

**MILITARY LAW TASK FORCE  
OF THE NATIONAL LAWYERS GUILD**

**MILITARY POLICY ON  
HOMOSEXUALITY**

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**A Decade of Don't Ask, Don't Tell:  
The Military's Policy on Homosexuals in the Service**

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*Ten Years of Discrimination*

When it was first enacted in 1994, the "Don't Ask, Don't Tell" (DADT) policy on homosexuality in the military was lauded by the Clinton administration as a liberalization of the military's policies towards lesbian and gay servicemembers. Congressional and military leaders acknowledged for the first time that lesbians, gays and bisexuals serve our nation honorably, and that sexual orientation is no longer a bar to military service.

Has the policy proven to be as enlightened as its authors suggested? The clear answer is no. From 1994, when the policy was first implemented, through 2001, discharges of lesbian, gay and bisexual servicemembers have steadily increased to more than double, from 617 to 1273. 2002 saw the first drop in discharges from the year before, but gays were discharged 906 times,<sup>1</sup> still much higher than the 617 discharged during 1994, the first year of the policy. More than 9,000 Americans have been discharged since 1993 because of "Don't Ask, Don't Tell," at a cost of more than a quarter billion dollars in taxpayer money.<sup>2</sup>

The policy often undermines important national security objectives. For example, in the summer of 2002, the Army discharged seven linguists, all trained in Arabic, for being gay. They did so despite a critical shortage of Arabic specialists, and despite their importance to the so-called "War on Terrorism" in the Middle East.

1 Women have been discharged consistently at a rate nearly twice their presence in the service. In 2002, 36% of the Army's discharges under "Don't Ask, Don't Tell" were women, while women comprise only 15% of the Army's total force strength. In the Coast

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<sup>1</sup> Traditionally during times of war there is a decrease in the number of discharges for homosexuality.

<sup>2</sup> SLDN, "Conduct Unbecoming, The Ninth Annual Report of Don't Ask, Don't Tell, Don't Pursue, Don't Harass." (March 25, 2003)

Guard, 34% of the discharges were women, while 7% of the force is women. Similarly, in the Air Force, 34% of the “Don’t Ask, Don’t Tell” discharges were women, while women comprise 19% of the Air Force’s total strength. In the Marine Corps, 27% of the “Don’t Ask, Don’t Tell” discharges were women, who are 6% of the Corps. African American women were discharged at almost three times their presence in the military. Latina and other women of color were also discharged at a disproportionate rate.<sup>3</sup>

The military is the largest employer in the United States, with approximately 2.5 million members on active duty and in the reserves. The military is also the largest employer of youth in our country, with more than one million of the active and reserve population between the ages of 18 and 25. In fiscal year 2001, young adults comprised approximately 42% of the armed forces. Yet they comprised 90% of the Marine Corps and Navy and 79% of the Coast Guard gay discharges.<sup>4</sup> Shamefully, the US Military is the only major institution in the country that requires the firing of openly gay employees solely based upon their sexual orientation.

This memo provides an overview of the policy and discusses its implementation. Discussion is divided into sections on the basic discharge policy, exceptions to the policy, characterization of discharges, enlistment policy, investigations and command inquiries, and anti-gay harassment.

#### *Overview of the Discharge Policy*

The policy on homosexuality is based on the Congressional “Policy Concerning Homosexuality in the Armed Forces,” a number of regulations issued by the Department of Defense, and regulations of the various services.<sup>5</sup> UCMJ provisions on sodomy, indecent acts, fraternization, and similar “offenses,” although on their face applying to heterosexuals as well as homosexuals, are typically charged against gay service members and should also be consulted.

