a sense, they belong to a group consisting only of one another.

Most of them leave Flicks at 10:30, before the stripper begins performing, and head home to bed.

WHAT R. AND HIS FRIENDS HOPE TO WARD OFF through the use of stunt babes, phony photos and other false trappings of heterosexual life are any formal inquiries into their sexuality. Under "Don't Ask, Don't Tell," an inquiry cannot begin without credible information that a person has made a statement of homosexual orientation or engaged in homosexual conduct, but what exactly constitutes "credible information" is up to the commanding officer. (C.O.'s are advised to check with legal counsel before beginning such inquiries.) **Sonya Harden**, a heterosexual black enlisted woman with the Air Force, was investigated for homosexuality after a former civilian roommate who claimed that Harden owed her money forged letters in Harden's name stating that she was gay and gave them to her commanding officer. Harden's C.O. initiated an inquiry. Such inquiries are often as simple as questioning the service member — or, in the practice, discouraged but still extant, known as witch hunting, pressing the service member for the names of other homosexuals in exchange for leniency. Some inquiries are more complex: in the case of D., a black female marine who was in training for the Military Police, the inquiry included interviews with her parents, her childhood friends and even her prom dates — 300 pages of testimony.

After investigating, a commanding officer must decide whether a service member has, in fact, made a statement of homosexuality or engaged in homosexual acts, which current policy defines as any bodily contact that "a reasonable person" would understand to be for purposes of sexual gratification or an expression of homosexuality — in some cases, as little as a kiss, a hug or hand-holding. If the C.O. determines that a basis for discharge exists, he or she will initiate "separation" proceedings — the administrative process whereby a service member may be prematurely discharged. In the case of D., who had been caught lying on a bed fully clothed with another female trainee, the C.O. read through hundreds



Shadow warriors:
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of pages of testimony and decided not to seek a discharge. But in Harden's case, the C.O. went ahead with her discharge despite the fact that, by then, her accuser had recanted and had admitted to having forged the incriminating letters.

Service members like Harden who choose to fight their separations must appear before a separation board. Once things have come this far, though, a number of factors weigh heavily against the accused. For one, because a separation hearing is an administrative rather than a criminal proceeding, there are no strict rules of evidence; the Government can present or exclude virtually anything it wants, no matter how it was obtained. (That was why, in Colonel Loomis's case, the videotape could be used against him.) In Harden's case, the Government presented the forged letters — even though the forger herself testified before the board on Harden's behalf — and also chose to exclude a polygraph, which Harden had passed.

Another factor weighing against a service member in a separation hearing is that the members of the typically three-person panel who will determine his or her fate are chosen by — and sometimes answer to — the very commanding officer who is presenting the allegations. Moreover, although the accused is entitled to a military defense lawyer, and by all accounts these lawyers defend their clients assiduously, they are notoriously overworked. Sometimes service members are not provided a lawyer — or even told what they are being charged with — until

discharge paperwork is already pending, at which point little can be done to stop it. And most enlisted people cannot afford civilian lawyers.

But perhaps the biggest hurdle facing a service member in a homosexual case is the near impossibility of proving that he or she is unlikely to engage in homosexual acts. "You have to prove that you not only don't have sex, but you have no propensity to," says Beatrice Dohrn, legal director of the Lambda Legal Defense and Education Fund. "How do you prove that?" With great difficulty, it would seem — even if, like Harden, you are heterosexual. Three former boyfriends testified on her behalf, and Harden gave a sworn statement, but the separation board still ruled against her, and she was discharged in August 1996. "Once somebody says you're gay, you can sleep with a hundred guys, but they're still going to say, 'She's gay,'" Harden says. Harden filed a complaint with the Inspector General of the Air Force, whose job is to investigate alleged command abuses. He ultimately concluded that Harden had been treated fairly without ever interviewing her.

On Harden's discharge form, beside her honorable discharge (in the absence of aggravating circumstances, policy stipulates that the character of a homosexual discharge be commensurate with the character of the person's service) are the words, "Homosexual Acts." She will carry that form with her for the rest of her life, and some employers will want to see it. Even on the so-called short form, there is a code barring reenlistment that many employers recognize.

"The humiliation goes on," says Harden, a sad-eyed woman who now works as a police officer in Louisiana. She still wears her Air Force ring.

ON A BRIGHT, WINDY SPRING FRIDAY, R. AND I attend the weekly graduation ceremony at the Marine Corps Recruit Depot in San Diego. R. wears his dress-blue trousers, which have a thick red stripe down each side to show that he is an officer; his white "cover," as hats are known in the military; a long-sleeved khaki shirt, and khaki tie. He has misplaced his officer's tie clip; appearing at the graduation without one is out of the question, so we stop to buy another. The marines we pass on our way to the graduation salute R. crisply and say, "Good morning, Sir," as R. returns the salute. He admits to falling naturally into the designated marine walk, swinging his arms so that each hand extends six inches beyond his body and then three inches behind it.

The six graduating platoons, all male (female marines are trained on Parris Island, S.C.), stand perfectly still, occupying a tiny fraction of a runway-size courtyard surrounded by golden California Mission-style buildings. They have just completed three months of famously punishing training — longer than boot camp in the other military services. As the Marine band begins to play, R. looks at the hundreds of identical-looking soldiers and says: "There's 500 of them. You figure, probably 50 are gay."

During his early years in the Corps, R. had two homosexual experiences, which he viewed as the temptations of Satan. His transformation from rabid homophobe to gay man occurred haltingly over seven confusing years. At times he felt an urge to bond with his enlisted men that led him once to share a hotel room with some of them during a trip in Asia — an act of fraternization and favoritism that he now deplors. "I was in denial," he says. "I told myself I was an officer looking out for my men in a foreign country. Now I see that I was attracted to my men."

It was in 1992 that R.'s perception of himself began to shift. In an officer's meeting, he says: "Somebody told a gay joke, and everyone laughed. Then he said, 'You know, faggots are the last group of people that a marine can joke about without having to worry about offending anyone.' And I said, 'Yeah!' But somewhere in the back of my mind I thought: Good. He can't tell I've had sex with two men."

Several months later, R. admitted to himself that he was homosexual and experienced a tremendous relief, even euphoria, along with a heightened awareness of his actions. "Right after I admitted it, we went to some training in the desert, and they had field showers," he recalls. "It's a room full of 50 naked men. I purposely waited until the very end, when I was the only one there, because I thought, Someday everyone's going to know I was gay, and I don't want anyone saying: 'Oh, I re- Continued on page 40

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member. He used to leer at me in the shower." To this day, he showers alone whenever possible.

R.'s problems as a gay marine were just beginning. A rumor reached him that after a group sexual experience he was involved in with female prostitutes in the Philippines a year earlier, someone had described him as a guy who was looking a little too closely at other men's anatomy. Desperate to quash the rumor, R. invited a female friend to San Diego to pose as his girlfriend. While at a bar with R., she became interested in one of the straight marines she was supposed to be deceiving. R. made it clear that if she wanted to flirt with the man, she and R. would first have to stage a fight, which they proceeded to do. "We were screaming," he says, "and I went like I was going to hit her. 'You bitch, you're a slut.'" R. charged out of the bar, passed a couple of hours at a gay bar nearby, then returned to pick up his "girlfriend." By this time, however, the heterosexual marine was bruising for a fight over the way R. had treated the woman, and R. narrowly escaped a punch-out. His life of paranoid dissembling had begun.

When the graduation ends, we drive to Camp Pendleton for lunch. Passing through one of the many military checkpoints in and around San Diego has the quality of falling into a parallel universe; today, near the Staff Noncommissioned Officers' Club, teams of military prisoners in bright orange coveralls are manicuring hedges. As we head inside the dining room, R. is greeted by a leathery man with vivid blue eyes wearing cammies. "How's life on the other side?" the man barks.

I feel R. go tense beside me. "What other side, Sir?" he asks.

"The other side you're on," the man says, and laughs.

While eating his Reuben sandwich, R. mulls over the encounter, trying to recall where he had previously met the man, what he could have meant by "the other side." There are many "sides" in the Marine Corps: officer versus enlisted, ground versus air wing, active duty versus reserves. Most likely, R. muses, the man was alluding to his stint as a general's aide. But the question lingers: Does he know?

We have arranged to meet M., a gay female friend of R.'s, at lunch.

Because she is not in uniform, having just come from a farewell party, M. is able to join us despite the fact that R. is an officer and she is a staff N.C.O. Still, M. grows anxious at our table; like most military women, she functions in an overwhelmingly male environment where she says that she feels intensely scrutinized. An attractive woman with a small gold cross around her neck, M. has told only one of her heterosexual colleagues, a civilian, that she is gay. "It is relaxing, or easing, to feel like she knows me," M. says.

If male homosexuals feel pressure to invent heterosexual lives, the pressure on women is exponentially greater — they represent 14 percent

for gay military women is a problem they share with straight women: they are often deeply resented by their male colleagues and subordinates, many of whom still feel that women shouldn't be serving at all. Being gay is a vulnerability for women that some male colleagues are only too happy to exploit. The C.O. of one of M.'s friends has threatened to sit outside her house all night to prove that she has female lovers. Often, gay women are reluctant to report sexual harassment for fear of retaliatory investigations into their sexuality. A., an Army officer who has been deployed to both the Persian Gulf and Bosnia, filed a sexual-harass-

At least some of R.'s gay friends in the military don't dispute this view. "Homophobic people don't want to work with a fag," one officer said. "The group falls apart, we do not fight effectively." And while it is true that many NATO countries allow homosexuals to serve openly in their militaries (as does Israel), anecdotal evidence suggests that most homosexuals in these forces still remain closeted — and must, if they wish to advance in rank.

There is a hesitation to dispute the military's arguments. I, like most Americans, have no idea how wars are fought, and it is easy to underestimate the deep animus toward homosexuals that exists in the armed

'In flight school, in every school I was in, I finished first,' says P., a former F-18 fighter pilot. 'In every squadron I was in, I was always the No. 1 guy. But no matter how many times you're No. 1, if they find out you're a homo, you're out.'

of the armed forces, yet have accounted for roughly a quarter of the homosexuals discharged over the past four years.

Several years ago, M. took a step that is quite common among gay military personnel of both sexes: she got married. In addition to the obvious boon of creating the appearance of heterosexuality, marriage in the military brings myriad financial benefits; the most important is a higher Basic Allowance for Quarters when you live off-base — essential for any homosexual who wants a private life, but on an enlisted salary, which begins at \$11,113 per year, virtually unaffordable. Marriages of convenience, either between gay men and women or with foreigners seeking American citizenship, are one solution.

M. married a civilian homosexual so that she could live off-base with her partner while securing medical benefits for her "husband," who was her partner's best friend. But guilt over deceiving the Government soon began to gnaw at her. Her relationship foundered; when M. told her partner that she was divorcing the friend, the woman threatened to tell M.'s C.O. that she was gay. Panic-stricken, M. nevertheless held her ground. "I said, 'Go ahead, there are going to be three of us in jail,'" she says. M. proceeded with the divorce, and her partner kept quiet. "I felt haunted by that nightmare for years," she says.

Yet perhaps the biggest problem

ment complaint against a superior who demanded sexual favors from her. Some months later, an anonymous assertion that she was homosexual appeared in A.'s personnel file, and her security clearance was suspended.

M. has spent more than 10 years in the Corps, but like R., she plans to end her career when her present enlistment is up. "I'm sick of living the lie," she says. "What scares me is that it gets to the point where you don't even notice it. You start to withhold information that you don't have to. *How was your night? Oh, good.* I'm practicing saying, *We did this and we did that.* Kind of remembering that this is human interaction, and this is O.K."

THE MILITARY IS ADAMANT that it cannot allow homosexuals to serve openly without greatly compromising the readiness and effectiveness of its troops. Military personnel live and work under intimate conditions that would shock most civilians. (On the U.S.S. Constellation, an aircraft carrier I toured, the enlisted men's berthing quarters were crammed with three-tiered bunk beds the size of large dresser drawers.) Unit cohesion is at the heart of a successful fighting force, and Gen. Norman Schwarzkopf and Gen. Colin Powell argued passionately before Congress that openly homosexual men and women would polarize units and destroy that cohesion.

forces. (General Schwarzkopf, for one, says he believes that allowing homosexuals to serve openly would sharply discourage enlistments.)

Still, several factors complicate this picture. For one, homosexuals have served in the armed forces since the country was founded (even earlier, actually; one of George Washington's generals is said to have been gay), and many have served openly — their units knew of their sexual orientation — without apparent problems. Brig. Gen. Pat Foote, who retired in 1989 after 29½ years in the Army, says, "I don't know many serving officers or N.C.O.'s who have not, in units with which they were affiliated, known that there were men and women other than heterosexuals doing magnificent jobs." Maj. Gen. Vance Coleman, who was wounded in the Korean War and is now retired from the Army, says that he served with homosexuals without incident.

General Coleman, who is black, says that the present-day arguments against allowing homosexuals to serve openly echo prior ones against integrating blacks in the armed forces — including the claims that white soldiers would not follow orders given by black officers and that whites and blacks could not peaceably share a foxhole. When President Truman overrode those arguments in 1948 with an executive order to integrate,

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military personnel, among others, reacted with horror.

Referring to homosexuals in the military, General Coleman says: "This is a civil rights issue and a human rights issue. You're not the same as I am, therefore you're inferior."

Perhaps another factor complicating the military's argument against homosexuals serving openly is that discharges of homosexuals, some suspect, fall during wartime; indeed, revelations of homosexuality during wartime are often received skeptically by the military, as possible ruses to avoid combat, and a person must sometimes furnish sworn statements from sexual partners to be discharged. Though the Pentagon disputes this, General Coleman, among others, says he believes that concern about the presence of homosexuals

is a peacetime obsession. "When there's a war, nobody has time to deal with that," he says. "It's about fighting and winning."

Tom Carpenter, a former Marine fighter pilot who met his partner of 20 years, a former naval flight officer, while on active duty in the 70's, says he believes that the military's revulsion from homosexuality is linked to the intense male bonding that has traditionally been a part of military life. Like many historically all-male environments, the military has had its share of homoerotic rituals — most famously the Navy's "Crossing the Line" ceremony ("modified" and "supervised" nowadays, according to the Navy, but said to still occur unmodified on at least some ships). "Crossing the Line" is an initiation for new sailors, or "polliwogs," making their first Equator crossing. Elements of this ritual include

the crowning of "King Neptune's queen," played by a young sailor in drag; the whipping and paddling of polliwogs by a gantlet of seasoned sailors, known as "shellbacks," and sometimes simulated fellatio and anal intercourse between shellbacks and polliwogs. At the conclusion, the young initiates strip off their soiled uniforms and pitch them into the sea, then mill about in the nude as proof that they, too, are now shellbacks.

Indeed, by many accounts, what is known as "conditional homosexuality," or homosexual behavior by men who are normally heterosexual, is not uncommon among soldiers during long periods when women are unavailable. Navy phrases like "It ain't queer unless it's tied to the pier" allude to such behaviors. Some married men, it is said, believe that sex with another man does not constitute adultery. There is

even a provision in "Don't Ask, Don't Tell" that excuses homosexual conduct if it is aberrant behavior for an individual. Bridget Wilson, a San Diego lawyer who has defended gay military personnel, calls this the queen-for-a-day exception.

Lois Shawver, a clinical psychologist whose book "And the Flag Was Still There" studies attitudes toward homosexuality in the military, says, "The sense of the troops' being demoralized is built on the anxiety that gays are going to stare at them and turn on them sexually." But Shawver's research suggests that this fear is unfounded — that, in fact, homosexuals regulate their behavior even more carefully when they are known to be gay. As for exceptions, military policy and, in some cases, the Uniform Code of Military Justice prohibit displays of physical affection while in uniform, sex in military bar-

racks, sex between people of different ranks and sodomy, which includes oral sex.

"We have within the U.C.M.J. all that we need to deal with people that bring any type of sexual misbehavior to the workplace or the barracks," says General Foote, who recently served as the vice chairman of the Army's Senior Review Panel on Sexual Harassment. "We don't need any more laws."

THE NEXT TIME I SEE R., a few weeks later, the weather is warmer and El Niño has roused rashes of fluorescent purple flowers along Interstate 5. At the end of his workday, we drive from Camp Pendleton to Hillcrest and meet the tank officer I'd first met at the pizza dinner and his male partner, a naval nurse, in the home they share with a burly chow and a small striped cat.

Over beers, R. recounts a
Continued on page 56

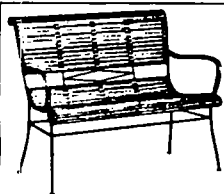
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UNIFORMS

Continued from page 48

quintessential gay-military snafu that occurred at the Marine officer's brunch he attended a few Sundays back. The officer had invited his straight military friends for brunch on Saturday, his gay friends on Sunday, but one straight Navy pilot got the days confused and arrived with his wife in the midst of the all-male brunch. The host panicked, feigned an emergency and bolted from his own party.

But the heterosexual couple, apparently unfazed, were still there when the shaken host finally returned. According to R., the Marine officer then took his straight friend into a quiet room and said, "There's something I have to tell you" — at which point the guest seized his arm and answered: "Don't worry. I'm on board with the program."

There are people who feel that as a younger generation rises to power within the military, attitudes like that of the Navy pilot will gradually prevail, and that the laws barring open homosexuality will fall away, just as those barring women and blacks eventually did.

But "Don't Ask, Don't Tell" is now Federal law, and laws are not changed easily. So far, the Supreme Court has refused to hear a case challenging it, and three Circuit Courts have upheld the policy. However, the Second Circuit Court, in New York City, recently heard an appeal of a case in which a lower-court judge ruled that "Don't Ask, Don't Tell" violates the constitutional rights of equal protection and free speech. That case, *Able v. the United States*, may yet reach the Supreme Court, but even then, precedent suggests that the Court may defer to the military.

"If you look at the case in terms of the law and reason, it looks like an overwhelming winner," says Matt Coles, director of the Lesbian and Gay Rights Project of the American Civil Liberties Union, which filed the case jointly with Lambda. "But if you look at it in terms of the courts and the military, it looks like it doesn't have a chance."

The more likely venue for change is Congress, but that, too, seems a long way off. Republicans are virtually unanimous in their opposition to gay rights; so far, even the Employment Non-Discrimination Act, a basic gay rights

bill, has failed to pass. Representative Barney Frank (Democrat of Massachusetts), who is openly gay and opposes "Don't Ask, Don't Tell," says that should the Democrats win even a small majority in the House and the Senate in November (no small task), the gay rights bill could eventually pass. However, he holds out little hope for lifting "Don't Ask, Don't Tell" anytime soon.

"The military issue is unfortunately seen as a tougher one," he says. "So you'd need a bigger Democratic majority for that."

Whatever happens, R. will be reading about it in the newspapers, like everyone else; in a few months, he will become a civilian for the first time in his adult life. It won't be an easy transition for him. "It's a way of life," he says of being a marine. "David and I will be walking down the Oceanside Pier, and somebody will see me, and they'll be like, 'Sir, how are you doing?' David's like: 'You're not at work! You're not in uniform! Why are they calling you Sir?' I'm like: 'That's just the way it is. I can't explain it.'"

But R. joined the Marines for the brotherhood, the esprit de corps, and ultimately, his sense of brotherhood has been eroded by the years of hiding. "For the longest time, I felt close to the people," he says. "But more and more, when you hear somebody make an anti-gay comment, that becomes a bookmark in your mind. I can't become close friends with the people I work with. It's definitely made me grow apart from the Marine Corps."

His experience raises the question of whether openly gay soldiers are as great a threat to unit cohesion as closeted homosexuals, whose enforced secrecy gradually distances them from their fellow soldiers. A., the woman who served in the Persian Gulf and in Bosnia, says that as a homosexual "you have this barrier to intimacy with the people you're serving with — and that intimacy is what keeps people alive in hostile situations."

Among the many paradoxes surrounding the issue of homosexuals in the military is this: the fact that R. has thrived in the military — and has the record to prove it — is partly what impels him to move on. "I want to leave in a pristine state," he says. "I'm tired of the looming prospect that tomorrow the whole world could come crashing down." ■

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Congress of the United States
Washington, DC 20515

February 10, 1998

President William Jefferson Clinton
The White House
Washington, D.C. 20500

Dear Mr. President:

FEB 18 1998 12:40

As members of the House Judiciary Subcommittee on Courts and Intellectual Property, we are writing to express our concern regarding the much-publicized case of ETCS(SS) Timothy R. McVeigh, who faces administrative discharge from the Navy as a result of the unauthorized disclosure of confidential information by an Internet service provider, in apparent violation of the Electronic Communications Privacy Act (ECPA).

Both Democrats and Republicans are watching this case with the keenest attention. Some of us oppose the policy requiring the discharge of gay service members; some of us support that policy. However, while we may disagree on this underlying issue, we are united in our concern over the implications of this case for the development of the Internet and the legitimate privacy interests of those who make use of it.

Last year, the Judiciary Committee approved legislation that would protect the security of on-line communications by providing Internet users with unrestricted access to advanced encryption technology. That legislation is opposed by federal law enforcement agencies which insist that the government be given a "key" that would unlock encrypted messages.

When concerns have been raised that a key recovery system would compromise public confidence in the integrity of confidential communications, these agencies have repeatedly given their assurances that encryption keys would not be used in the absence of a warrant or court order. Yet what are we to make of such assurances when the Navy could so readily circumvent the warrant requirements of the ECPA in order to obtain private subscriber information?

Now is the time for the Administration to send an unequivocal message to Americans of every political persuasion that government agencies will not be permitted to gather private information on American citizens without their consent and in violation of federal law, or to take punitive actions on the basis of private information that has been illegally obtained.

We respectfully urge you to order a full investigation into this case, and invite you to work with us to ensure that such incidents do not recur.


Howard L. Coble

Sincerely,

William D. Delahunt

The New York Times Magazine

JUNE 28, 1999

SECTION 6

THE
JOURNAL OF
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COLLECTIONS
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The Shadow Life of a Gary Marine

By Jennifer L.

Uniforms in the Closet

By Jennifer Egan

Before R., a Marine Corps officer, leaves Camp Pendleton, he changes out of the starched camouflage suit that is the everyday uniform of marines into "civvies" — in R.'s case, jeans and a T-shirt. It is normal for a marine to change clothes before leaving the base; by shedding his "cammies," R. leaves behind the obligation to salute other marines in uniform. But for R., the change is also symbolic: as a marine who is gay, he looks forward to the end of each workday as a reprieve from hiding part of himself from everyone around him.

Most days, the marines in R.'s battalion are not in the field but at their desks in a modest office building, set amid scrubby Southern California coastland, where images of wives and crinkly faced infants smile from picture frames and computer screens. In R.'s office, the décor is strictly military: photographs of his various units over the 12 years he has been a marine, a picture of the general whom he served as an aide — a demanding and highly prestigious job. (R. has also been a commanding officer, bearing ultimate responsibility for a unit.) R. wishes he could place on his desk a photograph of David, a civilian mechanical engineer and his partner of three years, but a man's picture would almost certainly kindle suspicions. Even a personal telephone call from a man might be considered unusual, so David almost never calls R. at his office, where a single phone line serves dozens of marines.

Yet despite these and a multitude of other precautions, he worries that some men in his unit suspect that he is gay — in part because he is over 30 and unmarried; in part because years of hiding have made him deeply paranoid. "Sometimes I feel like they can look at me and just tell," says R., who would speak with me, and allow me into his life, on condition that I refer to him only by one of his initials. (Other gay military personnel I interviewed

Photographs by Matt Mahurin

for this article similarly requested anonymity.)

Driving from Camp Pendleton into San Diego, 40 miles south, R. grows visibly more relaxed. He has a California tan, deep-set eyes and the sturdy build characteristic of marines, along with a large Marine Corps tattoo — eagle, globe and anchor. A vigorous, sociable man, he is full of plans. After work tomorrow, he will make the two-hour drive north to David's house in Los Angeles, as he does each weekend. On Sunday, they will go to brunch at the home of a gay Marine officer. In a couple of weeks, R. will accompany his battalion to "the desert," Twentynine Palms, a Marine base outside Palm Springs where field training exercises are performed. From there he will head into Palm Springs for the annual White Party, a large all-night gay dance.

This constant switching between mutually exclusive worlds can have some odd, hallucinatory effects. R. says: "Several times I've met someone on base and wondered, Haven't I seen him at a bar? And then I've seen people at bars and thought I recognized them from the base. When I see someone at the mall, I can't remember where I know them from."

R. joined the Marines as a teen-ager and is fiercely loyal to the Corps, particularly to the enlisted men who answer to him — "my marines," he calls them, and adds, "I'm a marine first and gay second." His career has been stellar; he is what is known in the Corps as a "mustang," an enlisted marine who crossed over to become a commissioned officer. "Now that I've been a commanding officer and a general's aide, sky's the limit," he says. Military retirement, which can begin after 20 years, would allow him to draw half his base pay for the rest of his life. But R. plans to leave the Marines at the end of his current commission. The reason is simple. "I'm fed up," he says, "with having to hide."

It has been more than four years since the policy known as "Don't Ask, Don't Tell, Don't Pursue" went into effect. This policy was a compromise eked out among the White House, Congress and the Pentagon after President Clinton's announcement of his intention to lift the ban on homosexuals in the military — a ban that prohibited homosexuals from serving under any circumstances — set off a firestorm of opposition. Under "Don't Ask, Don't Tell," homosexuals (and bisexuals) may serve as long as they tell no one about their sexual orientation, refrain from "homosexual acts" and forgo homosexual marriage. The policy bars the military from questioning service members about their sexual orientation or investigating them without credible information that they have engaged in homosexual conduct. The stated goal of the policy is to allow homosexuals to serve while preserving mo-

Pride and prejudice:
"A marine first
and gay second,"
R. (shown with
David) is planning
to end his stellar
military career
because, he says, "I'm
fed up with
having to hide."



rale and unit cohesion, which the military believes would be impaired by the presence of openly gay soldiers. But "Don't Ask, Don't Tell" forces a difficult choice upon homosexuals: in order to serve, they must either do without sex, romance and companionship or live uncelibate lives and lie about it — breaking the law and forfeiting their careers if they are caught.

Two months ago, the Pentagon issued figures indicating that the number of homosexuals discharged — 997 in 1997 — has risen 67 percent since "Don't Ask, Don't Tell" went into effect. Michelle Benecke, co-founder and co-director of Servicemembers Legal Defense Network, a watchdog group that assists military personnel accused under "Don't Ask, Don't Tell," says she believes the rise in discharges indicates that commanders are continuing to seek out homosexuals despite the fact that they are no longer supposed to. "No one has informed commanders of what the new rules are," says Benecke, whose organization has documented 1,379 command violations of the policy in the four years of its existence. "No one has ever told them the intent: to back off."

The Pentagon disagrees, attributing the rise in discharges to an increase in "statement" cases, in which homosexuals — many of them in their first year of service — openly declare that they are gay. But what the military regards as a statement is not always so clear-cut: last November, the Navy tried to discharge a senior chief petty officer named Timothy McVeigh, a nuclear submarine

expert who had been in the service for 18 years, on the basis of what it called his homosexual admittance. McVeigh's so-called admittance was an Internet posting with America Online in which he stated, anonymously, that his marital status was "gay"; a Federal judge ruled in January that the military's investigation of McVeigh was in violation of policy and ordered that McVeigh, who has declined to discuss his sexual orientation, be retained. Earlier this month, McVeigh and the Navy reached a settlement under which he will retire this summer with full benefits and receive a payment of \$90,000 to cover his legal fees.

