

## TEN YEARS OF “DON’T ASK, DON’T TELL.” A DISSERVICE TO THE NATION

The decade under “Don’t Ask, Don’t Tell” has been a disservice to our country and to the people who serve in our Armed Forces.

“Don’t Ask, Don’t Tell” has deprived our Armed Forces of the skills, talent, experience and commitment of nearly 10,000 personnel discharged under the law.

It has deprived us of untold numbers of young Americans who have chosen not to serve or who have cut short their careers in the military because of the ban. The ban demands self-denial far beyond the already substantial sacrifices expected of uniformed personnel and their families.

“Don’t Ask, Don’t Tell” forces gay military personnel to live a lie as a condition of service. The law denies others the opportunity to know and learn from their gay colleagues.

The history of “Don’t Ask, Don’t Tell” is complicated. A comprehensive account of the policy, its genesis and application, would require volumes to tell. On this tenth anniversary, however, we review some of the defining moments of the past decade.

We review how the initial promise of a more benign policy toward gays actually created mass confusion about the policy and backlash against lesbian, gay and bisexual service members.

We review how, over time, the new law showed its true colors as a gay ban, just like its predecessors, not a

step forward for our nation, our military or our military personnel.

We review the epidemic of anti-gay harassment in the ranks and the inadequate response of our military leaders. In particular, we review the brutal murder of Private First Class Barry Winchell at Fort Campbell, Kentucky, exposing six years of harassment and violence against gay service members left unchecked by military leaders.

Lastly, we examine the significant shift in public opinion post September 11th in support of gays serving openly in the military. The American people and some military leaders are beginning to acknowledge that “Don’t Ask, Don’t Tell” was bad policy when it became law, and it is bad policy today. It is time for change.

### WHAT IS “DON’T ASK, DON’T TELL?”

“Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass” is a statutory ban on gays in the military, similar to the regulatory bans that preceded it.<sup>48</sup> It is the only law in America that authorizes firing someone for his or her sexual orientation. Indeed, “Don’t Ask, Don’t Tell” is the only

law that punishes lesbians, gays and bisexuals for coming out. Many Americans believe that “Don’t Ask, Don’t Tell” represents a compromise in which gay people can serve in the military as long as they are discrete about their personal lives. Ten years’ experience has proven beyond a doubt that this is simply not the case. An honest statement by a gay

service member of his or her sexual orientation to anyone, at anytime, anywhere may lead to discharge.

“Don’t Ask, Don’t Tell” is an umbrella term for the statute, regulations and memoranda that comprise the ban. It is perhaps easiest to understand by breaking it down into its component parts.

**Don't Ask.** Commanders or appointed inquiry officials shall not ask, and members shall not be required to reveal, their sexual orientation.<sup>49</sup>

**Don't Tell.** "A basis for discharge exists if . . . [t]he member has said that he or she is a homosexual or bisexual, or made some other statement that indicates a propensity or intent to engage in homosexual acts . . ."<sup>50</sup>

**Don't Pursue.** More than a dozen specific investigative limits laid out in DoD instructions and directives comprise "Don't Pursue." It is the most complicated and least understood component of the policy. These investigative limits establish a minimum threshold to start an inquiry and restrict the scope of an inquiry when one is properly initiated.

A service member may be investigated and administratively discharged if they:

- 1) make a statement that they are lesbian, gay or bisexual;
- 2) engage in physical contact with someone of the same sex for the purposes of sexual gratification; or
- 3) marry, or attempt to marry, someone of the same sex.<sup>51</sup>

Only a service member's commanding officer may initiate an inquiry into homosexual conduct.<sup>52</sup> In order to begin an inquiry, the commanding officer must receive credible information from a reliable source that a service member has violated the policy.<sup>53</sup> Actions that are associa-

tional behavior, such as having gay friends, going to a gay bar, attending gay pride events, and reading gay magazines or books, are never to be considered credible.<sup>54</sup> In addition, a service member's report to his/her command regarding harassment or assault based on perceived sexuality is never to be considered credible evidence of their sexual orientation.<sup>55</sup>

If a determination is made that credible information exists that a service member has violated the policy, a service member's commanding officer may initiate a "limited inquiry" into the allegation or statement.

That inquiry is limited in two primary ways. First, the command may only investigate the factual circumstances directly relevant to the specific allegation(s).<sup>56</sup> Second, in statements cases, the command may only question the service member, his/her chain of command, and anyone that the service member suggests.<sup>57</sup> In most cases of homosexual statements, no investigation is necessary.<sup>58</sup> Cases involving sexual acts between consenting adults should normally be dealt with administratively, and criminal investigators should not be involved, except in extraordinary circumstances.<sup>59</sup>

The command may not attempt to gather additional information not relevant to the specific act or allegation, and the command may not question anyone outside of those listed above, without approval from the Secretary of that service.<sup>60</sup> Such an investigation is considered a "substantial investigation."<sup>61</sup> In order to

request authority to conduct a "substantial investigation," the service member's command must be able to clearly articulate an appropriate basis for an investigation.<sup>62</sup>

As with a "limited inquiry," only a service member's commanding officer has the authority to request permission to conduct a "substantial investigation."<sup>63</sup> By definition, a "substantial investigation" is anything that extends beyond questioning the service member, the service member's immediate chain of command, and anyone the service member suggests.<sup>64</sup>

**Don't Harass.** "The Armed Forces do not tolerate harassment or violence against any service member, for any reason."<sup>65</sup> There are many regulations and laws that prohibit harassment and can be applied to anti-gay harassment cases. Harassment can take different forms, ranging from a hostile climate rife with anti-gay comments, to direct verbal and physical abuse, to death threats.