10 USC 1177 articulates the rationale for the policy in a set of 15 congressional findings, designed to strengthen arguments for exclusion of lesbians and gay men. They include detailed language about the special role of the military, the differences which must exist between the military and civilian communities, and the critical importance of unit cohesion, “the bonds of trust . . . that make the combat effectiveness of a military unit greater than the sum of the combat effectiveness of the individual unit members.” They conclude with the finding that:

“The presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards

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<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> Department of Defense policies were promulgated on December 22, 1993. The basic discharge policy was added to DoD Directive 1332.14, “Enlisted Administrative Separations,” and the parallel officer regulation, DoD Directive 1332.30, “Separation of Regular Commissioned Officers.” Army regulations are contained in AR 600-20 (general), AR 635-200 (Personnel), AR 195-2 (criminal investigations), and AR 380-67 (security clearances).

of morale, good order and discipline, and unit cohesion that are the essence of military capability.”

The major change that DADT made over the previous policy was to purport to exclude people from the military for homosexual conduct rather than status. The regulations state explicitly that homosexual orientation is a personal and private matter and not a bar to enlistment or continued service. However, the policy has so significantly expanded the definition of homosexual conduct that the distinction between conduct and orientation is virtually eliminated. The true distinction is not between a gay service member’s status and conduct, but between the member being openly gay and in the closet. Under the new policy, conduct includes “a statement by the Service member that demonstrates a propensity or intent to engage in homosexual acts,”<sup>6</sup> as well as homosexual acts and homosexual marriages or attempted marriages.

The federal Courts of Appeals have uniformly upheld DADT against constitutional and other challenges by lesbian and gay service members, citing the unique character of military service and court deference towards the executive branch in areas of national defense. See *Holmes v. California National Guard*, 124 F.3d 1126 (9<sup>th</sup> Cir. 1997).<sup>7</sup>

[1] Statements as conduct.

The central premise of the policy is that statements about one’s sexual orientation are presumptive evidence of sexual conduct, and thus a basis for rejection or discharge from the military. Statements include not only comments such as “I am gay,” but also statements that “a reasonable person would understand to demonstrate a propensity or intent to engage in” homosexual acts, regardless of the speaker’s subjective meaning.<sup>8</sup> Statements about sexual orientation create a rebuttable presumption that the service member engages in homosexual acts or has a propensity or intent to do so.<sup>9</sup> Service members may try to rebut the presumption, by providing evidence that they do not engage in such acts, do not intend to do so, and have no propensity to do so. Propensity is defined as “more than an abstract preference or desire to engage in homosexual acts; it indicates a likelihood that a person engages in or will engage in homosexual acts.”<sup>10</sup> While this language offers a limited exception to mandatory discharge, it has been difficult to rebut the presumption in practice.

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<sup>6</sup> DoD Dir. 1332.14.E2.1.7

<sup>7</sup> However, the Ninth Circuit Court of Appeals in *Hensala v. Dept. of the Air Force*, 343 F.3d 951 (9<sup>th</sup> Cir. 2003) suggested that the Supreme Court decision in *Lawrence v. Texas*, 123 S.Ct. 2472 (2003) decriminalizing sodomy may impliedly overrule *Holmes*.

<sup>8</sup> DoD Dir. 1332.14.E2.1.16 defines a statement to include “language or behavior that a reasonable person would believe intends to convey the statement that a person engages in or has a propensity or intent to engage in homosexual acts.”

<sup>9</sup> Some portions of the regulations, however, refer to statements which indicate a propensity or intent as a basis for discharge, suggesting that not all statements are conduct-laden. This definition has been raised by some servicemembers in discharge proceedings, so far without success.

<sup>10</sup> DoD Dir. 1332.14.E2.1.10

[2] Homosexual Acts.

Service members may be discharged for engage in, attempting or soliciting homosexual acts. The policy defines acts as “any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purposes of satisfying sexual desires,”<sup>11</sup> and “any bodily contact that a reasonable person would understand to demonstrate a propensity or intent to engage in an act.”<sup>12</sup>

Under either definition, kisses, hugs and other affectionate behavior are grounds for discharge. Under the second definition, the actor’s sexual orientation or interest is immaterial; all that matters is the perception of a “reasonable person.” Women and others who are socialized to believe that same-sex physical affection is appropriate run the risk of engaging in homosexual acts even if their intent is entirely platonic and their orientation entirely heterosexual.