During a recent interview, Kenneth H. ... the Pentagon spokesman, told me: "Obviously, there are many people serving in the armed forces who have gay relationships, but they're discreet. They aren't pursued, and they may not even be known about." This suggests a split between the letter and the spirit of "Don't Ask, Don't Tell": the letter says, Don't do it; the spirit says, It's O.K. to do it as long as you are discreet. But this double message leaves homosexuals on a very uneasy middle ground: theoretically, they are allowed to serve, but their private lives are illegal and will cost them their careers — if they get caught. But then, no one is supposed to be trying to catch them. When I raised this notion of the policy's murkiness with Rudy de Leon, Under Secretary of Defense for Personnel and Readiness, he said, "I think we're at the heart of some of the conflicts that are built into the policy, which tries to balance many competing interests."

Jennifer Egan, a novelist, has written for *The Times Magazine* about teen-age fashion models and young women who cut themselves.

The Days of Don't

gay culture, R. says
 friends, R. was
 named to Baby Jane.

If, as the Pentagon says, some homosexuals are outing themselves with the knowledge that they will be discharged, it may be that for them, the pressures and risks of serving under "Don't Ask, Don't Tell" are too intense to bear.

R. IS PART OF A SPRAWLING social network of gay marines and sailors, men and women, based in and around San Diego, where the shoreline bristles with dull gray ships and the sky is full of lumbering choppers and S-3's, anti-submarine-warfare planes that honk like gigantic geese as they fly. On this unseasonably cool spring evening, I accompany R. to a 6:30 dinner at the home of a Navy doctor near Hillcrest, a gay neighborhood north of downtown San Diego. The group tonight includes a tank officer who was one of the first to enter Kuwait during the gulf war, where he earned a bronze star; a Navy helicopter pilot, and several noncommissioned officers, or N.C.O.'s — enlisted men who have worked their way up through the ranks. The off-duty mingling of officers and enlisted people of different ranks is prohibited because of its potential to break down the chain of command, but the fact that gay personnel are forced underground creates a bond among them that transcends military hierarchy. None of these friends work together; they met socially and communicate mostly by E-mail, using a code that eliminates gender-specific pronouns, since the military can monitor any E-mail exchanges that take place on a base. (Most of R.'s friends say they have never met a gay person on duty; even when they suspect that a fellow sailor or marine might be gay, they rarely approach — the risk of being wrong is too great.)

Like a number of his friends, R. joined the military believing he was heterosexual. Reared and educated in a strict Southern Christian community, he was profoundly homophobic. "I would say, 'AIDS is God's judgment on homosexuals' — I really felt that," he says. He was drawn to the Marines by the camaraderie, by the promise of adventure — and also by the largely single-sex environment. "I would think I'm going to be with all these men — that's kind of exciting," he says. "But I didn't know why I was excited."

Some of R.'s friends, aware of their homosexual inclinations, joined in hopes that the military — the Marines in particular — would "cure" them. "Everybody knows that there are no fags in the Marines," says a former infantryman. Over pizza, R.'s friends talk of other motivations for joining the military, including the de-

sire to get away from home and the hope of proving themselves to a disapproving world. "I'm supposed to be that one guy that can't survive in this environment," says one powerfully built man, an operations officer in the Marine air wing. "I'm the guy that's supposed to be filtered out, the weak one who can't carry the pack."

This officer goes on to tell me that his homosexuality is an open secret. "I know that in my command there are marines who work for me that assume I'm gay," he says. But he is clearly the exception. A logistics officer I'm introduced to at dinner has a dedicated "stunt babe" — a woman who poses as his girlfriend at military events and whose picture he keeps on his desk. The annual Marine Corps Ball, I learn, is the biggest command performance of this sort: R. usually brings a date with whom he has collaborated on a complex romantic history while David stays home, watching TV. It isn't enough to say nothing about your private life; unless you give the appearance of being heterosexual, people will start to wonder — especially now that "Don't Ask, Don't Tell" has alerted them to the fact that there may be homosexuals in their midst.

As a result, R. and his friends monitor themselves obsessively, aware that a single blunder can lead to exposure, humiliation and a discharge they regard as a disgrace — particularly those, like R., whose families don't know they are gay. A strange car in front of your house, clicks on the telephone line, a summons from the commanding officer — in the life of a gay soldier, any one of these can prompt a flicker of anxiety, even all-out panic. "Say you're out with four or five of your friends at a restaurant, and there goes somebody in your department with his wife," says the Navy doctor who is the host of the pizza party. "You know you're nailed."

Even gay nightclubs can be a hazard, although "Don't Ask, Don't Tell" has discouraged the trolling of clubs by investigators, a formerly common practice. One officer says of a popular San Diego club: "Last time I was there on a gay night, I ran into two of my marines, who were there by mistake. They were like, 'Hey, Sir, what're you doing here?'" Another of R.'s friends, P., was an F-18 fighter pilot who dropped bombs on Iraq during the gulf war before leaving active duty three years ago. (He is still with the Marine reserves.) P. was in a long-term relationship with his civilian "roommate" while in the military, but feigned a romance with a lesbian friend for three years to avoid having to go on any more blind dates set up by the Officers' Wives Club. A fair, soft-spoken man who has retained his marine build and haircut, P. says

his hardest times were the six-month deployments on aircraft carriers, when he and P. were rarely able to speak, and when P. rationed the letters he sent home out of that too many to the same man would draw attention. The letters his partner sent him unsigned or signed with a female name, sent out a return address and chary on endearments. (During R.'s ship deployment, he asked P. to have a woman address his letters.)

Each month, P. recalls, a videotape would arrive on his ship, fashioned by the Officers' Wives Club, filled with greetings from loved ones. "Everybody else in the squadron's wife or girlfriend would be in the video saying, 'Hey, honey, how're you doing?'" he says. "And you'd be the only one without anything on that tape."

At the end of the deployment, when the was within six or seven days of land, senior with wives or fiancées would get to fly the ashore early to be with their loved ones. Though P. was always among the most senior, he, being single, had to wait until the ship docked. "You get off, you have this huge welcome-home ty and everyone else is there, except yours," he says. "He could be, except you'd have to stand there and shake his hand: *Thanks for coming, buddy.*" And, of course, being met by a man after six months at sea might well arouse suspicions.

Still, in this crowd it is generally felt that gay enlisted people, not officers, have it the worst. The enlisted are a tighter pack, which makes keeping secrets much harder, and the homophobic atmosphere tends to be far more virulent. Twelve of the homosexuals discharged in 1997 were officers; the remaining 985, enlisted people. J., an N.C.O. who says he has witnessed beatings and harassment of those suspected of being gay, told me he would fear for his life if his subordinates were to discover his secret. He socializes in Hillcrest, but tells subordinates he goes to bars they can't afford: "I'll say: 'Dude, I met this babe last night. We hit it off!' You have to lie. They're like a pack of dogs — if they smell blood, they're going to go after it. You're dealing with kids, 18 or 19 who are trying to prove their manhood." Homosexual jokes and slurs, he adds, are a constant.

So saturated is the Marine Corps with homophobia that some of R.'s friends agree with the Pentagon that they should not be allowed to serve openly, that it would hinder their ability to lead. R. used to feel this way, but like the majority of gay personnel I spoke with, he has come to believe that although President Clinton had good intentions in seeking to change a draconian policy, "Don't Ask, Don't Tell" amounts to a

step backward. For one thing, it has turned discrimination against homosexuals — formerly just a military policy — into Federal law. And by forcing homosexuals to remain invisible, R. says, the policy deprives gay military people of the chance to prove themselves and begin to dispel the prejudices against them. "The best way to change people's attitudes is the personal one-on-one relationship," he says, and tells of how a close friend, a heterosexual Marine fighter pilot with whom R. used to trade jokes about homosexuals, has completely revised his views since learning that R. is gay. But under "Don't Ask Don't Tell," R. could be discharged simply for having told his friend that he is homosexual.

"Clinton thought he was doing us this big favor," R. says, "and all he did was build a brick wall around the closet."

Each time J., the N.C.O., recalls one of his fabrications, he begins, "I told a lie," as if to keep straight in his mind what is a lie and what is the truth. Clearly, so much lying troubles him. He shows me the red plastic Core Values card that every marine must carry. "Honor," begins the text, which also includes the words "Integrity," "Responsibility" and "Accountability."

"Look at those and tell me if a marine who lives by that code can be gay in the military and live with himself," J. says. "They encourage integrity, but they expect us to lie."

Yet none of this seems to have blunted J.'s passion for the military. "If I could do it all over again, I would have gone Air Force," he says.

The Air Force and the air wings of the Navy and the Marines are seen as being less intensely homophobic environments. "But now that I'm a marine, I'm a marine through and through. It's in my blood."

Still, for gay service members, devotion to the military is fraught with the knowledge that it will turn on them instantly if it learns one of the most basic facts about them. Many are haunted by the story of Lieut. Col. Loren S. Loomis of the Army, winner of two bronze stars and a purple heart in Vietnam, whose homosexuality was exposed in a way few could have imagined. After his house near Fort Hood, Tex., caught fire in 1996, the Fire Department, suspecting arson, took a video camera and a videotape from Loomis's home as part of its investigation. The video showed Loomis engaging in gay sex. Although the Fire Department had removed the video without a search warrant or a subpoena, the district attorney's office nevertheless turned it over to the Army. Loomis offered to retire early, but was discharged instead, and thus deprived of his active-duty pension and retirement bene-

fits. Most chillingly to gay service members, his ouster came just five days before his 20-year retirement eligibility would have begun.

"In flight school, in every school I was in," says R., the former F-18 pilot. "I finished first. In every squadron I was in, I was always the No. 1 guy. But no matter how many times you're No. 1, if they find out you're a homo, you're out."

A

FTER DINNER, I HEAD WITH R. and some of his friends to Flicks, a gay bar popular with military men and their civilian admirers, known as "chasers," some of whom emulate the distinctive Marine "high and tight" haircut — shaved almost to the scalp around the sides of the head with a flat wedge of hair along the top. Part of the allure of military men is that they're tested regularly for H.I.V. and thus are perceived as "clean."

Andrew Cunanan, who is believed to have murdered Gianni Versace and others, was a chaser, and Flicks was his bar of choice. His bloody rampage across America has fueled the wariness R.'s crowd already says it feels toward civilian homosexuals: at Flicks, he and his friends are a somewhat insular presence, clean-cut and light drinking — most rise at 5:30 A.M. and are in their offices by 6:30 or 7. They talk among themselves or with the other military men they encounter. The night's entertainment is a performance by a former marine, now a stripper and porn star, but that's not why they're there. Military socialization, with its emphasis on patriotism and war, structure and rank, is conservative and unique; it creates a gap between soldiers and civilians that doesn't disappear simply because both are gay. R. and his friends tend to be leery of "nellie," or effeminate, men, though it is a prejudice of which they are somewhat ashamed.

"I know very little about gay culture," R. says. On a gay cruise he and David took recently with some military friends, R. was mystified by a drag spoof of "Whatever Happened to Baby Jane." "The whole place is going wild, and none of us had seen 'Whatever Happened to Baby Jane,'" he says, and admits to finding the hedonism in some pockets of gay culture — the all-night dance parties, for example, which David enjoys — wearying and empty. As for gay advocates in San Francisco and Washington, many of whom are left-leaning and anti-military, R. says: "I don't think they speak for us. I don't think they understand us."

Part of what they don't understand, of course, is what it's like to function in a world where even saying that you are gay is illegal. After the gay

cruise, R. says: "When I was going back to work, I actually felt sick, nauseous with dread. I go to bars and these people are able to live without fear. It makes me jealous. It puts a barrier between us."

Yet this barrier leaves R. and his friends in something of a no man's land: socialized by the military but divided from it by sexual orientation; bound to gay culture by definition, yet culturally estranged from it. In a sense, they belong to a group consisting only of one another.

Most of them leave Flicks at 10:30, before the stripper begins performing, and head home to bed.

WHAT R. AND HIS FRIENDS HOPE TO WARD OFF through the use of stunt babes, phony photos and other false trappings of heterosexual life are any formal inquiries into their sexuality. Under "Don't Ask, Don't Tell," an inquiry cannot begin without credible information that a person has made a statement of homosexual orientation or engaged in homosexual conduct, but what exactly constitutes "credible information" is up to the commanding officer. (C.O.'s are advised to check with legal counsel before beginning such inquiries.) Sonya Harden, a heterosexual black enlisted woman with the Air Force, was investigated for homosexuality after a former civilian roommate who claimed that Harden owed her money forged letters in Harden's name stating that she was gay and gave them to her commanding officer. Harden's C.O. initiated an inquiry. Such inquiries are often as simple as questioning the service member — or, in the practice, discouraged but still extant, known as witch hunting, pressing the service member for the names of other homosexuals in exchange for leniency. Some inquiries are more complex: in the case of D., a black female marine who was in training for the Military Police, the inquiry included interviews with her parents, her childhood friends and even her prom dates — 300 pages of testimony.

After investigating, a commanding officer must decide whether a service member has, in fact, made a statement of homosexuality or engaged in homosexual acts, which current policy defines as any bodily contact that "a reasonable person" would understand to be for purposes of sexual gratification or an expression of homosexuality — in some cases, as little as a kiss, a hug or hand-holding. If the C.O. determines that a basis for discharge exists, he or she will initiate "separation" proceedings — the administrative process whereby a service member may be prematurely discharged. In the case of D., who had been caught lying on a bed fully clothed with another female trainee, the C.O. had hundreds



Shadow warriors:
"Clinton thought he
was doing us this
big favor," R. says
of "Don't Ask,
Don't Tell." "And all
he did was build
a brick wall around
the closet."

of pages of testimony and decided not to seek a discharge. But in Harden's case, the C.O. went ahead with her discharge despite the fact that, by then, her accuser had recanted and had admitted to having forged the incriminating letters.

Service members like Harden who choose to fight their separations must appear before a separation board. Once things have come this far, though, a number of factors weigh heavily against the accused. For one, because a separation hearing is an administrative rather than a criminal proceeding, there are no strict rules of evidence: the Government can present or exclude virtually anything it wants, no matter how it was obtained. (That was why, in Colonel Loomis's case, the videotape could be used against him.) In Harden's case, the Government presented the forged letters — even though the forger herself testified before the board on Harden's behalf — and also chose to exclude a polygraph, which Harden had passed.

Another factor weighing against a service member in a separation hearing is that the members of the typically three-person panel who will determine his or her fate are chosen by — and sometimes answer to — the very commanding officer who is presenting the allegations. Moreover, although the accused is entitled to a military defense lawyer, and by all accounts these lawyers defend their clients assiduously, they are notoriously overworked. Sometimes service members are not provided a lawyer — or even told what they are being charged with — until

discharge paperwork is already pending, at which point little can be done to stop it. And most enlisted people cannot afford civilian lawyers.

But perhaps the biggest hurdle facing a service member in a homosexual case is the near impossibility of proving that he or she is unlikely to engage in homosexual acts. "You have to prove that you not only don't have sex, but you have no propensity to," says Beatrice Dohm, legal director of the Lambda Legal Defense and Education Fund. "How do you prove that?" With great difficulty, it would seem — even if, like Harden, you are heterosexual. Three former boyfriends testified on her behalf, and Harden gave a sworn statement, but the separation board still ruled against her, and she was discharged in August 1996. "Once somebody says you're gay, you can sleep with a hundred guys, but they're still going to say, 'She's gay,'" Harden says. Harden filed a complaint with the Inspector General of the Air Force, whose job is to investigate alleged command abuses. He ultimately concluded that Harden had been treated fairly without ever interviewing her.

On Harden's discharge form, beside her honorable discharge (in the absence of aggravating circumstances, policy stipulates that the character of a homosexual discharge be commensurate with the character of the person's service) are the words, "Homosexual Acts." She will carry that form with her for the rest of her life, and some employers will want to see it. Even on the so-called short form, there is a code barring reenlistment that many employers recognize.

"The humiliation goes on," says Harden, a sad-eyed woman who now works as a police officer in Louisiana. She still wears her Air Force ring.

ON A BRIGHT, WINDY SPRING FRIDAY, R. AND I attend the weekly graduation ceremony at the Marine Corps Recruit Depot in San Diego. R. wears his dress-blue trousers, which have a thick red stripe down each side to show that he is an officer; his white "cover," as hats are known in the military; a long-sleeved khaki shirt, and khaki tie. He has misplaced his officer's tie clip, appearing at the graduation without one is [redacted] of the question, so we stop to buy another. The marines we pass on our way to the graduation salute R. crisply and say, "Good morning, Sir," as R. returns the salute. He admits to falling naturally into the designated marine walk, swinging his arms so that each hand extends six inches beyond his body and then three inches behind it.

The six graduating platoons, all male (for marines are trained on Parris Island, S.C.), sit perfectly still, occupying a tiny fraction of a runway-size courtyard surrounded by golden California Mission-style buildings. They have just completed three months of famously punishing training — longer than boot camp in the other military services. As the Marine band begins to play, R. looks at the hundreds of identical-looking soldiers and says: "There's 500 of them. You figure, probably 50 are gay."

During his early years in the Corps, R. had two homosexual experiences, which he views as the temptations of Satan. His transformation from rabid homophobe to gay man occurred haltingly over seven confusing years. At first he felt an urge to bond with his enlisted men, and he had him once to share a hotel room with some of them during a trip in Asia — an act of fraternization and favoritism that he now deprecates. "I was in denial," he says. "I told myself I was an officer looking out for my men in a foreign country. Now I see that I was attracted to my men."

It was in 1992 that R.'s perception of himself began to shift. In an officer's meeting, he says: "Somebody told a gay joke, and everyone laughed. Then he said, 'You know, faggots are the last group of people that a marine can joke about without having to worry about offending anyone.' And I said, 'Yeah! But somewhere in the back of my mind I thought, 'Good. He can't tell I've had sex with two men.'"

Several months later, R. admitted to himself that he was homosexual and experienced a tremendous relief, even euphoria, along with a heightened awareness of his actions. "Right after I admitted it, we went to some training in the desert, and they had field showers," he recalls. "It's a room full of 50 naked men. I purposely waited until the very end, when I was the only one there, because I thought, 'Someday everyone's going to know I was gay, and I don't want anyone saying: 'Oh, I re- Continued on page 40

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member. He used to leer at me in the shower." To this day, he showers alone whenever possible.

R.'s problems as a gay marine were just beginning. A rumor reached him that after a group sexual experience he was involved in with female prostitutes in the Philippines a year earlier, someone had described him as a guy who was looking a little too closely at other men's anatomy. Desperate to quash the rumor, R. invited a female friend to San Diego to pose as his girlfriend. While at a bar with R., she became interested in one of the straight marines she was supposed to be deceiving. R. made it clear that if she wanted to flirt with the man, she and R. would first have to stage a fight, which they proceeded to do. "We were screaming," he says, "and I went like I was going to hit her. 'You bitch, you're a slut.'" R. charged out of the bar, passed a couple of hours at a gay bar nearby, then returned to pick up his "girlfriend." By this time, however, the heterosexual marine was bruising for a fight over the way R. had treated the woman, and R. narrowly escaped a punch-out. His life of paranoid dissembling had begun.

When the graduation ends, we drive to Camp Pendleton for lunch. Passing through one of the many military checkpoints in and around San Diego has the quality of falling into a parallel universe; today, near the Staff Noncommissioned Officers' Club, teams of military prisoners in bright orange coveralls are manicuring hedges. As we head inside the dining room, R. is greeted by a leathery man with vivid blue eyes wearing cammies. "How's life on the other side?" the man barks.

I feel R. go tense beside me. "What other side, Sir?" he asks.

"The other side you're on," the man says, and laughs.

While eating his Reuben sandwich, R. mulls over the encounter, trying to recall where he had previously met the man, what he could have meant by "the other side." There are many "sides" in the Marine Corps: officer versus enlisted, ground versus air wing, active duty versus reserves. Most likely, R. muses, the man was alluding to his stint as a general's aide. But the question lingers: Does he know?

We have arranged to M., a gay female friend of R.'s, at lunch.

Because she is not in uniform, having just come from a farewell party, M. is able to join us despite the fact that R. is an officer and she is a staff N.C.O. Still, M. grows anxious at our table; like most military women, she functions in an overwhelmingly male environment where she says that she feels intensely scrutinized. An attractive woman with a small gold cross around her neck, M. has told only one of her heterosexual colleagues, a civilian, that she is gay. "It is relaxing, or easing, to feel like she knows me," M. says.

If male homosexuals feel pressure to invent heterosexual lives, the pressure on women is exponentially greater — they represent 14 percent

for gay military women is a problem they share with straight women: they are often deeply resented by their male colleagues and subordinates, many of whom still feel that women shouldn't be serving at all. Being gay is a vulnerability for women that some male colleagues are only too happy to exploit. The C.O. of one of M.'s friends has threatened to sit outside her house all night to prove that she has female lovers. Often, gay women are reluctant to report sexual harassment for fear of retaliatory investigations into their sexuality. A., an Army officer who has been deployed to both the Persian Gulf and Bosnia, filed a sexual-harass-

At least some of R.'s gay friends in the military don't dispute this view. "Homophobic people don't want to work with a fag," one officer said. "The group falls apart, we do not fight effectively." And while it is true that many NATO countries allow homosexuals to serve openly in their militaries (as does Israel), anecdotal evidence suggests that homosexuals in these forces still remain closeted — and must, if they wish to advance in rank.

There is a hesitation to dispute the military's arguments, like Americans, have no idea how are fought, and it is easy to underestimate the deep animus t homosexuals that exists in the

'In flight school, in every school I was in, I finished first,' says P., a former F-18 fighter pilot. 'In every squadron I was in, I was always the No. 1 guy. But no matter how many times you're No. 1, if they find out you're a homo, you're out.'

of the armed forces, yet have accounted for roughly a quarter of the homosexuals discharged over the past four years.

Several years ago, M. took a step that is quite common among gay military personnel of both sexes: she got married. In addition to the obvious boon of creating the appearance of heterosexuality, marriage in the military brings myriad financial benefits: the most important is a higher Basic Allowance for Quarters when you live off-base — essential for any homosexual who wants a private life, but on an enlisted salary, which begins at \$11,113 per year, virtually unaffordable. Marriages of convenience, either between gay men and women or with foreigners seeking American citizenship, are one solution.

M. married a civilian homosexual so that she could live off-base with her partner while securing medical benefits for her "husband," who was her partner's best friend. But guilt over deceiving the Government soon began to gnaw at her. Her relationship foundered; when M. told her partner that she was divorcing the friend, the woman threatened to tell M.'s C.O. that she was gay. Panic-stricken, M. nevertheless held her ground. "I said, 'Go ahead, there are going to be three of us in jail,'" she says. M. proceeded with the divorce, and her partner kept quiet. "I felt haunted by that nightmare for years," she says.

Yet perhaps the biggest problem

ment complaint against a superior who demanded sexual favors from her. Some months later, an anonymous assertion that she was homosexual appeared in A.'s personnel file, and her security clearance was suspended.

M. has spent more than 10 years in the Corps, but like R., she plans to end her career when her present enlistment is up. "I'm sick of living the lie," she says. "What scares me is that it gets to the point where you don't even notice it. You start to withhold information that you don't have to. *How was your night?* Oh, good. I'm practicing saying, *We did this and we did that.* Kind of remembering that this is human interaction, and this is O.K."

THE MILITARY IS ADAMANT that it cannot allow homosexuals to serve openly without greatly compromising the readiness and effectiveness of its troops. Military personnel live and work under intimate conditions that would shock most civilians. (On the U.S.S. Constellation, an aircraft carrier I toured, the enlisted men's berthing quarters were crammed with three-tiered bunk beds the size of large dresser drawers.) Unit cohesion is at the heart of a successful fighting force, and Gen. Norman Schwarzkopf and Gen. Colin Powell argued passionately before Congress that openly homosexual men and women would polarize units and destroy that cohesion.

forces. (General Schwarzkopf, for one, says he believes that allowing homosexuals to serve openly would sharply discourage enlistments.)

Still, several factors complicate this picture. For one, homosexuals have served in the armed forces since the country was founded (even earlier, actually, one of George Washington's generals is said to have been gay), and many have served openly — their units knew of their sexual orientation — without apparent problems. Brig. Gen. Pat Foote, who retired in 1989 after 29½ years in the Army, says, "I don't know many serving officers or N.C.O.'s who have not, in units with which they were affiliated, known that there were men and women other than heterosexuals doing magnificent jobs." Maj. Gen. Vance Coleman, who was wounded in the Korean War, is now retired from the Army, says that he served with homosexuals without incident.

General Coleman, who is black, says that the present-day arguments against allowing homosexuals to serve openly echo prior ones against integrating blacks in the armed forces — including the claims that white soldiers would not follow orders given by black officers and that whites and blacks could not peaceably share a foxhole. When President Truman overrode those arguments in 1948 with an executive order to integrate,

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military personnel, among others, reacted with horror.

Referring to homosexuals in the military, General Coleman says: "This is a civil rights issue and a human rights issue. You're not the same as I am, therefore you're inferior."

Perhaps another factor complicating the military's argument against homosexuals serving openly is that discharges of homosexuals, some suspect, fall during wartime; indeed, revelations of homosexuality during wartime are often received skeptically by the military, as possible ruses to avoid combat, and a person must sometimes furnish sworn statements from sexual partners to be discharged. Though the Pentagon disputes this, General Coleman, among others, says he believes that concern about the presence of homosexuals

is a peacetime obsession. "When there's a war, nobody has time to deal with that," he says. "It's about fighting and winning."

Tom Carpenter, a former Marine fighter pilot who met his partner of 20 years, a former naval flight officer, while on active duty in the 70's, says he believes that the military's revulsion from homosexuality is linked to the intense male bonding that has traditionally been a part of military life. Like many historically all-male environments, the military has had its share of homoerotic rituals — most famously the Navy's "Crossing the Line" ceremony ("modified" and "supervised" nowadays, according to the Navy, but said to still occur unmodified on at least some ships). "Crossing the Line" is an initiation for new sailors, or "polliwogs," making their first Equator crossing. Elements of this ritual include

the crowning of "King Neptune's queen," played by a young sailor in drag; the whipping and paddling of polliwogs by a gantlet of seasoned sailors, known as "shellbacks," and sometimes simulated fellatio and anal intercourse between shellbacks and polliwogs. At the conclusion, the young initiates strip off their soiled uniforms and pitch them into the sea, then mill about in the nude as proof that they, too, are now shellbacks.

Indeed, by many accounts, what is known as "conditional homosexuality," or homosexual behavior by men who are normally heterosexual, is not uncommon among soldiers during long periods when women are unavailable. Navy phrases like "It ain't queer unless it's tied to the pier" allude to such behaviors. Some married men, it is said, believe that sex with another man does not constitute adultery. There is

even a provision in "Don't Ask, Don't Tell" that excuses homosexual conduct if it is aberrant behavior for an individual. Bridget Willson, a San Diego lawyer who has defended gay military personnel, calls this the queen-for-a-day exception.

