

TURNING POINTS: CHALLENGES AND SUCCESSES IN ENDING DON'T ASK, DON'T TELL¹

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INTRODUCTION

On September 20, 2011, the Don’t Ask, Don’t Tell (DADT) law² that banned known gay men and women from serving in the armed forces met its end after the culmination of a Congressional vote on December 18, 2010. The vote allowed DADT to die upon “certification” by the President, Secretary of Defense and Chairman of the Joint Chiefs of Staff that it would not harm military readiness.³ The demise

1. Thank you to Dixon Osburn, my colleague and co-founder of Servicemembers Legal Defense Network (SLDN), and the staff of SLDN, past and present, whose dedication, persistence and talent saved lives and careers and brought about the end of Don’t Ask, Don’t Tell (DADT). I am especially grateful to the editors and staff of this journal and to Carolyn Cobb, Lila Helms, Julie Spiezio and Bridget Wilson, whose review, comments and encouragement made it possible to write this history of early turning points in the movement to end DADT.

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2. Don’t Ask, Don’t Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515.

3. Chris Geidner, *DADT Repeal Act Becomes Law*, METRO WEEKLY (Dec. 22, 2010, 2:16 PM), <http://www.metroweekly.com/news/?ak=5858>; Carl Hulse, *Senate Ends Military Ban on Gays Serving Openly*, N.Y. TIMES, Dec. 19, 2010, at A1; “*Don’t Ask, Don’t Tell*”

of DADT did not occur in isolation or merely as the fulfillment of a presidential campaign promise. It resulted from a deliberate long-term strategy—launched the day after President Clinton announced DADT in 1993—to put an end to the law by turning public opinion against it. This new chapter was a pivotal moment in the decades-long fight against policies barring military service by known gay, lesbian and bisexual (GLB) military members.⁴ Understandably, recent

Consigned to History, CBS NEWS (Sept. 20, 2011, 6:21 AM), <http://www.cbsnews.com/stories/2011/09/20/national/main20108690.shtml>.

4. Prior efforts by and large centered on the courts. Although some military members were successful in the district courts, the appeals courts consistently upheld the military's exclusionary policies. *See, e.g.*, *Ben-Shalom v. Marsh*, 881 F.2d 454, 455 (7th Cir. 1989) ("First Amendment rights of [the] sergeant were not violated by application of regulation making homosexuality . . . nonwaivable disqualification to service . . ."); *Woodward v. United States*, 871 F.2d 1068, 1068 (Fed. Cir. 1989) (holding that the Navy's policy of discharging homosexuals did not violate the right to privacy); *Dronenburg v. Zech*, 741 F.2d 1388, 1388 (D.C. Cir. 1984) (finding for the Navy on grounds that Navy's policy of discharging members for "homosexual conduct" was not a violation of the constitutional right to privacy or equal protection); *Berg v. Claytor*, 591 F.2d 849, 851 (D.C. Cir. 1978) (remanding to the Navy to determine whether the appellant's record was unique enough to exempt him from discharge due to his homosexuality); *Matlovich v. Sec'y of the Air Force*, 591 F.2d 852, 852 (D.C. Cir. 1978) (remanding the case so that the Air Force could explain what "unusual circumstances" would exempt appellant from the policy of discharging homosexuals). This pattern continued in cases involving the "90s Plaintiffs," many of whom came out in support of President Clinton's pledge to lift the ban. *See, e.g.*, *Richenberg v. Perry*, 97 F.3d 256, 256 (8th Cir. 1996) (affirming that the DADT policy "did not violate the First Amendment or . . . Fifth Amendment" rights of the appellant); *Steffan v. Perry*, 41 F.3d 677, 678 (D.C. Cir. 1994) (finding that the appellant failed to demonstrate that the DADT Directives were unconstitutional as applied to his case); *Thorne v. U.S. Dep't of Def.*, 945 F. Supp. 924, 924 (E.D. Va. 1996) (holding that DADT "was not facially invalid"); *Selland v. Perry*, 905 F. Supp. 260, 260–61 (D. Md. 1995) (holding that DADT "did not violate officer's free speech right; . . . separation was not unconstitutional . . . and . . . Navy's decision was not arbitrary and capricious"); NATHANIEL FRANK, UNFRIENDLY FIRE: HOW THE GAY BAN UNDERMINES THE MILITARY AND WEAKENS AMERICA 22 (2009) (discussing Air Force Staff Sergeant Tom Paniccia's announcement on the *ABC News* that he was a homosexual). Along the way, some military members with long-standing careers would reach settlements with the services after courts validated their complaints and be permitted to retire with their pensions and benefits. *See, e.g.*, *Cammermeyer v. Perry*, 97 F.3d 1235, 1235 (9th Cir. 1996) (holding that the appellant should not have been discharged from the National Guard simply because she stated that she was a lesbian); *Meinhold v. U.S. Dep't of Def.*, 34 F.3d 1469, 1480 (9th Cir. 1994) (enjoining the Department of Defense from discharging appellant solely based on his statement of homosexuality); *Watkins v. U.S. Army*, 875 F.2d 699, 731 (9th Cir. 1989) (instructing the Army to reconsider appellant's reinstatement application "without regard to his sexual orientation"). Sergeant Justin Elzie served openly under DADT for four years before reaching a settlement with the Marine Corps. *Elzie v. Aspin*, 841 F. Supp. 439, 444 (D.D.C. 1993) (affirming injunction against military taking adverse action based on Elzie public announcement of homosexuality); FRANK, *supra*, at 261. Outside the courts, fledgling efforts included the formation of the Gay, Lesbian and Bisexual Veterans of America in 1990 and the Military Freedom Project, formed in 1988 by leaders of the National Gay and Lesbian Task Force, National Organization for Women, the Lesbian and Gay Rights Project of the American Civil Liberties Union, Women's Equity Action League and the Military Law Task Force of the National Lawyers Guild. The author has personal experience working with these groups. *See* RANDY SHILTS, CONDUCT UNBECOMING: LESBIANS AND GAYS IN THE U.S. MILITARY 640 (1993).

developments surrounding the end of DADT have received widespread attention. This long-term strategy to overturn DADT and the military members who sacrificed early in this fight have, for the most part, gone unnoticed. Because the complete history of this effort would require many volumes, this piece focuses on selected early turning points that set the stage to overturn DADT. These events, and the military members responsible for them, systematically dismantled the infrastructure that supported DADT and provided indisputable facts about GLB military members and their service to this country that swayed public opinion against this discriminatory law and, by bringing the issue back to the forefront of the national debate, made the end of DADT possible.

With DADT now consigned to the history books, there can be little doubt that it will be remembered as a chapter every bit as shameful as the McCarthy-era witch hunts.⁵ This is not hyperbole. For decades, military officials proactively sought out, investigated and purged suspected GLB servicemembers.⁶ An estimated 125,000 men and women lost their careers under the military's gay bans since their inception in 1945;⁷ more than 14,500 were dismissed under DADT alone. Discharge figures are but the tip of the iceberg. Those of us who left at the end of our tours because of the gay bans are not counted.⁸ Further, no statistic can accurately convey the reign of fear and suspicion the gay bans unleashed. Gay men and women in the armed forces had to carefully, consciously hide the truth of their lives from their friends, family members and colleagues; a discovered diary, using the wrong pronoun or simply having suspected gay friends could lead to one's investigation and dismissal.

Looking solely at more recent history, even those who created DADT in 1993 recognized its abuses. In 2000, the late Charles Moskos, the Northwestern University sociologist who coined the phrase "don't ask, don't tell," authored the policy, and never recanted his support, joined me in writing a piece on this subject for *The Washington Post*.⁹ Moskos saw the "insidious" consequences of

5. See SHILTS, *supra* note 4, at 104–08 (1993) (describing the hunt for gays, who were seen as a security threat, and noting that the military's gay bans have their roots in McCarthyism).

6. *Id.*

7. Rev. Dusty Pruitt, *Introduction* to J. LEE WATTON, *OUT OF STEP* (2011).

8. Additionally, many officers were permitted to resign their commissions and thus are not counted in the discharge figures. Others were kicked out for being gay, but were given discharge paperwork reflecting other, less "stigmatizing" codes than those for homosexuality; the latter was a fairly common practice when I served and continued into the DADT era.

9. Charles Moskos & Michelle M. Benecke, Op-Ed., *Suffering in Silence*, WASH. POST, July 18, 2000, at A23.

the DADT policy in discouraging gay and lesbian military members from reporting harassment.¹⁰ This was just one of many ways in which DADT harmed servicemembers, and Moskos understood that fact. He warned the military that its witch hunts of gay and lesbian servicemembers would lead to a backlash that would ultimately end DADT.¹¹ His prediction proved correct and validated the strategy described in this piece.

DADT is now a law of the past. A shameful chapter in our Nation's history has ended. But the end of this shameful period provides all the more reason to learn from those who sacrificed and endured great hardship from a military that did not see their service as worthy of their own country. We must heed the lessons of their sacrifice, without which the end of DADT would not have been possible.

I. BACKGROUND

On July 19, 1993, President Clinton announced DADT, portraying it as a new beginning.¹² Although gay military members would be subject to the same grounds for discharge as before¹³ and would continue to be required to hide their sexual orientation, the President and military leaders promised to stop "asking" military members about their sexual orientation and to end the infamous witch hunts to ferret out suspected GLB military members.¹⁴ President Clinton

10. *Id.*

11. Declaration of Professor Charles Moskos ¶ 8, *McVeigh v. Cohen*, 983 F. Supp. 215 (D.D.C. 1998) (No. 98-116).

12. *Clinton: Policy on Gays in Military is 'Sensible Balance,'* WASH. POST, July 20, 1993, at A12 ("I believe the policy I am announcing represents a real step forward" (quoting President William J. Clinton's remarks from July 19, 1993 on his new policy regarding homosexuals in the military)).

13. "Homosexual conduct" was defined as "engaging in, attempting to engage in, or soliciting another to engage in a homosexual act or acts, a statement made by a service member that he or she is a homosexual . . . or marriage or attempted marriage to a person known to be the same biological sex." DEP'T OF DEF. INSTRUCTION NO. 1332.14, encl. 3 ¶ 8.a(1) (Aug. 28, 2008) [hereinafter DOD INSTRUCTION 1332.14], available at <http://www.dtic.mil/whs/directives/corres/pdf/133214p.pdf>. There were two new developments under DADT. First, sexual orientation was no longer a bar to military service: "[S]exual orientation is considered a personal and private matter, and [homosexual orientation] is not a bar to continued [military] service . . . unless manifested by homosexual conduct" *Id.* Second, military leaders acknowledged for the first time that gay men, lesbians and bisexuals serve our nation and do so honorably. See, e.g., *Policy Concerning Homosexuality in the Armed Forces: Hearings Before the S. Comm. on Armed Servs.*, 103d Cong. 707 (1993) [hereinafter *Policy Hearings*] (statement of Gen. Colin L. Powell, Chairman, Joint Chiefs of Staff) ("[H]omosexuals have privately served well in the past and are continuing to serve well today.").