[3] Marriages.

The policy requires discharge of persons who marry or attempt to marry persons of the same sex. While this basis for discharge has never occurred to the writers’ knowledge, one may see some discharges for same-sex marriage given the current gains made by the lesbian and gay community for marriage equality.

[4] Exceptions to Mandatory Discharge.

There are several limited exceptions to mandatory discharge under the current policy. Retention is possible in cases based solely on statements about sexual orientation if the service member successfully rebuts the presumption of a propensity or intent to engage in acts. Factors to be considered in determining whether a service member has successfully rebutted the presumption include:

- “(a) whether the member has engaged in homosexual acts;
- (b) the member’s credibility;
- (c) testimony from others about the member’s past conduct, character, and credibility;
- (d) the nature and circumstances of the member’s statement;
- (e) any other evidence relevant to whether the member is likely to engage in homosexual acts.”<sup>13</sup>

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<sup>11</sup> DoD Dir. 1332.14.E2.1.6.1

<sup>12</sup> DoD Dir. 1332.14.E2.1.6.2

<sup>13</sup> DoD Dir. 1332.14.E3.A1.1.8.1.2.2

The regulation notes that “some or all” of the factors may be considered, and that the list is not meant to be exhaustive. Generally the member must convince the command that he/she is celibate in order to remain in the service.

Where acts, attempts or solicitations are alleged, a service member may be retained if there are approved findings that:

- “(a) Such acts are a departure from the member’s usual and customary behavior;
- (b) Such acts under all the circumstances are unlikely to recur;
- (c) Such acts were not accomplished by use of force, coercion, or intimidation;
- (d) Under the particular circumstances of the case, the member’s continued presence in the Armed Forces is consistent with the interest of the Armed Forces in proper discipline, good order, and morale; and
- (e) The member does not have a propensity or intent to engage in homosexual acts.”<sup>14</sup>

Service members may also be retained in the following circumstances:

- (a) the member engaged in acts, made statements, or married or attempted to marry a person known to be of the same biological sex for the purpose of avoiding or terminating military service; and
- (b) Separation of the member would not be in the best interest of the Armed Forces.”<sup>15</sup>

[5] Character of discharge.

Discharges for statements or gay marriages are normally honorable or general, depending on the member’s overall record of service. An other than honorable (OTH) discharge is warranted where homosexual acts are accomplished, attempted or solicited under the following circumstances:

- (1) By using force, coercion, or intimidation;
- (2) with a person under 16 years of age;

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<sup>14</sup> DoD Dir. 1332.14.E3.A1.1.8.1.2. This “gay for a day” defense recognizes the fluidity of sexuality and orientation, and undermines as well the underpinnings of the policy: that persons who engage in homosexual acts “would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.” 10 USC 1177.

<sup>15</sup> DoD Dir. 1332.14.E3.A1.1.8.4.7.2. This exception is yet another example of the hypocrisy of the policy. If persons who engage in homosexual acts are detrimental to the good order and discipline of the armed forces, then how could retention of someone who engaged in such acts for the express purpose of seeking discharge be in the best interest of the armed forces? The policy’s answer is that the member is not really gay, but is just trying to get out of his/her service contract. But being gay is not a bar to service under the policy. Homosexual acts are a bar. If acts, not orientation, are the reason for discharge, then the reason why the member engaged in the act is irrelevant.