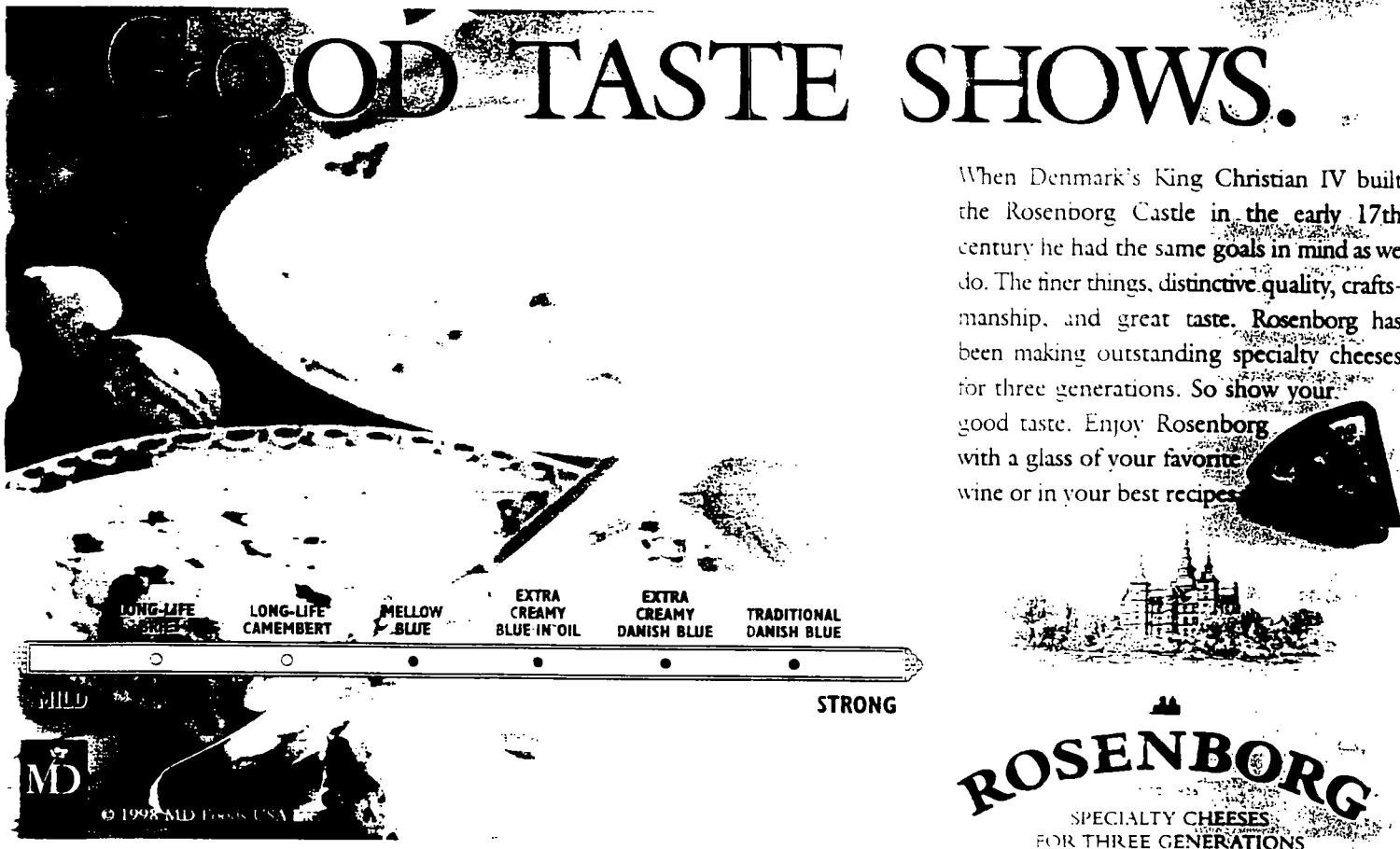
Lois Shawver, a clinical psychologist whose book "And the Flag Was Still There" studies attitudes toward homosexuality in the military, says, "The sense of the troops' being demoralized is built on the anxiety that gays are going to stare at them and turn on them sexually." But Shawver's research suggests that this fear is unfounded — that, in fact, homosexuals regulate their behavior even more carefully when they are known to be gay. As for exceptions, military policy and, in some cases, the Uniform Code of Military Justice prohibit displays of physical affection while in uniform, sex in military bar-

racks, sex between people of different ranks and sodomy, which includes oral sex.

"We have within the U.C.M.J. all that we need to deal with people that bring any type of sexual misbehavior to the workplace or the barracks," says General Foote, who recently served as the vice chairman of the Army's Senior Review Panel on Sexual Harassment. "We don't need any more laws."

THE NEXT TIME I SEE R., a few weeks later, the weather is warmer and El Niño has rashes of fluorescent purple flowers along Interstate 5. At the end of his workday, we drive from Camp Pendleton to Hillcrest and meet the tank officer I'd first met at the pizza dinner and his male partner, a nurse, in the home they share with a burly chow and a small striped cat.

Over beers, R. recounts a
Continued on page 56



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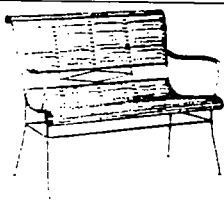
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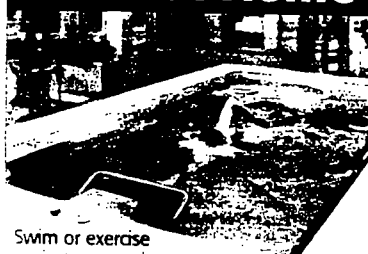
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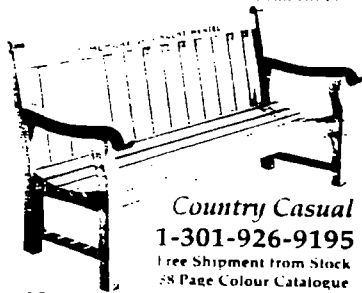
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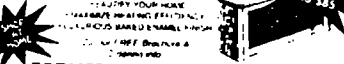
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quintessential gay-military snafu that occurred at the Marine officer's brunch he attended a few Sundays back. The officer had invited his straight military friends for brunch on Saturday, his gay friends on Sunday, but one straight Navy pilot got the days confused and arrived with his wife in the midst of the all-male brunch. The host panicked, feigned an emergency and bolted from his own party.

But the heterosexual couple, apparently unfazed, were still there when the shaken host finally returned. According to R., the Marine officer then took his straight friend into a quiet room and said, "There's something I have to tell you" — at which point the guest seized his arm and answered: "Don't worry. I'm on board with the program."

There are people who feel that as a younger generation rises to power within the military, attitudes like that of the Navy pilot will gradually prevail, and that the laws barring open homosexuality will fall away, just as those barring women and blacks eventually did.

But "Don't Ask, Don't Tell" is now Federal law, and laws are not changed easily. So far, the Supreme Court has refused to hear a case challenging it, and three Circuit Courts have upheld the policy. However, the Second Circuit Court, in New York City, recently heard an appeal of a case in which a lower-court judge ruled that "Don't Ask, Don't Tell" violates the constitutional rights of equal protection and free speech. That case, *Able v. the United States*, may yet reach the Supreme Court, but even then, precedent suggests that the Court may defer to the military.

"If you look at the case in terms of the law and reason, it looks like an overwhelming winner," says Matt Coles, director of the Lesbian and Gay Rights Project of the American Civil Liberties Union, which filed the case jointly with Lambda. "But if you look at it in terms of the courts and the military, it looks like it doesn't have a chance."

The more likely venue for change is Congress, but that, too, seems a long way off. Republicans are virtually unanimous in their opposition to gay rights; so far, even the Employment Non-Discrimination Act, a basic gay rights

bill, has failed to pass. Representative Barney Frank (Democrat of Massachusetts), who is openly gay and opposes "Don't Ask, Don't Tell," says that should the Democrats win even a small majority in the House and the Senate in November (no small task), the gay rights bill could eventually pass. However, he holds out little hope for lifting "Don't Ask, Don't Tell" anytime soon.

"The military issue is unfortunately seen as a tougher one," he says. "So you'd need a bigger Democratic majority for that."

Whatever happens, R. will be reading about it in the newspapers, like everyone else; in a few months, he will become a civilian for the first time in his adult life. It won't be an easy transition for him. "It's a way of life," he says of being a marine. "David and I will be walking down the Oceanside Pier, and somebody will see me, and they'll be like, 'Sir, how are you doing?' David's like: 'You're not at work! You're not in uniform! Why are they calling you Sir?' I'm like: 'That's just the way it is. I can't explain it.'"

But R. joined the Marines for the brotherhood, the esprit de corps, and ultimately, his sense of brotherhood has been eroded by the years of hiding. "For the longest time, I felt close to the people," he says. "But more and more, when you hear somebody make an anti-gay comment, that becomes a bookmark in your mind. I can't become close friends with the people I work with. It's definitely made me grow apart from the Marine Corps."

His experience raises the question of whether openly gay soldiers are as great a threat to unit cohesion as closeted homosexuals, whose enforced secrecy gradually distances them from their fellow soldiers. A., the woman who served in the Persian Gulf and in Bosnia, says that as a homosexual you have this barrier to intimacy with the people you're serving with — and that intimacy is what keeps people alive in hostile situations.

Among the many paradoxes surrounding the issue of homosexuals in the military is this: the fact that R. has thrived in the military — and has the record to prove it — is partly what impels him to move on. "I want to leave in a pristine state," he says. "I'm tired of the lot of prospect that tomorrow the whole world could come crashing down."

The Honorable Barney Frank
House of Representatives
2210 Rayburn House Office Building
Washington, D.C. 20515-2104

Dear Barney:

Thank you for your correspondence regarding the Timothy McVeigh case. As you know, the case has now settled. I think the settlement is fair, and I am pleased the matter has been resolved.

This Administration remains committed to fair implementation of the Don't Ask, Don't Tell policy enacted by Congress. I look forward to working with you to achieve that goal.

Sincerely,

The Honorable Howard Coble
United States House of Representatives
2239 Rayburn House Office Building
Washington, D.C. 20515-3306

Dear Congressman Coble:

Thank you for your correspondence regarding the Timothy McVeigh case. Now that the case has settled, I wanted to write to assure you that this Administration is firmly committed to the Electronic Communications Privacy Act. We expect government employees to comply with its provisions, and we will take appropriate steps when violations occur.

Sincerely,

The Honorable William D. Delahunt
United States House of Representatives
1517 Longworth House Office Building
Washington, D.C. 20515-2110

Dear Congressman Delahunt:

Thank you for your correspondence regarding the Timothy McVeigh case. Now that the case has settled, I wanted to write to assure you that this Administration is firmly committed to the Electronic Communications Privacy Act. We expect government employees to comply with its provisions, and we will take appropriate steps when violations occur.

Sincerely,

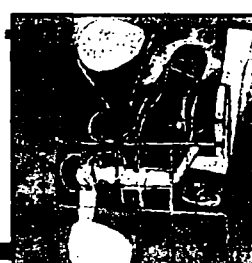
Patience is a virtue

Lesbian lives portrayed in an opera based on novel *Patience and Sarah*. See page 39



Reel downer

High Art gets high praise, but it's depressing. See page 37



A shooting star

In his brief life, Cuban painter Carlos Alfonzo triumphed. See page 35

The Washington Blade

SERVING THE NATION'S CAPITAL SINCE 1969

White House chides Lott for statements

Senate leader compares homosexuality to alcoholism, kleptomania, sex addiction

by Lou Chibbaro Jr.

The White House joined Gay civil rights leaders and Gay Republicans this week in criticizing Senate Majority Leader Trent Lott (R-Miss.) for stating in a television interview that homosexuality is sinful and comparable to alcoholism, kleptomania, and "sex addiction."

Lott's comments came during the taping of a cable television show hosted by conservative anti-Gay commentator Armstrong Williams. The program is scheduled for broadcast this weekend.

In response to a question by Williams, Lott said he considers homosexuality to be sinful. Then, according to the Associated Press, he said, "You should still love that person. You should not try to mistreat them or treat them as outcasts. You should try to show them a way to deal with that problem, just like alcohol ... or sex addiction ... or kleptomaniacs."

According to the AP, Lott added, "There are all kinds of problems, addictions, difficulties, experiences of things that are wrong, but you should try to work with that person to learn to control that problem." The remarks were widely reported in the mainstream media, and on Tuesday, reporters asked White House Press Secretary



Senate Majority Leader Trent Lott on Gays: "You should try to work with that person to learn to control that problem."

Mike McCurry what President Clinton thought of Lott's remarks.

"He thinks that the American people understand how difficult it is to get business done in Washington sometimes when you're dealing with people who are so backward in their thinking," McCurry said. "For over 25 years, it's been quite clear that sexual orientation is not an affliction," McCurry said. "It's not a disease. ... And the fact that the majority leader has such views, apparently, consistent with some who are fairly extreme in his party, is an indicator of how difficult it is to do rational work in Washington."

McCurry's comments came on the same day that the Human Rights Campaign, the nation's largest Gay political group, and Log Cabin Republicans, a national Gay Republican group, called Lott's characterization of homosexuality an insult to Gay people and a contradiction of scientific findings on homosexuality over the past 25 years. The two groups noted that the American Psychological Association and the American Psychiatric Association, along with other mental health experts, have cited scientific evidence for many years showing that homosexuality is not a mental disorder.

Continued on page 14



Proud in a crowd

Revelers enjoy a Sunday in the park for an afternoon of Gay entertainment and celebration. The suburban Maryland picnic-style Pride Day celebration was Montgomery County's sixth annual event. For more, see page 10.

Gays still waiting at the altar

Vermont, Alaska, Hawaii experiencing cold feet on Gay marriages, but that could change any day now

by Lisa Keen

The problem with allowing same-sex couples to obtain marriage licenses, argues the state of Vermont, is that it would enable them to obtain "rights and obligations under hundreds of other statutes" the same as heterosexual couples.

Duh...

"They're correct," said Mary Bonauto, a Gay legal activist helping to represent Gay couples in Vermont seeking marriage licenses. "Marriage brings all those things."

Yes, said Bonauto, Gay couples could pay a hundred dollars to a lawyer and have durable power of attorney documents drawn up—one for health decisions and one for financial matters. They could spend several hundred dollars for a will to



Attorney Mary Bonauto is helping to represent Gay couples in Vermont who are seeking marriage licenses.

ensure the transfer of property should one partner die. They could pay hundreds of dollars to have a relationship "contract" formalized to handle the division of property should the couple split up. But some Gay couples would prefer to pay the one-time fee of about \$35 charged in most states to obtain a marriage license which would give them all the "rights and obligations" available to heterosexual couples who buy marriage licenses today.

But to read what Vermont has to say about the "rights and obligations" of marriage—as evidenced by its 94-page brief to the Vermont Supreme Court—one gets the distinct impression that marriage boils down to one

Continued on page 20

17 to 145 with 12 (202)

States get cold feet on Gay marriage

Continued from page 1
basic thing: procreation.

According to the brief filed by Vermont, and echoed by Hawaii and Alaska in their respective supreme courts, the historic purpose underlying marriage laws is the "regulation of reproductive activity and child rearing."

The Vermont Supreme Court has yet to rule on the case before it, *Baker v. Vermont*. The Hawaii Supreme Court has had briefs for its case, *Hawaii v. Baehr*, since June 1997 and has yet to rule or even indicate whether it intends to first hear oral arguments in the matter. The Alaska Supreme Court, on May 29, declined a request from the state to issue a quick decision in its marriage case, *Alaska v. Brause*, and sent the matter back to trial.

Sign, seal, but not deliver?

Becoming the first state to give Gay couples the same legal rights as straight couples does not appear to be a race that any state wants to win. It seems the economic promise of millions of dollars in Gay tourist trade is not offsetting the political threat of having one's home state being dubbed the "Gay honeymoon capital of the world"—not even in Hawaii, where everyone acknowledges the economy is a wreck.

The battle over marriage is beginning to sound a lot like the battle over anti-Gay initiatives from a few years ago: a tug-of-war between "the voters right to decide" and "the courts responsibility to defend the constitution." But will the courts pull their weight or will they let the voters rein in the constitution with one pull of a lever?

John Gaguine, assistant attorney general for Alaska (and a 1965 graduate of Washington, D.C.'s Woodrow Wilson High School), said it is "possible" the Alaska Supreme Court declined last month to review the marriage case because there's a question on this November's ballot seeking to change the state constitution to, in essence, prohibit marriage licenses for same-sex couples.

Dan Foley, an attorney representing the Gay couples in the Hawaii case, said he's

heard people speculate the Hawaii Supreme Court might be trying to delay a decision there until after November's vote, but he's also heard people say the court is going to take up the case "real soon."

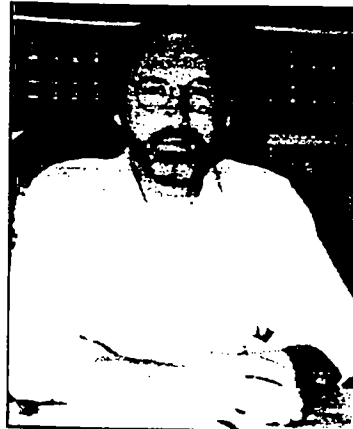
"We just don't know," said Foley. But even if the Hawaii Supreme Court doesn't make a ruling before November's vote—and even if voters decide then to give the legislature the nod to change the constitution to ban same-sex marriages—Foley says the fight won't be over.

"We hope to win in November, but if we lose and the legislature passes a law and limits marriage to opposite sex [couples]," said Foley, "then the attorney general would probably" ask the court to rule on the *Baehr* case in light of the amended constitution. But the Gay couples' legal team would still have a case, said Foley. After all, he noted, the Hawaii Supreme Court's preliminary ruling in this case held that denying marriage licenses to same-sex couples was *sex discrimination*. And while a majority of legislators in 29 states (including Alaska) have voted to approve laws banning legal recognition of same-sex marriages, it seems unlikely that any legislator today—at the state or federal level—is ready to campaign for re-election on a promise to lift the ban against sex discrimination.

So the three-way court race, however reluctant its participants may be, is still on. Hawaii still has the lead, being in a position to have its supreme court issue a decision. It could any day now—if the court so chooses. If Hawaii's supreme court decides to first hear oral arguments, it could be in a very tight race with Vermont, whose supreme court is expected to hear arguments this fall, perhaps as early as September. Because Alaska's Supreme Court sent the case back to the lower court for a trial, the 49th state is running a distant third.

(The Missouri Supreme Court on May 26 struck down a bill enacted in that state which involves the incorporation of certain entities but included a provision to ban recognition of same-sex marriage. The full court agreed the overall bill vio-

lated a provision of the state constitution forbidding legislation from addressing more than one subject. It made no comment about the same-sex marriage ban's constitutionality but that ban is, technical-



Dan Foley said he's heard people speculate the Hawaii Supreme Court might be trying to delay a decision until after November.

ly speaking, dead.)

Whether and when decisions are issued, the matter is going before voters in Alaska and Hawaii in November. Vermont has no provision for an initiative vote there. But California, which doesn't have a same-sex marriage case in the courts, does have an initiative process, and a state Assembly member has until June 25 to collect enough signatures to put an initiative on that state's ballot in November seeking to ban recognition of same-sex marriages.

Meanwhile, as Lesbian columnist Debbie Woodell for the *Philadelphia Daily News* put it June 9, "Gay people have been trying to plan trips to Hawaii ever since hopes rose that the nation's 50th state would become the first to give us the same legal rights as straight people."

Gay activists in Hawaii are busy planning, too, but their work right now is focused on the November ballot. The polls have suggested for some time that voters

are inclined to give the legislature the power it needs to amend the state constitution to stipulate that marriage can be valid only for couples comprised of "one man and one woman." But activists are hoping that the polls are soft and that voters can be swayed by an election campaign that can convince them that Gay couples should be treated the same as heterosexual couples. They don't have to convince everyone, noted David Smith of the Human Rights Campaign, which is going to spend \$1 million helping with such a voter campaign. They don't even have to convince a majority of voters to say "no." Activists just have to convince 50.1 percent of voters to either vote for the measure or leave their ballots blank on that question.

"It's achievable," said Smith. "People have a tendency to vote no [on initiatives] regardless. And polling shows that when the discussion is focused on constitutional issues, most people don't want the constitution changed because a particular group is unpopular."

HRC launched its campaign this month, as did a Hawaii-based coalition of Gay and civil rights activists.

Smith says HRC won't be able to pour \$1 million into Alaska for its ballot battle this November, but the organization is sending staff to the state to help with training activists and non-monetary resources.

"It's going to be very difficult to fight on two fronts in the election cycle," said Smith. He said HRC simply doesn't have the extra dollars to funnel into the Alaska campaign, which arose very suddenly this year when the legislature voted to put the issue on the ballot. Most of the organization's \$12 million annual budget, he explained, is "raised incrementally" and already committed to other projects and goals, such as lobbying on Capitol Hill and its national Millennium March.

"It's very, very difficult to turn on a dime and launch a campaign," said Smith. Hawaii's ballot showdown, however, has been in the works for more than a year. Plus, he noted, Alaska's court case is now back to square one, whereas Hawaii's is "an incredibly urgent situation with the state supreme court ready to rule and a constitutional amendment hanging over the head of the court case." ▼

- from
Richard
Socarides

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May 7, 1998

The Honorable William Jefferson Clinton
President
The White House
Washington, D.C. 20500

*Sure
Has this been
answered
Rob Weiner*

Dear Mr. President,

We are approaching a crisis over the Timothy McVeigh matter. When I first raised this issue with the White House, I was assured that control over the negotiations for a settlement would rest with the Justice Department. Instead, the Navy has reasserted its right to control this and Mr. McVeigh is being given a very inadequate offer.

The Navy violated his privacy rights and violated your policy with regard to gays in the military. Judge Sporkin -- a Reagan appointee -- found against the Navy on both these points. While the Navy was prevented from actively appealing this decision, they did succeed in filing an appeal and keeping open their option of challenging Judge Sporkin's opinion. That would of course be an absolute disaster and a total repudiation of all of us who have been supportive of your efforts regarding gay and lesbian rights.

The way to avoid this is to recognize that Mr. McVeigh was treated unfairly by the Navy. And that can be done without repudiating your policy on gays in the military -- indeed we believe we are in fact acting in its spirit and according to its letter. Mr. McVeigh has served 17 ½ years. The financial settlement he should be offered should reflect a 20 year commitment. This is more money than if he were simply given funds to reflect his 17 ½ years. But an important issue of principle is involved here, not simply money.

The principle is an acknowledgment that he was unfairly treated in being forced to retire early. If he is simply given credit for the time served, the Navy will succeed in maintaining that they were upheld in their actions. In fact, contrary to what I was assured by White House staff members, the Navy's version was already printed in the Washington Times and trumpeted as the official administration position -- with absolutely no dissent from the White House or the Justice Department.

If the Navy simply gives Mr. McVeigh money that reflects actual time served with no recognition that he was treated badly, it will be an outrageous betrayal of all of us who have worked for a reasonable outcome here. The Defense Department is dug in and only your personal intervention can prevent this disaster. Please vindicate your gay and lesbian supporters by insisting that Mr. McVeigh be given a settlement that would reflect 20 years of service as an acknowledgment of the government's grave error in this case.

Barney Frank
BARNEY FRANK

THE WHITE HOUSE
WASHINGTON

February 20, 1998

MEMORANDUM FOR CHARLES RUFF
DON GOLDBERG

FROM: JANET MURGUIA 
LEGISLATIVE AFFAIRS

SUBJECT: Congressional Correspondence

Attached is a copy of a letter sent to the President from Member(s) of Congress. We would appreciate your assistance in drafting the response.

Thank you very much for your assistance. If you have any questions, please feel free to call Chris Walker at x67500.

The following is a description of the letter:

- 1) Rep. Howard L. Coble (R-NC) and Rep. William D. Delahunt (D-MA).

Attachment

10 USCS @ 1370 (1998) printed in FULL format.

UNITED STATES CODE SERVICE

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*** THIS SECTION IS CURRENT THROUGH 105-165, APPROVED 3/20/98 ***

*** WITH A GAP OF 160 AND 164 ***

TITLE 10. ARMED FORCES
SUBTITLE A. GENERAL MILITARY LAW
PART II. PERSONNEL
CHAPTER 69. RETIRED GRADE

10 USCS @ 1370 (1998)

@ 1370. Commissioned officers: general rule; exceptions

(a) Rule for retirement in highest grade held satisfactorily.

(1) Unless entitled to a higher retired grade under some other provision of law, a commissioned officer (other than a commissioned warrant officer) of the Army, Navy, Air Force, or Marine Corps who retires under any provision of law other than chapter 61 or chapter 1223 of this title [10 USCS @@ 1201 et seq. or 12731 et seq.] shall, except as provided in paragraph (2), be retired in the highest grade in which he served on active duty satisfactorily, as determined by the Secretary of the military department concerned, for not less than six months.

(2) (A) In order to be eligible for voluntary retirement under any provision of this title in a grade above major or lieutenant commander, a commissioned officer of the Army, Navy, Air Force, or Marine Corps must have served on active duty in that grade for not less than three years, except that the Secretary of Defense may authorize the Secretary of a military department to reduce such period to a period not less than two years in the case of retirements effective during the nine-year period beginning on October 1, 1990.

(B) The President may waive subparagraph (A) in individual cases involving extreme hardship or exceptional or unusual circumstances. The authority of the President under the preceding sentence may not be delegated.

(C) In the case of a grade below the grade of lieutenant general or vice admiral, the number of members of one of the armed forces in that grade for whom a reduction is made during any fiscal year in the period of service-in-grade otherwise required under this paragraph may not exceed the number equal to two percent of the authorized active-duty strength for that fiscal year for officers of that armed force in that grade.

(3) A reserve or temporary officer who is notified that he will be released from active duty without his consent and thereafter requests retirement under section 3911, 6323, or 8911 of this title and is retired pursuant to that request is considered for purposes of this section, to have been retired involuntarily. An officer retired pursuant to section 1186(b)(1) of this title is considered for purposes of this section to have been retired voluntarily.

(b) Retirement in next lower grade. An officer whose length of service in the highest grade he held while on active duty does not meet the service in grade requirements specified in subsection (a) shall be retired in the next lower grade in which he served on active duty satisfactorily, as determined by the Secretary of the military department concerned, for not less than six months.

(c) Officers in O-9 and O-10 grades.

(1) An officer who is serving in or has served in the grade of general or admiral or lieutenant general or vice admiral may be retired in that grade under subsection (a) only after the Secretary of Defense certifies in writing to the President and Congress that the officer served on active duty satisfactorily in that grade.

(2) In the case of an officer covered by paragraph (1), the three-year service-in-grade requirement in paragraph (2)(A) of subsection (a) may not be reduced or waived under that subsection--

(A) while the officer is under investigation for alleged misconduct; or

(B) while there is pending the disposition of an adverse personnel action against the officer for alleged misconduct.

(d) Reserve officers.

(1) Unless entitled to a higher grade, or to credit for satisfactory service in a higher grade, under some other provision of law, a person who is entitled to retired pay under chapter 1225 of this title shall, upon application under section 12731 of this title, be credited with satisfactory service in the highest grade in which that person served satisfactorily at any time in the armed forces, as determined by the Secretary concerned in accordance with this subsection.

(2) In order to be credited with satisfactory service in an officer grade (other than a warrant officer grade) below the grade of lieutenant colonel or commander, a person covered by paragraph (1) must have served satisfactorily in that grade (as determined by the Secretary of the military department concerned) as a reserve commissioned officer in an active status, or in a retired status on active duty, for not less than six months.

(3) (A) In order to be credited with satisfactory service in an officer grade above major or lieutenant commander, a person covered by paragraph (1) must have served satisfactorily in that grade (as determined by the Secretary of the military department concerned) as a reserve commissioned officer in an active status, or in a retired status on active duty, for not less than three years.

(B) A person covered by subparagraph (A) who has completed at least six months of satisfactory service in grade and is transferred from an active status or discharged as a reserve commissioned officer solely due to the requirements of a nondiscretionary provision of law requiring that transfer or discharge due to the person's age or years of service may be credited with satisfactory service in the grade in which serving at the time of such transfer or discharge, notwithstanding failure of the person to complete three years of service in that grade.