"Don't Ask, Don't Tell" is a complex law comprised of statute, regulations and policy memoranda. The above description, however, covers the basic components of the law – and those are fairly simple. Don't ask about sexual orientation. Don't investigate sexual orientation, except in specific circumstances and in limited ways. Don't harass. Don't tolerate harassment based on perceived sexual orientation.

Unfortunately, even after almost ten years, the services continue to violate these basic rules.

## HOPES DASHED THAT THE BAN WOULD BE LIFTED: HOW "DON'T ASK, DON'T TELL" BECAME A LAW

The prohibition of gays from military service has been an issue since the regulatory ban began during

World War II. In 1992, the issue came to the forefront of the American consciousness with the national news coverage of the brutal murder of Seaman Allen Schindler, beaten to death by fellow sailors because he was gay.<sup>66</sup> The murder

and the public response that accompanied it helped bring attention and support to then-candidate Bill Clinton's vow to lift the ban on gays in the military if he were elected President.



*"I lost my son Allen to anti-gay hatred at the hands of his fellow sailors. My son's life was ended in the most brutal way imaginable, and the Navy has done nothing to ensure that another mother of a gay sailor in the future won't have to go through this kind of pain."*

DOROTHY HOLMAN, MOTHER OF ALLEN SCHINDLER



*"As a member of the Military Working Group assigned by the Secretary of Defense to develop a policy to meet President Clinton's intent to lift the ban, I can attest to the unfairness of the process that led to "Don't Ask, Don't Tell." There was no honest discussion about whether gay service members contribute positively or negatively to unit cohesion. Anti-gay stereotypes and a sense that the military should not break with tradition so as to acknowledge the civil rights of gay Americans were key features of the working group's dynamic. My 30 years of military service lead me to believe that gay, lesbian and bisexual members of the Armed Services deserve every opportunity afforded straight service members; sexual orientation is irrelevant to one's ability to serve well in our Armed Forces."*

MASTER CHIEF PETTY OFFICER OF THE COAST GUARD VINCENT W. PATTON, USCG (RET.)



After President Clinton's election, there was hope that he would issue an Executive Order allowing gays and lesbians to serve following the example of President Harry Truman who

integrated the military by Executive Order. The political response in opposition to lifting the ban was swift and vicious. In the intense political wrangling that plagued his Administration in early 1993, it became clear that President Clinton's promise of an end to the ban would be blocked by the Joint Chiefs of Staff and conservatives in Congress, including members of the President's own party.<sup>67</sup>

Congress held hearings heavily weighted toward supporters of the ban.<sup>68</sup> The Pentagon created a working group to examine the issue that

was also biased towards retention of the existing policy.<sup>69</sup> Ultimately, in July 1993, President Clinton announced that a "compromise" had been reached. This compromise was presented to the public as a "gentleman's agreement" which would respect the sensibilities of heterosexual service members while affording some privacy to gay members of the armed forces. Assurances of a "zone of privacy" with respect to sexual orientation were made, as then-Chair of the Joint Chiefs Colin Powell promised, "We won't witch

hunt. We won't chase. We won't seek to learn orientation."<sup>70</sup> Military leaders promised that discretion would be all that was required of gay service members, and in exchange, gay service members would not be subject to invasive questioning. As a result, this new policy came to be popularly known as "Don't Ask, Don't Tell."

In November 1993, the new ban on gays in the military became law – a statute passed by Congress. No longer could the ban be lifted by Executive Order, nor was it still possible to work through the regulations to alter the status of gay military personnel.

"Don't Ask, Don't Tell" was different from prior prohibitions on service in three respects. First, Congressional and military leaders acknowledged, for the first time in 1993, that lesbians, gays and bisexuals serve our nation and do so honorably.<sup>71</sup> Second, the policy states sexual orientation is no longer a bar to military service.<sup>72</sup> Third, President Clinton, Congress and military leaders agreed to end intrusive questions about service members' sexual orientation and to stop the military's infamous investigations to ferret out suspected lesbian, gay and bisexual service members.<sup>73</sup> They agreed to take steps to prevent anti-gay harassment.<sup>74</sup> They agreed to treat lesbian, gay and bisexual service members even-handedly in the criminal justice system, instead of criminally prosecuting them in circumstances where they would not prosecute heterosexual service members.<sup>75</sup> They agreed to implement the law with due regard for the privacy and associations of service members.<sup>76</sup>

The ink on the new statute had barely dried when the promises underlying it were broken. The "gentleman's agreement" proved illusory when the regulations imple-

menting it were published. Witch hunts and anti-gay harassment were left unchecked by the Pentagon. The promised zone of privacy did not materialize. It quickly became clear that far from a liberalization of the prior regulations, “Don’t Ask, Don’t Tell” was a ban on gay service of the most insidious kind.<sup>77</sup>

*No Evidence to Support the Ban: Four reports authored or commissioned by DoD since 1957 have concluded there is no evidence to support a ban on military service by gay people. The Navy’s 1957 Crittenden Report challenged the assumption that gay people in the military posed security risks.<sup>78</sup> Two reports issued by the Personnel Security Research and Education Center in 1988 and 1989 concluded that there was no empirical evidence to support the ban, finding that gay people performed as well as heterosexuals.<sup>79</sup> Finally, a 1993 Rand Report commissioned by DoD concluded that allowing gay people to serve openly in the military posed no threat to readiness.<sup>80</sup> Congress and the public virtually ignored these studies during the debates surrounding the creation of “Don’t Ask, Don’t Tell.”*

### THE EARLY YEARS OF “DON’T ASK, DON’T TELL:” CONFUSION AND BACKLASH

In the first few years of “Don’t Ask, Don’t Tell,” some believed, mistakenly, that the new policy represented a liberalization of the prior ban on gays in the military. The response from military leaders, however created mass confusion in the ranks.

DoD failed to distribute the new regulations, or train on the policy’s investigative limits.