- (3) with a subordinate in circumstances that violate customary military superior-subordinate relationships;
- (4) Openly in public view;
- (5) For compensation;
- (6) Aboard a military vessel or aircraft; or
- (7) In another location subject to military control under aggravating circumstances noted in the finding that have an adverse impact on discipline, good order, or morale comparable to the impact of such activity aboard a vessel or aircraft.<sup>16</sup>

While sexual acts under some of these circumstances would warrant OTH discharge in a heterosexual context, readers should bear in mind that a hug at an off-base gathering, an attempt to touch dance in a gay bar, or a solicitation to kiss in the barracks can all result in an OTH separation.

Recruiters and officials at Military Entrance Processing Stations (MEPS) were required to stop asking recruits about sexual orientation on January 23, 1993, so that fraudulent enlistment is not a problem in most cases.

Some commands are unwilling to give lesbians and gay men honorable discharges. The Army and Air Force occasionally characterize discharges as general without any legal basis where the member's overall record clearly required an honorable discharge. All of the services occasionally demonstrate this tendency in cases involving officers. The Navy and Marine Corps frequently try to award an other than honorable discharge by "dual processing" the member for homosexuality and another applicable reason for discharge which warrants OTH discharge-- usually discharge by reason of misconduct. This often involves searching the member's record for an incident of misconduct which would not otherwise have led to discharge, such as a two-year old civilian conviction for drunk driving, or even disciplining the member for a homosexual act and then "dual processing" him or her for homosexuality and misconduct based on commission of a serious offense (the homosexual act).

### *Enlistment Policy*

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<sup>16</sup> DoD Dir. 1332.14.E3.A1.1.8.3

The DADT policy includes standards for enlistment and procurement of a commission.<sup>17</sup> These standards permit lesbians, gay men and bisexuals who do not reveal their sexual orientation to enlist.

As with the discharge regulations, sexual orientation is considered a private and personal matter, and not a bar to entry into the service. Homosexual conduct is a basis for rejection of new recruits, and is defined to include homosexual acts, marriages or attempted marriages, or statements which demonstrate a propensity to engage in homosexual acts.

Recruits can no longer be questioned about their sexual orientation, and the question has been removed from enlistment forms. Additionally, they cannot be questioned about prior sexual conduct, unless there is independent evidence of conduct or they volunteer information about their sexual orientation. All recruits should be told about the military's policy on homosexuality as part of the entrance process, but with many recruitment policies, this is frequently overlooked by recruiters.

If recruits state that they are homosexual, they should be given an opportunity to rebut the presumption of a propensity to engage in homosexual acts. However, the regulation contains no special procedures for this. Recruits who have engaged in homosexual acts may attempt to prove that the act is a departure from their normal behavior, and do not have a propensity to engage in homosexual acts.<sup>18</sup>

### *Inquiries and Investigations*

The policy incorporates two types of inquiry into allegations of homosexual conduct-- formal investigations by the military investigative agencies, such as the Naval Criminal Investigative Agency, and informal fact finding inquiries by local commands. The former are theoretically to be reserved for cases involving non-consensual acts, fraternization between ranks, and similar aggravated acts. (Most such acts would be criminal offenses if the context were heterosexual.) The policy claims to limit investigations and prevent full-scale witch-hunts. While full-scale investigations may be waning, an advocacy group monitoring the policy finds that the number of investigations of gay service members in violation of the policy rose from 65 since enactment in 1994 to 471 in 1999.<sup>19</sup>

#### [1] Traditional Problems.

Witch-hunts, or mass investigations of allegedly lesbian or gay service members, have been a long-standing tradition in the military. In the past, commands responded to allegations with vigorous and often humiliating investigations. Command investigators,

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<sup>17</sup> DoD Dir. 1304.26.E1.2.8 "Qualification standards for Enlistment, Appointment and Induction." The Directive applies to initial entry into the regular and reserve forces, reenlistment, applicants for the Reserve Officer Training Corps (ROTC), the military academies, and other special officer procurement programs.

<sup>18</sup> DoD Dir. 1304.26.E1.2.8.2.1. The exception is identical to that for administrative discharges.