(C) If a person covered by subparagraph (A) has completed at least six months of satisfactory service in grade, the person was serving in that grade while serving in a position of adjutant general required under section 314 of title 32 or while serving in a position of assistant adjutant general subordinate to such a position of adjutant general, and the person has failed to complete three years of service in that grade solely because the person's appointment to such position has been terminated or vacated as described in section 324(b) of such title, then such person may be credited with satisfactory service in that grade, notwithstanding the failure to complete three years of service in that grade.

(D) To the extent authorized by the Secretary of the military department concerned, a person who, after having been recommended for promotion in a report of a promotion board but before being promoted to the recommended grade, served in a position for which that grade is the minimum authorized grade may be credited for purposes of subparagraph (A) as having served in that grade for the period for which the person served in that position while in the next lower

grade. The period credited may not include any period before the date on which the Senate provides advice and consent for the appointment of that person in the recommended grade.

(E) To the extent authorized by the Secretary of the military department concerned, a person who, after having been extended temporary Federal recognition as a reserve officer of the Army National Guard in a particular grade under section 308 of title 32 or temporary Federal recognition as a reserve officer of the Air National Guard in a particular grade under such section, served in a position for which that grade is the minimum authorized grade may be credited for purposes of subparagraph (A) as having served in that grade for the period for which the person served in that position while extended the temporary Federal recognition, but only if the person was subsequently extended permanent Federal recognition as a reserve officer in that grade and also served in that position after being extended the permanent Federal recognition.

(4) A person whose length of service in the highest grade held does not meet the service in grade requirements specified in this subsection shall be credited with satisfactory service in the next lower grade in which that person served satisfactorily (as determined by the Secretary of the military department concerned) for not less than six months.

HISTORY: (Added Dec. 12, 1980, P.L. 96-513, Title I, @ 112, 94 Stat. 2876.)

(As amended Nov. 5, 1990, P.L. 101-510, Div A, Title V, Part B, @ 522, 104 Stat. 1561; Nov. 30, 1993, P.L. 103-160, Div A, Title V, Subtitle F, @ 561(d), 107 Stat. 1667; Oct. 5, 1994, P.L. 103-337, Div A, Title XVI, Subtitle B, Part II, @ 1641, Subtitle D, @ 1671(c)(7)(B), 108 Stat. 2968, 3014; Feb. 10, 1996, P.L. 104-106, Div A, Title V, Subtitle A, @ 502(a), (b), (f), (g), 110 Stat. 292, 293; Sept. 23, 1996, P.L. 104-201, Div A, Title V, Subtitle E, @ 544, 110 Stat. 2522.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Effective date of section:

Act Dec. 12, 1980, P.L. 96-513, Title VII, @ 701(a), 94 Stat. 2955, provided that this section "shall take effect on September 15, 1981", except as provided in @ 701(b)(1) of such Act Dec. 12, 1980, which appears as 10 USCS @ 101 note.

Amendments:

1990. Act Nov. 5, 1990, in subsec. (a)(2), designated the sentence beginning "In order to be eligible . . ." as subpara. (A) and in such subparagraph inserted ", except that the Secretary of Defense may authorize the Secretary of a military department to reduce such period to a period not less than two years in the case of retirements effective during the five-year period beginning on October 1, 1990", designated the sentences beginning "The President may waive . . ." and "The authority of the President . . ." as subpara. (B) and in such subparagraph substituted "subparagraph (A)" for "the preceding sentence", and added subpara. (C).

1993. Act Nov. 30, 1993, in subsec. (a)(2)(A), substituted "nine-year period" for "five-year period".

1994. Act Oct. 5, 1994 (effective 12/1/94 as provided by @ 1691 of such Act, which appears as 10 USCS @ 10001 note), in subsec. (a)(1), substituted "chapter 1223" for "chapter 67".

Such Act further (effective 10/1/96, as provided by @ 1691(b)(1) of such Act, which appears as 10 USCS @ 10001 note) added subsec. (d).

1996. Act Feb. 10, 1996, in subsec. (a), inserted the heading, in para.

(2), in subpara. (A), deleted "and below lieutenant general or vice admiral" following "commander" and, in subpara. (C), substituted "In the case of a grade below the grade of lieutenant general or vice admiral, the number of members of one of the armed forces in that grade" for "The number of officers in an armed force in a grade"; in subsec. (b), inserted the heading; substituted subsec. (c) for one which read: "(c) Upon retirement an officer of the Army, Navy, Air Force, or Marine Corps who is serving in or has served in a position of importance and responsibility designated by the President to carry the grade of general or admiral or lieutenant general or vice admiral under section 601 of this title may, in the discretion of the President, be retired, by and with the advice and consent of the Senate, in the highest grade held by him while serving on active duty."; and, in subsec. (d), inserted the heading.

Such Act further (effective 10/1/96 immediately after subsec. (d) takes effect, as provided by @ 302(e) of such Act, which appears as a note to this section), in subsec. (d)(2)(B), deleted "and below lieutenant general or vice admiral" following "commander".

Act Sept. 23, 1996, in subsec. (d), redesignated para. (3) as para. (4), in para. (2), deleted "(A)" preceding "in order" and redesignated subpara. (B) as para. (3), and, in para. (3) as so redesignated, designated the sentence beginning "In order to be credited with satisfactory service . . ." as subpara. (A), designated the sentence beginning "A person covered by . . ." as subpara. (B), in subpara. (B) as so redesignated, substituted "subparagraph (A)" for "the preceding sentence", and added subparas. (C)-(E).

Other provisions:

Transition provisions under Defense Officer Personnel Management Act. For provisions relating to the time-in-grade requirement for voluntary retirement of officers not subsequently promoted, see Act Dec. 12, 1980, P.L. 96-513, Title VI, Part C, @ 629, 94 Stat. 2953, which appears as 10 USCS @ 611 note.

Effective date of Feb. 10, 1996 amendment of subsec. (d)(2)(B). Act Feb. 10, 1996, P.L. 104-106, Div A, Title V, Subtitle A, @ 502(e), 110 Stat. 293, provides: "The amendment made by subsection (a)(2) [amending subsec. (d)(2)(B) of this section] shall take effect on October 1, 1996, immediately after subsection (d) of section 1370 of title 10, United States Code, takes effect under section 1691(b)(1) of the Reserve Officer Personnel Management Act (108 Stat. 3026) [10 USCS @ 10001 note]."

NOTES:

CROSS REFERENCES

This section is referred to in 10 USCS @@ 3961, 6151, 6323, 6325, 6383, 8961; 33 USCS @ 857a; 42 USCS @ 213a.

RESEARCH GUIDE

Am Jur:

54 Am Jur 2d, Military, and Civil Defense @ 156.

INTERPRETIVE NOTES AND DECISIONS

Predecessor to 10 USCS @ 1370 applied to one who attained rank of rear admiral in lower half only on retirement as well as to those who served in that grade prior to retirement; retired rear admiral could not recover upon claims for installments of pay and retired pay that became due more than 6 years prior to filing of suit, as such was barred by limitations. *McColl v United States* (1957) 137 Ct Cl 337, 147 F Supp 494.

Federal Court cannot entertain claim by former temporary major general

retired in permanent rank of brigadier general, arising out of determination by Secretary of Army under predecessor to 10 USCS @ 1370 that plaintiff's service in rank of temporary major general was not satisfactory, where administrative decision is supported by substantial evidence, since determination of satisfactory performance is within secretary's discretion and involved no immediate entitlement of plaintiff to money. *Koster v United States* (1982) 231 Ct Cl 301, 685 F2d 407.

Retired pay grade for Marine Corps retiree was that of captain, where retiree was major on April 1, when he first became eligible for voluntary retirement, and board of inquiry (following conviction by general court-martial) had recommended on February 16 retirement in grade of captain and had found that member's record was not otherwise so meritorious as to demonstrate his satisfactory service as major, despite fact that Secretary did not concur in board's recommendation and finding until April 6, because any request for retirement on April 1 as major would not have been approved under 10 USCS @ 1370. *Captain William G. Peters, U.S. Marine Corps (Retired)* (1991) 70 Comp Gen 398.

Naval officer, who had been serving in position under 10 USCS @ 601 for which he was entitled to grade of Admiral, was entitled, upon retirement, to have his excess leave liquidated at grade of Admiral, where Board for Correction of Naval Records had changed officer's military records to show that he had retired on 6/1/92 in rank of Admiral, rather than on 7/1/92, at which time he had reverted to permanent rank of Rear Admiral, due to delay in confirmation of his retirement at rank of Admiral. *Admiral Jonathan T. Howe, USN (Retired)* (5/9/94) Comp. Gen. Dec. No. B-255792.

10 USCS @ 3914 (1998) printed in FULL format.

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*** THIS SECTION IS CURRENT THROUGH 105-165, APPROVED 3/20/98 ***
*** WITH A GAP OF 160 AND 164 ***

TITLE 10. ARMED FORCES
SUBTITLE B. ARMY
PART II. PERSONNEL
CHAPTER 367. RETIREMENT FOR LENGTH OF SERVICE

10 USCS @ 3914 (1998)

@ 3914. Twenty to thirty years: enlisted members

Under regulations to be prescribed by the Secretary of the Army, an enlisted member of the Army who has at least 20, but less than 30, years of service computed under section 3925 of this title may, upon his request, be retired.

HISTORY: (Aug. 10, 1956, ch 1041, @ 1, 70A Stat. 225; Sept. 2, 1958, P.L. 85-861, @ 33(a)(25), 72 Stat. 1565.)

(As amended Sept. 8, 1980, P.L. 96-343, @ 9(a)(1), 94 Stat. 1128; Oct. 5, 1994, P.L. 103-337, Div A, Title V, Subtitle B, @ 515(a), 108 Stat. 2753.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Prior law and revision:

1956 Act

Revised Section	Source (U.S. Code)	Source (Statutes at Large)
3914	10:948 (1st sentence). 10:948a.	Oct. 6, 1945, ch 393, Sec. 4 (1st sentence); re-stated Aug. 10, 1946, ch 952, Sec. 6 (a) (1st sentence), 60 Stat. 996. Aug. 10, 1946, ch 952, Sec. 7, 60 Stat. 996.

The words "now or hereafter", in 10:948a, are omitted as surplusage. The words "computed under section 3925 of this title" are substituted for the words "active Federal service", in 10:948, and "active Federal military service", in 10:948a, since that revised section makes explicit the service covered. The words "be retired" are substituted for the words "will be placed on the retired list of", in 10:948. The words "completed a minimum", in 10:948; and "the period of", "be subject to", "periods of", and "now or after August 10, 1946", in 10:948a; are omitted as surplusage.

1958 Act

The change makes clear that the Secretary of the Army is required to prescribe regulations in this case, and conforms this section to 10 USCS @ 8914 its Air Force counterpart.

Amendments:

1958. Act Sept. 2, 1958, (effective 8/10/56 for all purposes, as provided by @ 33(g) of such Act), inserted "to be" after the word "regulations".

1980. Act Sept. 8, 1980 substituted this section and catchline for ones which read:

"@ 3914. Twenty to thirty years: regular enlisted members

"Under regulations to be prescribed by the Secretary of the Army, a regular enlisted member of the Army who has at least 20, but less than 30, years of service computed under section 3925 of this title may, upon his request, be retired. He then becomes a member of the Army Reserve, and shall perform such active duty as may be prescribed under law, until his service computed under section 3925 of this title, plus his inactive service as a member of the Army Reserve, equals 30 years."

1994. Act Oct. 5, 1994 deleted "A regular enlisted member then becomes a member of the Army Reserve. A member retired under this section shall perform such active duty as may be prescribed by law until his service computed under section 3925 of this title, plus his inactive service as a member of the Army Reserve, equals 30 years." following "retired.".

Other provisions:

Double credits for foreign service by enlisted men. In computing length of service for retirement, credit is given soldiers for double the time of their actual service in China, Puerto Rico, Cuba, the Philippine Islands, the Island of Guam, Alaska, and Panama, but double credit is not given for service rendered subsequent to Apr. 23, 1904, in Puerto Rico or the Territory of Hawaii, and credit is not given for double time for foreign service of those who enlisted after Aug. 24, 1912. See Acts May 26, 1900, ch 586, 31 Stat. 209; Mar. 2, 1903, ch 975, 32 Stat. 933; Apr. 23, 1904, ch 1485, 33 Stat. 264; and Aug. 24, 1912, ch 391, @ 1, 37 Stat. 575.

Applicability of 1980 amendments. Act Sept. 8, 1980, P.L. 96-343, @ 9(c), 94 Stat. 1129, provides: "The amendments made by this section [amending this section, among other things; for full classification, consult USCS Tables volumes] shall apply with respect to retired pay payable for months beginning after the date of the enactment of this Act.".

Applicability of section during period of active force drawdown.

For applicability of the provisions of this section during period of active force drawdown to individuals with at least 15 but less than 20 years of service, see Act Oct. 23, 1992, P.L. 102-484, Div D, Title XLIV, Subtitle A, @ 4403, 106 Stat. 2702, which appears as 10 USCS @ 1293 note.

NOTES:

CODE OF FEDERAL REGULATIONS

Add:

32 CFR Part 114

CROSS REFERENCES

This section is referred to in 10 USCS @@ 3925, 3991.

2ND SECTION of Level 1 printed in FULL format.

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*** THIS SECTION IS CURRENT THROUGH 105-165, APPROVED 3/20/98 ***
*** WITH A GAP OF 160 AND 164 ***

TITLE 10. ARMED FORCES
SUBTITLE C. NAVY AND MARINE CORPS
PART II. PERSONNEL
CHAPTER 535. GRADE AND RANK OF OFFICERS

10 USCS @ 5501 (1998)

@ 5501. Navy: grades above chief warrant officer, W-5

The commissioned grades in the Navy above the grade of chief warrant officer, W-5, are the following:

- (1) Admiral.
- (2) Vice admiral.
- (3) Rear admiral.
- (4) Rear admiral (lower half).
- (5) Captain.
- (6) Commander.
- (7) Lieutenant commander.
- (8) Lieutenant.
- (9) Lieutenant (junior grade).
- (10) Ensign.

HISTORY: (Aug. 10, 1956, ch 1041, @ 1, 70A Stat. 314.)

(As amended Dec. 12, 1980, P.L. 96-513, Title III, Part A, @ 301, 94 Stat. 2887; Dec. 1, 1981, P.L. 97-86, Title IV, @ 405(a), 95 Stat. 1105; Nov. 8, 1985, P.L. 99-145, Title V, Part B, @ 514(a)(1), 99 Stat. 628; Dec. 5, 1991, P.L. 102-190, Div A, Title XI, Part C, @ 1131(8)(A), 105 Stat. 1506.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

PRIOR LAW AND REVISION:

Revised Section	Source (U.S. Code)	Source (Statutes at Large)
5501(a)	34 U.S.C. 1.	R.S. 1362; Mar. 3, 1883, ch 97, Sec. 1 (2d para. on p. 472, as applicable to masters and junior

		grade lieutenants), 22
		Stat. 472; Mar. 3, 1899,
		ch 413, Sec. 7 (1st sen-
		tence, less proviso), 30
		Stat. 1005.
34 U.S.C. 211d(a)		Aug. 7, 1947, ch 512,
(as applicable to		Sec. 413(a) (as applicable
grades of admiral		to grades of admiral
and vice admiral).		and vice admiral), 61
		Stat. 875.
34 U.S.C. 10a		Aug. 7, 1947, ch 512,
1st sentence).		Sec. 405 (1st sentence), 61
		Stat. 872.
5501(b)	34 U.S.C. 350e	July 24, 1941, ch 320,
	(1st sentence).	Sec. 6 (1st sentence), 55
		Stat. 604; Apr. 9, 1943,
		ch 38, Sec. 1, 57 Stat. 59;
		Oct. 12, 1949, ch 681,
		Sec. 531(b) (28), 63 Stat.
		839.

The Act of July 24, 1941, ch 320, as amended (34 U.S.C. 350 et seq.), and @ 413 of the Officer Personnel Act of 1947 (34 U.S.C. 211d) provide for the temporary appointment of officers to grades up to and including admiral. Staff corps officers, women officers, and reserve officers are not excluded from the operation of the provisions of the 1941 Act. Since authority exists for the appointment of officers of any category in any grade in the Navy, the existence of every grade in the several staff corps and in the Naval Reserve is recognized, and the restriction of these grades to the active list of the line is removed.

The grade of Fleet Admiral is omitted inasmuch as the law authorizing appointments in this grade was limited.

In subsec. (a) the words "above the grade of chief warrant officer, W-4" are inserted for clarity.

Subsec. (c) is added to make clear the fact that an officer serving in a position, such as chief of bureau, which entitles him to the rank, pay, and allowances of a rear admiral of the upper half ranks rear admirals receiving the pay and allowances of the lower half even though he has not been appointed to the grade of rear admiral or, if so appointed, is in the lower half. A statement of this fact is necessary to give full effect to 5 U.S.C. 441 which provides that chiefs of bureaus of the Navy Department and the Judge Advocate General of the Navy, while so serving, shall have "corresponding rank and shall receive the same pay and allowances . . . as . . . chiefs of bureaus of the War Department and the Judge Advocate General of the Army". The rank so conferred, corresponding to the Army rank of major general, is rear admiral of the upper half. In 10 USCS @@ 5133 and 5148, based on 5 U.S.C. 441, the reference to the Army rank is eliminated and the corresponding Navy rank is substituted. The substitution is made because, as stated in the revision notes on those sections, the creation of the Department of the Air Force and the reorganization of the Department of the Army make it impracticable to continue to relate Navy Department positions to former War Department positions. This treatment of 5 U.S.C. 441 does not, however, completely cover the question of the rank, in relation to other officers in the Navy and other services, of a captain or rear admiral of the lower half who by virtue of his position becomes entitled to

the rank, pay, and allowances of a rear admiral of the upper half. Under 34 U.S.C. 241a officers holding commissions in the grade of rear admiral rank with major generals if entitled to the pay of the upper half and with brigadier generals if entitled to the pay of the lower half. Under 5 U.S.C. 441 bureau chiefs and the Judge Advocate General rank with major generals regardless of the grade in which they hold commissions and, therefore, also rank all officers of the Navy who are ranked by major generals. This fact, obscured by the substitution of Navy rank in the codification of 5 U.S.C. 441, is set out in subsec. (c).

AMENDMENTS:

1980. Act Dec. 12, 1980 (effective 9/15/81, as provided by @ 701(a) of such Act, which appears as 10 USCS @ 101 note), substituted this section for one which read:

"(a) The commissioned grades in the Navy above the grade of chief warrant officer, W-4, are:

- "(1) Admiral.
- "(2) Vice admiral.
- "(3) Rear admiral.
- "(4) Captain.
- "(5) Commander.
- "(6) Lieutenant commander.
- "(7) Lieutenant.
- "(8) Lieutenant (junior grade).
- "(9) Ensign.

"(b) In addition to the grades listed in subsection (a), there is also the grade of commodore. Appointments in this grade may be made under section 5597 or section 5787 of this title. Officers in the grade of commodore rank next above officers in the grade of captain.

"(c) Officers having the grade or rank of rear admiral who are entitled to the basic pay and allowances of a rear admiral of the upper half rank above officers in the grade of rear admiral who are entitled to the pay and allowances of a rear admiral of the lower half."

1981. Act Dec. 1, 1981 (effective 9/15/81, as provided by @ 405(f) of such Act, which appears as 10 USCS @ 101 note), in para. (4), deleted "admiral" after "Commodore".

1985. Act Nov. 8, 1985, in para. (4), substituted "Rear admiral (lower half)" for "Commodore".

1991. Act Dec. 5, 1991 (effective 2/1/92 as provided by @ 1132 of such Act, which appears as 10 USCS @ 521 note), in the section heading and introductory matter, substituted "W-5" for "W-4".

OTHER PROVISIONS:

Effective date of 1980 amendment. Act Dec. 12, 1980, P.L. 96-513, Title VII, @ 701(a), 94 Stat. 2955, provided that the amendment made to this section "shall take effect on September 15, 1981", except as provided in @ 701(b)(1) of such Act Dec. 12, 1980, which appears as 10 USCS @ 101 note.

NOTES:

RESEARCH GUIDE

AM JUR:

- 53 Am Jur 2d, Military, and Civil Defense @@ 11, 18, 149.
- 54 Am Jur 2d, Military, and Civil Defense @ 156.

INTERPRETIVE NOTES AND DECISIONS

1. Generally
2. Types of officers
3. Grades and rank
4. Titles of officers

1. Generally

Congress had power to change rank and pay of retired officers. *Wood v United States*, 15 Ct Cl 151; affd 107 US 414, 27 L Ed 542.

2. Types of officers

Major difference between different kinds of officers in navy is manner of appointment rather than functions performed by such officers; commissioned officers are those holding commissions from President, warrant officers hold warrants, but not commissions, from President, and petty officers are designated as such by commanders from among enlisted men; only officers in navy who are "line officers" are those specified as such by Congress. (1899) 22 Op Atty Gen 620.

3. Grades and rank

Under predecessor of 10 USCS @ 5501, grade was a step in a series, a rank; but no lieutenant in Navy could obtain increased rank simply by length of service. *Schuetze v U. S.*, 24 CtCl 299.

Terms "rank" and "grade" are sometimes used synonymously and use of term "rank" in describing given officer, in absence of qualifying terms, has same basic effect as use of term "grade". 16 Op Atty Gen 414.

4. Titles of officers

Act of March 3, 1883 (predecessor of 10 USCS @ 5501), changed title of masters in Navy to that of lieutenants, those then on list constituting junior grade, and only effect was to change title. *Schuetze v United States* (1889) 24 Ct Cl 299.

Act of March 3, 1883 (predecessor of 10 USCS @ 5501) replaced grade of midshipman with that of ensign, title of midshipman being given thereafter only to students at Naval Academy. *Weller v United States* (1906) 41 Ct Cl 324.

Under predecessor of 10 USCS @ 5501, title of given grade composed of more than one officer does not determine relative rank of all those holding such grade, although it expresses rank with regard to those officers in grades above and below. 16 Op Atty Gen 414.

10 USCS @ 6404 (1998) printed in FULL format.

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*** THIS SECTION IS CURRENT THROUGH 105-165, APPROVED 3/20/98 ***
*** WITH A GAP OF 160 AND 164 ***

TITLE 10. ARMED FORCES
SUBTITLE C. NAVY AND MARINE CORPS
PART II. PERSONNEL
CHAPTER 573. INVOLUNTARY RETIREMENT, SEPARATION, AND FURLOUGH

10 USCS @ 6404 (1998)

@ 6404. Treatment of fractions of years of service in computing retired pay and separation pay

In determining the total number of years of service to be used as a multiplier in computing retired pay and separation pay on discharge under this chapter [10 USCS @@ 6371 et seq.], each full month of service that is in addition to the number of full years of service creditable to a member is counted as one-twelfth of a year and any remaining fractional part of a month is disregarded.

HISTORY: (Aug. 10, 1956, ch 1041, @ 1, 70A Stat. 415.)

(As amended Dec. 12, 1980, P.L. 96-513, Title V, Part A, @ 503(50), 94 Stat. 2915; Sept. 24, 1983, P.L. 98-94, Title IX, Part B, @ 923(c)(4), 97 Stat. 643.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

PRIOR LAW AND REVISION:

Revised Section	Source (U.S. Code)	Source (Statutes at Large)
6404	34 U.S.C. 410c(a) (1st proviso).	Feb. 21, 1946, ch 34, Sec. 7 (a) (1st proviso), 60 Stat. 27; Aug. 7, 1947, ch 512; Sec. 432(a), 61 Stat. 881.
	34 U.S.C. 410j(g) (1st proviso).	Aug. 7, 1947, ch 512, Sec. 312(g) (1st proviso), 61 Stat. 860.
	34 U.S.C. 410d (1st proviso).	Feb. 21, 1946, ch 34, Sec. 9 (1st proviso), 60 Stat. 28; Aug. 7, 1947, ch 512, Sec. 432(b), 61 Stat. 881.
	34 U.S.C. 410j(h) (1st proviso).	Aug. 7, 1947, ch 512, Sec. 312(h) (1st proviso), 61 Stat. 860.
	34 U.S.C. 410r(h).	June 12, 1948, ch 449, Sec. 207(h), 62 Stat. 368.
	34 U.S.C. 410r(j) (proviso).	June 12, 1948, ch 449, Sec. 207(j) (proviso), 62 Stat. 366.

34 U.S.C. 43g(g).	Apr. 16, 1947, ch 38, Sec. 207(h), 61 Stat. 50; redesignated (g), Aug. 7, 1947, ch 512, Sec. 434(d), 61 Stat. 882; May 16, 1950, ch 186, Sec. 3(j), 64 Stat. 162.
34 U.S.C. 625h(a).	June 12, 1948, ch 449, Sec. 213(a), 62 Stat. 369.

The words "and a part of a year that is less than six months is disregarded" are added for clarity. The legislative history of the Career Compensation Act of 1949, which contains a provision identical to those codified in this section, indicates that all of these provisions are construed as requiring a fractional year of less than six months to be disregarded (hearing before the Committee on Armed Services of the Senate on H.R. 5007, 81st Cong., 1st sess., p. 313, July 6, 1949).

AMENDMENTS:

1980. Act Dec. 12, 1980 (effective 9/15/81, as provided by @ 701(a) of such Act, which appears as 10 USCS @ 101 note), in the catchline, substituted "separation" for "severance"; and, in the text, substituted "separation pay" for "lump-sum payments".

1983. Act Sept. 24, 1983 substituted this section for one which read: "In determining the total number of years of service to be used as a multiplier in computing retired pay and separation pay on discharge under this chapter, a part of a year that is six months or more is counted as a whole year and a part of a year that is less than six months is disregarded.".

OTHER PROVISIONS:

Application of the Sept. 24, 1983 amendment of this section. For provisions as to the application of the Sept. 24, 1983 amendment of this section, see @ 923(g) of such Act, which appears as 10 USCS @ 1174 note.

NOTES:

RESEARCH GUIDE

AM JUR:

54 Am Jur 2d, Military, and Civil Defense @ 170.



DEFENSE FINANCE AND ACCOUNTING SERVICE

1931 JEFFERSON DAVIS HIGHWAY
ARLINGTON, VA 22240-5291

JAN 27 1998

DFAS-HQ/FMM

MEMORANDUM FOR DIRECTOR DEFENSE FINANCE AND ACCOUNTING SERVICE
- CLEVELAND CENTER
DIRECTOR DEFENSE FINANCE AND ACCOUNTING SERVICE
- DENVER CENTER
DIRECTOR DEFENSE FINANCE AND ACCOUNTING SERVICE
- INDIANAPOLIS CENTER
DIRECTOR DEFENSE FINANCE AND ACCOUNTING SERVICE
- KANSAS CITY CENTER

SUBJECT: Change to the DODFMR, Volume 7A, Regarding -
Nuclear Bonuses, (DFAS Item G-65)

Attached is DFAS Interim Change 07-98 to Chapter 12 of the DoDFMR, Volume 7A. It is effective retroactively to October 1, 1997.

This change is the result of the Fiscal Year 1998 National Defense Authorization Act and increases the allowable ceiling on certain Nuclear Officer Bonus rates. Although this change raises the allowable maximums, the Navy Department has indicated they will not initially raise the current rates to the maximum.

We have evaluated your comments on the draft change to the DoDFMR, Volume 7A. The attached final version of the change includes your comments where appropriate.