DoD and the services issued guidance that directly contradicted the promises made when “Don’t Ask, Don’t Tell” became law.

The confusion generated by inaction and missteps created a vacuum quickly filled by anti-gay harassment and improper investigations - manifestations of a severe backlash against service members perceived to be gay, or even gay-friendly. Conservatives within the military transferred their anti-Clinton sentiment and their anger at what they perceived to be a “homosexual agenda” foisted on them by a President with no military credibility, to the easiest targets – their gay coworkers.<sup>81</sup> Where once gay service members flew largely under the radar, there was now nowhere to hide after the political firestorm that surrounded “Don’t Ask, Don’t Tell.”<sup>82</sup> Anti-gay harassment and witch hunts soared. The human toll mounted as careers were

shattered by an increasing number of illegal investigations and discharges.

### CONFUSION

When the Department of Defense issued the regulations implementing “Don’t Ask, Don’t Tell” and the services followed with their directives, the promises made by those who supported the new ban were already broken. The regulations contradicted the very assurances that made “Don’t Ask, Don’t Tell” palatable to those who favored lifting or liberalizing the ban.<sup>83</sup> There was no zone of privacy for gay service members, and it was clear that discretion would not save anyone’s career.<sup>84</sup> Contrary to the promises made, nothing short of celibacy and complete secrecy would be necessary for gay service members to avoid discharge under the new regulations.

For example, in June 1994, the Navy Manpower Analysis Center issued a memorandum suggesting that public displays of support for gay activities by Navy members may be “inconsistent with good military character” contrary to “Don’t Ask, Don’t Tell.”<sup>85</sup> The Navy issued this memo in response to the discovery that an active duty sailor was a member of a gay choir.

In another memo, the Navy instructed psychologists and other healthcare providers to turn in service members who sought counseling

for issues related to their sexual orientation.<sup>86</sup> Again, from all indications, Congress had no intent to include within the mandate “Don’t Tell” a prohibition that would prevent members of the armed services from obtaining adequate medical assistance by requiring them to lie to their military healthcare providers. Nonetheless, this guidance served as the basis for a number of discharges.<sup>87</sup>

A November 1994 memorandum from Richard A. Peterson, Air Force Judge Advocate General instructs investigators to question parents, siblings, school counselors, roommates, and close friends of suspected gay service members. The memo also tacitly promotes witch hunts in that it states that commands may take action against service members discovered to be gay during the course of an investigation into another service member.<sup>88</sup> Nothing in “Don’t Ask, Don’t Tell” or its legislative history even hints at a prohibition on “telling” to parents and family members; the only justification asserted for the “Don’t Tell” component of the law lay in the (unfounded) premise that unit cohesion would be impacted negatively by open gay service. No one ever argued that coming out to one’s parent would impact military readiness.

Then DoD General Counsel Judith Miller buttressed the Air Force memo with one of her own on August 18, 1995, which, among

other things, instructed commanders and inquiry officers to inquire into whether service members making statements of homosexual or bisexual orientation had ever engaged in a sexual relationship with a person of the same sex.<sup>89</sup> Once again, this instruction contradicted the stated intent of the “Don’t Pursue” component of “Don’t Ask, Don’t Tell.”

DoD General Counsel Miller issued this memorandum in response to a surprising case in which a service member actually prevailed against the odds to remain in the service as an openly gay woman. This was the case of Navy Lieutenant Zoe Dunning. Dunning was a Naval Reserve Lieutenant when she stated publicly that she was a lesbian, and the Naval Reserve initiated discharge proceedings against her.<sup>90</sup> Dunning fought to remain in the Naval Reserves, arguing that her status as a lesbian could not serve as the basis for her discharge without evidence that she intended to act upon her sexual orientation so as to violate military law.<sup>91</sup> The separation board agreed and retained her. The Miller memorandum prohibited further use of Dunning’s successful “status versus conduct” defense.<sup>92</sup> Dunning nonetheless continues to serve today, having now reached the rank of Commander.

Commander Dunning and others like her present perhaps the most salient contradiction that marked this early period of the ban - the fact that many gay service members challenging the ban in court served openly during this period with overwhelming support from their colleagues and their commands. A number of service members came out in 1993 as well, when gay discharges were temporarily suspended



served our country in uniform.

Colonel Margarethe Cammermeyer was perhaps the most celebrated case of a lesbian serving openly, with her story forming the basis of a movie with Glenn Close, *Serving in Silence*. The Army National Guard initiated Colonel Cammermeyer’s discharge after learning that she is a lesbian during a security clearance investigation.<sup>94</sup> Cammermeyer, a Vietnam veteran, successfully challenged her discharge, and received overwhelming support from her military colleagues.<sup>95</sup> She served as an open lesbian for four and one-half years. She was not alone.

Petty Officer Mark Phillips’ coworkers presented him with a chocolate cake on the anniversary of his coming out to his unit, and Captain Rich Richenberg’s colleagues surprised him with a birthday party during his legal battle to stay in the military.<sup>96</sup> Sergeant Justin Elzie served as an openly gay Marine for many years before he left the military.<sup>97</sup>

Petty Officer Keith Meinhold, rated as one of the Navy’s top airborne sonar analysts, served openly even before he became a plaintiff in litigation challenging the ban.<sup>98</sup> His unit was named the most combat-ready in the Pacific Fleet, and Meinhold’s coworkers supported him throughout his battle to stay in the Navy.<sup>99</sup> One of Meinhold’s coworkers, who admitted to being “the bigot from

while the new policy was being ironed out.<sup>93</sup> The Pentagon has never once suggested that military effectiveness decreased while these openly lesbian, gay and bisexual Americans