<sup>19</sup> SLDN, "Conduct Unbecoming, The Ninth Annual Report of Don't Ask, Don't Tell, Don't Pursue, Don't Harass." (March 25, 2003)

or agents of military investigative services, routinely interrogated suspects and fellow service members at length. Suspects were commonly threatened with exposure to friends and family, with disciplinary action, or with bad discharges. Requests for counsel were frequently ignored. Telephone surveillance and interception of mail were not unheard of. Women, particularly women in traditionally male rates and MOS's, were the most common targets of witch-hunts.

It appears that the policy has been successful in discouraging full-scale investigations of units and vessels in order to discharge lesbian and gay members. While investigations to determine homosexual orientation and conduct continue in unacceptable numbers, the large-scale abuses appear to be a thing of the past.

## [2] Formal Investigations

The policy limits the circumstances under which investigative agencies will be asked to investigate cases of homosexual conduct, and to ensure that the investigations do not turn into sweeping witch-hunts. The regulation<sup>20</sup> shows that investigative agencies still have broad discretion to investigate cases as they wish. In practice, formal investigations involving statements about sexual orientation are rare, but investigations of alleged homosexual acts are still a problem.

The DoD Instruction states that no investigative agency “shall conduct an investigation solely to determine whether a Service member is a heterosexual, homosexual or bisexual.”<sup>21</sup> The Instruction also directs that, in most cases, the investigative agency will not initiate a criminal investigation into private, consensual homosexual conduct where such conduct is the sole offense involved.<sup>22</sup>

The regulation excludes from an investigative agency's purview private, consensual, homosexual conduct by categorizing this conduct as “sexual misconduct,” and excluding sexual conduct involving force, intimidation, abuse of rank, etc., which would warrant the agency's investigation.

“Sexual misconduct” is defined as:

“A sexual act or acts in violation of [the Uniform Code of Military Justice] that occur between consenting adults, in private, whether on or off a military installation. It does not include any sexual act or acts that involve allegations of force, coercion, or intimidation; abuse of position or rank; persons under the age

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<sup>20</sup> DoD Instructions 5505.8, “Investigations of Sexual Misconduct By Defense Criminal Investigative Organizations and other DoD Law Enforcement Organizations.”

<sup>21</sup> DoD Instructions 5505.8(4)

<sup>22</sup> DoD Instructions 5505.8.4 and 5505.8.6

of 16; or conduct that relates directly to applicable security standards for access to classified information.”<sup>23</sup>

Where the agency learns of this so-called “sexual misconduct,” it should refer the matter to the commander of the member involved, who may then request a criminal investigation by the investigative agency if he or she feels there is credible evidence of sexual misconduct and that the referral is appropriate.<sup>24</sup> The Instruction also notes that the investigative agency should independently evaluate requests for investigation made by commanders, and may reject a request where it lacks credible information of sexual misconduct or is not in keeping with policy.

The policy generally encourages administrative discharge proceedings rather than criminal proceedings, and command-level fact-finding inquiries rather than formal investigation. However, commanders remain free to refer the matter right back to the investigative agency. In addition, the Instruction permits investigative agencies to investigate service members without a command request, if the Director, Commander or Principal Deputy of the agency determines that there is credible information of sexual misconduct and that the investigation is “an appropriate use of investigative resources.”<sup>25</sup> Agency investigations of homosexual acts under the policy continue.

In reality, investigations have seldom been formally predicated on sexual orientation alone in recent years. Since the agencies are primarily responsible for inquiry into criminal behavior, they normally claim to premise investigations on criminal activity even when sexual orientation alone is at issue. Investigative agencies have sometimes been quite creative in finding a reasonable basis to believe acts have occurred even where the evidence first presented gave no indication of acts. In theory, commanders with the power to refer, and investigative agencies, should not conclude that statements about sexual orientation warrant investigation and in practice such investigations are now quite uncommon. Under most circumstances, statements do not violate the UCMJ and are therefore beyond the scope of agency investigation. They do not fit the definition of sexual misconduct in the Instruction. However, since statements are presumptively a form of homosexual conduct under the policy, statements may always form the basis for an investigation into suspected acts.