Assignment of an interim change number is your authority to start a procedural modification to facilitate this change. For the Denver Center, use the attached to initiate the formal printed change to the DoDFMR and the interim change message.

Our point of contact, Mr. Gary McGee, may be contacted at DSN 332-5280 or (703) 602-5280.

Roger W. Searce
Brigadier General, USA
Deputy Director for Finance

Attachment:
As stated

cc: DASD (MPP) (Comp)
ODGC (F)
DFAS-DE/DG
Service Liaisons
USCG/NOAA/PHS Liaisons
DJMS-PM

NUCLEAR OFFICER BONUSES

1. Revise paragraph 120101A to read as follows:

"Effective 1 October 1997, individuals accepted, on or before 30 September 1999, for officer naval nuclear power training for duty in connection with the supervision, operation, and maintenance of naval nuclear propulsion plants may be entitled to accession bonuses not to exceed a total of \$10,000."

2. Revise paragraph 120201A to read as follows:

"Effective 1 October 1997, nuclear qualified officers with applications for extension on active duty accepted, on or before 30 September 1999, may be entitled to a bonus not to exceed a total of \$15,000 for each year of the active service agreement."

3. Revise paragraph 120301A as follows:

- a. Replace "1 October 1998" with "1 October 1999" at both occurrences.

- b. Replace "\$10,000" with "\$12,000" and replace "\$4,500" with "\$5,500".

4. Revise the bibliography under paragraphs 120101A, 120201A and 120301A by replacing the current Public Law citation with "Public Law 105-85, Sections 613 and 624, 18 Nov 1997" in each instance it appears.

5. Note that this chapter under went extensive revision by DFAS Interim Change Number 43-96 and that the bonus dates and the bibliography were again revised by DFAS Interim Change Number 52-96.

CHAPTER 12

SPECIAL PAY FOR NUCLEAR-QUALIFIED OFFICERS1201 NUCLEAR CAREER ACCESSION BONUS

120101. Entitlement. Naval officers or prospective naval officers accepted for training for duty in connection with the supervision, operation, and maintenance of naval nuclear propulsion plants are entitled to an accession bonus when they meet the requirements of this chapter and the requirements of SECNAV Instruction 7220.65 series (reference (ac)).

120102. Eligibility Requirements. To qualify for the accession bonus under this section unrestricted line officers must:

A. Have been accepted for training leading to qualification for duty involving the supervision, operation, and maintenance of naval nuclear propulsion plants, subject to the following limitations:

★1. For Regular Navy (USN) unrestricted line officers accepted on or after 1 August 1976 and before 1 October 1996;

★2. For Naval Reserve (USNR) unrestricted line officers accepted on or after 15 March 1977 and before 1 October 1996; and

B. Have, as a commissioned officer, successfully completed training and have been designated qualified for duty involving the supervision, operation, and maintenance of naval nuclear propulsion plants.

120103. Computation

A. Unrestricted line officers, or prospective officers who are scheduled to receive an unrestricted line officer commission, who apply for training for duty in connection with the supervision, operation, and maintenance of naval nuclear propulsion plants, will be entitled to the accession bonus as follows:

1. Upon selection for officer naval nuclear power training; and

2. Upon successful completion, as a commissioned officer, of training for duty in connection with the supervision, operation, and maintenance of naval nuclear propulsion plants.

B. The amount payable is determined by the Secretary of the Navy and prescribed in SECNAV Instruction 7220.65 series (reference (ac)). The amount may not exceed \$2,000. When an officer is accepted into the nuclear power training program, the amount payable becomes fixed at that time.

120104. Time of Payment. Upon successful completion of the nuclear power training program, the commanding officer of the nuclear power training unit will certify the eligibility of each officer.

1202 NUCLEAR-QUALIFIED OFFICER EXTENDING PERIOD OF ACTIVE SERVICE (CONTINUATION PAY)

120201. Entitlement. Certain nuclear-qualified naval officers are entitled to continuation pay when they meet the requirements of this section and the requirements of SECNAV Instruction 7220.65 series (reference (ac)).

120202. Eligibility Requirements. To qualify for continuation pay under this section an officer of the naval service must:

A. Have the current technical qualification for duty in connection with supervision, operation, and maintenance of naval nuclear propulsion plants; and

B. Have completed less than 23 years' commissioned service on applications; and

★C. On or before 30 September 1996, execute a written agreement to remain on active duty in connection with supervision, operation, and maintenance of naval nuclear propulsion plants for a period of 3, 4, or 5 years. Multiple co-pay contracts may also be used through the full period of eligibility so long as the final contract does not extend past the 26th year of commissioned service.

120203. Computation. The amount payable is determined semiannually by the Secretary of the Navy. When an officer's agreement is accepted, the total amount payable becomes fixed at that time. Effective 23 December 1987, the amount may not exceed \$10,000 for each year of the active service agreement.

120204. Time of Payment

A. When an officer's agreement is accepted before the end of an existing service obligation, continuation pay may be paid in a:

1. Number of installments equal to the number of years covered by the contract plus 1; the first upon acceptance of the application, the second upon expiration of existing obligated service, and the remaining payments annually (12-month intervals), thereafter. (Note: this provision only applies to the first continuation pay contract.)

2. Number of annual installments equal to the number of years covered by the contract; the first upon expiration of existing obligated service and the remaining payments annually thereafter.

B. When an officer's agreement is accepted after an existing service requirement expires, continuation pay is paid in equal annual installments over the length of the contract, commencing upon acceptance of the application and the remaining payments annually thereafter.

120205. Recoupment of Unearned Continuation Pay. An officer who does not complete the full period of 3, 4, or 5 years of active duty as agreed may not be paid any unpaid installments of continuation pay. Except under certain conditions prescribed in SECNAV Instruction 7220.65 series (reference (ac)), an officer must repay the unearned portion of any installments already paid. To arrive at an amount to be recouped, reduce the total continuation pay to an amount per month and multiply the monthly amount by the number of months, and fractions of months, for which payment was made that the officer has not served. See SECNAV Instruction 7220.65 series (reference (ac)) for recoupment criteria.

1203 NUCLEAR CAREER ANNUAL INCENTIVE BONUS

★120301. Entitlement. Certain nuclear-qualified naval officers are entitled to an annual incentive bonus when they meet the requirements of this section and the criteria prescribed in SECNAV Instruction 7220.65 series (reference (ac)). The entitlement provisions of this section expire on 30 September 1996.

120302. Eligibility Requirements. To qualify for the annual incentive bonus under this section, an officer of the naval service must:

- A. Be entitled to basic pay; and
- B. Not be above pay grade O-6; and
- C. Not be selected for and not have assumed the rank of rear admiral; and
- D. Be currently qualified for duty in connection with supervision, operation, and maintenance of naval nuclear propulsion plants in accordance with the provisions of BUPERS Instruction 1540.1 series (reference (ad)); and
- E. Not be serving in a period of obligated service incurred as a result of the acceptance of nuclear officer continuation pay. (This does not preclude pro rata payment in accordance with SECNAV Instruction 7220.65 series (reference (ac))).

F. When receiving aviation career incentive pay, those officers must be serving in a billet requiring them to be:

- 1. Technically qualified for duty in connection with the supervision, operation, and maintenance of naval nuclear propulsion plants; and
- 2. Qualified for the performance of operational flying duties.

120303. Computation. The amount payable is determined by the Secretary of the Navy and prescribed in SECNAV Instruction 7220.65 series (reference (ac)). The amount may not exceed

\$7,200 for unrestricted line officers and \$3,600 for limited-duty officers and warrant officers.

120304. Time of Payment. The nuclear officer annual incentive bonus will be paid annually on 30 September to all eligible officers on active duty as of that date. SECNAV Instruction 7220.65 series (reference (ac)) contains provisions applicable to officers who meet the eligibility requirements for a portion of a preceding year.

1204 NUCLEAR OFFICER ACCESSION BONUS

120401. Entitlement. Naval officers or prospective naval officers with less than 5 years' commissioned service who are selected for officer naval nuclear power training and execute a written agreement to participate in a program of training for duty in connection with the supervision, operation, and maintenance of naval nuclear power propulsion plants are entitled to a nuclear officer bonus of not more than \$4,000.

120402. Payment. Payment of the nuclear power accession bonus will be in accordance with SECNAV Instruction 7220.65 series (reference (ac)).

120403. Recoupment.

A. A naval officer or prospective naval officer who has received a nuclear power accession bonus and fails to commence or satisfactorily complete the nuclear power training specified in the agreement with the Secretary of the Navy, for any of the reasons listed below, will be required to refund the entire bonus:

1. Approved request for voluntary release from the written agreement if, due to unusual circumstances, it is determined by the bureau of Naval Personnel, that such release would be clearly in the best interest of both the Navy and the officer concerned.

2. Disqualification that results from nuclear power or submarine physical examinations completed after payment of the bonus.

3. Disability resulting from misconduct, willful neglect, or incurred during a period of unauthorized absence.

4. Separation from the naval service pursuant to an approved court-martial sentence.

5. Unfitness or misconduct (including misconduct falling under the provisions of SECNAV Instruction 1900.7C and 1920.6A series.

B. However, reduce the amount to be recouped by an amount equal to any reduction taken under subparagraphs 350702F or 350802D.

120404. Recoupment Exception. If, for any reason other than stated above, the officer fails to maintain eligibility for the nuclear power accession bonus, recoupment of payments already made will not be required. Examples of reasons within the meaning of this paragraph include:

A. Disability, not the result of misconduct, willful neglect, or not incurred during a period of unauthorized absence.

B. Death.

C. Separation from the naval service by operation of laws independent of misconduct.

D. Physical disqualification occurring after satisfactory completion of nuclear power or submarine physical examinations.

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CHAPTER 13

SPECIAL PAY FOR OFFICERS SERVING
IN POSITIONS OF
UNUSUAL RESPONSIBILITY AND OF A CRITICAL NATURE

1301 ENTITLEMENT

Certain Navy officers entitled to the basic pay of grades O-6 and below are entitled to special pay while serving in a position of unusual responsibility and of a critical nature as designated by the Secretary of the Navy. This special pay will be referred to as responsibility pay.

1302 RATES PAYABLE

The monthly rates of responsibility pay are:

<u>Pay Grade</u>	<u>Amount</u>
O-6	\$ 150
O-5	100
O-4 and below	50

1303 AUTHORIZED PAYEES

Subject to the entitlement condition in section 1301 and the restrictions in section 1304, Navy

officers are entitled to responsibility pay while serving as commanding officer or commander of a unit listed in a directive promulgated by the Chief of Naval Operations. Responsibility pay will continue to accrue while on TAD, leave, or similar temporary absences from duty where there is no permanent relief.

1304 RESTRICTIONS

Responsibility pay is not authorized for:

130401. Officers temporarily in command.

130402. Officers assigned in designated "Officer in Charge" billets other than those promulgated by the Chief of Naval Operations.

130403. More than one officer per designated billet, except for the dates of assumption of and relief from command.

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HUMAN
RIGHTS
CAMPAIGN

July 1998

Dear Friend:

Enclosed please find the Human Rights Campaign 1998 Manual, *Equality: A Winning Message-- Talking About Lesbian and Gay Issues in Your Campaign*. We are pleased to present this third volume of our successful manual designed to help members of Congress, candidates, consultants, and voters discuss lesbian and gay issues in an informed and aware manner.

Equality: A Winning Message is a powerful primer on gay and lesbian issues. It provides an overview of the major issues facing the lesbian and gay community today, as well as up to date bipartisan survey and polling information. Based on this extensive research, it suggests strategies and messages for handling questions that affect the gay and lesbian community.

The Human Rights Campaign has a commitment to elect leaders to Congress who will fight for the equality of all people. That commitment reaches far beyond PAC and monetary contributions to candidates. By providing this manual, we hope to make it easier for you to discuss the importance of justice for lesbian, gay, and bisexual Americans.

In 1998 HRC will be active in over 200 campaigns of Democrats and Republicans who support equal rights and fairness. It is our intent that this manual, in conjunction with our political resources, can help you succeed in this important political year. Please feel free to contact us if you would like additional copies or have any questions.

Equality is a winning message and on Election Day that message will be heard!

Sincerely,



Winnie Stachelberg
Political Director

WORKING FOR LESBIAN AND GAY EQUAL RIGHTS.

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phone (202) 628 4160 fax (202) 347 5323 e-mail hrc@hrc.org



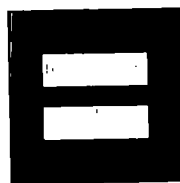
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Equality: A Winning Message



HUMAN
RIGHTS
CAMPAIGN

Talking About Lesbian & Gay Issues in Your Campaign

Rob Weiner

128 OEOB

from Richard
Scavides

'98
Election

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Equality: A Winning Message

Talking About Lesbian & Gay Issues in Your Campaign



HUMAN
RIGHTS
CAMPAIGN

'98
Election

TO: RUIB WENBER
12B

May 12, 1998

The Honorable William S. Cohen
(By U.S. Mail and Facsimile)

Dear Secretary Cohen:

The recent Department of Defense (DoD) report on the implementation of "Don't Ask, Don't Tell, Don't Pursue" is seriously flawed. The deficiencies in the report and the misleading manner in which it was released call into question DoD's commitment to fair enforcement of the policy.

The report provides no evidence, even anecdotal, for its central assertion that the reason gay discharges have soared to 997, the highest level since 1988, are due to "voluntary"¹ statements of sexual orientation made by service members. In fact, the report admits that the reasons for the explosion in gay discharges "are not known and would be difficult to ascertain."²

The report ignores key issues, misstates basic regulations and is non-responsive to cases raised by SLDN in our annual reports, the reason DoD commissioned its review. The DoD review group failed to contact a single service member affected by the policy. The review was conducted in secret. Even key military leaders such as former Secretary of the Air Force Sheila Widnall have stated that they had no knowledge of the review.³

Pentagon officials have exacerbated concerns about the report's credibility by claiming, without support, that gay people are using the policy to "opt out" of the military. This derogatory assertion raises serious concerns whether the report's recommendations – some of which are promising – will be implemented in good faith.

The Report Ignores Limits To Investigations and Intent of Policy To Protect Privacy

The DoD report is silent on the fundamental problem that personnel do not know the limits to gay investigations or the intent of the policy to respect people's privacy.⁴ Service members must know the rules in order to follow them or to train others. We ask that you fix this critical oversight by ensuring that guidance on the limits to investigations is issued immediately. A sample memorandum, using exact quotes from your own regulations, is attached.

The Report Ignores Coercive Tactics

The DoD report fails to address coercive tactics that violate the letter and spirit of this policy, including:

- ★ Threatening people with prison unless they confess to being gay or accuse others of being gay, as occurred on the *USS Simon Lake* (see attached);
- ★ Seizing personal diaries and private letters to find out if people are gay, as in the case of former West Point Cadet Nicole Galvan (see attached);

- ★ Questioning coworkers about a member's sexual orientation: TSgt Daryl Gandy's unit was asked "Has TSgt Gandy ever had a girlfriend?" "Would you be surprised to find out that TSgt Gandy is gay?" "Where does TSgt Gandy hang out? With whom?" (see attached);
- ★ Instructing Air Force investigators to interrogate parents and siblings of service members who have come out as gay (see attached); and
- ★ Using a "Homosexual/Bisexual Questionnaire" to solicit sailors' sexual orientation and to identify suspected gay people (see attached).

The report's assertion that the criticisms of DoD's implementation of "Don't Ask, Don't Tell, Don't Pursue" "reflect a misunderstanding of the Department's policy"⁵ is not credible when the report ignores the cases that belie this assertion. The Department needs to be honest about whether the actions described above are appropriate federal policy. We believe that they are not.

Thus, we ask that you reinforce the basic rule that "service members will not be asked, or required to reveal, their sexual orientation."⁶ Despite your prior statements that asking is wrong,⁷ some commanders, as you have said, do not seem to "get it."⁸ We also ask that you make clear that it is unacceptable to threaten service members -- with prison or other adverse action -- to elicit information about their sexual orientation or that of others. And we ask that you make clear that private confidences such as those shared with parents or contained in diaries do not constitute "statements" of orientation, as contemplated by the regulations, giving rise to inquiry or discharge.

The Report Fails To Address Issues of Accountability and Recourse

The report omits the issues of accountability for command violations and recourse for personnel harmed by improper inquiries. At most, only one commander has been held accountable in four years for the 1,369 command violations documented by SLDN. Service members who have been illegally asked about their sexual orientation, like former SS3 Kelli Sprague,⁹ or who have been falsely accused, like former Senior Airman Sonya Harden,¹⁰ have been unable to stop their discharges because the current administrative discharge system contains no checks on improper command actions.

Failure to address the issue of accountability signals a "wink and nod" attitude that is unacceptable. We ask that you implement a simple first step toward accountability: require commanders to articulate in writing the specific information they have deemed credible as the basis for their inquiries. We also ask that you review the viability of an exclusionary rule in the administrative system, as recommended by the Advisory Board on DoD Investigative Capability.¹¹

The Report Misstates Basic Regulations

The DoD report itself misstates and misrepresents basic regulations. The report, for example, finds fault with investigators who have "asked service members questions concerning their sexual orientation without credible information or without the requisite determination by a

commander that credible information was present....”¹² Under current regulations, however, questions about sexual orientation are *never* permitted.¹³ This bright line rule was reiterated by then DoD General Counsel Jamie Gorelick in testimony before Congress, where she stated that asking is inappropriate “at accession or any other point.”¹⁴ It is astounding that DoD, after a year-long review of current policy, could misstate such a fundamental principle.

The report also misrepresents current policy when it asserts that it is proper to initiate an inquiry in circumstances where “current or former partners, roommates, or unrelated third parties have sometimes come forward on their own to report information or evidence of homosexual conduct to commanders against the wishes of the service member in question.”¹⁵ Under the regulations, however, commanders may not initiate inquiries if the allegations are not credible.¹⁶ Commanders must assess whether the person making an allegation is trustworthy and reliable,¹⁷ and whether an inquiry would be consistent with the intent of the policy to respect people’s privacy.¹⁸ Credible information does not include anonymous allegations,¹⁹ or associational activities such as going to a gay bar,²⁰ which are protected under current policy. Under current regulations, and as outlined in the attached memorandum, there are many limits to investigations commanders must take into account before launching any inquiry.

Likewise, the report misrepresents the standard for criminal prosecutions when it indicates that it is appropriate to prosecute gay service members in cases involving “additional charges,” “fraternization” or “aggravating circumstances,” among others. The correct standard according to the regulations, is even-handedness: “Investigations by DCIOs and other DoD law enforcement organizations shall be conducted in an even-handed manner, without regard to whether the alleged sexual misconduct involves homosexual or heterosexual conduct.”²¹ The services are not supposed to investigate or prosecute gay service members unless they would also investigate and prosecute straight service members in the same circumstances.

Lastly, the report’s claim that investigations into homosexual conduct are mandatory²² is a wholly new assertion that requires fuller discussion. The claim erodes the longstanding principle of commander discretion that applies to many command contexts, not just in gay cases. Under “Don’t Ask, Don’t Tell, Don’t Pursue,” the regulations state that commanders “shall examine the information and decide whether an inquiry is warranted or no action should be taken.”²³ That determination rests solely with the commander. Further, the practical effect of DoD’s pronouncement would be to drive commanders to investigate everything, no matter how tenuous or incredible, for fear of being out of step with the message coming from their superiors. DoD’s overreaching sends a clear signal to commanders to err on the side of pursuing suspected gay people, not on the side of respecting the limits to investigations. This is precisely the kind of climate and message that raises concerns about DoD’s commitment to fair implementation and enforcement of the policy.

DoD Recommendations That Are Problematic

The serious omissions and errors in the DoD report and the misleading manner in which it was released raise concerns about some of the report’s recommendations which, under more sanguine circumstances, could have the potential to be helpful, depending on how they are implemented. We have concerns about the recommendations regarding (1) training, (2) the advisory role of military attorneys for the command, and (3) requiring Service Secretary

approval prior to initiating inquiries or investigations in cases where service members have stated their sexual orientation.

First, training will only be useful if it conveys all the limits to investigations and the intent of the policy to respect people's privacy, which the DoD report fails to recommend, as discussed above.

Second, relying on lawyers to police command actions under this policy will be helpful only if lawyers are given specific instructions that their role is to stop improper command actions, not find ways to justify them. We note that command lawyers have been responsible for some of the worst abuses of this policy, including the use of a pretrial agreement at Hickam Air Force Base to solicit the identities of suspected gay personnel. We are further concerned that this recommendation may reinforce the harmful trend we have identified in our annual reports to treat this policy as a legal issue rather than a leadership issue.

Third, the report's recommendations regarding coming out cases and recoupment issues are confusing and problematic. It is simply not clear why the report recommends that commanders obtain Service Secretary approval prior to initiating an investigation in coming out and recoupment cases. It is also unclear under what circumstances Service Secretary approval is required.

The tone of this section of the report raises grave concerns about how these questions will be answered by DoD officials charged with implementing these recommendations. The report states without substantiation, for example, that service members state that they are gay to abuse "the public purse"²⁴ and "to avoid a deployment or service obligation."²⁵ In four years under "Don't Ask, Don't Tell, Don't Pursue," we have not seen one case that would support such a claim and the DoD report provides no such evidence for this inflammatory assertion.

Instead, in SLDN's cases, we have found that (1) widespread anti-gay harassment is forcing some members out of the closet, and (2) the way this policy has been implemented creates for many an untenable ethical dilemma by conditioning their service on lying about their sexual identity, even to their family and friends.

We are also deeply concerned that the report ignores the Air Force's practice of asking service members in recoupment and coming out cases hundreds of deeply personal questions about their private lives, as well as Air Force instructions to investigators to interrogate parents and siblings in such cases. The appropriate response would be to ensure that the Air Force drops such intrusive, offensive tactics, bringing it in line with the other services, not to accommodate the Air Force's bad practices.

In the meantime, Under Secretary of Defense Rudy DeLeon has committed to us that, at a minimum, you intend to uphold and follow the current recoupment policy as set forth in the Deutch memorandum and that there will be further conversations regarding the proper enforcement of that policy.

Good Recommendations By DoD That Should Be Implemented

We welcome the recommendations to (1) clarify and reissue the Dorn memorandum on anti-gay harassment and lesbian-baiting so that those who are victims of anti-gay hate crimes and harassment, like former Marine Lance Corporal Kevin Smith, are not, as he was, threatened with criminal investigations by their commanders solely because they are victims of hate crimes;²⁶ (2) prohibit the use of pretrial agreements to solicit accusations against others as occurred Hickam Air Force Base; (3) clarify that health care providers are not required to turn in gay personnel or those who have questions about their sexual orientation, as happened in the case of former Marine Corporal Kevin Blaesing;²⁷ and (4) ensure compliance with your order last year to replace obsolete recruiting forms that asked prospective recruits if they were gay.

We also welcome the report's enunciation of some basic principles that underlie "Don't Ask, Don't Tell, Don't Pursue," including:

- ★ "Sexual orientation is a personal and private matter;"²⁸
- ★ "Respect[] the limits that the policy imposes on investigations;"²⁹
- ★ "Fact-finding inquiries must not be unduly intrusive;"³⁰
- ★ "Ensure that the privacy rights of our service members are respected in accordance with the policy."³¹

These basic principles, however, must be conveyed to the field. They currently have not been communicated in terms that make clear their meaning and scope.

SLDN Recommendations To Shore Up DoD's Credibility

While the DoD report raises many questions that need to be addressed, there are nevertheless some steps that we request you take now to repair the damaged credibility of your review of the implementation of "Don't Ask, Don't Tell, Don't Pursue."

First, we ask that you issue guidance on the limits to gay investigations and the intent of the policy to respect people's privacy. Without this basic step, the Department will not be credible and will inevitably repeat the mistakes of the past. The Department's mistakes are costly not only in terms of troop morale, but in dollars spent by DoD and the Department of Justice defending the military's actions in federal court. As mentioned earlier, a sample memorandum on the limits to gay investigations, using exact quotes from your regulations, is attached.

Second, we ask that you make clear it is unacceptable to threaten service members with prison or other adverse action, to elicit information about their sexual orientation or that of others. And we ask that you make clear that private confidences such as those shared with parents or contained in diaries do not constitute "statements" of orientation, as contemplated by the regulations, giving rise to inquiry or discharge.

Third, we ask that you require commanders to articulate in writing the specific information they have deemed credible as a basis for initiating an inquiry. This would be a good first step toward ensuring that inquiries are properly started, and where they are not, that there is

an opportunity to stop improper command actions and false allegations before they ruin people's lives.

Fourth, Pentagon officials should move forward on the good recommendations that have, in fact, emerged in this report. We welcome, for example, the Chief of Naval Operations (CNO) message on April 23, 1998 instructing commanders to ensure that "all personnel" understand and comply with the Dorn memo on anti-gay harassment and lesbian-baiting, although we note that the CNO message must be updated to cover not just crimes and threats, but all anti-gay harassment, as per DoD's instructions.

Fifth, officials should use this report as a springboard for further dialogue to address the many questions raised by the report and the outstanding details regarding some of its recommendations regarding training, reliance on lawyers to police command actions, and the requirement to obtain Service Secretary approval in coming out and recoupment cases.

We appreciate your willingness to order a review of the implementation of "Don't Ask, Don't Tell, Don't Pursue." We also appreciate your pledge to properly and fairly enforce current regulations and guidelines. There is a lot of work to be done to ensure that your words translate into effective and credible action.

Sincerely,



C. Dixon Osburn, Esq.
Co-Executive Director



Michelle M. Benecke, Esq.
Co-Executive Director

Enclosures:

Proposed Memorandum on Limits To Gay Investigations
Affidavits, *Barnes v. Perry*
Notification of Administrative Hearing, Cadet Nicole Galvan
Report of Investigation, Hickam Air Force Base, Technical Sergeant Daryl Gandy
Air Force Memorandum Dated November 3, 1994
Navy "Homosexual/Bisexual Questionnaire"

cc:

Bob Tyrer, Chief of Staff to Defense Secretary Cohen
John Podesta, Assistant to the President and Deputy Chief of Staff
Larry Stein, Assistant to the President & Director for Legislative Affairs
Karen Skelton, Deputy Assistant to the President & Deputy Director of Political Affairs
Laura Marcus, Senior Advisor to the Chief of Staff
Richard Socarides, Special Assistant to the President
Ron Klain, Chief of Staff to the Vice President
Monica Dixon, Deputy Chief of Staff to the Vice President
Maurice Daniel, Director of Political Affairs for the Vice President
Bob Dreier, Chief Domestic Policy Advisor to the Vice President

Philip DuFour, Office of the Vice President

¹ DoD Report at 5.

² *Id.*

³ *Don't Ask, Don't Tell*, (ABC news broadcast, November 1997).

⁴ Exchange between then Senator William Cohen and then DoD General Counsel Jamie Gorelick -- Sen. Cohen: "[T]his small measure of privacy is to do what? Just to prevent the military from prying into private life?" Gorelick: "Yes." *Policy Concerning Homosexuality in the Armed Forces: Hearings Before the Senate Comm. On Armed Services*, 103rd Cong., 2d Sess. (1993), p. 788. See also, President William J. Clinton, "Text of Remarks Announcing the New Policy," *The Washington Post*, July 20, 1993, A12 ("There will be a decent regard to the legitimate privacy and associational rights of all service members.") See also DEP'T OF DEFENSE DIRECTIVE NO. 1304.26, Enclosure 2(8)(a) (1994) and DEP'T OF DEFENSE DIRECTIVE NO. 1332.30, Enclosure 2-2(C) (1994) and DEP'T OF DEFENSE DIRECTIVE NO. 1332.14, Enclosure 4(H)(1) (1994) ("Sexual orientation is considered a personal and private matter.")