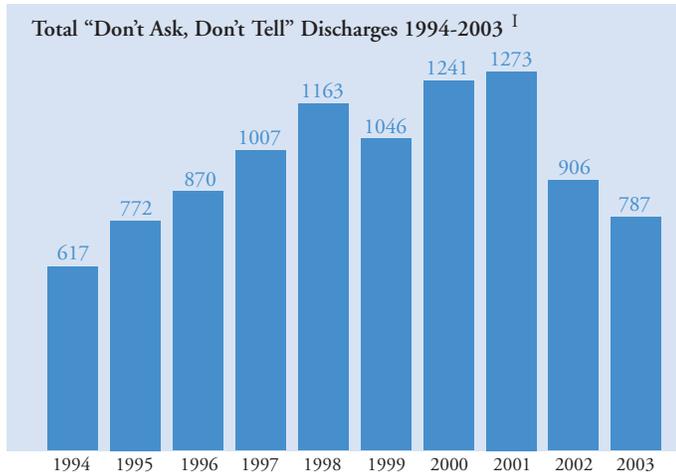
hell” prior to working with Meinhold, said Meinhold “totally changed” his attitude toward gays in the military.<sup>100</sup>

For members of the Armed Forces trying to make sense of the new ban during these early years, the juxtaposition of these successful openly gay service members against the regulations mandating discharge of any person found to be gay – regardless of his or her accomplishments or value to the unit – was perplexing.

The silver lining in these early years should have been the limits on administrative and criminal investigations included among the initial guidance from DoD and the services. The prohibition of the use of criminal investigators in almost all inquiries into alleged homosexual conduct was a significant improvement over prior regulations. And even though “Don’t Ask, Don’t Tell” is and will always be a ban on gays in the military, the limits on administrative investigations, if observed, would have provided some minimal protections for gay service members. DoD and the services, however, failed to disseminate this guidance to commanders in the field.<sup>101</sup> The vacuum created by the lack of guidance was quickly filled with misinformation, leading to severe violations of service members’ privacy in contravention of the new regulations. Accountability for such violations was virtually non-existent, providing no real incentive for commanders to learn the new regulations and observe them.<sup>102</sup>

## BACKLASH

The confusion created by the new regulations themselves, the vacuum created by the poor dissemination of the regulations, and the additional guidance that undercut the initial promises of the policy, set the stage



for anti-gay forces within the military to engage in substantial backlash against service members perceived to be gay or even gay friendly. Gay discharges soared during the first years of the policy, and witch hunts and anti-gay harassment skyrocketed.

SLDN documented a startling number of witch hunts in its first three annual reports on "Don't Ask, Don't Tell." One of the most outrageous occurred in Okinawa in 1994, when twenty-one service members were questioned about their sexual orientation and the sexual orientation of other service members in a massive sweep of suspected gay personnel.<sup>103</sup>

Another egregious situation occurred in the same year in South Korea, where a young female enlisted soldier was threatened with criminal charges for allegedly being a lesbian, after she reported a sexual assault committed by male soldiers and they initiated rumors about her sexual orientation in retaliation.<sup>104</sup>

On the *USS Simon Lake*, ported in Sardinia in 1995, over sixty women were questioned about their sexual orientation.<sup>105</sup> General Powell's promises in 1993 of "Don't Pursue" notwithstanding, witch hunts and illegal pursuits were rampant during the first three to four years of "Don't Ask, Don't Tell."

routinely investigated themselves or found their complaints ignored.

The case of Airman Sean Fucci illustrates how military leadership has consistently failed to stop harassment.<sup>108</sup> Fucci reported a note reading, "DIE FAG" left in his room. His commanders offered him no protection, and failed to investigate the source of the threat.<sup>109</sup> Instead, his supervisor questioned him about his sexual orientation, forcing Fucci to move off-base at his own expense for his personal safety.<sup>110</sup>

Even the tragic death of Seaman Allen Schindler at the hands of fellow sailors was not enough to make the leadership of the *USS Belleau Woods* take anti-gay violence seriously. In 1996, a young sailor on the same ship from which Schindler and his murderers hailed was told by his Chief Master at

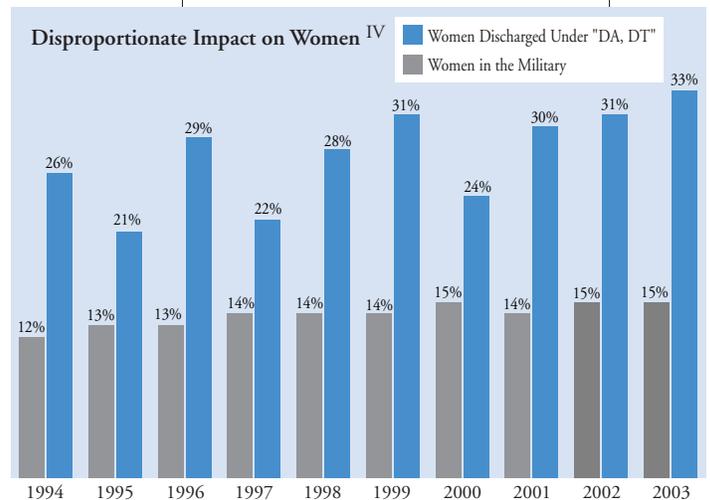
*Women are disproportionately impacted by the ban, making up 30% of all gay discharges despite comprising only 14% of the force.*

In addition to the witch hunts, anti-gay harassment skyrocketed during the first years of "Don't Ask, Don't Tell," and remains a significant problem today.<sup>106</sup> In 1995, SLDN documented ten death threats in just one year under the ban.<sup>107</sup> When service members reported death threats, they were

Arms that he would be killed in the same way Schindler was if he exercised his right to a discharge board to fight allegations of gay conduct.<sup>111</sup> Assured that his leaders would not protect him and fearful for his safety the sailor accepted the discharge.<sup>112</sup>