14. *Policy Hearings*, *supra* note 13, at 709 (statement of Gen. Colin Powell) ("We will not ask, we will not witch hunt, we will not seek to learn orientation."); see also MICHELLE BENECKE & DIXON OSBURN, *SERVICEMEMBERS LEGAL DEF. NETWORK, CONDUCT*

further promised to “carry out this policy with fairness, with balance and with due regard for the privacy of individuals.”¹⁵ The American public was left with the impression that DADT would be a “more lenient” policy and “less anti-gay” than its predecessors.¹⁶

Gay military members and veterans knew otherwise. The day after President Clinton announced DADT as the new policy, the phones began ringing off the hook at the Campaign for Military Service (CMS), the umbrella group that had formed to support President Clinton’s initial effort to lift the ban on service by gay military members.¹⁷ Military witch hunts had immediately resumed, notwithstanding promises to the contrary by the President and military leaders.¹⁸

The six-month debate that preceded the President’s announcement of DADT focused unprecedented attention on the issue of gays in the military and invited widespread speculation about who might be gay.¹⁹ During this time, suspected gay military members lived with a “bull’s eye” on their backs.²⁰ After the President’s announcement, they were targeted with renewed vigor by criminal investigators and commanders who felt emboldened by the President’s defeat.²¹ Servicemembers had nowhere within the military to turn

UNBECOMING: THE FOURTH ANNUAL REPORT ON “DON’T ASK, DON’T TELL, DON’T PURSUE, DON’T HARASS” 4 (1998) [hereinafter SLDN FOURTH ANNUAL REPORT] (“I do not believe we should have sex squads prying into the private lives of our service members.” (quoting Sen. Sam Nunn, Chairman, S. Armed Serv. Comm., RECORD, May 31, 1993, at A10) (internal quotation marks omitted)).

15. Clinton, *supra* note 12; *see also Policy Hearings, supra* note 13, at 786 (statement of Jamie Gorelick, General Counsel, Department of Defense). Senator William Cohen, who later became Secretary of Defense and oversaw the implementation of DADT, asked then Department of Defense General Counsel Jamie Gorelick whether “the policy really [was] designed to allow a small measure of privacy to homosexuals,” and Gorelick answered clearly, “Yes.” *Id.*

16. JANET E. HALLEY, DON’T: A READER’S GUIDE TO THE MILITARY’S ANTI-GAY POLICY 1 (1999).

17. *The U.S. Military’s Discriminatory Policy: “Don’t Ask, Don’t Tell,”* SOLOMON RESPONSE.ORG, <http://www.law.georgetown.edu/solomon/background.html> (last visited Nov. 2, 2011) [hereinafter *Don’t Ask, Don’t Tell*].

18. MICHELLE BENECKE & DIXON OSBURN, SERVICEMEMBERS LEGAL DEF. NETWORK, CONDUCT UNBECOMING: THE THIRD ANNUAL REPORT ON “DON’T ASK, DON’T TELL, DON’T PURSUE” (1997) [hereinafter SLDN THIRD ANNUAL REPORT], *available at* <http://www.sldn.org/page/-/Website/SLDN%20Reports/SLDN%20Reports/SLDN%20Report%203.pdf> (reporting ongoing witch hunts).

19. *See, e.g.,* Dirk Johnson, *Are Homosexuals the New Enemy?*, N.Y. TIMES, Jan. 28, 1993, at A16 (reporting on the increasing violent prejudice displayed against homosexual military members).

20. *See, e.g., id.* (“It was a warning repeated time and again by . . . airmen . . . gathered in the bar: . . . homosexuals in the military would be beaten.”).

21. *See* Eric Schmitt, *U.S. Agencies Split Over Legal Tactics on Gay Troop Plan*, N.Y. TIMES, Dec. 19, 1993, at A1 (discussing the increased discrimination against homosexuals and the increased fear felt by homosexual military members).

for help.²² They called CMS, which had received publicity during the six-month debate.²³

At CMS, however, staffers and volunteers packed up and left; the organization was never intended to outlast the debate over President Clinton's plan.²⁴ A co-worker, Dixon Osburn, and I found ourselves standing alone at the CMS headquarters, wondering aloud about next steps and what could be done to repeal this new policy and to help the servicemembers who were calling.

No organization had plans to seek the repeal of DADT or assist military members. With Congress moving to codify DADT into law, activists considered the fight to be over.

If nothing were done, the issue of DADT repeal would fall off the table and military members would continue to suffer, their plight unknown to the public. While serving in the Army, I had vowed to form an advocacy organization for GLB military members. Dixon and I agreed—it was now or never.

With no seed money, we launched Servicemembers Legal Defense Network (SLDN) the day after President Clinton announced DADT.²⁵

II. THE STRATEGY

SLDN had two goals: (1) repeal DADT, and (2) assist military members harmed by the law in the meantime.²⁶ We developed a model integrating legal, policy, watchdog, media and grassroots advocacy efforts.²⁷ We would resuscitate the military issue, chip away at the bulwark of prejudices that supported DADT and build the foundation to overturn the law.²⁸ We committed ourselves to exploiting every opportunity to protect military members. In a context where no real recourse existed under DADT, more than legal tools were needed.²⁹

SLDN would give voice to military members who were required to serve in silence.³⁰ The 1993 debate was dominated by the worst of

22. MICHELLE BENECKE & DIXON OSBURN, *SERVICEMEMBERS LEGAL DEF. NETWORK, CONDUCT UNBECOMING: THE FIFTH ANNUAL REPORT ON "DON'T ASK, DON'T TELL, DON'T PURSUE" 1* (1999) [hereinafter *SLDN FIFTH ANNUAL REPORT*], available at http://sldn.3cdn.net/a8b3dc696e4d065d6a_15m6b5wse.pdf.

23. *Don't Ask, Don't Tell*, *supra* note 17.

24. *Id.*

25. *Id.*

26. *About SLDN: Vision, Mission and Goals*, *SERVICEMEMBERS LEGAL DEF. NETWORK*, <http://www.sldn.org/pages/about-sldn-vision-mission-and-goals> (last visited Nov. 2, 2011).

27. *Id.*; *Don't Ask, Don't Tell*, *supra* note 17; Steve Ralls, *The History Makers*, *HUFFINGTON POST*, Dec. 20, 2010, http://www.huffingtonpost.com/steve-rall/the-history-makers_b_798637.html.

28. *About SLDN: Vision, Mission and Goals*, *supra* note 26.

29. *Id.*

30. *Id.*

stereotypes and misconceptions about gay people.³¹ It would be fair to say that a great many Americans at the time saw GLB people as subhuman; there was not yet any national consensus that gay rights issues were civil rights issues.³² We vowed to change the terms of the debate by putting GLB military members front and center, knowing that once we did so, it would be all the more difficult to deny their humanity and to define them solely in terms of the most pernicious stereotypes about gays and lesbians. This issue simply could not be understood by the courts, Congress, the media and the public without understanding servicemembers' experiences.

When I served, military members were railroaded out of the service in the middle of the night, leaving only rumors behind. Alone and isolated, we were easy prey for military criminal investigators. As lawyers at SLDN, we would provide a confidential and trustworthy place for military members to seek help³³ under the attorney-client privilege. With sound advice, military members could make informed decisions about their lives and would have a choice to fight back.

We would assist military members who were harassed and bring scrutiny to bear on command actions.³⁴ We would intervene early to cut off investigations, before they snowballed.³⁵ While DADT sealed the fate of those who were discovered engaging in "homosexual conduct" (statements, acts or marriage),³⁶ we would ensure they received what process the military afforded.³⁷ Over time, our aggressive presence would start to change the climate. Our goal was to ward off investigations and create some safe space for military members to

31. See, e.g., *Policy Hearings*, *supra* note 13, at 688 (statement of Sen. Strom Thurmond) (asking Margarethe Cammermeyer, during her Senate testimony to the Armed Services Committee, "Have you ever thought about seeking help, psychiatric or medical help, to try to correct your situation?"); Eric Schmitt, *Joint Chiefs Fighting Clinton Plan to Allow Homosexuals in Military*, N.Y. TIMES, Jan. 23, 1993, at 1 (describing the concerns of lifting the ban that came up during Defense Secretary Aspin's first meeting with the Joint Chiefs of Staff: "[t]he ban would wreck morale, undermine recruiting, force devoutly religious service members to resign and increase the risk of AIDS for heterosexual troops . . .").

32. See C. Dixon Osburn & Michelle Benecke, *A Pivotal Moment*, HUFFINGTON POST (Sept. 20, 2011, 9:35 AM), http://www.huffingtonpost.com/c-dixon-osburn/dadt-repeal_b_971540.html (remarking that the repeal of Don't Ask, Don't Tell "marks the first time Congress has acted to end discrimination against gay, lesbian and bisexual Americans").

33. Early heroes Kathy Gilberd, Frank Kameny, Bridget Wilson, and Jim Woodward were among the few advocates who assisted GLB military members on a daily basis prior to SLDN's formation.

34. SLDN THIRD ANNUAL REPORT, *supra* note 18, at 26.

35. See *id.* at iii (urging the Department of Defense to require that commanders justify decisions to commence investigations).

36. DoD INSTRUCTION 1332.14, *supra* note 13; SLDN THIRD ANNUAL REPORT, *supra* note 18, at i, 25–26 (emphasizing the "Machiavellian" reach of the policy).

37. SLDN THIRD ANNUAL REPORT, *supra* note 18, at 19–20 (detailing SLDN's efforts to investigate and monitor military action in response to complaints).

live their lives. Most importantly, we would empower military members to defend themselves by educating them on their legal rights and the practical steps they could take if investigated.³⁸

Although most military members would require on-the-spot legal advice and counseling from SLDN lawyers, we would build a network of cooperating attorneys, eventually numbering 250, to support cases requiring intensive litigation or international reach.³⁹

For the first time in history, there would be a watchdog to document abuses and hold the military accountable.⁴⁰ Through our casework, we would be able to identify individuals who harmed gay military members, and document systemic trends for which we would seek reform in Washington.⁴¹ We would publish our findings and recommendations in an annual report, around which we would endeavor to obtain press coverage and bring the issue of DADT repeal to the national forefront.⁴² From this platform, we would unearth the hypocrisy of DADT.