⁵ DoD Report at 6.

⁶ DoDD 1332.30, Enclosure 8 (1994) and DoDD. 1332.14, Enclosure 4 (1994) [Hereinafter "Inquiry Guidelines"] at ¶ D(3).

⁷ *Larry King Live*, (CNN television broadcast, Transcript # 97012700V22, January 27, 1997).

⁸ *All Things Considered*, (NPR radio broadcast, April 7, 1998).

⁹ C. Dixon Osburn et al., Servicemembers Legal Defense Network, *Conduct Unbecoming: The Third Annual Report on "Don't Ask, Don't Tell, Don't Pursue"* (1997) at 4.

¹⁰ *Id.* at 32-3.

¹¹ CHARLES F.C. RUFF, REPORT OF THE ADVISORY BOARD ON THE INVESTIGATIVE CAPABILITY OF THE DEPARTMENT OF DEFENSE (1995).

¹² DoD REPORT at 7.

¹³ DoDD 1332.30, Enclosure 8 (1994) and DoDD. 1332.14, Enclosure 4 (1994) [Hereinafter "Inquiry Guidelines"] at ¶ D(3).

¹⁴ Comments by former DoD General Counsel Jamie Gorelick, *Policy Concerning Homosexuality in the Armed Forces: Hearings Before the Senate Comm. On Armed Services*, 103rd Cong., 2d Sess. (1993), p. 789 ("...[W]e do not ask about orientation not only at accession but at any time.")

¹⁵ DoD REPORT at 6.

¹⁶ Inquiry Guidelines, ¶ C.

¹⁷ Inquiry Guidelines, ¶ F(1) (Credible information requires an accusation by "a reliable person.").

¹⁸ DoDD 1304.26, Enclosure 2(8)(a) (1994), DoDD 1332.30, Enclosure 2 ¶ (C) (1994), and DoDD 1332.14, Enclosure 1 ¶ (H)(1)(a) (1994) ("Sexual orientation is considered a personal and private matter.").

¹⁹ Inquiry Guidelines, ¶ B(3) (Credible information "requires a determination based on articulable facts, not just belief or suspicion.").

²⁰ Inquiry Guidelines, ¶ E(4) ("Credible information does not exist when the accusation concerns an associational activity, such as going to a gay bar..., associating with known homosexuals, membership or participation in gay organizations or marching in a gay rights rally in civilian clothes.").

²¹ DoDI 5505.8 ¶ D(3).

²² DoD Report at 7 ("...commanders are obliged to investigate whenever they receive credible evidence of homosexual conduct").

²³ Inquiry Guidelines, ¶ D(2).

²⁴ DoD Report at 11.

²⁵ *Id.*

²⁶ C. Dixon Osburn et al., Servicemembers Legal Defense Network, *Conduct Unbecoming: The Fourth Annual Report on "Don't Ask, Don't Tell, Don't Pursue"* (1998) at 50-1. The services should also address lesbian-baiting as a standard component of their training programs on leadership and sexual harassment.

²⁷ C. Dixon Osburn et al., Servicemembers Legal Defense Network, *Conduct Unbecoming: The Second Annual Report on "Don't Ask, Don't Tell, Don't Pursue"* (1996) at 15. The report's clarification will serve no purpose unless it is communicated to the field -- a step the report fails to recommend. We appreciate the report's mention of a current DoD proposal for a limited psychotherapist privilege which would cover service members who seek

counseling about their sexual orientation and conduct, bringing DoD closer to compliance with the Supreme Court's opinion in *Jaffee v. Redmond*, 518 U.S. 1 (1996).

²⁸ DOD REPORT at 1.

²⁹ *Id.* at 2.

³⁰ *Id.*

³¹ *Id.* at 13.



**Enclosures To Cohen Letter
Regarding Report On Implementation Of
“Don’t Ask, Don’t Tell, Don’t Pursue”**

May 12, 1998

**Proposed Memorandum on
Limits To Gay Investigations**

1

**MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS,
CHAIRMAN OF THE JOINT CHIEFS OF STAFF,
INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE**

**SUBJECT: Current Limits on Inquiries and Investigations Into Accusations of
Alleged Homosexual Conduct**

This memorandum restates current policy regarding command inquiries of service members accused of homosexual conduct.¹ This guidance is issued because commands have asked for clarification regarding when an inquiry into homosexual conduct is appropriate.

Under DoD policy, no one will be asked about his or her sexual orientation,² no one will undertake affirmative efforts to identify members suspected of homosexual conduct,³ the Armed Forces will not tolerate harassment against any individual for any reason,⁴ and there will be a decent regard to the legitimate privacy and associational rights of all servicemembers regardless of sexual orientation.⁵

Informal fact-finding and administrative separation procedures are the preferred method of addressing homosexual conduct.⁶ Only a service member's commander may initiate an inquiry into homosexual conduct.⁷ Commanders may initiate inquiries only upon receipt of credible information of such conduct.⁸ Credible information exists when information, considering its source and the surrounding circumstances, supports a reasonable belief that a service member has engaged in homosexual conduct.⁹ Credible information requires a determination based on articulable facts, not just belief or suspicion.¹⁰

Commanders shall exercise sound discretion regarding when credible information exists.¹¹ They shall examine the information and decide whether an inquiry is warranted or no action should be taken.¹² Commanders will consider, in allocating scarce investigative resources,¹³ that sexual orientation is a personal and private matter, and that under current policy, there is a decent regard to the legitimate privacy and associational rights of all servicemembers.¹⁴

Not all accusations of homosexual conduct constitute credible information as a basis for inquiry or discharge.¹⁵ Credible information does not exist when the source of the accusation is not credible or reliable.¹⁶ Credible information does not exist when the accusation concerns an associational activity, such as going to a gay bar, associating with known homosexuals, [membership or participation in gay organizations,] or marching in a gay rights rally in civilian clothes.¹⁷ Credible information does not exist when the information concerns possessing or reading homosexual publications, [possessing or reading information containing homosexual references including information obtained on-line, in electronic mail messages or in personal diaries.]¹⁸ Credible information does not exist when the information concerns listing by a service member of someone of the same gender as the person to be contacted in the case of an emergency, as an insurance beneficiary, or in a similar context.¹⁹

Credible information does not exist when the information concerns an allegation by another that a service member is homosexual.²⁰ Credible information does not exist when the inquiry would be based on rumor, suspicion, or capricious claims concerning a member's sexual orientation.²¹ Credible information does not exist when a service member reports being threatened because he or she is said or perceived to be a homosexual.²² [Credible information does not exist when the information concerns private communications to a member's attorney,²³ chaplain,²⁴ spouse,²⁵ security clearance investigator,²⁶ psychotherapist,²⁷ doctor²⁸ or family member.²⁹] [Credible information does not exist when the accusations result from an attempt at blackmail or extortion.³⁰]

A commander may initiate an inquiry only if he or she has credible information that a basis for discharge exists.³¹ A basis for discharge exists if: (1) The member has engaged in a homosexual act; (2) The member has said that he or she is homosexual or bisexual, or made some other statement that indicates a propensity or intent to engage in homosexual acts; or (3) The member has married or attempted to marry a person of the same sex.³²

Inquiries shall be limited to the factual circumstances directly relevant to the specific allegations.³³ [For example, if a member has made a statement that he or she is a homosexual, the inquiry shall be limited to verifying whether the statement in question was made. If a member is accused of engaging in a homosexual act, the inquiry shall be limited to the specific act in question.]³⁴ [It is inappropriate during the course of an inquiry or in preparation for legal action to solicit information about additional incidents of homosexual conduct not in question or to solicit additional information about others who might be homosexual.]³⁵ [It is inappropriate during the course of an inquiry or in preparation for legal action to threaten service members with adverse action or promise them more lenient treatment in exchange for information concerning homosexual conduct.]³⁶

At any given point of the inquiry, the commander or appointed inquiry official must be able clearly and specifically to explain [to the servicemember and his or her legal representation] which grounds for separation he or she is attempting to verify and how the information being collected relates to those specific separation grounds.³⁷

Servicemembers must be advised of their rights under Article 31 of the Uniform Code of Military Justice.³⁸ Servicemembers subject to a command inquiry or criminal investigation cannot be prevented from exercising their right to consult with a defense attorney³⁹ and cannot be denied representation by a defense attorney during custodial interrogation.⁴⁰

Commanders are responsible for ensuring that inquiries are conducted properly and that no abuse of authority occurs.⁴¹

Allegations involving adult private consensual sexual conduct shall be referred to the member's commander for appropriate disposition.⁴² Criminal investigations should

not be undertaken when the allegations involve only private, consensual sexual conduct.⁴³ [Criminal investigations of other allegations will be suspended and referred to the commander for inquiry and administrative processing when it is determined during the course of the investigation that the only credible allegations are of private, consensual sexual conduct.]⁴⁴ Investigations shall be conducted in an evenhanded manner without regard to whether the alleged conduct involves homosexual or heterosexual conduct.⁴⁵

If a member is separated for homosexual conduct, the characterization of discharge shall be based on a pattern of behavior and duty performance rather than an isolated incident.⁴⁶ [Homosexual conduct does not warrant a discharge characterization of general under honorable conditions when the member's overall service record warrants an honorable discharge.⁴⁷]

¹ Note: The bracketed portions of the memorandum are supported by the letter and intent of the policy, but are not direct quotes.

² "...[W]e do not ask about orientation not only at accession but at any time." Former DoD General Counsel Jamie Gorelick, *Policy Concerning Homosexuality in the Armed Forces: Hearings Before the Senate Comm. On Armed Services*, 103rd Cong., 2d Sess. (1993), p. 789. See also, DEP'T OF DEFENSE DIRECTIVE NO. 1332.30, Enclosure 8(D)(3) (1994) and DEP'T OF DEFENSE DIRECTIVE NO. 1332.14, Enclosure 4(D)(3) (1994) ("Commanders or appointed inquiry officials shall not ask, and members shall not be required, to reveal their sexual orientation.")

³ "We will not ask, we will not witch hunt, we will not seek to learn orientation." General Colin Powell, *Policy Concerning Homosexuality in the Armed Forces: Hearings Before the Senate Comm. On Armed Services*, 103rd Cong., 2d Sess. (1993), p. 709. "This is an end to witch hunts." President William J. Clinton, "Text of Remarks Announcing the New Policy," *The Washington Post*, July 20, 1993, A12. "Should we have sex squads going out and looking for homosexual conduct that is done between adults in private? Absolutely not." Former Senator and Chairman of the Senate Armed Services Committee, Sam Nunn, *The Record*, May 31, 1993, A10. "No investigations or inquiries will be conducted solely to determine a service member's sexual orientation." DoD Policy Guidelines on Homosexual Conduct in the Armed Forces, July 19, 1993.

⁴ "The Armed Forces do not tolerate harassment or violence against any servicemember, for any reason." DEP'T OF DEFENSE DIRECTIVE NO. 1304.26 (1994). See also, Edwin Dorn, MEMORANDUM FOR SECRETARIES OF MILITARY DEPARTMENTS, March 24, 1997 ("The fact that a servicemember reports being threatened because he or she is said or is perceived to be a homosexual shall not by itself constitute credible information justifying the initiation of an investigation of the threatened servicemember. The report of such a threat should result in the prompt investigation of the threat itself.")

⁵ Exchange between then Senator William Cohen and then DoD General Counsel Jamie Gorelick -- Sen. Cohen: "[T]his small measure of privacy is to do what? Just to prevent the military from prying into private life?" Gorelick: "Yes." *Policy Concerning Homosexuality in the Armed Forces: Hearings Before the Senate Comm. On Armed Services*, 103rd Cong., 2d Sess. (1993), p. 788. See also, President William J. Clinton, "Text of Remarks Announcing the New Policy," *The Washington Post*, July 20, 1993, A12 ("There will be a decent regard to the legitimate privacy and associational rights of all service members.") See also DEP'T OF DEFENSE DIRECTIVE NO. 1304.26, Enclosure 2(8)(a) (1994) and DEP'T OF DEFENSE DIRECTIVE NO. 1332.30, Enclosure 2-2(C) (1994) and DEP'T OF DEFENSE DIRECTIVE NO. 1332.14, Enclosure 4(H)(1) (1994) ("Sexual orientation is considered a personal and private matter.")

⁶ "Informal fact-finding inquiries and administrative separation procedures are the preferred method of addressing homosexual conduct." DEP'T OF DEFENSE DIRECTIVE NO. 1332.30, Enclosure 8-3 (D)(1) (1994) and DEP'T OF DEFENSE DIRECTIVE NO. 1332.14, Enclosure 4(D)(1) (1994).

⁷ "Only the member's commander is authorized to initiate fact-finding inquiries involving homosexual conduct." DEP'T OF DEFENSE DIRECTIVE NO. 1332.30, Enclosure 8-1 (A)(1) (1994) and DEP'T OF DEFENSE DIRECTIVE NO. 1332.14, Enclosure 4(A)(1) (1994).

⁸ "A commander may initiate a fact-finding inquiry only when he or she has received credible information that there is a basis for discharge." DEP'T OF DEFENSE DIRECTIVE NO. 1332.30, Enclosure 8-1 (A)(1) (1994) and DEP'T OF DEFENSE DIRECTIVE NO. 1332.14, Enclosure 4(A)(1) (1994).

⁹ "Credible information exists when information, considering its source and the surrounding circumstances, supports a reasonable belief that a service member has engaged in homosexual conduct." DEP'T OF DEFENSE DIRECTIVE NO. 1332.30, Enclosure 8-1 (B)(3) (1994) and DEP'T OF DEFENSE DIRECTIVE NO. 1332.14, Enclosure 4(B)(3) (1994).

¹⁰ Credible information "requires a determination based on articulable facts, not just belief or suspicion." DEP'T OF DEFENSE DIRECTIVE NO. 1332.30, Enclosure 8-1(B)(3) (1994) and DEP'T OF DEFENSE DIRECTIVE NO. 1332.14, Enclosure 4(B)(3) (1994).

¹¹ DEP'T OF DEFENSE DIRECTIVE NO. 1332.30, Enclosure 8-3(D)(2) (1994) and DEP'T OF DEFENSE DIRECTIVE NO. 1332.14, Enclosure 4-3 (D)(2) (1994). ("Commanders shall exercise sound discretion regarding when credible information exists.")

¹² *Ibid.* ("They shall examine the information and decide whether an inquiry is warranted or no action should be taken.")

¹³ DEP'T OF DEFENSE INSTRUCTION 5505.8 (1994) ("...as a matter of investigative priorities and resource limitations, Defense Criminal Investigative Organizations (DCIOs) and other DoD law enforcement organizations will normally refer allegations involving only adult private consensual sexual misconduct to the service member's commander for appropriate disposition.")

¹⁴ DEP'T OF DEFENSE DIRECTIVE NO. 1304.26, Enclosure 2(8)(a) (1994) and DEP'T OF DEFENSE DIRECTIVE NO. 1332.30, Enclosure 2-2(C) (1994) and DEP'T OF DEFENSE DIRECTIVE NO. 1332.14, Enclosure 4(H)(1) (1994) ("Sexual orientation is considered a personal and private matter.")

¹⁵ *Ibid.*

¹⁶ Credible information requires an accusation by "a reliable person." DEP'T OF DEFENSE DIRECTIVE NO. 1332.30, Enclosure 8-4 (F)(1) (1994) and DEP'T OF DEFENSE DIRECTIVE NO. 1332.14, Enclosure 4(F)(1) (1994).

¹⁷ "Credible information does not exist when the accusation concerns an associational activity, such as going to a gay bar...., associating with known homosexuals, membership or participation in gay organizations or marching in a gay rights rally in civilian clothes." DEP'T OF DEFENSE DIRECTIVE NO. 1332.30, Enclosure 8-3 (E)(4) (1994) and DEP'T OF DEFENSE DIRECTIVE NO. 1332.14, Enclosure 4(E)(4) (1994). The list of associational rights is nonexhaustive and should be understood to permit service members the right to attend churches that welcome gay congregants and other organizations. The United States Navy, however, issued a memorandum in June 1994 stating that supporting "homosexual interests may violate" the "Standards of Conduct," thus necessitating the clarification regarding membership or participation in gay organizations.

¹⁸ "Credible information does not exist when the information concerns...possessing or reading homosexual publications...." DEP'T OF DEFENSE DIRECTIVE NO. 1332.30, Enclosure 8-3 (E)(4) (1994) and DEP'T OF DEFENSE DIRECTIVE NO. 1332.14, Enclosure 4(E)(4) (1994). Documented cases suggest that commands do not understand that associational activities are not to be used as a basis for inquiry or discharge in a variety of contexts. Commands have seized personal diaries, personal letters, electronic mail and the like to look for private information about a service member's sexual orientation. Further guidance as provided that is consistent with the current regulations is needed to direct commands not to use these associational activities as a basis for discharge.

¹⁹ "The listing by a service member of someone of the same gender as the person to be contacted in the case of an emergency, as an insurance beneficiary, or in a similar context, does not provide a basis for separation or further investigation." DEP'T OF DEFENSE POLICY GUIDELINES ON HOMOSEXUAL CONDUCT IN THE ARMED FORCES, July 19, 1993.

²⁰ "Credible information does not exist when...the only information is the opinions of others that a member is homosexual...." DEP'T OF DEFENSE DIRECTIVE NO. 1332.30, Enclosure 8-3 (E)(2) (1994) and DEP'T OF DEFENSE DIRECTIVE NO. 1332.14, Enclosure 4(E)(2) (1994).

²¹ "Credible information does not exist when the inquiry would be based on rumor, suspicion, or capricious claims concerning a member's sexual orientation." DEP'T OF DEFENSE DIRECTIVE NO. 1332.30, Enclosure 8-3 (E)(3) (1994) and DEP'T OF DEFENSE DIRECTIVE NO. 1332.14, Enclosure 4(E)(3) (1994).

²² Credible information does not exist when "a service member reports being threatened because he or she is said or perceived to be a homosexual." Edwin Dorn, MEMORANDUM FOR SECRETARIES OF MILITARY DEPARTMENTS, March 24, 1997.

²³ While not defined in terms of credible information, the current regulations do not eviscerate privileged communications. See M.R.E. 502. See also DEP'T OF DEFENSE POLICY GUIDELINES ON HOMOSEXUAL CONDUCT IN THE ARMED FORCES, July 19, 1993 ("Speech within the context of priest-penitent, husband-wife, or attorney-client communications remains privileged.").

²⁴ While not defined in terms of credible information, the current regulations do not eviscerate privileged communications. See M.R.E. 503. See also DEP'T OF DEFENSE POLICY GUIDELINES ON HOMOSEXUAL CONDUCT IN THE ARMED FORCES, July 19, 1993 ("Speech within the context of priest-penitent, husband-wife, or attorney-client communications remains privileged.").

²⁵ While not defined in terms of credible information, the current regulations do not eviscerate privileged communications. See M.R.E. 504. See also DEP'T OF DEFENSE POLICY GUIDELINES ON HOMOSEXUAL CONDUCT IN THE ARMED FORCES, July 19, 1993 ("Speech within the context of priest-penitent, husband-wife, or attorney-client communications remains privileged.").

²⁶ Exec. Order No. 12968, sec. 3.1 (c), (d), 60 Fed. Reg. 40245 (1995). See also MEMORANDUM FOR SECRETARIES OF MILITARY DEPARTMENTS, December 22, 1993 ("Information about homosexual orientation or conduct obtained during a security clearance investigation will not be used...by the military departments in separation proceedings.")

²⁷ Recognizing conversations with psychotherapists as private conversations that will not trigger an inquiry under "Don't Ask, Don't Tell, Don't Pursue" does not require a determination that the conversations are privileged or confidential, just like the security clearance context. Not interfering with psychotherapists' ability to care for the health of service members is consistent with the policy's statement that "sexual orientation is a personal and private matter" and that the policy creates for service members a "zone of privacy." See *supra*, note 4.

²⁸ *Ibid.*

²⁹ Most Americans would agree that the armed forces should not intrude into the private conversations of family members. Indeed, security clearance regulations anticipate that gay servicemembers will tell their parents and sibling about their sexual orientation in order to diffuse national security concerns. An Air Force memorandum, dated November 3, 1994, however, specifically instructs inquiry officers to interrogate parents and siblings in homosexual conduct cases. Conversations with family members should be viewed as private, consistent with current regulations that state that sexual orientation is a "personal and private matter" and that the policy creates for service members a "zone of privacy."

³⁰ Current regulations leave open the question whether extortion or blackmail would constitute credible information for the basis of inquiry or discharge. Documented cases indicate that those who seek revenge against a service member through retaliatory accusations, blackmail or discharge, can use the current policy as a means of ending someone's career regardless of the credibility of the accusations themselves. It is now appropriate for the Department of Defense to make clear that allegations resulting from blackmail or extortion do not constitute credible information. The clarification would be consistent with current guidance that requires commanders to "consider...the character and service of the accused...[and]...possible improper motives of the accuser." See, DEP'T OF DEFENSE INSTRUCTION 5505.8 (1994). The clarification is consistent with the statement that "extortion and blackmail are criminal offenses under military and federal law." See DEP'T OF DEFENSE POLICY GUIDELINES ON HOMOSEXUAL CONDUCT IN THE ARMED FORCES, July 19, 1993.

³¹ DEP'T OF DEFENSE DIRECTIVE NO. 1332.30, Enclosure 8-2 (C)(1-3) (1994) and DEP'T OF DEFENSE DIRECTIVE NO. 1332.14, Enclosure 4-2(C)(1-3) (1994).

³² *Ibid.*

³³ DEP'T OF DEFENSE DIRECTIVE NO. 1332.30, Enclosure 8-1 (A)(3) (1994) and DEP'T OF DEFENSE DIRECTIVE NO. 1332.14, Enclosure 4 (A)(3) (1994). ("Inquiries shall be limited to the factual circumstances directly relevant to the specific allegations.") See also DEP'T OF DEFENSE INSTRUCTION 5505.8 (1994) ("Investigations shall be limited to the factual circumstances directly relevant to the specific allegations.") See also comments by then DoD General Counsel Jamie Gorelick ("Once you establish the elements of the offense or basis for discharge, you go no further.") *Policy Concerning Homosexuality in the Armed Forces: Hearings Before the Senate Comm. On Armed Services*, 103rd Cong., 2d Sess. (1993), p. 789.

³⁴ Documented cases indicate that commands do not understand the prohibition against expanding inquiries beyond the instant allegation. The Pentagon needs to clarify the current regulation to ensure that it is properly understood.

³⁵ *Ibid.*

³⁶ *Ibid.* Documented cases show that some commands have threatened service members with prison unless they confess to being gay or accuse others as gay. Investigative tactics such as these are inappropriate and are not authorized by current regulations or guidance.

³⁷ "At 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." DEP'T OF DEFENSE DIRECTIVE NO. 1332.14, Enclosure 4(D)(4) (1994) and DEP'T OF DEFENSE DIRECTIVE NO. 1332.30, Enclosure 8-3 (D)(4) (1994). The additional language "to the servicemember and his or her legal representative" is added in light of documented cases where some commands have refused to disclose this information on the theory that the guidance requires only that the command be able to explain the credible determination information when ordered to do so.

³⁸ Article 31(b), Uniform Code of Military Justice, 10 U.S.C. 831 (1997). *See also* DEP'T OF DEFENSE DIRECTIVE NO. 1332.14, Enclosure, 4 (D)(3).

³⁹ *Ibid.*

⁴⁰ *Ibid.* *See also*, Letter from Judith A. Miller to Jonathan M. Bowie, March 26, 1996.

⁴¹ "Commanders are responsible for ensuring that investigations are conducted properly and that no abuse of authority occurs." DEP'T OF DEFENSE DIRECTIVE NO. 1332.30, Enclosure 8-1 (A)(1) (1994) and DEP'T OF DEFENSE DIRECTIVE NO. 1332.14, Enclosure 4 (A)(1) (1994).

⁴² DEP'T OF DEFENSE INSTRUCTION 5505.8 (1994). ("...as a matter of investigative priorities and resource limitations, Defense Criminal Investigative Organizations (DCIOs) and other DoD law enforcement organizations will normally refer allegations involving only adult private consensual sexual misconduct to the service member's commander for appropriate disposition.") *See also* DEP'T OF DEFENSE DIRECTIVE NO. 1332.30, Enclosure 8-3 (D)(1) (1994) and DEP'T OF DEFENSE DIRECTIVE NO. 1332.14, Enclosure 4(D)(1) (1994). ("Informal fact-finding inquiries and administrative separation procedures are the preferred method of addressing homosexual conduct.")

⁴³ *Ibid.*

⁴⁴ Documented cases demonstrate that some service members are falsely accused of nonconsensual sexual conduct. When the facts demonstrate that the conduct in question is consensual, commands should suspend criminal processing and use the administrative system to resolve the matter, consistent with current regulations, not prosecute the member.

⁴⁵ "Investigations...shall be conducted in an even-handed manner without regard to whether the alleged sexual misconduct involves homosexual or heterosexual conduct." DEP'T OF DEFENSE INSTRUCTION 5505.8 (1994).

⁴⁶ "Characterization normally shall be based on a pattern of behavior and duty performance rather than an isolated incident." DEP'T OF DEFENSE DIRECTIVE NO. 1332.30, Enclosure 7-1 (B)(1) (1994). The regulations for enlisted personnel adopt a similar "overall service record" standard. DEP'T OF DEFENSE DIRECTIVE NO. 1332.14 (H)(3).

⁴⁷ *Ibid.*

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P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
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b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMY L. BARNES,

Plaintiff,

v.

THE HONORABLE WILLIAM J. PERRY,
and
THE HONORABLE JOHN E. DALTON

Defendants.

CIVIL ACTION NO:
96-591 (EGS)

DECLARATION OF

USN

Pursuant to 28 U.S.C. § 1746, I,

United States Navy, declare as follows:

1. I was interrogated in connection with the Navy's investigation of RMSN Amy Barnes on three separate occasions, for a total of approximately six hours. At times during the course of the interrogations, there were a number of people questioning me. I was all alone in the interview room and there was no one there to advise me of my rights or tell me whether I could refuse to answer any of their questions. No one told me that there was a formal investigation of RMSN Barnes' sexual orientation. When I told Command Investigators who interrogated me that I did not want to answer certain questions about the sexual orientation of RMSN Amy Barnes, EMFN Heather Hilbun and others, because such questions violated the Navy's "don't ask, don't tell, don't pursue" policy, I was made to feel that I had no choice other than to answer the questions. The Command Investigators

threatened and intimidated me into giving involuntary statements by telling me I would be violating Article 78 of the Uniform Code of Military Justice and would go to jail if I did not answer their questions and cooperate. As the affidavit of RMC (SS) Michael C. Beyrle states, I was told to do the right thing by cooperating. Being forced into giving statements which had the potential to be used against RMSN Barnes, who is my friend, was extremely upsetting.