Not all harassment was this extreme. But the day-to-day experience for gay service members during this period, and throughout the history of "Don't Ask, Don't Tell," has been characterized by persistent anti-gay comments, jokes, cadences, and epithets - on the parts of both officers and non-commissioned officers (NCOs), as well as junior enlisted personnel. Hostile command climates for gay service members have been the rule, rather than the exception. After putting up with anti-gay language and veiled threats of physical and professional harm for long periods of time, some service members found it necessary to make coming out statements as a matter of principle or personal safety. One such case was that of Air Force Major Robert Kittyle, in which an inquiry officer concluded, "It appears Major Kittyle made this announcement after he could not tolerate derogatory comments concerning homosexuals."<sup>113</sup>

A form of harassment known as "lesbian-baiting" was prevalent during



this period and made life very difficult for many women in the service.<sup>114</sup> Top female performers, as well as women who rebuffed the sexual

advances of male colleagues and superiors, were regularly targeted by rumors of lesbian conduct.<sup>115</sup> This may be one of the reasons behind the

fact that women are discharged at a rate twice their presence in the services under “Don’t, Ask, Don’t Tell.”

#### REALITY SINKS IN:

“DON’T ASK, DON’T TELL” IS A BAN

In 1998, SLDN continued to document inadequate dissemination of the regulations implementing “Don’t Ask, Don’t Tell.” Commanders and military lawyers received conflicting guidance when they received any guidance at all. Service members and commands were still confused about the new rules. Nevertheless, by the mid 1990’s, norms emerged – some good, some not.

Criminal investigations became less common, witch hunts decreased, and inappropriate command-directed asking and pursuits also generally decreased.

Conversely, gay discharges increased exponentially. Reports of anti-gay harassment skyrocketed. Attempts to preserve the promised zone of privacy completely failed. The last of the constitutional challenges to “Don’t Ask, Don’t Tell” also failed, extinguishing the hope some held that the courts would lift the ban.<sup>116</sup>

#### THE RULES OF “DON’T ASK, DON’T TELL” BECOME CLEARER

While the regulations implementing “Don’t Ask, Don’t Tell” were promulgated in 1994,<sup>117</sup> it took years before they began to filter down to the unit level.<sup>118</sup> Even where the new regulations were available, old habits died hard, and reversion to the tactics allowable under the prior ban, but not under “Don’t Ask, Don’t Tell,” was common.<sup>119</sup>

In 1998, DoD released its only review of the implementation of

“Don’t Ask, Don’t Tell.” While the report white-washed many of the problems in the first years of the implementation of “Don’t Ask, Don’t Tell,” it acknowledged the improper investigations reported by SLDN, and recommended that those responsible for implementing the policy be given better training to ensure compliance with the regulations.<sup>120</sup> The review also contained recommendations that DoD stress the need for “consultation with higher headquarters” prior to the initiation of substantial investigations.<sup>121</sup> Finally, the report recommended the reissuance of existing guidance on anti-gay harassment.<sup>122</sup>

Certain aspects of the new rules, however, began to be generally observed. The new security clearance rules were one example.<sup>123</sup> The new regulations, followed by an Executive Order, prohibited the use of information about a service member’s sexual orientation garnered during the security clearance process as a basis for investigation and discharge.<sup>124</sup>

Criminal investigations also became less common, as word got out – even where the regulations did not – that the regulations prohibited the use of criminal investigators in administrative investigations under “Don’t Ask, Don’t Tell.”<sup>125</sup> In the early 1990’s, SLDN documented more than a dozen cases of criminal prosecution for consensual same-sex conduct. Over time, reports of criminal investigations diminished. In 1997, SLDN reported that it did not receive a single report of a gay service member undergoing court martial for consensual same-sex sexual conduct during the entire year.<sup>126</sup>

There were exceptions to this trend, like the 1995 case of Air Force Debra Meeks. The Air Force held Major Meeks beyond her retirement date and subjected her to court-martial for allegedly engaging in sexual conduct with another female.<sup>127</sup> At stake were Meek’s liberty and her twenty year retirement pension. The court-martial acquitted her.

Witch hunts were not entirely a thing of the past by the mid-to-late 1990’s. A plea arrangement used in a 1996 sexual assault case at Hickam Air Force Base in Hawaii provided a lesser sentence for the accused in exchange for his promise to give the names of all men with whom he had had consensual sex.<sup>128</sup> The defendant offered 17 names of men in all branches of the military but the Coast Guard, and every one was discharged.<sup>129</sup>

Over time, command-directed asking and pursuing decreased. The regulations were still inadequately disseminated. SLDN reported in 1997 that it was still receiving regular requests for copies of the regulations from commanders and JAG officers. The norm, however, was beginning to change.

There were exceptions to the general trend away from improper administrative investigations.<sup>130</sup> One of the more flagrant of these was the March 1999 witch hunt at the Defense Language Institute in Monterey, California, in which 14 airmen, primarily women were discharged.<sup>131</sup>

Another example of unlawful pursuit was the highly publicized case of Senior Petty Officer Timothy

McVeigh, outed to his command when AOL disclosed his personal information – including the use of the word “gay” in his user profile – to a Navy investigator.<sup>132</sup> A federal judge found the Navy acted improperly in McVeigh’s case.<sup>133</sup>

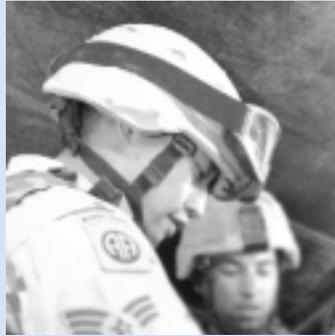
Perhaps the most heart-wrenching example of an inappropriate administrative investigation was the case of Air Force Captain Monica Hill, subjected to invasive and demeaning questions about her sexual life after requesting a deferment of her active duty report date to care for her terminally ill partner.<sup>134</sup> Upon receiving the deferment request, the Air Force immediately suspended Hill’s orders in order to investigate her.<sup>135</sup> Hill’s partner died several months later, and the Air Force discharged Hill several months after that.<sup>136</sup>

Complaints of inappropriate investigations by service members rarely resulted in the investigations being stopped, and often resulted in retaliation. Such was the case of Nikki Galvan, a West Point cadet who stood up for what she believed were her rights under “Don’t Ask, Don’t Tell,” when she reported a Lieutenant Colonel for inappropriately questioning her about her sexual orientation and sexual activities.<sup>137</sup> In response to her complaint, Galvan’s diaries and three years worth of emails were seized, and information contained in them led to her discharge.<sup>138</sup>

While improper command-directed asking decreased, peer asking increased as a new generation of Americans entered the service.