Finally, we would create disincentives to enforcing DADT. There had never before been a reason to think twice about going after

38. *About SLDN: Vision, Mission and Goals*, *supra* note 26; see also discussion *infra* Part II.B, “Ending the Witch Hunts” (providing accounts of such investigations).

39. MICHELLE BENECKE & DIXON OSBURN, SERVICEMEMBERS LEGAL DEF. NETWORK, CONDUCT UNBECOMING: THE SECOND ANNUAL REPORT ON “DON’T ASK, DON’T TELL, DON’T PURSUE” v (1996) [hereinafter SLDN SECOND ANNUAL REPORT], available at <http://www.sldn.org/page/-/Website/SLDN%20Reports/SLDN%20Reports/SLDN%20Report%202.pdf>.

Servicemembers would need other service providers as well. Within the military, servicemembers could trust no one. Chaplains, doctors, therapists and psychologists were all known to turn in GLB people who sought their help. SLDN SECOND ANNUAL REPORT, *supra* note 39, at 4. Civilian clergy would play an especially important role in situations where military members feared for their safety. See, e.g., Beverly M. Payton, *Clergy Group Denounces Gay-bashing the Religious Leaders Didn’t Agree on Whether Homosexuality Is A Sin. They Did Agree That Tolerance Is Needed.*, PHILLY.COM (Feb. 25, 1993), http://articles.philly.com/1993-02-25/news/25957295_1_ministerium-members-sexual-orientation-homosexuals (giving an example of one interfaith consortium that “denounc[ed] violence” against gays). Pastors of the Metropolitan Community Churches and other denominations intervened many times at SLDN’s request to check on military members and let officials know that someone was watching. See, e.g., *Gay & Lesbian Military Personnel Receive Church Support*, WORLDWIDE FAITH NEWS (Apr. 23, 2003, 12:49 PM), <http://www.wfn.org/2003/04/msg00281.html> (describing how the MCC supported servicemembers and their loved ones). Persistent PFLAG members who were retired from the military would also prove successful in this regard.

40. See Brief for Servicemembers Legal Def. Network as Amici Curiae Supporting Plaintiff-Appellee at 1, *Log Cabin Republicans v. United States*, 2011 WL 4494225 (9th Cir. Sept. 29, 2011) (No. 10-56634) (“Dedicated to helping servicemembers affected by the discriminatory regime . . . [SLDN] is the nation’s premier organization addressing the effects of DADT.”).

41. See *id.*

42. *About “Don’t Ask, Don’t Tell”: SLDN Reports*, SERVICEMEMBERS LEGAL DEF. NETWORK, <http://sldn.org/pages/sldn-reports> (last visited Nov. 2, 2011) (providing the SLDN annual reports for the first 10 years).

suspected GLB members.⁴³ Every incentive supported the military's pursuits of gay people.⁴⁴ Given the pre-existing exclusionary policies and now DADT law, even well-intentioned commanders at the individual level believed they had no choice but to act on information concerning a servicemember's sexual orientation no matter how this information came to light.⁴⁵

Having been a battery commander, I knew that outside intervention was the last thing military leaders wanted. Where it was in our clients' interests, SLDN would trigger congressional inquiries, inspector general investigations, media inquiries, grassroots delegations of concerned citizens and visits by trusted civilian clergy—all of which would impose scrutiny on the actions of military leaders and require their response.⁴⁶ Our aim was to use guerilla lawyering to “problematize” the implementation of DADT; some number of commanders would then consider it too much of a hassle to pursue GLB military members.⁴⁷

We knew that, to win, the DADT repeal movement would need to be bigger than SLDN. It was our hope to galvanize an integrated national movement. We had faith that new allies would step up to the plate over time, building on the work of pioneers in this fight—and thousands did.

In the course of fighting against DADT, servicemembers would stay on duty for longer periods of time, some even for full careers. Their presence would bring about a sea change in attitudes within the military as their leaders and fellow servicemembers came to know gay people, many for the first time.⁴⁸ Over time, the rationale for DADT—that known gay people harmed unit morale and cohesion—would be proven to be the lie it was.⁴⁹

43. SLDN SECOND ANNUAL REPORT, *supra* note 39, at 18.

44. *Id.*

45. *Id.* at 25–26.

46. *About SLDN: Vision, Mission and Goals*, *supra* note 26.

47. *Id.*

48. *See, e.g., Policy Hearings*, *supra* note 13, at 649–50 (statement of Dr. Margarethe Cammermeyer, former Colonel, Chief Nurse, Washington Army National Guard) (recalling colleagues' willingness to support her in court after learning of her sexual orientation); *id.* at 662–63 (statement of Thomas Paniccia, former Staff Sergeant, U.S. Air Force) (testifying that two co-workers went out of their way to show acceptance and that they “knew [he] was still the same person”); *id.* at 667 (statement of Sgt. Justin Elzie, U.S. Marine Corps) (expressing his realization that many servicemembers do not mind serving with gays and lesbians but are afraid to publicly show support).

49. *See, e.g., U.S. GEN. ACCOUNTING OFFICE, GAO/NSAID-93-215, HOMOSEXUALS IN THE MILITARY: POLICIES AND PRACTICES OF FOREIGN COUNTRIES*, 3–4 (1993) (providing testimony from foreign military officials that inclusion of homosexuals has not caused problems); Om Prakash, *The Efficacy of “Don't Ask, Don't Tell,”* JOINT FORCE Q., 4th Quarter 2009, at 88, 90 (2009) (citing the lack of scientific evidence that homosexuality harms unit cohesion); *see also* Suzanne B. Goldberg, *Open Service and Our Allies: A*

Our long term intention was to make the DADT law fall under its own weight. Military buy-in was essential. We not only needed to change attitudes in the courts, Congress and the public, we needed to create an environment where even military leaders questioned the efficacy of the law and no longer wanted to deal with DADT cases.⁵⁰

At the time, we predicted it would take twenty years to repeal DADT in Congress if we put a consistent and effective advocate into place. This timeline would be an improvement compared to efforts to end exclusionary policies based on race and gender.⁵¹ (To this day, military women continue to face restrictions on their service.⁵²) It took eighteen years and tremendous sacrifices by thousands of military members until DADT—this pernicious law that ruined the careers and even lives of thousands of Americans serving their country—ended.⁵³

A. Early Challenges: Fighting the Pentagon to Stop “Asking” and “Pursuing”

SLDN’s first priority was to get the military’s criminal investigative agencies⁵⁴ out of the business of hunting down gay people.⁵⁵ Criminal investigators were responsible for the military’s infamous witch hunts to ferret out and purge suspected gay military members.

Report on the Inclusion of Openly Gay and Lesbian Servicemembers in U.S. Allies’ Armed Forces, 17 WM. & MARY J. WOMEN & L. 547 (2011) (reporting on the success of integrating openly gay servicemembers into the military in Australia, Canada, Israel and the United Kingdom).

50. See, e.g., Brief for Servicemembers Legal Defense Network, *supra* note 40, at 2 (describing SLDN’s efforts to educate military commanders about the scope of DADT).

51. *Lesbians and Gay Men in the U.S. Military: Historical Background*, UCDAVIS.EDU, http://psychology.ucdavis.edu/rainbow/html/military_history.html (last visited Nov. 2, 2011); see also DEP’T OF DEF., REPORT OF THE COMPREHENSIVE REVIEW OF THE ISSUES ASSOCIATED WITH A REPEAL OF “DON’T ASK, DON’T TELL,” 81–88 (2010), [http://www.defense.gov/home/features/2010/0610_dadt/DADTReport_FINAL_20101130\(secure-hires\).pdf](http://www.defense.gov/home/features/2010/0610_dadt/DADTReport_FINAL_20101130(secure-hires).pdf) (giving a short history of the integration of African Americans and women into the United States Armed Forces).

52. Rick Maze, *Bill Would Lift Combat Restrictions for Women*, ARMY TIMES, May 20, 2011, <http://www.armytimes.com/news/2011/05/military-bill-would-lift-restrictions-on-women-in-combat-052011w/>.

53. *Don’t Ask, Don’t Tell*, N.Y. TIMES, http://topics.nytimes.com/top/reference/times/topics/subjects/d/dont_ask_dont_tell/index.html (last updated Sept. 20, 2011).

54. These include the Army Criminal Investigation Command (CID), Air Force Office of Special Investigations, Naval Criminal Investigative Service (NCIS) and Coast Guard Investigative Service.

55. See, e.g., MICHELLE BENECKE & DIXON OSBURN, SERVICEMEMBERS LEGAL DEF. NETWORK, CONDUCT UNBECOMING CONTINUES: THE FIRST YEAR UNDER “DON’T ASK, DON’T TELL, DON’T PURSUE” 25 (1995) [hereinafter SLDN FIRST ANNUAL REPORT], available at <http://www.sldn.org/page/-/Website/SLDN%20Reports/SLDN%20Reports/SLDN%20Report%201.pdf> (“[T]he Department of Defense should clearly and strongly communicate the intent of the new policy to stop anti-gay harassment and pursuits of suspected homosexual servicemembers.”).

With their resources and broad jurisdiction, they had the ability to quickly expand individual investigations into mass dragnets, in some cases ensnaring hundreds of military members at a time.⁵⁶ To end the witch hunts and create some safe space for military members, we had to stop the criminal investigators.

Second, we had to make people believe there were limits on investigations, even though none were included in the law as passed by Congress in February 1994.⁵⁷ “Don’t Ask” and “Don’t Pursue” were merely thin reeds of rhetoric.⁵⁸ To the extent there would be any limits, the details would be worked out in the administrative process at the Pentagon. There was only a short window at the very beginning of DADT in which to try to influence this internal process and obtain limits on the military’s ability to pursue people suspected of being gay.

Fortuitously, the Pentagon’s proposed guidance to commanders was leaked to SLDN during the implementation process. In an Orwellian gambit, the guidance elevated pursuits of gay people to official policy in the guise of placing limits on investigations. The Pentagon had devised a construct that, on its face, appeared to uphold the President’s promises: military members would not be investigated absent “credible information” of “homosexual conduct.”⁵⁹ The leaked document defined “credible information” so broadly that it eviscerated any promised limits and revealed the Pentagon’s intention to ferret out people suspected of being gay.