2. Following the assault on RMSN Amy Barnes on or about November 17, 1995, I experienced hostility, harassment, threats and retaliation on the U.S.S. Simon Lake. Members of the chain of command as well as certain colleagues have made hostile and harassing statements to me. I have been threatened by virtue of my association with RMSN Barnes and told by members of the chain of command that if I do not choose my friends more carefully, I will become the target of an investigation. I believe I have also been retaliated against because of my statements supporting RMSN Barnes. When I provided a statement at the Captain's Mast about what I had witnessed at the bar when RMSN Barnes was assaulted, I was stripped of my top secret security clearance. When I requested annual leave in February, my request was initially denied, and I had to persuade my command to grant my request. At work, everything I did was scrutinized more closely than usual. It took an unusually long time for the chain of command to respond to other "chits" that I put in. I had difficulty obtaining a copy of my evaluation, and I was not

allowed to take my advancement exam, which is a precondition to a promotion, for the purported reason that I had not scored high enough on my physical readiness test (PRT). However, other sailors who were in the remedial program were permitted to take the exam. I never experienced any problems before on board the U.S.S. Simon Lake before the investigation of RMSN Barnes, and the hostility, harassment, threats and retaliation I have experienced all appear to relate to or arise from the investigation and recommended discharge of RMSN Barnes.

3. Due to my experiences before I left the ship on annual leave, I am genuinely afraid that if I were to return to the U.S.S. Simon Lake, I will be subjected to further hostility, harassment, threats and retaliation because of my connection to the Barnes case. Therefore, I have requested a permanent transfer from the U.S.S. Simon Lake to another post.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on April 27, 1996, in Washington, D.C.

**Notification of Administrative Hearing,
Cadet Nicole Galvan**

3



DEPARTMENT OF THE ARMY
UNITED STATES MILITARY ACADEMY
WEST POINT, NEW YORK 10996

REPORT TO
ATTENTION OF

MAJA-SC (15(b) 1-10)

APR 17 1998

MEMORANDUM FOR Cadet Nicole Galvan, Company H-3, Class of 1997, USCC,
West Point, New York 10997

SUBJECT: Investigation UP Paragraph 10.09, Regs USMA

1. Pursuant to the direction of the Superintendent, USMA, I have been appointed Investigating Officer under the provisions of paragraph 10.09, Regs USMA, to investigate the following allegations and any related misconduct:

MAJA-SC

SUBJECT: Investigation UP Paragraph 10.09, Regs USMA

(7) That Cadet Nicole Galvan, Company H-3, Class of 1997, did, from on or about 6 January 1995 to on or about 24 March 1996, violate paragraph 10.25, Regulations, United States Military Academy, by making various statements in her diary indicating a propensity or intent to engage in homosexual acts or conduct or indicating she had engaged in homosexual conduct, including but not limited to, the following:

6. Documentary evidence which will be considered at the hearing includes, but is not limited to, the attached written statements of

March 1996, the memorandum by ; your memorandum dated 8 March 1996, your diary dated 8 March 1996, your diary which was seized by MSG Stoneking, the attached e-mail correspondence, and all other attached documentation. In addition, the Superintendent may consider matters from your personnel and disciplinary records without referral to you for comment; you may review these files upon request to the appropriate custodian at USCC.

Encls

KERRY PIERCE
LTC, EN
Investigating Officer

**Report of Investigation, Hickam Air Force Base,
Technical Sergeant Daryl Gandy**

4

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**REPORT OF INVESTIGATION
PREPARED BY
COLONEL JOE M. MCKETHAN,
INVESTIGATION OFFICER;
MAJOR CATHY F. HEWITT,
ASSISTANT INVESTIGATION OFFICER;
AND
COLONEL CHARLES R. LUCY,
LEGAL ADVISOR
AIR FORCE INSPECTION AGENCY
CONCERNING
VIOLATIONS OF DOD POLICY
AT HICKAM AFB HI
11 SEPTEMBER 1996**

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or given additional dissemination (in whole or in part) outside the Air Force without the approval of
The Inspector General, SAE/IG.

~~FOR OFFICIAL USE ONLY~~

(b)(6)

3. After the report of investigation was completed and during their preparation for a potential administrative discharge hearing involving [REDACTED] two assistant SJAs questioned four of [REDACTED] coworkers as potential witnesses. During the interviews, the following questions, or questions similar to them, were asked:

1. Do you have any reason to believe that [REDACTED] doesn't like girls?
2. Have you ever had the feeling that [REDACTED] is interested in men?
3. Have you ever seen [REDACTED] hug, kiss, or hold hands with another man in a way that was more than just a means of saying hello?
4. Would you be surprised to find out that [REDACTED] is gay?
5. What is it like to work in a unit with so many homosexuals?
6. Has [REDACTED] ever talked about women to you, you know, the way men talk about women?
7. Where does [REDACTED] hang out? With whom?
8. Has [REDACTED] ever had a girlfriend?
9. Do you think it is unusual for him not to have a girlfriend?
10. Does anyone in your office know that [REDACTED] is gay?

Several of these questions created confusion in the minds of [REDACTED] coworkers as to the scope of the inquiry and whether conclusions about sexual orientation were being solicited. One of the coworkers was offended by question #6 which he interpreted to imply sexual harassment and/or stereotyping. These questions were asked by assistant SJAs in preparation for board proceedings. The assistant SJAs stated that the purpose of these questions was to identify evidence to disprove any assertion [REDACTED] might make during board proceedings that he had not engaged in homosexual conduct or, if he had, that such conduct was a departure from his ordinary and customary behavior. DoD and AF regulations contain no specific guidance on the scope of questions that may be asked in preparing rebuttal evidence/argument. The base legal office attorneys also attempted to question one Navy member and a former Air Force member as potential witnesses in [REDACTED] administrative board hearing. Both refused to be interviewed and there was no further contact.

4. Approval of [REDACTED] conditional waiver of his right to a discharge board contingent upon receipt of an honorable separation was not tied to a [grant of immunity] and order to testify in US v. [REDACTED]. The timing of [REDACTED] request and the government's action to ensure his availability to testify in US v. [REDACTED] were coincidental. The two actions were independent and processed independently. A [grant of immunity] does not require acceptance and it is unrelated to the characterization of discharge. The [grant of immunity] could have been given any time, even if [REDACTED] had not been being processed for administrative separation. [REDACTED] perception that the [immunity grant] and his waiver request were interrelated

**Air Force Memorandum Dated
November 3, 1994**

5

**TIPS FOR INQUIRY OFFICERS OF CASES INVOLVING MEMBERS WHO STATE
THEY ARE HOMOSEXUAL**

1. You have been appointed to serve as an inquiry officer in a case involving a member stating he or she is homosexual or bisexual. Making such a statement is homosexual conduct that subjects the member to involuntary separation action because the statement creates a rebuttable presumption that the member engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts. Moreover, if the member has received educational assistance, special pay, or bonuses, the member may be subject to recoupment of an amount of government benefits proportional to the amount of the member's military service obligation that has not been fulfilled.

2. The purpose of the inquiry is to determine if the commander possesses credible information upon which to initiate separation action or if other action should be taken because the member has made a false statement to avoid service. The intent of the member in making the statement also must be examined because it is highly probative to the issue of recoupment. As an inquiry officer (IO), you must look at all relevant evidence to enable you to make a finding on the truth of the statement by the member that he or she is homosexual. You also should make a finding on the member's purpose for stating he or she is homosexual or bisexual.

3. You initially should interview the subject member. Ensure you notify counsel if the member already has retained counsel. You also may interview the following persons and consider the following evidence, as appropriate in the particular case:

a. Parents and siblings. If the member does not provide this information, DD Form 398 should have this data.

b. Look at the DD Form 398 for any other possible leads for interview subjects.

c. School counselor and advisor.

d. Any other knowledgeable school officials.

e. School career development office; did the member interview for civilian jobs? Did the student apply for fellowships, internships, etc., that would have been displaced by military service?

f. Roommates and close friends, including people the subject member dated.

g. Mental health and medical records.

h. AFIT program manager. Did the member apply for deferment of military service? If the member is in medical

school, was the member assigned to intern in an area of medicine that he or she did not want?

i. Air Force career manager.

4. You should prepare a list of anticipated questions and forward them to your MAJCOM staff judge advocate for review and comment. Attached is a list of suggested questions for interviewing the subject member; many also can be used for other witnesses.

**SAMPLE QUESTIONS FOR INQUIRY CONCERNING MEMBER WHO STATES HE
IS HOMOSEXUAL AFTER RECEIVING ADVANCED EDUCATION BENEFITS**

Review AFI 90-301, Attachment 5, which contains the script for introduction of an inquiry officer. (Also review Attachment 6 to AFI 90-301, which is an inquiry officer guide.) Tell the witness/subject member if you are recording the interview.

1. Read the member the Air Force policy on homosexual conduct. (See 10 U.S.C. 654 and the attached). Remember that a member must be given a rights advisement under Article 31, UCMJ, if the discussion begins to involve acts or conduct that violate the UCMJ. As an inquiry officer in a statement-only case, you may ask questions concerning homosexual acts or attempted acts.
2. Verify the member's full name and social security number. Also verify his address and phone number.
3. Swear the member in by oath or attestation.
4. If a written statement is in question, ask if he recognizes the statement.
 - a. Is the signature on the statement that of the member?
 - b. Did the member write the statement himself or did he have assistance, such as an attorney?
 - c. Did the member understand the policy on homosexual conduct at the time he made the statement?
5. If the statement in question is not written, ask the member if he made the statement.
 - a. If so, when did he make it? To whom? Where?
 - b. Under what circumstances?
6. Had the member ever been briefed on the policy on homosexual conduct? If so, by whom and when?
7. When did the member enter the education program, such as HPSP or FLEP?
8. What status is the member, e.g., Reserves?
9. What was the member obligated to do in return for the education assistance?
10. If currently in the education program, what school is the member attending, what year of studies, when will the member graduate?

11. Who is the member's academic and/or faculty advisor? Advisor for thesis, dissertation, etc.?
12. If HPSP, what area of medicine does the member intend to pursue?
 - a. Has the member applied for any intern or residency programs?
 - b. If so, where and for when?
 - c. Has the Air Force directed the member to choose from specified specialties? If so, which ones?
13. Why did the member make the statement? If written, why did the member choose to send the letter where he did?
14. Why did the member choose this particular time to make the statement?
15. If the member used certain terms, such as "homosexual orientation" or "propensity," ask the following question: What did the member mean by "homosexual orientation" or "propensity?" (Note: If the member states he means what the regulation says, ask him to explain what he means in his own words. Further, DoD policy is that a statement of homosexual orientation will be treated the same as a statement that the member is a homosexual.)
16. Does the member have a "propensity to engage in homosexual acts?" If so, can he explain what he means?
17. How does he know he has a "homosexual orientation" and/or "propensity?"
18. When did he realize he has a "homosexual orientation" and/or "propensity?"
19. Whom has he told he is a homosexual or that he has a "homosexual orientation" and/or "propensity?" When did he tell them? Why did he tell them?
20. Has the member been dating anybody (opposite or same sex)?
 - a. How frequently has the member dated?
 - b. How recently?
 - c. How can these persons be contacted?
21. Did the member belong to any homosexual student organizations at school?
 - a. If so, which?
 - b. How can other members of the organization, who knew of his membership, be contacted?
22. Has the member told any of his family members? If so, whom? How can they be contacted?
23. Who are close friends of the member and how can they be contacted?

24. How does the member feel about the Air Force?
25. Does the member prefer to remain in the Air Force, or would he rather be discharged?
26. What is the member's understanding of the possibility of the Air Force recouping the costs of his educational assistance?
27. What, if any, influence did the recoupment policy have on making the statement?
28. Are there any other witnesses or documents that could verify the member's statement that he is homosexual?
29. Has the member engaged in or attempted to engage in any homosexual acts? [NOTE: If you ask this question, be sure to read the member his or her Article 31 rights first]
 - a. If yes, when did the member engage in or attempt to engage in homosexual acts?
 - b. If yes, where and how often did the member engage in or attempt to engage in homosexual acts?
 - c. If yes, what was the nature of the homosexual act?
30. Is there any further information, statements, or evidence concerning the matters discussed?

Navy “Homosexual/Bisexual Questionnaire”

6

HOMOSEXUAL / BISEXUAL QUESTIONNAIRE

DATE:

TIME:

1. Do you engage in homosexual/bisexual activity?

If so when was the last time?

If so with whom?

If so is he/she in the military?

2. have you attempted to engage in homosexual/bisexual acts?

If so, when?

If so with whom?

If so, is he/she in the military?

3. Do you have a propensity to engage in homosexual/bisexual acts?

If so, when?

If so, with whom?

If so, is he/she in the military?

4. Do you intend to engage in homosexual/bisexual acts?

If so, when?

If so, with whom?

If so, is he/she in the military?

5. Are you engaged in a homosexual/bisexual marriage?

If so, when did you?

If so, with whom?

If so, is he/she in the military?

TALKING POINTS
DOD REPORT ON THE IMPLEMENTATION OF
“DON'T ASK, DON'T TELL, DON'T PURSUE”

- **Gay Discharges Are Up 67%.** Discharges soared to 997 in 1997, a 67% increase under the policy, and the highest level of discharges since 1988.
- **DoD Misrepresents Report Findings.** The DoD report admits that the reasons for increased discharges “are not known.” Yet, officials publicly represented that increased discharges are due to gays “opting out” of the military. This unsupported and offensive generalization raises questions about DoD’s credibility and commitment to fair enforcement of the policy.
- **Commands Continue To Ask, Pursue and Harass.** SLDN documented 1379 instances in four years where commanders did not follow the rules under this policy. DoD’s report is non-responsive to these documented command violations.
- **DoD Fails To Address Limits To Investigations and Intent of Policy To Protect People's Privacy.** A major problem is that personnel do not know the rules. DoD cannot be deemed credible until it issues guidance on the limits to investigations and the intent of the policy.
- **DoD Ignores Coercive Tactics.** The DoD report fails to respond to documented instances where commanders threatened service members with prison unless they confessed to being gay or accused others as gay, as occurred on the *USS Simon Lake*. The report also ignored the practice of seizing personal diaries to find out if someone is gay, as in the case of West Point Cadet Nicole Galvan, and the practice of questioning parents and siblings per Air Force instructions. Secretary Cohen should end these practices.
- **DoD Fails To Address Issues of Accountability and Recourse.** The report omits the issues of accountability for command violations and recourse for personnel harmed by improper inquiries.
- **DoD Did Not Interview Service Members Affected by The Policy.** The Department failed to contact one of the primary sources of information on this subject for its review.
- **DoD Agrees That Health Care Providers Are Not Required To Turn In Gay People.** Providers should be informed of this important clarification, a step the DoD report fails to recommend. Secretary Cohen should further clarify that information confided in a health care provider should not be used for purposes of discharge.
- **Some Recommendations are Problematic.** Recommendations concerning training evaluations, the use of lawyers to police command actions and service Secretary approval for some investigations raise many questions and contain loopholes that could do more harm than good.
- **DoD Should Implement its Good Recommendations Now.** The Department should implement (1) guidance against anti-gay harassment, and (2) an end to pretrial agreements to solicit names of suspected gay service members, as recommended in the DoD report.

The New York Times

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The Trouble With 'Don't Ask, Don't Tell'

A new Defense Department draft report shows that the number of homosexuals being forced out of the military under the "Don't ask, don't tell, don't pursue" policy is 67 percent higher than when the policy was adopted in 1993. The report is silent on what might be causing this surprising rise. Yet the Pentagon seems resistant to examining the most disturbing and obvious possibility, which is that base and unit commanders are subverting a policy that was intended to stop witch hunts and to insure some measure of privacy for gay men and women in the ranks.

The Pentagon spin is that service members are voluntarily declaring themselves gay to get out of the military. But if that were true, wouldn't discharge numbers have stayed roughly the same from year to year?

The report should cause Defense Secretary William Cohen to worry that commanders are not being adequately trained on the purpose of the policy or the appropriate limits on investigations. At the same time, the nominal policy may be causing homosexuals to believe that they need not remain as vigilantly closeted as they were before. In any event, the promise of greater tolerance that was supposed to follow President Clinton's declaration

of this new policy is turning out to be unfounded.

Military guidelines say that investigations cannot be based on mere suspicion or rumor. Associational behavior such as going to gay bars or reading homosexual books is not to be used as evidence of homosexual conduct. Yet there continue to be cases where service members are directly asked about their sexual orientation. Reliance on anonymous reports is not uncommon.

In some egregious situations, individuals who complained about anti-gay harassment were then investigated for being gay. The decision to begin an investigation is left to the commanding officer. Yet some commanders are inadequately versed on the guidelines, according to the report.

At a minimum, better training has to be put in place. The report also recommends that commanders consult with legal officials before initiating investigations. But these improvements will not cure the injustice inherent in a military that is allowed to drum effective people out for no reason other than homosexuality. Mr. Clinton erred in 1993 when he let Gen. Colin Powell and others bully him into backing away from his original intention to ban discrimination against homosexuals in the military. This report provides a measure of that error.

Servicemembers Legal Defense Network

★ ★ ★ ★ ★

*For
Liz*

TO: SLDN Donors

FROM: Michelle M. Benecke and C. Dixon Osburn, Co-Executive Directors

DATE: June 12, 1998

RE: Master Chief Petty Officer McVeigh Wins!

**NAVY DROPS APPEAL OF DECISION UPHOLDING ELECTRONIC PRIVACY
RIGHTS FOR MASTER CHIEF PETTY OFFICER TIMOTHY R. McVEIGH**

Sailor To Retire With Full Benefits

We are pleased to announce that the Department of Navy today dropped its appeal of the case involving Master Chief Petty Officer Timothy R. McVeigh whom the Navy had been trying to oust with no retirement benefits for alleged violations of "Don't Ask, Don't Tell, Don't Pursue."

The Navy's action leaves intact an important federal court ruling that the Navy violated Tim's privacy rights under the Electronic Communications Privacy Act and "Don't Ask, Don't Tell, Don't Pursue." As part of the Navy's action, Tim has been made eligible for retirement with full pension benefits after 18½ years of service.

The decision today is significant for all who believe in privacy rights online and otherwise.

At a press conference this morning, Tim stated, "I have spent my entire adult life in service to our country. While I will miss the Navy, I consider today's settlement a victory that leaves intact a strong legal precedent that may help to prevent others from being harmed in the future."

SLDN has assisted Tim since last October both in the military system and as co-counsel on the federal court case with Chris Wolf from the law firm of Proskauer Rose, LLP.

This unprecedented victory was possible because of your on-going moral and financial support and with the help of our allies who helped bring international attention to the Navy's misconduct: Wired Strategies, Electronic Privacy Information Center, Center for Democracy and Technology, Human Rights Campaign, Members of Congress, SLDN's Action Alert Network and many thousands of others.

NEXT: Look for SLDN and our clients in the *New York Times Magazine*, currently scheduled as the June 28th cover story!

"All the News
That's Fit to Print"

The New York Times

VOL. CXLVII No. 51,186

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FRIDAY, JUNE 12, 1998

Sailor Victorious in Gay Case of On-Line Privacy

By PHILIP SHENON

WASHINGTON, June 11 — In a victory for gay rights, with implications for the millions of people who use computer on-line services, both the Navy and America Online have reached settlements with a highly decorated sailor who was investigated by the Navy after he posted a message in which he described himself as "gay."

Under the Navy agreement, the 36-year-old sailor, Master Chief Petty Officer Timothy R. McVeigh, will retire from the military with full benefits and with tens of thousands

of dollars to pay his legal fees.

The Navy had originally sought to discharge Mr. McVeigh without any benefits, despite 18 years of unblemished service, after he posted a note on the on-line service in which he identified himself as "Tim," whose marital status was "gay" and whose E-mail address was "Boysrch."

The Navy's settlement with Mr. McVeigh, who is no relation to the man convicted of bombing the Federal Building in Oklahoma City, is expected to be announced on Friday.

In a separate settlement, America

Online, the nation's largest on-line computer service, with 12 million users, has apologized to Mr. McVeigh for violating his privacy and has agreed to pay him damages. The company acknowledged that it had confirmed to a Navy investigator that Mr. McVeigh was "Tim."

Under the settlement, both sides agreed not to reveal the amount of money paid to Mr. McVeigh by America Online. As a result of the case, the company has also announced new policies intended to guarantee the privacy of its users. The policies will require that all of

FREE TRUMAN FREE TRUMAN FREE TRUMAN
On the air. Unaware. On the air. Unaware. — ADVT.

Continued on Page A14

Over, please ➡

Sailor Prevails in Gay Case Over Privacy on the Internet

Continued From Page A1

the company's nearly 5,000 customer-service representatives be provided with special "scenario training" to insure that they do not give out private information about users without the user's consent or without a court order. The company has also rewritten its privacy policy to make it far clearer, and has made the new policy available on line to all users.

"I'm happy that this case has been resolved on my terms," Mr. McVeigh said in a telephone interview today from his home in Honolulu. "I think that all sailors can take comfort from this. I hope it sends a message that the rules and regulations that are in place need to be followed by the military."

The Navy said it would withhold comment on the settlement until the terms were made public.

Mr. McVeigh, who normally would not have been eligible for retirement for another two years, said he felt some sadness in leaving the Navy. "It's a job that I've been doing for 18 years, that I'm good at, that I like, but I'm ready to move on to bigger and better things," he said. "I think this opens a much broader opportunity for me."

Mr. McVeigh's lawyer, Christopher Wolf of Washington, said the settlement with the Navy was a very significant victory.

"It shows what we alleged at the outset, that Mr. McVeigh's electronic privacy rights and his rights under the military's 'don't ask, don't tell' policy were seriously violated by the Navy," Mr. Wolf said. "It is the first time, as far as I'm aware, that the Navy has let stand a court decision that it has broken the law in this area. Obviously it has a precedent that can be relied on in the future."

Last January, Judge Stanley Sporkin of Federal District Court in Washington ordered the Navy to halt its efforts to dismiss Mr. McVeigh and ruled that the Navy's investigation into his sexual orientation was a clear violation of the military's five-year-old "don't ask, don't tell" policy. The policy was intended to allow gay service members to remain in the military so long as they were discreet about their private lives.

Judge Sporkin also appeared to

side with lawyers who suggested that the Navy and America Online had violated a 1986 Federal law that bars computer service companies from releasing confidential information about customers without the person's permission or a court order.

Mr. Wolf said that under the settlement with the Navy, the Defense Department would not appeal the judge's ruling.

The case dates to September, when Mr. McVeigh sent an E-mail message to the wife of a fellow crewman aboard the nuclear-powered submarine Chicago about a Christmas toy drive for the crew's children.

Navy officials said the woman was disturbed by the return address on his E-mail — "Boysrch," which apparently referred to "boy search" — and she consulted the customer profile listed under the return address on America Online. The profile identified the user as Tim of Honolulu, whose hobbies included "collecting pictures of other young studs."

The information was passed on to a Navy investigator, who contacted America Online. Without identifying his ties to the Navy, the investigator asked for the full name of Tim.

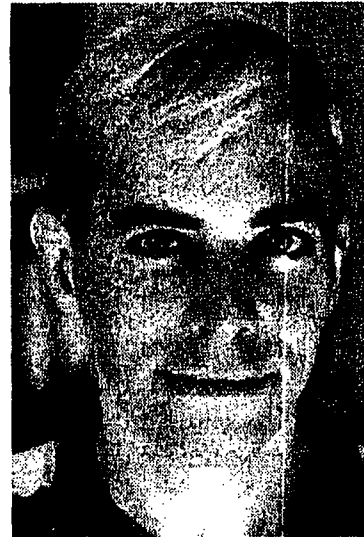
America Online acknowledged this year that a customer-service repre-

On-line customers win new guarantees of confidentiality.

sentative had violated the company's in-house rules and confirmed to the investigator that Tim was Master Chief Petty Officer McVeigh.

In interviews, Mr. McVeigh, who was described in recent performance evaluations as "an outstanding role model" and "the embodiment of Navy core values," has declined to discuss his sexual orientation, saying it was irrelevant to a case that should be focused instead on the possibility of misconduct by the Navy.

A spokeswoman for America Online, Tricia Primrose, said the settlement between the company and Mr. McVeigh was reached several



Associated Press

Timothy R. McVeigh will retire from the Navy with full benefits as a result of a gay-rights victory.

months ago but was not announced at the time. "In our review of the situation, we recognized that we had made a mistake as a result of human error, and that we absolutely regretted it," Ms. Primrose said. "We've taken responsibility for this action and satisfactorily resolved it with Mr. McVeigh."

As a result of the case, she said, America Online will require all of its customer-service representatives to undergo "scenario training, in which we give them examples of the ways in which they could be misled" into turning over confidential information to unauthorized callers.

The representatives, she said, will also be required to read and sign a copy of the company's privacy policy every six months, with the understanding that violations of the policy "will be sanctioned all the way up to and including termination."

She said the company had also recently rewritten its privacy policy to make it clearer, and had made it available on line. "We wanted to make this easier to read, written in plain English," she said. "It was a big overhaul to make this document understandable to us mere mortals."

The policy opens with a statement that America Online is "committed to protecting your personal privacy" and that "we understand that for you to take full advantage of the benefits of this interactive medium, we must do everything we can to insure that your privacy is secure."

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inadvertently missed you.

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Say Nothing. Sign Nothing. Get Legal Help. Call SLDN at
(202) 328-FAIR.

★ ABOUT SLDN ★

SLDN is the sole legal aid and watchdog organization for men
and women harmed by "Don't Ask, Don't Tell, Don't Pursue."
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1998 FIRST QUARTER REPORT

"The Navy went too far."

McVeigh v. Cohen, January 26, 1998

RESULTS AT A GLANCE

1998 FIRST QUARTER

Profit/Loss (x\$1,000)

Revenue	143
Expenses	174
Net Income	(31)
4th Q Ret'd Earnings	267
Total Equity	236

Budget Report (x\$1,000)

FY	1995	1996	1997	1998
Income	390	472	796	886
Expense	304	515	646	789
Change in Net Assets	86	(43)	150	97
Net Assets, Beginning of Yr.	63	149	106	256
Net Assets, End of Year	149	106	256	353

SLDN Opens 69 New Cases.

SLDN maintained its hectic schedule, managing an average of 123 open cases each day.

SLDN Publishes Fourth Annual Report.

SLDN released its fourth annual report on "Don't Ask, Don't Tell, Don't Pursue" on February 19, 1998 at the National Press Club to nationwide media attention. The report documents that command violations of "Don't Ask, Don't Tell, Don't Pursue" increased by 17% last year. Of particular concern, "Don't Harass" violations increased by 37%. SLDN attributed the increased command violations to a lack of leadership.

McVeigh Wins!

Senior Chief Petty Officer Timothy R. McVeigh won the first case to rule that the military violated the letter and intent of "Don't Ask, Don't Tell, Don't Pursue." The Navy had attempted to discharge McVeigh based on an anonymous America Online profile that contained the word "gay" to describe marital status. The Navy obtained the identity of the account holder from AOL without the requisite court order, thereby violating federal privacy law in addition to "Don't Ask, Don't Tell, Don't Pursue." SLDN, Chris Wolf from the law firm Proskauer Rose, HRC and the electronic privacy community combined forces in McVeigh's victory. Stay tuned: the Navy has stated that it will appeal the case.

America Online Apologizes to McVeigh.

In a strongly worded statement, AOL admitted that it was wrong to release private subscriber information about McVeigh to Navy officials. AOL also published the results of its internal investigation showing that the "Navy deliberately ignored both federal

law and well-established procedures for handling government inquiries about AOL members."

Architect of Policy Says Navy Violated Rules.

Professor Charles Moskos of Northwestern University filed a declaration in court stating his opinion that the Navy violated the current policy by pursuing McVeigh.

SLDN Stops Discharge of Women Falsely Accused.

SLDN successfully stopped the Army from discharging two women who were accused as lesbians when seen hugging. The facts were that one woman was consoling the other who was grieving. One of the many dangers of current policy is that the law can be used as a weapon to punish anyone.