## MURDER AND HARASSMENT

The tragic 1999 murder of Private First Class (PFC) Barry Winchell for his perceived sexual orientation exposed on the national stage the



*“Don’t Ask, Don’t Tell” Hits Young People Hardest. Personnel under 25 years of age are targeted at much higher rates for investigation and discharge under the ban than their percentage of the force would suggest.*

Source: Department of Defense

These young Americans were unfamiliar with the “closet” as a cultural phenomenon, having grown up watching *Will and Grace*, and having much greater access to openly gay people than had prior generations.<sup>139</sup> Many of them thought nothing of asking questions about the sexual orientation of their peers, sometimes causing trouble for gay service members struggling to keep their sexual orientation secret.

## HARASSMENT CONTINUES TO INCREASE

Throughout the mid-to-late 1990’s, harassment continued to increase, as did the targeting of service members who reported harassment for administrative investigation. In 1997, Assistant Secretary of Defense Edwin Dorn issued a memorandum emphasizing that reports of anti-gay harass-

military’s tolerance of anti-gay violence and harassment. It represented a defining moment in the history of “Don’t Ask, Don’t Tell.” No longer could one ever view “Don’t Ask, Don’t Tell” as a benign policy.

ment or threats do not constitute a basis for investigation.<sup>140</sup> In 1997, however, SLDN reported that not one of the many commanders and JAG officers with whom SLDN worked had ever heard of, much less seen a copy of, the Dorn memo.<sup>141</sup>

Lieutenant Edward Galloway’s experience of constant anti-gay harassment and inappropriate questioning from peers and subordinates on the *USS Vandergrift* was typical.<sup>142</sup> When the anti-gay climate aboard his ship proved too humiliating to bear, he came out to his commander in the hopes that he would put a stop to the harassment and ensure his own safety.<sup>143</sup> Far from protecting Galloway, the commander allowed the anti-gay climate to persist unchecked and offered Galloway no protection, despite acknowledging that a large percentage of the ship’s crew harbored anti-gay sentiments.<sup>144</sup>

In another particularly egregious example of anti-gay harassment in the Navy, graffiti aimed at a gay sailor reading “You’re a dead faggot” was left on the sailor’s bunk for more than two weeks.<sup>145</sup>

Over time it became clear to service members, commands and the public that “Don’t Ask, Don’t Tell” is indeed a ban on gays in the military. Over time, the rules of this new ban began to filter down from the Pentagon to commands. The new ban kept lesbian, gay and bisexual service members second class citizens in the military. The forced silence of gay service members and failure to address the barrage of harassment and violence set the stage for tragedy.

On July 5, 1999, PFC Barry Winchell was beaten to death with a baseball bat in his sleep by fellow soldiers who believed he was gay.<sup>146</sup> At the trial of his murderers, soldiers testified that Winchell endured four



Winchell

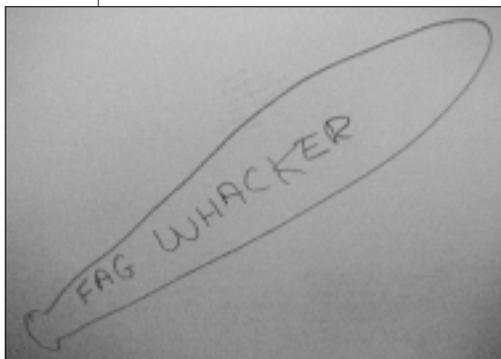
months of daily anti-gay taunts and harassing comments from the two killers and others prior to his death.<sup>147</sup> Winchell had tried to report the harassment to the Fort Campbell Inspector

General, but was turned away. Winchell's chain of command was aware of the harassment and did little. Some members of Winchell's chain of command even participated in the harassment.

*"Faggot, faggot down the street. Shot him, shot him 'til he retreats."*

– Cadence reported at Fort Campbell in the weeks following Private First Class Winchell's murder.

At Fort Campbell, soldiers continued to report anti-gay graffiti and anti-gay cadences in the weeks and months after Winchell's death.<sup>148</sup> Gay discharges at Fort Campbell skyrocketed after the murder. In FY1999, Fort Campbell's gay discharges represented 3.6% of the Army total. By FY2000, they represented almost 28% of the Army total.<sup>149</sup> Winchell's murder, and the Army's inadequate response to it, was a clear sign to gay soldiers that their lives would not be protected in the face of anti-gay violence.



Many consequently came to view assignment to Fort Campbell as a death sentence. Gay soldiers fled the installation in droves, often making statements of homosexual orientation purely as a means of self-preservation.

Fort Campbell was not the only place in the military where anti-gay rhetoric was pervasive. Rather, it was the most extreme example of a systemic problem across the services.

Just three months following the Winchell murder, a Marine Lieutenant Colonel at Twenty-Nine Palms sent an email to his subordinates mocking the Winchell murder and deriding the premise that commanders should take responsibility for the safety of their gay Marines, or "backside rangers," as he called them.<sup>150</sup>

In early 2000, a senior non-commissioned officer on the USS Carl Vinson told a sailor rumored to be gay, "I'm not the one you want to tell that you are gay; I will discharge you from the Navy and send you home in a box."<sup>151</sup> SLDN reported scores of similar statements by leaders and junior enlisted personnel across the services in 1999 and 2000.