Contrary to the President’s promises to protect “associational activities,”⁶⁰ military members could be investigated if they went to a gay bar, marched in a gay pride parade, or associated with known homosexuals.⁶¹ Given the military’s long history of surveilling gay bars, churches and other establishments,⁶² this development was

56. At Parris Island Marine Corps Recruit Training Depot in South Carolina from 1986 to 1988, nearly half of the post’s 246 women were interrogated in one witch hunt: “[S]ixty-five women eventually left the Marine Corps as a direct result of the investigation. At least twenty-seven of these women were administratively discharged. Three women . . . were jailed as a result of criminal convictions for [alleged consensual] homosexual activity.” Michelle M. Benecke & Kirstin S. Dodge, *Military Women in Nontraditional Job Fields: Casualties of the Armed Forces’ War on Homosexuals*, 13 HARV. WOMEN’S L.J. 215, 221 (1990) (footnotes omitted). Others chose to resign or accept discharges instead of facing the risk of investigations and possible criminal charges. *Id.*

57. 10 U.S.C. § 654 (2006), *repealed by* Don’t Ask, Don’t Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515 (containing no reference to investigations or limitations).

58. See *Policy Hearings*, *supra* note 13, at 709 (statement of Gen. Colin Powell) (“We will not ask, we will not witch hunt, we will not seek to learn orientation.”).

59. See *supra* note 13, for the definition of homosexual conduct.

60. *Policy Hearings*, *supra* note 13, at 714 (statement of Gen. Colin Powell).

61. See SLDN SECOND ANNUAL REPORT, *supra* note 39, at 16.

62. See, e.g., SHILTS, *supra* note 4, at 435–36. The Army parked a surveillance van outside Reverend Dusty Pruitt’s church, which ministered to a large gay congregation,

chilling to those of us who had served. While these tawdry practices were not new, the Pentagon now sought to condone them as official policy, rather than end them.⁶³

SLDN responded with a full court press involving all of the contacts we had managed to develop at that early date. Ultimately, early versions of the “Commanders Guidance” were shelved after senior political appointees, including the Department of Defense General Counsel, became engaged and made revisions to limit investigations, many of them adopting SLDN recommendations.⁶⁴

after she came out while serving in the Army Reserves. *Id.* Gay bars were consistent targets in all the services. Agents surveilled the nearby streets and parking lots, writing down license plate numbers and taking pictures of patrons. Agents then tracked down car owners who were in the military. See, for example, the story of Danny Leonard, the proprietor of Friends Lounge in Jacksonville, NC, who harbored 123 military patrons overnight on one occasion, after Navy investigators from Camp LeJeune—an hour away—riding with local sheriff’s deputies, remained parked outside through the night and into the next day. *Id.* at 442–43. Investigators finally dispersed when television reporters and camera crews showed up, called by Leonard to discuss the legality of this operation and its use of taxpayer dollars. *Id.* at 443.

63. SLDN SECOND ANNUAL REPORT, *supra* note 39, at 15–16 (citing a 1994 Navy memo that suggests “gay associational activities” are “inconsistent with good military character”).

64. The new guidelines contained limits on gay investigations that included, but were not limited to, the following:

- Only a service member’s commander may initiate an inquiry into homosexual conduct [statement, act or marriage].
- Commanders may initiate inquiries only upon receipt of credible information of homosexual conduct.
- 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.
- Credible information requires a determination based on articulable facts, not just belief or suspicion.
- Not all accusations of homosexual conduct constitute credible information as a basis for inquiry or discharge.
- Credible information does not exist when the source of the accusation is not credible or reliable.
- Credible information does not exist when the accusation concerns an associational activity, such as going to a gay bar, associating with known homosexuals, or marching in a gay rights rally in civilian clothes.
- Credible information does not exist when the information concerns possessing or reading homosexual publications.
- 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.
- Credible information does not exist when the information concerns an allegation by another that a service member is homosexual.
- Credible information does not exist when the inquiry would be based on rumor, suspicion, or capricious claims concerning a member’s sexual orientation.
- Credible information does not exist when a service member reports being threatened because he or she is said or perceived to be a homosexual.
- Inquiries shall be limited to the factual circumstances directly relevant to the specific allegations.

The most important of these was to remove DADT cases from the purview of the criminal investigative agencies. Individual commanders rather than criminal investigators would be the primary authorities responsible for DADT cases.⁶⁵ Allegations of “homosexual conduct” (statements, acts or marriage) were to be handled in the administrative system, through “inquiries” by unit commanders.⁶⁶ Servicemembers accused of engaging in “homosexual conduct” would face discharge proceedings rather than criminal prosecutions.⁶⁷

Third, we had to close loopholes through which military officials could conduct witch hunts. Among them, the security clearance process threatened to become the proverbial “hole the size of a truck” in the new limits that were supposed to curb pursuits of GLB military members.⁶⁸

For decades, our government’s official policy was to discriminate against gay civilians and military members in issuing security clearances.⁶⁹ On written forms and during interviews, security clearance investigators directly asked applicants and those undergoing periodic reviews whether they were “homosexual” or had ever engaged in “homosexual conduct.”⁷⁰ Answering honestly—or declining to answer—meant an end to one’s aspirations and career.⁷¹

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- Commanders shall exercise sound discretion regarding when credible information exists.

SLDN FOURTH ANNUAL REPORT, *supra* note 14, at 21–23 (footnotes omitted).

65. DEP’T OF DEF., INSTRUCTION NO. 5505.8—INVESTIGATIONS OF SEXUAL MISCONDUCT BY THE DEFENSE CRIMINAL INVESTIGATIVE ORGANIZATIONS AND OTHER DOD LAW ENFORCEMENT ORGANIZATIONS, § A (1994) [hereinafter GUIDELINES FOR DCIOS], available at <http://dont.stanford.edu/regulations/dodi5505.8.pdf>.

66. *Id.*

67. *Id.* § D (“Except pursuant to subsections F. 2. and F. 3., below, a . . . law enforcement organization shall not initiate a criminal investigation into sexual misconduct where such misconduct is the only offense involved. . . . Investigations . . . shall be conducted in an even-handed manner, without regard to whether the alleged sexual misconduct involves homosexual or heterosexual conduct.”). The military’s criminal code polices a wide range of consensual behavior for both heterosexual and GLB military members, but had been enforced selectively against GLB military members. See discussion *infra* Part II.D, “Ending Selective Criminal Prosecutions.”

68. SLDN FIRST ANNUAL REPORT, *supra* note 55, at 28.

69. See, e.g., U.S. GEN. ACCOUNTING OFFICE, GAO/NSIAD-95-21, SECURITY CLEARANCES: CONSIDERATION OF SEXUAL ORIENTATION IN THE CLEARANCE PROCESS 2 (1995) (stating that until 1991 civilian security clearance was routinely denied as a result of an individual’s sexual orientation).

70. See, e.g., *id.* at 3 (stating that agency policy authorized investigators within the Department of Defense and U.S. Secret Service “to pursue information regarding [a civilian] applicant’s homosexuality,” and did not prohibit directly questioning individuals about sexual orientation).

71. Perhaps the best known story is that of Frank Kameny, one of the pioneers of the modern gay rights movement. See Will O’Byran, *Gay Is Good: How Frank Kameny Changed the Face of America*, METRO WEEKLY, Oct. 5, 2006, <http://www.metroweekly.com/feature/?ak=2341>. After fighting in World War II, Kameny lost his early career as

From the 1950s through the early 1990s, security clearance policies evolved somewhat for civilian employees.⁷² Within the military, servicemembers found to be gay during security clearance investigations continued to face mandatory discharge under the gay bans.⁷³

At SLDN, we pressed Pentagon officials to stop questions about sexual orientation and wall off information obtained during the security clearance process. We knew this goal was impossible to attain because departments and agencies enjoy great deference in matters of security, including clearances.⁷⁴

As we experienced time and again, however, pushing the envelope opened up space in the process for other improvements. In this case, we were successful in making security clearance information off limits for purposes of discharge.⁷⁵ When released, new regulations stated

a government physicist because he was honest; it was an event that triggered a lifetime of activism to end discrimination against gay Americans. *See id.* Kameny refused to lie about his sexuality during the investigation, saying “it’s irrelevant. It has no bearing on any valid governmental purpose . . .” *Id.*; *see also* SHILTS, *supra* note 4, at 194–95 (detailing Kameny’s efforts as leader of the Washington Gay Activists Alliance).

72. In theory, it became possible to have a career in public service, but gay applicants and employees were automatically subjected to a lengthier investigative process than heterosexuals. U.S. GEN. ACCOUNTING OFFICE, *supra* note 69, at 4–5. This often served as an effective bar to employment; government offices and contractors were typically not willing to wait the additional six months to hire a gay person, when other (heterosexual) hires were available. This preference not to wait happened regardless of the reasons for the delay. *See, e.g.*, Richard Willing, *White House Looks for Faster Top-Secret Clearances*, USA TODAY, Feb. 14, 2007, http://www.usatoday.com/news/washington/2007-02-14-top-secret-clearances_x.htm (demonstrating that job offers may close during delays in applicants’ security clearance processes). This form of discrimination finally ended with the issuance of President Clinton’s Executive Order banning discrimination based on sexual orientation alone. *See infra* note 76.

73. *See* DOD INSTRUCTION 1332.14, *supra* note 13, encl. 3, ¶ 8 (setting out the reasons for mandatory discharges and suggesting, based on the 2010 amendments noting that security clearances cannot be grounds for exclusion from the military, that gays had continued to be discharged based on security clearances). Prior to DADT, one rationale for the gay bans was the notion that gay people posed a greater security risk than heterosexuals. *See, e.g., id.* at 2; *see also* 32 C.F.R. pt. 41, app. A (1991) (stating that the exclusion of homosexuals was necessary to “prevent breaches of security”). This policy was in effect from 1981 to 1994. In one form or another, this security rationale was used from 1949 to 1994. This persisted despite internal reports to the contrary dating back to 1957 and statements by prominent officials. THE CRITTENDEN REPORT: REPORT OF THE BOARD APPOINTED TO PREPARE AND SUBMIT RECOMMENDATIONS TO THE SECRETARY OF THE NAVY FOR THE REVISION OF POLICIES, PROCEDURES AND DIRECTIVES DEALING WITH HOMOSEXUALS 8–9, 14, 48 (1956–57); *see also* Judith Hicks Stiehm, *Managing the Military’s Homosexual Exclusion Policy: Text and Subtext*, 46 U. MIAMI L. REV. 685, 692 (1992) (describing the 1957 Crittenden Report and another done by the Defense Personnel Security Research and Education Center in 1990, both of which “suggest[ed] that security is not an issue”); *Defense Policy in the Post-Cold War Era: Hearing Before the H. Comm. on the Budget*, 102d Cong. 46 (1991) (statement of Dick Cheney, Secretary, Department of Defense) (famously referring to the security rationale as a “bit of an old chestnut”).