SLDN Thwarts Potential Witch Hunt.

SLDN successfully stopped a potential witch hunt of women at a Coast Guard base. An unnamed person speculated that women she saw at a private party might be lesbians because they hung out together at the party. The command initially started an inquiry against two of the women based on the innuendo, in direct violation of current policy. SLDN intervened and the investigations have been dropped.

SLDN Stops Criminal Prosecution in Entrapment Case.

SLDN cooperating counsel Rob Merhige from Hunton & Williams in Richmond, Virginia convinced civilian authorities not to prosecute a client entrapped by a military investigator online. The case started when the investigator monitored an online gay chat room and persuaded a reservist to meet him for lunch, where he had the reservist arrested by military police. Having violated numerous military regulations and his jurisdiction, the investigator initially persuaded civilian authorities to prosecute instead.

Marine Corps Prosecutes Gay Bashers.

The Marine Corps prosecuted four marines for lobbing a tear gas canister into Remington's, a gay bar in Washington, D.C. The leadership at Gays and Lesbians Opposing Violence and the local Marine Corps post commander deserve great credit for pressing the case to ensure accountability. All the marines were found guilty.

SLDN Stops Discharge Based on Retaliation.

A client was threatened with discharge based on retaliatory allegations. A young soldier being discharged for a "pattern of misconduct" accused our client of being "bisexual" and made numerous miscellaneous charges against others in his unit. Originally, the command dismissed the allegations against everyone else but start-

ed to pursue our client. We were able to convince the command to drop the inquiry because the accuser was simply not credible as defined in current regulations.

SLDN Trains Service Members in Colorado Springs.

SLDN trained servicemembers and friends on survival tips under "Don't Ask, Don't Tell, Don't Pursue" at the home of the Air Force Academy, Ft. Carson and other military installations.

SLDN Publishes Survival Guide.

With a grant from the Colin Higgins Foundation, SLDN published 4,000 copies of a handbook on the rules of survival under "Don't Ask, Don't Tell, Don't Pursue." The *Survival Guide* is being distributed to SLDN's network of service members, military defense attorneys, bookstores, churches, synagogues, community centers and other outlets. The Guide is also available online at our website.

SLDN Trains Attorneys at Norfolk Naval Base.

SLDN trained Navy defense attorneys on the rules under "Don't Ask, Don't Tell, Don't Pursue," by invitation.

Additional Highlights:

(1) Dixon speaks to Pentagon chapter of Federal Bar Association; (2) Michelle briefs Congressional Staffers on findings of SLDN's Fourth Annual Report; (3) Kelly speaks at Cornell and Syracuse Universities; (4) SLDN attends National Policy Roundtable and describes SLDN's unique strategy in obtaining change within federal agencies; (5) CNN airs special report on lesbian-baiting; featuring SLDN and our clients; (6) Mary attends the NSFRE conference in Philadelphia with a grant from the Gill Foundation OutGiving Project.

How You Can Help

★ **CONTRIBUTE STOCK.** The stock market continued to climb during the first quarter of 1998. Now is the time to seriously consider giving a gift of stock to SLDN. You will avoid paying capital gains tax on the increased value of the stock and you will receive an income tax deduction for the full fair market value of the stock at the time of the gift. Call Mary Ester for information.

★ **MAKE A BEQUEST.** Leaving SLDN a gift through your will can be a simple yet profound act of generosity. Please consider designating SLDN as the beneficiary of a portion of your estate, your residual estate, or specific assets you name. For sample wording for your bequest and SLDN's tax identification number, please call Mary Ester.

FROM THE DESK OF

Robert Weiner

Janet,

These letters reached my desk, and I think we can respond given that the case has settled. Could you direct these drafts to the right person in Leg Aff? Podesta may want to see the draft before it goes (at least the one to Barney).

R

The Honorable Barney Frank
House of Representatives
2210 Rayburn House Office Building
Washington, D.C. 20515-2104

Dear Barney:

Thank you for your correspondence regarding the Timothy McVeigh case. As you know, the case has now settled. I think the settlement is fair, and I am pleased the matter has been resolved.

This Administration remains committed to fair implementation of the Don't Ask, Don't Tell policy enacted by Congress. I look forward to continuing to work with you to achieve that goal.

Sincerely,

The Honorable Howard Coble
United States House of Representatives
2239 Rayburn House Office Building
Washington, D.C. 20515-3306

Dear Congressman Coble:

Thank you for your correspondence regarding the Timothy McVeigh case. Now that the case has settled, I wanted to write to assure you that this Administration is firmly committed to the Electronic Communications Privacy Act. We expect government employees to comply with its provisions, and we will take appropriate steps when violations occur.

Sincerely,

The Honorable William D. Delahunt
United States House of Representatives
1517 Longworth House Office Building
Washington, D.C. 20515-2110

Dear Congressman Delahunt:

Thank you for your correspondence regarding the Timothy McVeigh case. Now that the case has settled, I wanted to write to assure you that this Administration is firmly committed to the Electronic Communications Privacy Act. We expect government employees to comply with its provisions, and we will take appropriate steps when violations occur.

Sincerely,

BARNEY FRANK
4TH DISTRICT, MASSACHUSETTS

2210 RAYBURN BUILDING
WASHINGTON, DC 20515-2104
(202) 226-6931

29 CRAFTS STREET
NEWTON, MA 02158
(617) 332-3920

Congress of the United States
House of Representatives
Washington, DC

May 7, 1998

The Honorable William Jefferson Clinton
President
The White House
Washington, D.C. 20500

Dear Mr. President,

We are approaching a crisis over the Timothy McVeigh matter. When I first raised this issue with the White House, I was assured that control over the negotiations for a settlement would rest with the Justice Department. Instead, the Navy has reasserted its right to control this and Mr. McVeigh is being given a very inadequate offer.

The Navy violated his privacy rights and violated your policy with regard to gays in the military. Judge Sporkin -- a Reagan appointee -- found against the Navy on both these points. While the Navy was prevented from actively appealing this decision, they did succeed in filing an appeal and keeping open their option of challenging Judge Sporkin's opinion. That would of course be an absolute disaster and a total repudiation of all of us who have been supportive of your efforts regarding gay and lesbian rights.

The way to avoid this is to recognize that Mr. McVeigh was treated unfairly by the Navy. And that can be done without repudiating your policy on gays in the military -- indeed we believe we are in fact acting in its spirit and according to its letter. Mr. McVeigh has served 17 1/2 years. The financial settlement he should be offered should reflect a 20 year commitment. This is more money than if he were simply given funds to reflect his 17 1/2 years. But an important issue of principle is involved here, not simply money.

The principle is an acknowledgment that he was unfairly treated in being forced to retire early. If he is simply given credit for the time served, the Navy will succeed in maintaining that they were upheld in their actions. In fact, contrary to what I was assured by White House staff members, the Navy's version was already printed in the Washington Times and trumpeted as the official administration position -- with absolutely no dissent from the White House or the Justice Department.

If the Navy simply gives Mr. McVeigh money that reflects actual time served with no recognition that he was treated badly, it will be an outrageous betrayal of all of us who have worked for a reasonable outcome here. The Defense Department is dug in and only your personal intervention can prevent this disaster. Please vindicate your gay and lesbian supporters by insisting that Mr. McVeigh be given a settlement that would reflect 20 years of service as an acknowledgment of the government's grave error in this case.


BARNEY FRANK

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BRIDGEWATER, MA 02324
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SACFA
Has this been answered
Rob Weiner

THE WHITE HOUSE
WASHINGTON

February 20, 1998

MEMORANDUM FOR CHARLES RUFF
DON GOLDBERG

FROM: JANET MURGUIA 
LEGISLATIVE AFFAIRS

SUBJECT: Congressional Correspondence

Attached is a copy of a letter sent to the President from Member(s) of Congress. We would appreciate your assistance in drafting the response.

Thank you very much for your assistance. If you have any questions, please feel free to call Chris Walker at x67500.

The following is a description of the letter:

- 1) Rep. Howard L. Coble (R-NC) and Rep. William D. Delahunt (D-MA).

Attachment

Congress of the United States
Washington, DC 20515

February 10, 1998

President William Jefferson Clinton
The White House
Washington, D.C. 20500

Dear Mr. President:

FEB 12 4:12:40

As members of the House Judiciary Subcommittee on Courts and Intellectual Property, we are writing to express our concern regarding the much-publicized case of ETCS(SS) Timothy R. McVeigh, who faces administrative discharge from the Navy as a result of the unauthorized disclosure of confidential information by an Internet service provider, in apparent violation of the Electronic Communications Privacy Act (ECPA).

Both Democrats and Republicans are watching this case with the keenest attention. Some of us oppose the policy requiring the discharge of gay service members; some of us support that policy. However, while we may disagree on this underlying issue, we are united in our concern over the implications of this case for the development of the Internet and the legitimate privacy interests of those who make use of it.

Last year, the Judiciary Committee approved legislation that would protect the security of on-line communications by providing Internet users with unrestricted access to advanced encryption technology. That legislation is opposed by federal law enforcement agencies which insist that the government be given a "key" that would unlock encrypted messages.

When concerns have been raised that a key recovery system would compromise public confidence in the integrity of confidential communications, these agencies have repeatedly given their assurances that encryption keys would not be used in the absence of a warrant or court order. Yet what are we to make of such assurances when the Navy could so readily circumvent the warrant requirements of the ECPA in order to obtain private subscriber information?

Now is the time for the Administration to send an unequivocal message to Americans of every political persuasion that government agencies will not be permitted to gather private information on American citizens without their consent and in violation of federal law, or to take punitive actions on the basis of private information that has been illegally obtained.

We respectfully urge you to order a full investigation into this case, and invite you to work with us to ensure that such incidents do not recur.


Howard L. Coble

Sincerely,

William D. Delahunt

10 USCS @ 1174A (1998) printed in FULL format.

UNITED STATES CODE SERVICE

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*** THIS SECTION IS CURRENT THROUGH 105-165, APPROVED 3/20/98 ***

*** WITH A GAP OF 160 AND 164 ***

TITLE 10. ARMED FORCES
SUBTITLE A. GENERAL MILITARY LAW
PART II. PERSONNEL
CHAPTER 59. SEPARATION

10 USCS @ 1174a (1998)

@ 1174a. Special separation benefits programs

(a) Requirement for programs. The Secretary concerned shall carry out a special separation benefits program under this section. An eligible member of the armed forces may request separation under the program. The request shall be subject to the approval of the Secretary.

(b) Benefits. Upon the approval of the request of an eligible member, the member shall--

(1) be released from active duty or full-time National Guard duty or discharged, as the case may be; and

(2) be entitled to--

(A) separation pay equal to 15 percent of the product of (i) the member's years of active service, and (ii) 12 times the monthly basic pay to which the member is entitled at the time of his discharge or release from active duty; and

(B) the same benefits and services as are provided under chapter 58 of this title [10 USCS @@ 1141 et seq.], sections 404 and 406 of title 37, and section 503(c) of the National Defense Authorization Act for Fiscal Year 1991 (104 Stat. 1558; 37 U.S.C. 406 note) for members of the armed forces who are involuntarily separated within the meaning of section 1141 of this title.

(c) Eligibility. Subject to subsections (d) and (e), a member of an armed force is eligible for voluntary separation under a program established for that armed force pursuant to this section if the member--

(1) has not been approved for payment of a voluntary separation incentive under section 1175 of this title;

(2) has served on active duty or full-time National Guard duty or any combination of active duty and full-time National Guard duty for more than 6 years;

(3) has served on active duty or full-time National Guard duty or any combination of active duty and full-time National Guard duty for not more than 20 years;

(4) has served at least 5 years of continuous active duty or full-time National Guard duty or any combination of active duty and full-time National Guard duty immediately preceding the date of the member's separation from active duty; and

(5) meets such other requirements as the Secretary may prescribe, which may include requirements relating to--

(A) years of service;

(B) skill or rating;

(C) grade or rank; and

(D) remaining period of obligated service.

(6) [Redesignated]

(d) Program applicability. The Secretary concerned may provide for the program under this section to apply to any of the following members:

- (1) A regular officer or warrant officer of an armed force.
- (2) A regular enlisted member of an armed force.
- (3) A member of an armed force other than a regular member.

(e) Applicability subject to needs of the service.

(1) Subject to paragraphs (2) and (3), the Secretary concerned may limit the applicability of a program under this section to any category of personnel defined by the Secretary in order to meet a need of the armed force under the Secretary's jurisdiction to reduce the number of members in certain grades, the number of members who have completed a certain number of years of active service, or the number of members who possess certain military skills or are serving in designated competitive categories.

(2) Any category prescribed by the Secretary concerned for regular officers, regular enlisted members, or other members pursuant to paragraph (1) shall be consistent with the categories applicable to regular officers, regular enlisted members, or other members, respectively, under the voluntary separation incentive program under section 1175 of this title or any other program established by law or by that Secretary for the involuntary separation of such members in the administration of a reduction in force.

(3) A member of the armed forces offered a voluntary separation incentive under section 1175 of this title shall also be offered the opportunity to request separation under a program established pursuant to this section. If the Secretary concerned approves a request for separation under either such section, the member shall be separated under the authority of the section selected by such member.

(f) Application requirements.

(1) In order to be separated under a program established pursuant to this section--

(A) a regular enlisted member eligible for separation under that program shall--

(i) submit a request for separation under the program before the expiration of the member's term of enlistment; or

(ii) upon discharge at the end of such term, enter into a written agreement (pursuant to regulations prescribed by the Secretary concerned) not to request reenlistment in a regular component; and

(B) a member referred to in subsection (d)(3) eligible for separation under that program shall submit a request for separation to the Secretary concerned before the expiration of the member's established term of active service.

(2) For purposes of this section, the entry of a member into an agreement referred to in paragraph (1)(A)(ii) under a program established pursuant to this section shall be considered a request for separation under the program.

(g) Other conditions, requirements, and administrative provisions. Subsections (e) through (h), other than subsection (e)(2)(A), of section 1174 of this title shall apply in the administration of programs established under this section.

(h) Termination of program.

(1) Except as provided in paragraph (2), the Secretary concerned may not

conduct a program pursuant to this section after September 30, 1999.

(2) No member of the armed forces may be separated under a program established pursuant to this section after the date of the termination of that program.

HISTORY: (Added Dec. 5, 1991, P.L. 102-190, Div A, Title VI, Part E, @ 661(a)(1), 105 Stat. 1394; Oct. 23, 1992, P.L. 102-484, Div A, Title X, Subtitle F, @ 1052(15), Div D, Title XLIV, Subtitle A, @ 4405(a), Subtitle B, @ 4422(a), 106 Stat. 2499, 2706, 2718; May 31, 1993, P.L. 103-35, Title II, @ 202(a)(17), 107 Stat. 102; Nov. 30, 1993, P.L. 103-160, Div A, Title V, Subtitle A, @ 502, Subtitle F, @ 561(g), 107 Stat. 1644, 1668; Oct. 5, 1994, P.L. 103-337, Div A, Title V, Subtitle D, @ 542(b), 108 Stat. 2768.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Amendments:

1992. Act Oct. 23, 1992, in subsec. (b)(1), inserted "or full-time National Guard duty"; in subsec. (c), in para. (2), inserted "or full-time National Guard duty or any combination of active duty and full-time National Guard duty" and substituted "December 5, 1991" for "the date of enactment of this section", in para. (3), inserted "or full-time National Guard duty or any combination of active duty and full-time National Guard duty", in para. (4), inserted "or full-time National Guard duty or any combination of active duty and full-time National Guard duty" and added "and" after the semicolon, deleted para. (5), which read: "if a Reserve, is on an active duty list; and", and redesignated para. (6) as new para. (5).

Such Act further (applicable as provided by @ 4405(c) of such Act, which appears as a note to this section), in subsec. (b)(2)(B), inserted ", sections 404 and 406 of title 37, and section 503(c) of the National Defense Authorization Act for Fiscal Year 1991 (104 Stat. 1558; 37 U.S.C. 406 note)".

1993. Act May 31, 1993 (applicable as if included in the enactment of Act Oct. 23, 1992, P.L. 102-484, as provided by @ 202(b) of the 1993 Act), amended the directory language of @ 4422(a) of Act Oct. 23, 1992, P.L. 102-484, without affecting the text of this section.

Act Nov. 30, 1993, in subsec. (c)(2), deleted "before December 5, 1991" after "6 years"; and, in subsec. (h), substituted "September 30, 1999" for "September 30, 1995".

1994. Act Oct. 5, 1994 (applicable only to members of the Coast Guard who are separated after 9/30/94, as provided by @ 542(e) of such Act, which appears as 10 USCS @ 1141 note), in subsec. (a), substituted "concerned" for "of each military department"; in subsec. (d), in the introductory matter, substituted "concerned" for "of a military department"; in subsec. (e)(3), deleted "of the military department" preceding "concerned"; and, in subsec. (h)(1), substituted "concerned" for "of a military department".

Other provisions:

Commencement of program within 60 days. Act Dec. 5, 1991, P.L. 102-190, Div A, Title VI, Part F, @ 661(b), 105 Stat. 1395, provides: "The Secretary of each military department shall commence the program required by section 1174a of title 10, United States Code (as added by subsection (a)), not later than 60 days after the date of the enactment of this Act."

Report on programs. Act Dec. 5, 1991, P.L. 102-190, Div A, Title VI, Part F, @ 663, 105 Stat. 1399, provides: "Not later than 180 days after the date of the enactment of this Act, the Secretary shall submit to the Committees on Armed Services of the Senate and House of Representatives a report containing the

10 USCS @ 1174A (1998)

Secretary's assessment of the effectiveness of the programs established under sections 1174a and 1175 of title 10, United States Code, as added by sections 661 and 662."

Application of amendments made by @ 4405 of Act Oct. 23, 1992. Act Oct. 23, 1992, P.L. 102-484, Div D, Title XLIV, Subtitle A, @ 4405(c), 106 Stat. 2706, provides: "The amendments made by subsections (a) and (b) [amending this section and adding 10 USCS @ 1175(j)] shall apply as if included in sections 1174a and 1175 of title 10, United States Code, as enacted on December 5, 1991, but any benefits or services payable by reason of the applicability of the provisions of those amendments during the period beginning on December 5, 1991, and ending on the date of the enactment of this Act shall be subject to the availability of appropriations."

Remedy for ineffective counseling of officers discharged following selection by early discharge boards. Act Nov. 30, 1993, P.L. 103-160, Div A, Title V, Subtitle A, @ 507, 107 Stat. 1646; Oct. 5, 1994, P.L. 103-337, Div A, Title X, Subtitle G, @ 1070(b)(1), 108 Stat. 2856 (effective as of 11/30/93, and as if included in Act Nov. 30, 1993 as enacted, as provided by @ 1070(b) of Act Oct. 5, 1994), provides:

"(a) Procedure for review.

(1) The Secretary of each military department shall establish a procedure for the review of the individual circumstances of an officer described in paragraph (2) who is discharged, or who the Secretary concerned approves for discharge, following the report of a selection board convened by the Secretary to select officers for separation. The procedure established by the Secretary of a military department under this section shall provide that each review under that procedure be carried out by the Board for the Correction of Military Records of that military department.

"(2) This section applies in the case of any officer (including a warrant officer) who, having been offered the opportunity to be discharged or otherwise separated from active duty through the programs provided under section 1174a and 1175 of title 10, United States Code--

"(A) elected not to accept such discharge or separation; and

"(B) submits an application under subsection (b) during the two-year period beginning on the later of the date of the enactment of this Act and the date of such discharge or separation.

"(b) Application. A review under this section shall be conducted in any case submitted to the Secretary concerned by application from the officer or former officer under regulations prescribed by the Secretary.

"(c) Purpose of review.

(1) The review under this section shall be designed to evaluate the effectiveness of the counseling of the officer before the convening of the board to ensure that the officer was properly informed that selection for discharge or other separation from active duty was a potential result of being within the group of officers to be considered by the board and that the officer was not improperly informed that such selection in that officer's personal case was unlikely.

"(2) The Board for the Correction of Military Records of a military department shall render a decision in each case under this section not later than 60 days after receipt by the Secretary concerned of an application under subsection (b).

"(d) Remedy. Upon a finding of ineffective counseling under subsection (c), the Secretary shall provide the officer the opportunity to participate, at the officer's option, in any one of the following programs for which the officer meets all eligibility criteria:

"(1) The Special Separation Benefits program under section 1174a of

title 10, United States Code.

"(2) The Voluntary Separation Incentive program under section 1175 of such title.

"(3) Retirement under the authority provided by section 4403 of the National Defense Authorization Act for Fiscal Year 1993 (Public Law 102-484; 106 Stat. 2702; 10 U.S.C. 1293 note).

"(e) Effective date. This section shall apply with respect to officers separated after September 30, 1990."

Reduction of separation payments by amount paid in other special or incentive bonus. Act Sept. 30, 1994, P.L. 103-335, Title VIII, @ 8106A, 108 Stat. 2645; April 10, 1995, P.L. 104-6, Title I, Chapter III, @ 105(a), 109 Stat. 79 (effective as of September 30, 1994, as provided by @ 105(c) of such Act, which appears as a note to this section), provides: "In the case of members who separate from active duty or full-time National Guard duty in a military department pursuant to a Special Separation Benefits program (10 U.S.C. 1174a) or a Voluntary Separation Incentive program (10 U.S.C. 1175) at any time after the enactment of this Act, the separation payments paid such members who are also paid any bonus provided for in chapter 5, title 37, United States Code [37 USCS @@ 301 et seq.], during the same years in which they separate shall be reduced (but in no event to an amount less than zero) by an amount equal to any such bonus: Provided, That any future bonus payments to which such members would otherwise be entitled are rescinded: Provided further, That this measure will not apply to members who separate during the last year of a bonus paid pursuant to chapter 5, title 37, United States Code [37 USCS @@ 301 et seq.]: Provided further, That civilian employees of the Department of Defense are prohibited from receiving voluntary separation payments if such employees are rehired by any agency of the Federal Government within one hundred and eighty days of separating from the Department of Defense: Provided further, That if, after September 30, 1994, a member of the Armed Forces (other than the Coast Guard) is approved for release from active duty or full-time National Guard duty and that person subsequently becomes employed in a position of civilian employment in the Department of Defense within 180 days after the release from active duty or full-time National Guard duty, then that person is prohibited from receiving payments under a Special Separation Benefits program (under section 1174a of title 10, United States Code) or a Voluntary Separation Incentive program (under section 1175 of title 10, United States Code) by reason of the release from active duty or full-time National Guard duty, and the person shall reimburse the United States the total amount, if any, paid such person under the program before the employment begins."

Provisions similar to those of this note were contained in Act Nov. 11, 1993, P.L. 103-139, Title VIII, @ 8127, 107 Stat. 1469.

Effective date of April 10, 1995 amendment. Act April 10, 1995, P.L. 104-6, Title I, Chapter III, @ 105(c), 109 Stat. 80, provides: "The amendment made by subsection (a) [amending note to this section] shall be effective as of September 30, 1994."

NOTES:

RESEARCH GUIDE

Am Jur:

53A Am Jur 2d, Military and Civil Defense @ 176.

INTERPRETIVE NOTES AND DECISIONS

Individual, who, pursuant to military's "old policy," had been denied benefits of voluntary separation incentive and special separation benefit

10 USCS @ 1174A (1998)

program (10 USCS @@ 1174a and 1175) solely on ground that individual admitted that he was homosexual, was entitled to have his eligibility reviewed under military's new policy, as codified at 10 USCS @ 654; such denial of benefits raised serious equal protection questions. *Elzie v Aspin* (1995, DC Dist Col) 897 F Supp 1, 68 BNA FEP Cas 1674.

10 USCS @ 1176 (1998) printed in FULL format.

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*** THIS SECTION IS CURRENT THROUGH 105-165, APPROVED 3/20/98 ***
*** WITH A GAP OF 160 AND 164 ***

TITLE 10. ARMED FORCES
SUBTITLE A. GENERAL MILITARY LAW
PART II. PERSONNEL
CHAPTER 59. SEPARATION

10 USCS @ 1176 (1998)

✓ 10 USC 8914
- air force
3914
- army

@ 1176. Enlisted members: retention after completion of 18 or more, but less than 20, years of service

(a) Regular members. A regular enlisted member who is selected to be involuntarily separated, or whose term of enlistment expires and who is denied reenlistment, and who on the date on which the member is to be discharged is within two years of qualifying for retirement under section 3914 or 8914 of this title, or of qualifying for transfer to the Fleet Reserve or Fleet Marine Corps Reserve under section 6330 of this title, shall be retained on active duty until the member is qualified for retirement or transfer to the Fleet Reserve or Fleet Marine Corps Reserve, as the case may be, unless the member is sooner retired or discharged under any other provision of law.

(b) Reserve members in active status. A reserve enlisted member serving in an active status who is selected to be involuntarily separated (other than for physical disability or for cause), or whose term of enlistment expires and who is denied reenlistment (other than for physical disability or for cause), and who on the date on which the member is to be discharged or transferred from an active status is entitled to be credited with at least 18 but less than 20 years of service computed under section 12732 of this title, may not be discharged, denied reenlistment, or transferred from an active status without the member's consent before the earlier of the following:

(1) If as of the date on which the member is to be discharged or transferred from an active status the member has at least 18, but less than 19, years of service computed under section 12732 of this title--

(A) the date on which the member is entitled to be credited with 20 years of service computed under section 12732 of this title; or

(B) the third anniversary of the date on which the member would otherwise be discharged or transferred from an active status.

(2) If as of the date on which the member is to be discharged or transferred from an active status the member has at least 19, but less than 20, years of service computed under section 12732 of this title--

(A) the date on which the member is entitled to be credited with 20 years of service computed under section 12732 of this title; or

(B) the second anniversary of the date on which the member would otherwise be discharged or transferred from an active status.

HISTORY: (Added Oct. 23, 1992, P.L. 102-484, Div A, Title V, Subtitle E, @ 541(a), 106 Stat. 2412; Nov. 30, 1993, P.L. 103-160, Div A, Title V, Subtitle F, @ 562(a), 107 Stat. 1669; Feb. 10, 1996, P.L. 104-106, Div A, Title XV, @ 1501(c)(12), 110 Stat. 499.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Amendments:

1993. Act Nov. 30, 1993 (effective as of 10/23/92 as provided by @ 562(b) of such Act) substituted subsec. (b) for one which read:

"(b) Reserve members. A reserve enlisted member serving on active duty who is selected to be involuntarily separated, or whose term of enlistment expires and who is denied reenlistment, and who on the date on which the member is to be discharged or released from active duty is entitled to be credited with at least 18 but less than 20 years of service computed under section 1332 of this title, may not be discharged or released from active duty without the member's consent before the earlier of the following:

"(1) If as of the date on which the member is to be discharged or released from active duty the member has at least 18, but less than 19, years of service computed under section 1332 of this title--

"(A) the date on which the member is entitled to be credited with 20 years of service computed under section 1332 of this title; or

"(B) the third anniversary of the date on which the member would otherwise be discharged or released from active duty.

"(2) If as of the date on which the member is to be discharged or released from active duty the member has at least 19, but less than 20, years of service computed under section 1332 of this title--

"(A) the date on which the member is entitled to be credited with 20 years of service computed under section 1332 of this title; or

"(B) the second anniversary of the date on which the member would otherwise be discharged or released from active duty."

1996. Act Feb. 10, 1996 (effective 12/1/94 and as if included as amendments made by Title XVI of Act Oct. 5, 1994 as originally enacted, as provided by @ 1501(c) of such Act), in subsec. (b), substituted "section 12732" for "section 1332" wherever appearing.