The limitations on agency-initiated investigations raise other problems. While investigators should not normally initiate investigations in the absence of a command referral, they can still do so. However, the decision will rest with upper-level

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<sup>23</sup> DoD Instructions 5505.8.E1.1.5

<sup>24</sup> DoD Instructions 5505.8.6.2.1. Credible information is defined here and elsewhere in the policy as “information, considered in light of its source and all attendant circumstances, that supports a reasonable belief that a Service member has engaged in sexual misconduct. Credible information consists of articulable facts, not just a belief or suspicion.” DoD Instructions 5505.8E1.1.2.

<sup>25</sup> DoD Instructions 5505.8.6.3. The Instruction offers no guidance about evaluation of appropriate uses of resources; this provision appears to be entirely discretionary.

investigators and the decision-makers must weigh the credibility of the information and investigative resources when making a decision.

“Investigations shall be limited to the factual circumstances directly relevant to the specific allegations.”<sup>26</sup> Hypothetical examples included in DoD training materials suggest, for example, that investigators inquiring about a specific act of consensual sodomy should not ask suspects to name other sexual partners with whom they may have had sex at other times. Similarly, if investigators find a list purporting to name homosexuals in the military, in the course of investigation of a specific act of “misconduct,” they are not to track down and investigate these individuals absent information linking them to an apparent violation of the UCMJ. The “directly relevant” requirement places important limitations on witch-hunt-style investigations.

Investigative agencies must make preliminary inquiries to determine how to respond to any information they receive. This gives investigators an opportunity to search for evidence warranting discharge or disciplinary action, before determining whether the matter warrants investigation without a command referral.

Unlike DoD 1332.14, this Instruction does not prohibit investigators from asking service members their sexual orientation. Since the prohibition appears elsewhere,<sup>27</sup> investigative agencies may argue that the question may be asked if they determine it is relevant to an investigation of homosexual conduct.

### [3] Informal Fact-Finding Inquiries

Informal command-level investigations of homosexuality have long been common in the military, and the DADT policy gives them primary importance. The discharge regulation states that “[i]nformal fact-finding inquiries...are the preferred method of addressing homosexual conduct.”<sup>28</sup> Although the regulation does not require fact-finding inquiries, they are discussed as an integral part of the discharge process, and some commands treat them as a requirement.

Fact-finding inquiries may be conducted by a commander or his or her appointee whenever he or she receives credible information that there is a basis for discharge. DoD Dir. 1332.14.E3.A4.3.1 provides more detail than DoD Inst. 5505.8 on credible evidence.

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<sup>26</sup> DoD Inst. 5505.8.6.4.

<sup>27</sup> DoD Dir. 1332.14.E3.A4.4.3, for example, states that “[c]ommanders or appointed inquiry officials shall not ask, and members shall not be required to reveal, whether a member is heterosexual, homosexual or bisexual. However, upon receipt of credible information of homosexual conduct . . . commanders or appointed inquiry officials may ask members if they engaged in such conduct. . . . Nothing in this provision precludes questioning a member about any information provided by the member in the course of the fact-finding inquiry or any related proceeding, nor does it provide the member with any basis for challenging the validity of any proceeding or the use of any evidence, including a statement by the member, in any proceeding.”