74. *Policy Hearings*, *supra* note 13, at 116, 126, 128, 151.

75. SLDN SECOND ANNUAL REPORT, *supra* note 39, at 7–8.

that information about homosexual orientation or conduct gathered during a security clearance investigation would not be employed in separation proceedings; the regulations further provided that “a servicemember [could] decline to answer questions about sexual orientation without adverse consequence.”⁷⁶

Old habits die hard. After DADT was implemented, SLDN fought a barrage of bad guidance that sought to justify witch hunts and circumvent the limits described above.⁷⁷ These included a June 1994 memo from the Navy’s appellate litigation group that suggested associational activities, for example “belonging to a gay men’s chorus, [were] inconsistent with good military character.”⁷⁸ A slide from the Navy’s training program implementing DADT hinted at the prevailing mindset: “[DADT] Does Not Mean Don’t Investigate.”⁷⁹ Imagine a different slide, one that said, “[DADT] . . . Places Limits On Investigations.”⁸⁰ The latter would convey a completely different message.

Memos from top Air Force lawyers dated November 3, 1994, and November 17, 1995, justified questioning family members, school counselors, roommates and friends, and encouraged inquiry officers to look for other suspected gay military members.⁸¹ Over time, SLDN’s work resulted in such guidance being rescinded or rendered unenforceable.

The impact of sidelining criminal investigators and closing down security clearance channels as an official loophole by which to ferret out suspected GLB military members cannot be understated. Individual commanders could reach suspected GLB people in their units, but they lacked resources and authority to launch

76. *Id.* at 7. President Clinton’s issuance of Executive Order 12968 on August 4, 1995, would later provide further momentum to the issue. *Id.* at 8. The Executive Order prohibits discrimination based on sexual orientation in the issuance of security clearances and makes clear that neither sexual orientation nor homosexual activities is a bar to issuance of security clearances in either the military or civilian contexts. *Id.* Representative Barney Frank (D-MA) pressed for the Executive Order after intervening to stop an anti-gay witch hunt by executive branch officials who used the security clearance process to identify suspected gay employees. See Warren E. Leary, *Government Agency Ferreted Out Names of Its Gay Workers*, N.Y. TIMES, May 14, 1992, at A1.

As a practical matter, military members remained at risk of being outed by errant security clearance investigators throughout the DADT era, making security clearance interviews and investigations a nerve-racking experience for GLB military members.

77. SLDN SECOND ANNUAL REPORT, *supra* note 39, at 11.

78. SLDN THIRD ANNUAL REPORT, *supra* note 18, at 28.

79. *Id.* at 14.

80. *Id.*

81. *Id.* at 29. Additionally, the memoranda instructed: “if . . . other military members are discovered during the proper course of the investigation . . . appropriate action may be taken.” *Id.* (emphasis added). As we pointed out, “no proper investigation . . . would ever turn up other people: that is a witch hunt.” *Id.*

global investigations.⁸² On the other side of the coin, SLDN assisted commanders who did not want to pursue suspected GLB military members; these changes helped them push back on intrusive criminal investigators and allowed them to ignore information obtained during security clearance investigations.⁸³

SLDN's work challenged the conception of GLB people as "criminals" and "security risks," thereby undermining significant pillars on which DADT stood.⁸⁴ It would take heroic work to put practical teeth into these reforms, which saved the careers of countless military members.

*B. Ending the Witch Hunts*⁸⁵

During the first two years under DADT, SLDN documented forty-three witch hunts.⁸⁶ Among them, criminal investigative agents interrogated twenty-one marines at Camp Hansen in Okinawa, Japan,

82. See DOD INSTRUCTION 1332.14, *supra* note 13, encl. 5 ¶ 1(a) (limiting inquiries to suspected servicemember's chain of command).

83. See *id.* ¶ 3(b) (granting commanders discretion to determine whether to initiate an inquiry); see also GUIDELINES FOR DCIOS, *supra* note 65, § A (instructing criminal investigators to refer private, consensual misconduct to commanders).

84. See, e.g., GUIDELINES FOR DCIOS, *supra* note 65, at § D(3) (requiring that investigations into sexual misconduct be conducted regardless of orientation); see also discussion *infra* Part II.D, "Ending Selective Criminal Prosecutions" (examining uneven prosecution of sexual misconduct).

85. Witch hunts refer to the military's longstanding method of using mass investigations to ferret out suspected GLB military members. See Benecke & Dodge, *supra* note 56, at 222 & n.46. During witch hunts, investigators compiled lists of suspected gay military members by coercing servicemembers into naming others who were rumored to be gay. *Id.* at 222–23. Obtaining the names of officers and senior enlisted leaders was especially valued. *Id.* at 225. Investigative tactics included prolonged interrogations, denial of military members' requests to speak with an attorney, and threats of jail sentences or other negative outcomes, such as loss of custody of one's children. *Id.* at 224. Often, military members were falsely promised that "they would be 'protected' if they turned the other women in, that the others had already confessed to being lesbians, and that the [investigators] had obtained 'conclusive evidence' of their guilt." *Id.* (footnote omitted).

Physical abuse was not unknown. Servicemembers have reported being beaten, locked in dark broom closets and, in the case of Army Special Forces soldier Jay Hatheway, having pins attached to his head for "neurological testing" until blood ran down his face. SHILTS, *supra* note 4, at 231.

Additionally, the services' criminal investigative agencies conducted extensive surveillance operations of civilian businesses and churches that welcomed gays, in an effort to identify any gay patrons who might be in the military. See, e.g., *id.* at 435–36 (describing the vane surveillance of Army Reserve Captain Dusty Pruitt). These are just a few examples of the lengths to which military criminal investigators went to identify suspected gay military members.

86. This was likely the tip of the iceberg, as these mass investigations occurred at a time when SLDN had limited outreach capability and the internet was not yet in wide use, making it easier for the military to conduct its witch hunts in secret.

about their own sexual orientation and that of other marines.⁸⁷ One marine was thrown in the brig for a month and others were targeted for discharge before SLDN learned of the cases and intervened to stop the witch hunt.⁸⁸

At Hickam Air Force Base in Hawaii, officials entered into a pre-trial agreement with an admitted felon, Airman Bryan Harris,⁸⁹ who was facing life in prison for rape and other charges.⁹⁰ Prosecutors agreed to reduce Harris's sentence from life to twenty months on the condition he hand over the names of military men with whom he had sex.⁹¹ Harris named seventeen men, only five of whom were in the Air Force.⁹² The Air Force members were discharged, some after further fishing expeditions.⁹³

In a case that once again placed scrutiny on the military's use of its gay policies to disproportionately investigate women, up to sixty female sailors were targeted onboard the USS Simon Lake, ported in Sardegna, Italy, in 1995.⁹⁴ Seaman Amy Barnes believes her refusal of a male sailor's advances triggered the investigation: "If you're a woman and single and don't want to sleep around with every guy,

87. SLDN SECOND ANNUAL REPORT, *supra* note 39, at 11.

88. *Id.* SLDN was assisted by cooperating attorneys at the international law firm Skadden Arps Slate Meagher & Flom.

89. Offer for Pretrial Agreement at 1–2, United States v. Harris, FR415-17-1302 (U.S.A.F. Pac. Cir. 1996).

90. SLDN THIRD ANNUAL REPORT, *supra* note 18, at 10.

91. *Id.*

92. *Id.*

93. *Id.* In response to SLDN's letter of complaint on behalf of four of the Air Force members, the Air Force Inspector General (IG) looked into the matter and confirmed the pretrial agreement and also verified that prosecutors asked co-workers of one of the men accused by Harris the below questions:

1. Do you have any reason to believe that TSgt Gandy doesn't like girls?
2. Have you ever had the feeling that Tsgrt [sic] Gandy is interested in men?
3. Have you ever seen TSgt Gandy 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 TSgt Gandy is gay?
5. What is it like to work in a unit with so many homosexuals?
6. Has TSgt Gandy ever talked about women to you, you know, the way men talk about women?
7. Where does TSgt Gandy hang out? With whom?
8. Has TSgt Gandy 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 TSgt Gandy is gay?

Id. at 10–11. The Air Force IG, incredibly, maintained that officials did nothing improper. The Marines ordered one man back from terminal leave in Texas, where he had moved to start civilian life, with the intention of court-martialing him; they backed off after the man retained a civilian attorney and assistance from SLDN. *Id.* at 11.

94. SLDN SECOND ANNUAL REPORT, *supra* note 39, at 10.

they think you must be gay That's just how everyone thought and talked."⁹⁵

Numerous sailors, men and women, were questioned about the sexual orientation of women serving onboard the USS Simon Lake.⁹⁶ Later, female sailors "filed sworn affidavits in federal court alleging that the command's investigators threatened them with prison unless they confessed to being lesbian or accused Seaman Amy Barnes as a lesbian."⁹⁷ One sailor stated in an affidavit dated March 26, 1996, that an investigator told her: "If you do not tell the truth, you will go to jail for 10–15 years.' He then proceeded to interrogate her about her own sexual orientation and that 'of at least six other women by name.'"⁹⁸

Another sailor's affidavit, dated April 27, 1996, stated:

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 [Accessory After the Fact] and would go to jail if I did not answer their questions and cooperate. . . . Being forced into giving statements which had the potential to be used against RMSN Barnes, who is my friend, was extremely upsetting.⁹⁹

Barnes was removed from her ship and flown via Italy to Norfolk Naval Base to be processed for discharge. When she refused to sign discharge paperwork and leave quietly, and instead requested an administrative discharge hearing, Navy officials moved to expedite her discharge and railroad her out of the service.

The case first ended up in federal court after Navy officials held Barnes in a locked room and denied her access to counsel while trying to force her to sign the discharge paperwork and waive her right to a hearing. Cooperating counsel from Arnold & Porter and I raced to the courthouse to petition for a temporary injunction after receiving an urgent call from Barnes's military defense counsel at Norfolk, with whom we were working closely.

Federal District Court Judge Emmet Sullivan granted a temporary injunction to keep Barnes in the Navy so she could exercise her right to a discharge board.¹⁰⁰ Ultimately, she was discharged and then sued the Navy for reinstatement, but settled out of court for a modest

95. J. Jennings Moss, *Lesbian Baiting in the Barracks*, ADVOCATE, Feb. 4, 1997, at 36, 38.

96. SLDN SECOND ANNUAL REPORT, *supra* note 39, at 12.

97. SLDN THIRD ANNUAL REPORT, *supra* note 18, at 9.

98. *Id.*

99. *Id.* (internal quotation marks omitted).