*"There is not, nor has there ever been a climate of homophobia at Fort Campbell."*

– LTG Robert Clark.<sup>152</sup>

*"Department policy concerning harassment is based on the fact that treatment of all individuals with dignity and respect is essential to good order and discipline. Mistreatment, harassment, and inappropriate comments or gestures undermine this principle and have no place in our armed forces."*

– Dr. David S.C. Chu, Under Secretary of Defense<sup>153</sup>



*"We never intended to become activists, but the murder of our son and the Army's indifference to the anti-gay climate that led to it left us no other choice. The command climate at Fort Campbell set the conditions for our son's death. After his death, the command, including the commanding general Robert T. Clark, failed to take any action to correct the anti-gay climate on the base. No one in command at the time of our son's murder was ever held accountable for the leadership failures that cost us our son. We will continue to fight for an end to the ban, in the hopes that no other parents will ever have to endure the loss of a child to anti-gay violence in the military again."*

– Pat and Wally Kutteles, parents of Private First Class Barry Winchell

#### RESPONSE FROM DoD AND THE SERVICES

The Pentagon took its first look at anti-gay harassment in 1998, and discovered confusion in the ranks about how to respond to such harassment.<sup>154</sup> Ironically, little more than a month after Winchell's murder, Under Secretary of Defense Rudy de Leon issued a memorandum reiterating DoD policy to investigate threats of harassment, in response to deficiencies discovered during the 1998 review.<sup>155</sup> This reaction was unfortunately too little, too late.

In response to the Winchell murder, the DoD Inspector General administered a survey to assess the command climate across the services and determine whether anti-gay harassment was truly a problem.<sup>156</sup> The results of the survey, reported in March 2000, indicated that anti-gay harassment was a substantial problem. 80% of service members reported having heard derogatory anti-gay remarks in the preceding year. 37% indicated that they witnessed or experienced targeted incidents of anti-gay harassment – of those, 14% reported anti-gay threats or anti-gay physical assaults.<sup>157</sup> The DoD could no longer claim that anti-gay harassment was an isolated occurrence.

The DoD formed a working group to address the now demonstrated wide-spread problem of anti-gay

harassment. The working group proposed a thirteen point Anti-Harassment Action Plan (AHAP) and on July 21, 2000 Under Secretary of Defense Bernard Rostker instructed the services to implement the plan.

The AHAP contained four primary mandates designed to curb anti-gay harassment: (1) training to prevent harassment; (2) appropriate and effective reporting mechanisms for complaints of anti-gay harassment; (3) enforcement of the prohibition on harassment and accountability for those who violate it; and (4) measurement of AHAP implementation and the plan's effectiveness. Unfortunately, the requirements of AHAP have gone largely unfulfilled to date and anti-gay harassment continues to be a significant problem

across the services.

In addition to issuing AHAP, the Administration had one final response to the epidemic of anti-gay harassment. Then President Clinton issued Executive Order 13140 providing for sentence enhancement under the Uniform Code of Military Justice for hate crimes.<sup>158</sup>

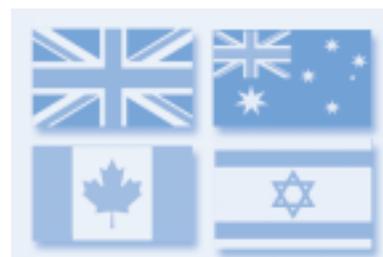
Anti-gay harassment left unchecked contributed to the tragic murder of PFC Barry Winchell. In response to this tragedy, the military finally began to acknowledge anti-gay harassment is a problem and has taken some steps to address it. The failure to adequately address anti-gay harassment, however, has allowed anti-gay harassment to continue in the ranks and leaves open the possibility of yet another tragedy.

#### OPPOSITION TO THE BAN GROWS

Over the years, evidence that “Don’t Ask, Don’t Tell” has failed service members and America has grown. After ten years, “Don’t Ask, Don’t Tell” has led to the discharge of nearly 10,000 service members and the loss of countless others who have chosen to leave the military earlier in their careers rather than serve in silence. The price to the American taxpayer is estimated between one quarter of a billion to over \$1.2 billion.<sup>159</sup> The lost time, resources and personnel caused by the law represent an immeasurable disservice to military readiness and American security.

The September 11th, 2001 terrorist attacks and the military actions that followed have brought the failure of “Don’t Ask, Don’t Tell” into stark relief. When the U.S. went to war in Afghanistan, gay discharges decreased 29%, a fact that is unsurprising given the historical trend toward fewer gay discharges in times of war.<sup>160</sup>

In FY2003, during which time the U.S. embarked on a second effort, Operation Iraqi Freedom, discharges dropped another 13%. The irony of gay service members being allowed to serve during the times when unit cohesion is of the utmost importance has not been lost on many Americans.



*Studies of the experiences of our allies in the United Kingdom, Australia, Canada and Israel have all concluded that lifting the ban was a non-event. Military service by openly gay personnel in these countries and others has resulted in no detriment to morale, unit cohesion, or readiness.<sup>162</sup>*

American troops have been serving side by side with openly gay members of allied forces, including the United Kingdom, Canada and Australia. Thirteen coalition partners in Operation Enduring Freedom allow lesbians, gays and bisexuals to serve openly, as do eleven coalition members fighting in Operation Iraqi Freedom. Service members have been working side by side in the war on terrorism with CIA, NSA, and FBI agents – all of whom cannot only be openly gay, but are protected from discrimination on the basis of their sexual orientation.<sup>161</sup>

Even inside the military, a change in attitude toward gay service members is evident. Gay troops are more openly valued than ever before.