<sup>28</sup> DoD Dir. 1332.14, E3.A4.4

It explains that credible evidence does not exist when an individual is merely suspected of conduct; when the only information is the opinion of others about a member's sexual orientation; where the inquiry "would be based on rumor, suspicion, or capricious claims concerning a member's sexual orientation;" or where the only information is associational activity. The directive also lists examples of credible information:

1. A reliable person states that he or she observed or heard a Service member engaging in homosexual acts, or saying that he or she is a homosexual or bisexual or is married to a member of the same sex; or
2. A reliable person states that he or she heard, observed, or discovered a member make a spoken or written statement that a reasonable person would believe was intended to convey the fact that he or she engages in or has a propensity or intent to engage in homosexual acts; or
3. A reliable person states that he or she observed behavior that amounts to a non-verbal statement by a member that he or she is a homosexual or bisexual--i.e., behavior that a reasonable person would believe intended to convey the statement that the member engages in or has a propensity or intent to engage in homosexual acts." DoD Dir. 1332.14, E3.A4.3.4.

In a corollary to the 'direct relevance' requirement in agency investigations, inquiry officers must be able to "clearly and specifically explain which grounds for separation he or she is attempting to verify and how the information being collected relates to those specific separation grounds" at any point during the inquiry.<sup>29</sup>

The regulations place some limitations on the type of questions which may be asked during inquiries. As with investigative agency actions, "[i]nquiries shall be limited to the factual circumstances directly relevant to the specific allegations."<sup>30</sup> Local commands are even less likely than investigators to understand and follow this requirement. The policy specifically prohibits inquiry officers from asking or requiring service members to reveal their sexual orientation, unless the commander has credible information that the member engages in homosexual conduct or has a propensity to engage in such conduct.<sup>31</sup> So ironically an inquiry officer may not ask, "are you gay?" but may ask, "have you told X you are gay?"

The guidelines for fact-finding inquiries require that members be advised of DoD policy on homosexual conduct before being questioned, and also require that the commander advise the member of his/her rights against self-incrimination under Art. 31 of the UCMJ "if applicable."<sup>32</sup> The vesting of discretion in the command to determine in what situations the right against self-incrimination is "applicable" risks abuse, as commanders wanting information will rarely view the right to refuse to answer their questions as

<sup>29</sup> DoD Dir. 1332.14, E3.A4.4.4

<sup>30</sup> DoD Dir. 1332.14, E3.A4.1.3

<sup>31</sup> DoD Dir. 1332.14, E3.A4.4.3

<sup>32</sup> *Id.*

“applicable.” However, “sodomy” (UCMJ Art. 125) and “indecent act with another (UCMJ Art. 134) are criminal offenses, and the advisement should always be given as any questioning can lead to self-incrimination under these two articles.<sup>33</sup> It is unlikely that a soldier, when confronted by his/her commander conducting an inquiry into homosexual acts, will assert the privilege against self-incrimination and refuse to answer the commanders questions, especially when ordered to do so. It is therefore extremely important that attorneys advise members to refuse to answer inquiries and to insist on asserting their Art. 31 rights.

In the past five years, commands have been instructed to rely on their staff judge advocates in conducting investigations into homosexual acts. Local staff judge advocates are instructed to consult with senior legal officers at higher headquarters prior to the initiation of an investigation.<sup>34</sup> However, the responsibility for determining whether credible information exists that the member has engaged in homosexual acts or has a propensity to do so remains with the commander.<sup>35</sup>

Fact-finding inquiries continue to pose serious problems for suspected lesbians and gay men. As noted above, some continue to ask suspected gay members for their sexual orientation despite the prohibition against doing so. However, many commands declined to investigate voluntary admissions of homosexuality, and a “do nothing” approach is not uncommon.

### *Harassment*

In 1999, PFC Barry Winchell was murdered by fellow soldiers at Fort Campbell, Kentucky because he was perceived to be gay. In the wake of this murder, the Department of Defense issued new guidance on prohibiting anti-gay harassment. The Pentagon Inspector General then did a survey on anti-gay harassment, finding it was widespread. The Inspector General’s Survey of military personnel found that 80 percent of respondents stated they had heard offensive speech, derogatory names, jokes, or remarks about homosexuals in the last 12 months. Eighty-five percent believed such comments were tolerated to some extent. Thirty-seven percent of the service members responded that they had witnessed or experienced an event or behavior toward a service member that they considered to be harassment based on perceived homosexuality. About 5 percent believed that harassment based on perceived homosexuality was tolerated by someone in their chain of command, and 10 percent believed it was tolerated by other unit members.<sup>36</sup>

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<sup>33</sup> It is doubtful that the crime of sodomy as defined under Art. 125 could withstand a constitutional challenge after *Lawrence v. Texas*, 123 S.Ct. 2472 (2003).