100. Catherine M. Brennan, *Claim Settled but Issue Still Open 'Don't Ask, Don't Tell' Avoids Showdown in Seaman's Case*, DAILY REC. (Balt.), Dec. 18, 1996, at 13.

agreement that enabled her to move on from the Navy and begin college with a record that reflected her honorable service.¹⁰¹ In addition to Barnes, one other woman, who opted not to fight her discharge, was kicked out of the Navy because of the witch hunt.¹⁰²

In the meantime, SLDN intervened with top Navy officials including the General Counsel. While we have no official confirmation, we know that officials called the ship's command; circumstances suggest it was these calls that stopped the witch hunt.

In all prior matters, the military's response when confronted with complaints of witch hunts was to categorically deny wrongdoing, as they did in the Hickam Air Force Base case.¹⁰³ For many years, it had been possible for the military to conduct its investigations in secret, without worry about outside scrutiny.¹⁰⁴ Navy officials did not adopt the usual approach in the Barnes case. Officials never denied or admitted a witch hunt had occurred.¹⁰⁵ Instead, they stuck with the government's argument that sailors had no recourse, even if military leaders violated "Don't Ask" or "Don't Pursue."¹⁰⁶ As disappointing as the argument may have been, it nonetheless signaled an evolving external awareness. That we possessed the entire record of investigation showing the questions asked by investigators may also have been a factor. When pressed, higher-level officials did not put their veracity on the line to "cover" for the Navy's witch hunt on the USS Simon Lake.

An Army case the following year starkly contrasted with prior cases in that officials themselves stopped a witch hunt. In this case, "investigators interrogated a soldier who was alleged to have been a male prostitute, stripper in a gay nightclub, porn star and drug dealer. Rather than charge him for all of his alleged crimes, however, . . . investigators . . . turned him into an informant . . . to identify gay soldiers."¹⁰⁷ Investigators obtained photos of the informant socializing with other patrons of the gay bar, then asked him to identify the patrons and reveal everything he knew about them and their sex lives.¹⁰⁸

101. Moss, *supra* note 95, at 38.

102. SLDN SECOND ANNUAL REPORT, *supra* note 39, at 12.

103. SLDN THIRD ANNUAL REPORT, *supra* note 18, at 10–11.

104. *See id.* at 10.

105. *Id.* at 9.

106. *Id.* at 9–10.

107. SLDN FOURTH ANNUAL REPORT, *supra* note 14, at 26.

108. *Id.* at 26–27. The questions included the following:

1. I'm showing you photograph #1, can you identify this individual?
2. I'm showing you photograph #2, can you identify this individual?
3. I'm showing you photograph #3, can you identify this individual?

...

7. I'm showing you photograph #7, can you identify this individual?

Instead of rushing to justify the command's actions, an Assistant Staff Judge Advocate (attorney) concluded in a letter to command officials:

[These] statements are rife with questions and areas of investigation which, although not illegal, suggest a goal of the investigation is identifying the sexual orientation of the soldiers among this group. . . . Attempting to identify soldiers who associate with [B] and asking witnesses to identify soldiers in photographs *is easily portrayed as a "witch-hunt" based upon sexual orientation.*¹⁰⁹

Based on the attorney's advice, the investigation was stopped.¹¹⁰

By 1999, we could report a decline in witch hunts.¹¹¹ Ultimately, SLDN ended the witch hunts. Aggressive legal intervention and public scrutiny were key factors in reaching this turning point. Additionally, SLDN built partnerships with military defense attorneys and empowered military members with education and information.¹¹²

SLDN sought out military defense attorneys who were willing to "push the envelope" and help accused GLB military members earlier in the process than usual.¹¹³ Military defense attorneys did not typically assist servicemembers until after an investigation was completed and charges had been filed or discharge proceedings had commenced.¹¹⁴ Of course, that was too late to deter witch hunts or

8. Tell me everything you know about [A]?
9. How many times did you and [A] have sex and where?
10. Describe the different sex acts you and [A] would perform?
11. Describe . . . the locations in the house where you had sex?
12. Tell me everything you know about [B]?
13. Tell me everything you know about [C]?
14. Tell me everything you know about [D]?
15. How many other men have you had sex with that are in the military at [base]?
16. Tell me everything you know about [E]?

Id.

109. *Id.* at 27–28 (emphasis added).

110. *Id.* at 27.

111. SLDN FIFTH ANNUAL REPORT, *supra* note 22, at 2.

112. SHARON E. DEBBAGE ALEXANDER ET AL., CONDUCT UNBECOMING: THE TENTH ANNUAL REPORT ON "DON'T ASK, DON'T TELL, DON'T PURSUE, DON'T HARASS" 19, 24 (2004) [hereinafter SLDN TENTH ANNUAL REPORT], available at http://sldn.3cdn.net/77d5825b8e0f3454f2_1cm6bgace.pdf.

113. See, for example, *supra* notes 94–101 and accompanying text, discussing involvement of cooperating counsel and Barnes's attorney in the Barnes case; see also SLDN THIRD ANNUAL REPORT, *supra* note 18, at 2 (indicating that SLDN had 250 private attorneys helping with DADT violation cases).

114. See STACEY L. SOBEL ET AL., SERVICEMEMBERS LEGAL DEF. NETWORK, CONDUCT UNBECOMING: THE SIXTH ANNUAL REPORT ON "DON'T ASK, DON'T TELL, DON'T PURSUE, DON'T HARASS" vi (2000) [hereinafter SLDN SIXTH ANNUAL REPORT], available at <http://>

keep them from snowballing. As a result, isolated and alone, many military members accepted less than honorable discharges and left quietly due to threats by military investigators.¹¹⁵

Most importantly, SLDN empowered military members to fight back if ensnared in witch hunts, by providing support, education and information.¹¹⁶ Our basic message was simple and consistent: “Say Nothing. Sign Nothing. Get Legal Help.”¹¹⁷ Among others, we distributed a legal rights card the size of a business card, describing how to invoke one’s rights to an attorney and thereby stop any questioning.¹¹⁸ The gay newspapers reprinted the legal rights information and, over initial objections from some publishers, we also placed classified ads in military newspapers. Our “Survival Guide” contained comprehensive information about DADT and the legal rights of military members, including what to do if investigated.¹¹⁹ It became the “bible” for GLB military members and remained in use until DADT ended on September 20, 2011. Before the internet was in widespread use, we distributed hard copy materials through every network imaginable, and gave classes and met in person with military members at gay bars, churches, pride celebrations, homes and other venues around the country.¹²⁰

Ending the witch hunts did not remove the “knife” from the backs of military members, as some have so poignantly described life under DADT.¹²¹ It did not relieve the need to overturn DADT. Nor did it stop some individual commanders from launching fishing expeditions to identify and discharge gay people within their units.¹²²

Ending the witch hunts did, however, remove the greatest threat to GLB military members, reduce the risk of criminal prosecution

sldn.3cdn.net/bc84613306fbdcf69d_gkm6iyfnf.pdf (recommending that military “members should be able to obtain a military defense attorney before an inquiry is initiated, and have an opportunity to show that no credible evidence exists” to start an inquiry).

115. SLDN FOURTH ANNUAL REPORT, *supra* note 14, at 43.

116. *About SLDN: Vision, Mission and Goals*, *supra* note 26, at 2–3.

117. SERVICEMEMBERS LEGAL DEF. NETWORK, THE SURVIVAL GUIDE 3 (5th ed. 2007) [hereinafter SLDN SURVIVAL GUIDE], available at http://sldn.3cdn.net/48ee19f69cf2e4d028_54m6bri8u.pdf. SLDN adopted this motto from the San Diego–based Military Law Task Force of the National Lawyer’s Guild.

118. SERVICEMEMBERS LEGAL DEF. NETWORK, POCKET SURVIVAL GUIDE FOR SERVICE MEMBERS (2010), available at http://sldn.3cdn.net/d758d07763926f8f46_4qm6bq9wz.pdf.

119. SLDN SURVIVAL GUIDE, *supra* note 117, at 3, 37–38.

120. *See, e.g., Upcoming Events*, SERVICEMEMBERS LEGAL DEF. NETWORK, <http://www.sldn.org/events/> (last visited Nov. 2, 2011) (listing SLDN events across the country).

121. *Gay Military Underground Network Says Report “Ends the Controversy,”* OUTSERVE (Nov. 29, 2010), <http://outserve.org/2010/11/gay-military-underground-network-says-report-ends-the-controversy/>.

122. *See, e.g., SLDN TENTH ANNUAL REPORT*, *supra* note 112, at 7 (continuing to recommend that the Department of Defense make it clear there are consequences for commanders who violate DADT guidelines).

and alleviate one of our worst fears. Looking ahead, military members could find each other and organize online, for example, to fight DADT leading up to the 2010 vote. This would never have been possible were witch hunts still the primary vehicle by which the military policed the presence of GLB military members, driven by the criminal investigative agencies.

C. Countering the Persecution of Women Under Don't Ask, Don't Tell

PFC "Jane Wayne"¹²³ was nearing the end of her tour of duty in South Korea when she was assaulted by male soldiers who threatened to rape her.¹²⁴ When she reported the assault, the perpetrators spread rumors that she was a lesbian.¹²⁵ Rather than investigate the men who attacked her, Wayne's leaders brought criminal charges against her and threatened her with prison time if she did not name other suspected lesbians; she refused to do so.¹²⁶ After the judge dismissed the criminal charges for complete lack of evidence, her battalion commander kept her beyond her scheduled transfer date and initiated "discharge proceedings . . . based on the same retaliatory . . . allegations."¹²⁷ In the meantime, she was denied a promotion opportunity,¹²⁸ but "[s]he still refused to buckle."¹²⁹

In July 1995, "after ten months of intense efforts by her family [and] Servicemembers Legal Defense Network . . . the Army finally dropped all charges and retaliatory actions against [Wayne]."¹³⁰ In the process, her "family incurred more than \$8,000 in non-legal expenses on behalf of their daughter."¹³¹ Wayne's case was not an exception. Straight or gay, DADT was used as a club to silence women who were raped, sexually assaulted or sexually harassed.

Lesbian baiting is "the practice of pressuring and harassing women through calling, or threatening to call them, lesbians."¹³² Women often are accused of being lesbians when they rebuff sexual advances by men or report sexual abuse.¹³³ In other cases, women are harassed because they depart from gender stereotypes, for example,

123. A pseudonym is being used because she is still serving.

124. SLDN SECOND ANNUAL REPORT, *supra* note 39, at i.

125. *Id.* at 12.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* at i.

130. SLDN SECOND ANNUAL REPORT, *supra* note 39, at i.

131. *Id.* at 12.