In 2001, the Army dropped its discharge proceedings against openly gay Lieutenant Steve May, an officer skilled in bio-terrorism.<sup>163</sup>

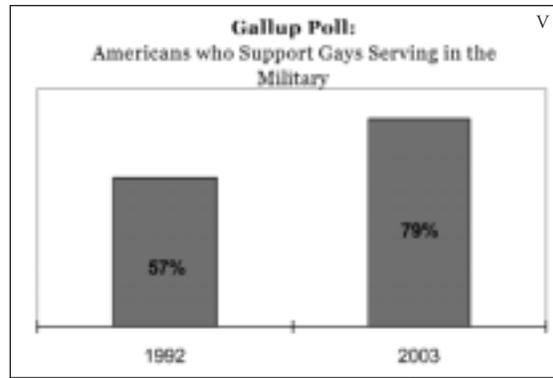
An April 2002 Marine Corps memorandum at Twenty-Nine Palms stat-

ed, "Homosexuals can and do make some of the best Marines."<sup>164</sup> Letters to the editor in the *Military Times* publications are increasingly supportive of gay Americans serving openly. A January 2004 *Military Times* poll shows an increase in acceptance of gays in the military among its subscribers, who tend to be senior military personnel and careerists.<sup>165</sup> Gay service members are becoming less willing to stay in the closet as a condition of service.

High-ranking retired officers and senior NCOs are increasingly speaking out on the issue. In October 2003, retired Admiral John Hutson, formerly the Navy's top military lawyer, wrote an article condemning the ban and calling for repeal.<sup>166</sup> Democratic presidential nomination candidate General Wesley Clark spoke out repeatedly against the ban during his campaign, arguing that the policy is unworkable and calling for a new law under which all Americans may serve regardless of sexual orientation.<sup>167</sup>

In November 2003, three retired flag officers denounced "Don't Ask Don't Tell" and came out in a *New York Times* article, becoming the highest ranking gay military personnel ever to come out publicly.<sup>168</sup> In December 2003, fifteen retired senior military leaders signed an open letter calling for an end to the ban.<sup>169</sup>

The public's attitude has changed as well. A December 2003 *Gallup Poll* reported that 79% of Americans



believe that openly gay people should serve in the U.S. military<sup>170</sup> – a dramatic change from 1992 when only 57% of Americans believed homosexuals should be hired for the armed forces.<sup>171</sup> Even the politically conservative *Fox News Network's* polling in August 2003 indicated that 64% of the public supports allowing gay people to serve in the military.<sup>172</sup>

The political landscape and discourse is shifting as well. From the halls of Congress to the editorial pages there was outrage at the discharge of thirty-seven linguists from the Defense Language Institute. The senselessness of losing Arabic linguists during a time of war for something as irrelevant as their sexual orientation was clear - particularly when there is a severe shortage of qualified linguists.<sup>173</sup> By the end of 2003, nearly every major newspaper in the country, including the *New York Times*, the *Washington Post*, *USA Today*, and the *Chicago Tribune* had issued editorials calling for an end to the ban.<sup>174</sup>

Members of Congress are speaking out against the ban. Sen. Mark Dayton (D-MN) made a lengthy speech on the floor of the Senate during the consideration of Major General Clark for promotion in which he called for an end to the ban.<sup>175</sup> In the same debate, Sen.

Jeff Sessions (R-AL), one of the most conservative voices in the Senate acknowledged gay service members have a right to be treated fairly.<sup>176</sup> Such a statement from as conservative a voice as Sen. Sessions' would have been unthinkable ten years ago.

In the presidential campaigns of 2000 and 2004, the shift in thinking on this issue is apparent. President Bush announced his support of "Don't Ask, Don't Tell"<sup>177</sup> in contradiction to the GOP platform which still states that "homosexuality is incompatible with military service."<sup>178</sup> Every contender for the Democratic nomination from the 2000 election forward has supported gay military service, including Vietnam veteran Sen. John Kerry and retired General Wesley Clark. And former President Clinton issued a letter in October 2003 acknowledging for the first time that there is no evidence to support the ban, marking a major retreat from his initial statements that the policy was a "step forward."<sup>179</sup>

**CONCLUSION:** “DON’T ASK, DON’T TELL” WAS BAD LAW WHEN IT WAS PASSED, AND IT IS BAD LAW TODAY

“Don’t Ask, Don’t Tell” has proven itself over the course of the last ten years to be an unworkable policy in which nobody wins. “Don’t Ask, Don’t Tell” provides no greater privacy for gay service members than its predecessor regulatory bans. The rules that implement the law are convoluted and strained. The wasted lives and resources behind the statistics of “Don’t Ask, Don’t Tell” are becoming less tolerable to Americans in a wartime environment and a cultural environment in which the clos-

et has become, in many segments of American society, a thing of the past. A sea change has resulted with respect to public support for the ban, stemming from a growing recognition that a policy which deprives the nation of skilled military service members has no place in our federal law. “Don’t Ask, Don’t Tell” will undoubtedly take its place in the history books as a failed policy experiment that did a great disservice to thousands of Americans discharged under the law, and to the country deprived of their service.

The future of the law is uncertain. The Supreme Court’s decision in

*Lawrence v. Texas*<sup>180</sup> acknowledging a constitutional right to engage in intimate sexual relationships may provide a new basis for a constitutional challenge to “Don’t Ask, Don’t Tell.” The Court’s pronouncement in that case has already led to challenges to the constitutional validity of the Uniform Code of Military Justice sodomy provision, Article 125, a provision often used to support the argument that gays should not serve.<sup>181</sup> The political landscape is shifting towards repeal. The time for change is upon us, and the only question remaining is when – not whether – the ban will cease to be the law of the land.