<sup>34</sup> Memo from Undersecretary of Defense Rudy DeLeon, “Implementation of Recommendations Concerning Homosexual Conduct Policy” (August 12, 1999).

<sup>35</sup> *Id.*

<sup>36</sup> DoD Inspector General, Report on the Military Environment With Respect to the Homosexual Conduct Policy (Report No. D-2000-101)(March 16, 200)

Overall, 97 percent of the respondents believed they had at least some understanding of the homosexual conduct policy, although approximately 57 percent stated they had not had training on the policy.<sup>37</sup>

In response to the report, the Pentagon formed a working group which issued a 13-point action plan to address anti-gay harassment which the services were then directed to implement.<sup>38</sup>

Since President Bush took office, this anti-harassment action plan has not been implemented. The Department of Defense has failed to issue a single Department wide directive on harassment as required by the plan. The directive was to “make clear that mistreatment, harassment, and inappropriate comments or gestures, including that based on sexual orientation, are not acceptable.”<sup>39</sup>

Defense Department instructions mandate that a commander who receives a report of anti-gay harassment should not view this information by itself as credible information justifying an inquiry or investigation into the sexual orientation of the threatened member under DADT. The report of harassment should not prompt an investigation and the command should not solicit information regarding the member’s sexual orientation or conduct.<sup>40</sup> Service members should be able to report crimes free from harm or reprisal or inadequate governmental response.<sup>41</sup> While these instructions look great on paper, they are often violated in practice. However a good advocate for the member can use them to persuade a command not to initiate an inquiry against the member based upon a complaint of harassment.

### *Resources*

Readers representing military clients are encouraged to keep in touch with the organizations monitoring the policy, including the National Lawyers Guild’s Military Law Task Force; LAMBDA Legal Defense And Education Fund (660 Broadway, 12th Floor, New York, NY 10012; 212-995-8585); the Servicemembers Legal Defense

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<sup>37</sup> *Id.*

<sup>38</sup> Department of Defense Working Group, *Anti-Harassment Action Plan* (Jul. 21, 2000)

<sup>39</sup> *Id.*

<sup>40</sup> Memo from Undersecretary of Defense Edwin Dorn, “Guidelines for Investigating Threats Against Service Members Based Upon Alleged Homosexuality.” (March 24, 1997); Memo from Undersecretary of Defense Rudy DeLeon, “Guidelines for Investigating Threats Against or Harassment of Service Members Based on Alleged Homosexuality.” (August 12, 1999)

<sup>41</sup> *Id.*

Network, P.O. Box 53013, Washington, DC 20009; 202-328-3244); and the American civil Liberties Union's Lesbian and Gay Rights Project (123 43rd Street, New York, NY 10036; 212-944-9800).

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## **ABOUT THE MILITARY LAW TASK FORCE**

The NLG Military Law Task Force includes attorneys, legal workers, law students and "Barracks lawyers" interested in draft, military and veterans issues. The Task Force publishes *ON WATCH*, produces interim mailings on legal and political issues for Task Force members, sponsors seminars and workshops on draft, military and veterans law, produces educational materials on these issues, and provides support for members on particular cases or projects. It sponsors legal and educational work on military dissent, the rights of servicemembers, and challenges to oppressive military policies.

The Task Force encourages comments, criticisms, assistance and membership from Guild members and others interested in military law. Call us at 619-233-1701 or 415-566-3732.