132. Benecke & Dodge, *supra* note 56, at 216.

133. *See, e.g.*, SLDN SECOND ANNUAL REPORT, *supra* note 39, at 10 (describing the experiences of two female servicemembers).

“[w]omen who are top performers in nontraditional fields are also subject to lesbian accusations, rumors and speculation designed to undermine their professional standing.”¹³⁴

In the military, lesbian baiting gained legitimacy and power from DADT and prior gay bans, under which women have been discharged regardless of their actual sexual orientation,¹³⁵ and the military’s criminal justice system, which was enforced selectively against gay people prior to SLDN’s involvement.¹³⁶ Too often, commanders investigated military women “under the guise of [DADT] rather than disciplining the individuals” who harmed them.¹³⁷

Lesbian baiting is one of the main reasons why women were disproportionately investigated and discharged under DADT and prior policies.¹³⁸ In SLDN’s second annual report, for example, we found that “[w]omen were disproportionately hurt by the new [DADT] policy, accounting for 30% of SLDN cases and 21% of DOD discharge figures, despite making up only 13% of the military’s active force.”¹³⁹

The following fiscal year, in 1996, women accounted for “29% of gay discharges, despite making up only 13% of the active force”;¹⁴⁰ “[i]n the Army, women accounted for 41% of gay discharges, three times

134. SLDN FIFTH ANNUAL REPORT, *supra* note 22, at 80; *see also* Benecke & Dodge, *supra* note 56, at 217–22, 233 (describing how lesbian-baiting has been used when women threaten male servicemembers’ “manpower”). The military’s use of anti-gay policies to harass women is not new. Since World War II, purges of women have occurred in a pattern that appears to be linked to women’s presence in nontraditional job fields. *Id.* at 218. Not surprisingly, when women were integrated into combat arms fields and onboard ships in the early 1980s, retaliatory lesbian allegations once again surfaced. Lisa M. Keen, *DOD Panel Advises Training to Help Curb Gay-Baiting*, WASH. BLADE, Apr. 21, 1989, at 1 [hereinafter Keen, *Gay-Baiting*] (referencing testimony of Mary Beth Harrison, Defense Advisory Committee on Women in the Services (DACOWITS) 1988 Spring Conference (April 16–20, 1988)); Lisa M. Keen, *Women are Separated from Military at a Higher Rate*, WASH. BLADE, Mar. 3, 1989, at 1. The DACOWITS members heard testimony from several military women who, after reporting sexual abuse, were accused of being lesbians and faced discharge as a result. The testimony so impressed the members that they recommended that all commanders be trained in order to avoid misuse of retaliatory allegations. SLDN THIRD ANNUAL REPORT, *supra* note 18, at 36 n.5 (“Harassment. DACOWITS recommends DOD expand existing leadership training to include dealing with unfounded accusations of homosexuality against servicemembers.” (quoting DACOWITS 1989 Spring Conference Recommendation 12)); Keen, *Gay-Baiting*, *supra*. The armed forces did not implement this recommendation. SLDN THIRD ANNUAL REPORT, *supra* note 18, at 23–4.

135. *See, e.g.*, SLDN FIFTH ANNUAL REPORT, *supra* note 22, at 9 (describing how one woman accused of being a lesbian presented ex-boyfriends as evidence at her discharge hearing, but was ultimately unsuccessful in avoiding discharge).

136. *See* discussion *infra* Part II.D, “Ending Selective Criminal Prosecutions.”

137. SLDN FIFTH ANNUAL REPORT, *supra* note 22, at 80.

138. *See id.*; SLDN SECOND ANNUAL REPORT, *supra* note 39, at iii.

139. SLDN SECOND ANNUAL REPORT, *supra* note 39, at ii.

140. SLDN THIRD ANNUAL REPORT, *supra* note 18, at i.

their presence in the service.”¹⁴¹ This disparity remained consistent throughout the DADT era.¹⁴²

SLDN pressed military leaders to recognize lesbian baiting as a form of sexual harassment and attempted to bar commanders from initiating inquiries based on retaliatory accusations.¹⁴³ In 1997, the Department of Defense, for the first time, officially acknowledged lesbian baiting and issued guidance clarifying that commanders should respond to anti-gay harassment and lesbian baiting by investigating the harassment itself, not servicemembers who report it (the “Dorn memo”).¹⁴⁴

141. *Id.*

142. See Lisa Leff, *Gay Ban Separates More Women*, ARMY TIMES, Oct. 8, 2009, http://www.armytimes.com/news/2009/10/ap_gay_discharges_100809/ (reporting that a third of those discharged were women, despite women making up only “15 percent of all active-duty and reserve members”); see also THE SEC’Y OF THE ARMY, SENIOR REVIEW PANEL REPORT ON SEXUAL HARASSMENT 66 (1997) [hereinafter SENIOR REVIEW PANEL ON SEXUAL HARASSMENT] (“Female soldiers who refuse the sexual advances of male soldiers may be accused of being lesbians and subjected to investigation for homosexual conduct.”).

143. See, e.g., MICHELLE M. BENECKE, SERVICEMEMBERS LEGAL DEF. NETWORK, POST-ABERDEEN PERSPECTIVES: ARMY WOMEN AND SEXUAL ABUSE (1997). This SLDN publication was presented to the Army Senior Review Panel, which was convened to look into the problem of sexual harassment Army-wide as the result of incidents of rape, sexual assault and sexual harassment that occurred at the Army’s Aberdeen (Maryland) Proving Grounds. The Senior Review Panel took up SLDN’s recommendation. SENIOR REVIEW PANEL ON SEXUAL HARASSMENT, *supra* note 142, at 31 (recommending that “professionals and leaders who are expected to deal with soldiers reporting incidents of inappropriate sexual behavior are trained and qualified,” a response needed because “victims are reluctant to report . . . for fear of being re-victimized by the very system that was put in place to deal with their complaints”).

144. Memorandum from Edwin Dorn, Under Sec’y of Def. for Personnel and Readiness, to Secretaries of Military Dep’t’s, Chairman of Joint Chiefs of Staff, Inspector Gen. of Dep’t of Def., Guidelines for Investigating Threats Against or Harassment of Service Members Based on Alleged Homosexuality (Mar. 24, 1997), available at <http://www.defense.gov/Releases/Release.aspx?ReleaseID=2171>. The memorandum states:

This guidance is issued because of information we have received that some service members have been threatened with being reported as homosexual after they rebuffed sexual advances

. . . .

The fact that a service member 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 service member. The report of such a threat should result in the prompt investigation of the threat itself. Investigators should not solicit allegations concerning the sexual orientation or homosexual conduct of the threatened person. . . .

Service members should be able to report crimes free from fear of harm, reprisal, or inappropriate or inadequate governmental response. Please ensure that commanders take appropriate actions in such instances, with due consideration given to the safety of persons who report threats, and see that commanders hold fully accountable persons found to have made threats or engaged in threatening conduct.

Id.

When the services failed to distribute the Dorn memo to the field,¹⁴⁵ SLDN recommended it be reissued.¹⁴⁶ An April 1998 Department of Defense report adopted this recommendation:

[I]t is critical that military service women feel free to report sexual harassment or threats without fear of reprisal or inappropriate governmental response. . . . [W]e recommend that the Department reissue guidance [the Dorn memo] to make clear that when sexual harassment is reported, the focus of the investigation must be on the harassment or threat.¹⁴⁷

Congress and an Army Review Panel¹⁴⁸ also recognized and expressed concern about lesbian baiting after hearing from SLDN and urged military officials to take action to address this problem. The Dorn memo was finally sent to the field in 2000 as one of a number of reforms undertaken in the wake of the murder of PFC Barry Winchell at Fort Campbell, Kentucky.¹⁴⁹

Implementation of the Dorn memo in the field was far from perfect.¹⁵⁰ However, recognition of lesbian baiting as a form of harassment was a step forward. Like PFC Jane Wayne, there are women serving today who otherwise would have been railroaded out of the military were it not for these developments. On a broader level, SLDN's documentation of widespread lesbian baiting underscored one means by which DADT, like prior policies, perpetuated sexual violence in the military. Over time, this contributed to eroding public support for DADT.

Sexual violence against military women by male servicemembers is again in the headlines due to incidents in Iraq and Afghanistan.¹⁵¹

145. SLDN FOURTH ANNUAL REPORT, *supra* note 14, at 1.

146. *Id.* at 2.

147. OFFICE OF THE UNDER SEC'Y (PERS. AND READINESS), REPORT TO THE SECRETARY OF DEFENSE: REVIEW OF THE EFFECTIVENESS OF THE APPLICATION AND ENFORCEMENT OF THE DEPARTMENT'S POLICY ON HOMOSEXUAL CONDUCT IN THE MILITARY (1998).

148. *See* SENIOR REVIEW PANEL ON SEXUAL HARASSMENT, *supra* note 142, at 66.

149. *See* SLDN SIXTH ANNUAL REPORT, *supra* note 114, at 47–48; *infra* Part II.E, “Restoring Dignity by Challenging Downgraded Discharge Characterizations.”

150. JEFFREY M. CLEGHORN ET AL., SERVICEMEMBERS LEGAL DEF. NETWORK, CONDUCT UNBECOMING: THE NINTH ANNUAL REPORT ON “DON'T ASK, DON'T TELL, DON'T PURSUE, DON'T HARASS” 5 (2003), available at http://sldn.3cdn.net/d7e44bb7ad24887854_w6m6b4y13.pdf (“SLDN has documented . . . that the training rarely meets the standards set forth . . .”).

151. *See, e.g.*, Helen Benedict, *The Private War of Women Soldiers*, SALON (Mar. 7, 2007, 7:42 AM), http://www.salon.com/news/feature/2007/03/07/women_in_military (explaining how assaults on female servicemembers in Iraq were so common that women's commanders often warned them against using the latrines or showers alone); Nancy Gibbs, *Sexual Assaults on Female Soldiers: Don't Ask, Don't Tell*, TIME (Mar. 8, 2010), <http://www.time.com/time/magazine/article/0,9171,1968110,00.html> (finding that the number of sexual assaults on women serving in Iraq and Afghanistan rose 25 percent in fiscal year 2008).

The demise of DADT should benefit military women by removing a major disincentive to reporting rape, sexual assault and sexual harassment. Women may be called lesbians, but they will not face discharges based on retaliatory gay accusations. Unfortunately, other forms of institutional failure to protect women who report rape, sexual assault or sexual harassment continue to exist and contribute to widespread under-reporting of abuse.¹⁵²

D. Ending Selective Criminal Prosecutions

Air Force Major Debra Meeks was looking forward to her retirement later on February 28, 1996.¹⁵³ She was a “mustang,”¹⁵⁴ one of a handful of officers who are commissioned after working their way up through the enlisted ranks.¹⁵⁵ After a full and successful career, Meeks was contemplating something different, perhaps going to culinary school.¹⁵⁶ On February 8th, those plans came to a crashing halt when Meeks learned that she was under investigation after a civilian woman accused her of being gay and having a consensual sexual relationship.¹⁵⁷ Based on these allegations, the Air Force held Meeks beyond her retirement date to criminally prosecute her on charges of consensual sodomy and conduct unbecoming an officer.¹⁵⁸ Meeks faced up to eight years in prison, a derogatory discharge characterization and loss of all benefits, including her retirement pension and medical care.¹⁵⁹

The United States military did not have laws or formal policies concerning oral or anal sex until 1916, when Congress revised the Articles of War to penalize assault to commit sodomy for both heterosexuals and homosexuals.¹⁶⁰ It was not until 1951 that the military

152. See *Advocacy*, SERVICE WOMEN'S ACTION NETWORK, <http://servicewomen.org/our-work/advocacy/> (last visited Nov. 2, 2011). Military members who have experienced Military Sexual Trauma (MST) (sexual harassment, assault or rape) can reach SWAN's National Peer Support Helpline at 1-888-729-2089 or peersupport@servicewomen.org.

153. *Air Force Major's Case Revives 'Don't Ask, Don't Tell' Debate*, N.Y. TIMES, Aug. 11, 1996, at 7.

154. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 768 (10th ed. 1993).

155. *Air Force Major's Case Revives 'Don't Ask, Don't Tell' Debate*, *supra* note 153.

156. *Id.*

157. *Id.*

158. *Id.*; see also Article 125 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 925 (1956) (outlawing “unnatural carnal copulation” between adults, whether of the same or opposite genders); Article 133 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 933 (1956) (stating that servicemembers “shall be punished as a court-martial may direct” if convicted of conduct unbecoming an officer).

159. *Air Force Major's Case Revives 'Don't Ask, Don't Tell' Debate*, *supra* note 153.

160. WAR DEP'T, A MANUAL FOR COURTS-MARTIAL: COURTS OF INQUIRY, AND OF OTHER PROCEDURE UNDER MILITARY LAW ix, 271 (1917) (reprinting 1916 revisions to Articles of War).

adopted the Uniform Code of Military Justice, including Article 125, which outlawed consensual oral and anal sex for both heterosexual and homosexual adults.¹⁶¹ Article 125 remains unchanged today.¹⁶²

Under DADT, commanders were supposed to handle allegations of homosexual statements, acts or marriage in the administrative discharge system; as mentioned above, commanders were not supposed to use the criminal system against suspected GLB military members for consensual, adult sexual activities in circumstances where they would not investigate or prefer criminal charges against heterosexuals for the same activities.¹⁶³ By requiring even-handed treatment in the criminal system, this provision sought to change the military's long-standing practice of punitive investigations and selective prosecutions against GLB members.¹⁶⁴ The military, however, did not consider the guidelines to be binding.¹⁶⁵

When Meeks contacted SLDN, she had already concluded that staying quiet was a sure road to prison. She wanted to fight the charges, publicly if needed, to hold the Air Force accountable. All she needed was a crack legal defense team.

Renowned attorney Michael Tigar, "a professor at the University of Texas Law School and one of the lead defense lawyers in the Oklahoma City bombing case, and Peter Held, a San Antonio lawyer who spent 18 years in the Air Force as a judge advocate," came to Meeks's defense.¹⁶⁶ With the benefit of his military experience and

161. Mynda G. Ohman, *Integrating Title 18 War Crimes into Title 10: A Proposal to Amend the Uniform Code of Military Justice*, 57 A.F. L. REV. 1, 9–10 (2005).

162. 10 U.S.C.A § 925 (West 2011).

163. GUIDELINES FOR DCIOS, *supra* note 65, § D.3. The military has both administrative and criminal systems. SLDN SURVIVAL GUIDE, *supra* note 117, at 37. Administrative separation boards recommend whether a service member should be retained in the service or discharged and what the characterization of any discharge should be. *Id.* at 41. The criminal system determines whether a service member has committed a crime under military law. *Id.* at 39. A service member who has said he or she is gay, has engaged in sexual activity with a person of the same gender, or married someone of the same gender was subject to administrative discharge under "Don't Ask, Don't Tell, Don't Pursue." GUIDELINES FOR DCIOS, *supra* note 65, § D.3. Heterosexuals were not subject to administrative discharge for the same statements, acts or marriages. A service member who has engaged in sexual acts, such as consensual oral sex, whether heterosexual or homosexual, may also be subject to criminal prosecution under the Uniform Code of Military Justice. *Id.* § F.2. The military rarely criminally punishes heterosexuals for consensual sexual activities; throughout history, however, the military has regularly prosecuted suspected gay service members for the same activities. The DADT guidelines sought to stop the practice of selective criminal prosecutions against GLB military members by requiring even-handed treatment in the criminal system. *Id.* § D.3.

164. *See, e.g.*, Tamar Lewin, *Gay Groups Suggest Marines Selectively Prosecute Women*, N.Y. TIMES, Dec. 4, 1988, at 34 (describing hypocrisy in the military's unwillingness to prosecute heterosexual sodomy).

165. *See Air Force Major's Case Revives 'Don't Ask, Don't Tell' Debate*, *supra* note 153.

166. *Id.*

knowledge, attorney Held repeatedly called the Air Force to account for its selective prosecution of Major Meeks.¹⁶⁷ Tigar delivered a brilliant closing argument that paid homage to military service and true military values. On August 15, 1996, after seven hours of deliberations, the jury of Air Force Colonels (five men and two women) found Major Meeks “not guilty.”¹⁶⁸

Throughout her ordeal, Meeks enjoyed tremendous support locally in San Antonio, a large military town.¹⁶⁹ The national press, including *The New York Times* and *Los Angeles Times*, covered her case closely, shining a spotlight on the Air Force’s harsh tactics.¹⁷⁰ The publicity surrounding Meeks’s case and her high-profile defense team served as a warning to other commanders who sought to prosecute alleged GLB people based on allegations of consensual adult relationships. In the years following the Meeks trial, selective criminal prosecutions of GLB military members waned, with the military typically discharging service members under DADT absent other alleged infractions.¹⁷¹

Ironically, the demise of DADT causes renewed concern about selective prosecutions of GLB military members.¹⁷² With no gay-specific

167. *Air Force Major’s Sodomy Trial Opens*, L.A. TIMES, Aug. 13, 1996, at A10.

168. *Air Force Major Acquitted of Lesbian Charges*, L.A. TIMES, Aug. 16, 1996, at A26.

169. See *Military City—San Antonio*, INFORMATIONSANANTONIO.COM, <http://www.information-sanantonio.com/sanantonio/living/militarycitysanantonio.html> (last visited Nov. 2, 2011) (documenting the many military bases in and around San Antonio).

170. See *Air Force Major Acquitted of Lesbian Charges*, *supra* note 168; *Air Force Major’s Case Revives ‘Don’t Ask, Don’t Tell’ Debate*, *supra* note 153; *Air Force Major’s Sodomy Trial Opens*, *supra* note 167.

171. After the Supreme Court’s June 2003 decision in *Lawrence v. Texas*, 539 U.S. 558 (2003), it was hoped that Article 125 of the Uniform Code of Military Justice, 10 U.S.C. § 925 (1956), would be reformed to criminalize only nonconsensual activities. In *Lawrence*, the Supreme Court ruled that a Texas sodomy statute prohibiting two persons of the same gender from engaging in private consensual sexual conduct, and all similar state laws, are unconstitutional. *Lawrence*, 539 U.S. 558. *Lawrence* overruled *Bowers v. Hardwick*, a prior Supreme Court decision that infamously upheld state laws prohibiting private consensual sexual conduct (*Bowers* involved sex between two men). *Bowers v. Hardwick*, 478 U.S. 186 (1986). Following the decision in *Lawrence*, there were multiple appeals of consensual sodomy convictions in the military court system challenging the constitutionality of Article 125; in August 2004, however, the military’s highest criminal court, the Court of Appeals for the Armed Forces (C.A.A.F.), ruled in *United States v. Marcum* that, although the *Lawrence* decision applies to the military, the military could nonetheless prosecute consensual sodomy if the conduct fell outside of protections provided under *Lawrence*, or if the conduct is prohibited because of additional factors solely relevant to the military context. 60 M.J. 198, 200, 202, 205–06 (C.A.A.F. 2004). In *Marcum*, the accused service member’s “conduct was outside the constitutional protection defined by the Supreme Court” because “it was with a subordinate (fraternization is a criminal offense in the military)”; as such, the court ruled that the conviction was correct. DAVID MCKEAN ET AL., SERVICEMEMBERS LEGAL DEF. NETWORK, FREEDOM TO SERVE: THE DEFINITIVE GUIDE TO LGBT MILITARY SERVICE 17–20 (2011). “In other words, the C.A.A.F. ruled that the military could constitutionally continue to prosecute consensual sodomy under limited circumstances.” *Id.*; see also *Marcum*, 60 M.J. at 207–08.

172. MCKEAN, *supra* note 171, at 19.

administrative sanction available, advocates fear anti-gay commanders and investigators might resort back to the criminal system to punish GLB members.¹⁷³ Article 125 is not the only risk. Virtually any physical act with another person can be criminally prosecuted under the vague provisions of Article 133 or 134, which are referred to as the “general articles” and which, respectively, prohibit “conduct unbecoming an officer and a gentleman”¹⁷⁴ and conduct that results in the “prejudice of good order and discipline in the armed forces” or that “bring[s] discredit upon the armed forces.”¹⁷⁵ This invites prosecution not only for consensual sex, but also for unintentional or inadvertent acts that, because a military member is known to be gay, are mistakenly perceived as offenses.

E. Restoring Dignity by Challenging Downgraded Discharge Characterizations

Air Force Captain Rich Richenberg “served in Desert Storm One, where he commanded the control center aboard the AWACs aircraft and garnered numerous accolades.”¹⁷⁶ He was “top notch,” ranking in the top ten percent of all Air Force officers.¹⁷⁷ As such an officer, many believed he would ultimately receive a position in the highest ranks of the Air Force.¹⁷⁸ Unfortunately, his promising Air Force career was cut short when he admitted to being gay during the first year of DADT.¹⁷⁹

Like many military members, Richenberg had hoped the gay ban would be lifted, but it was not in his nature to dissemble and lie about who he was, as required by DADT.¹⁸⁰ He “believed deeply in the military’s stated values of integrity, honor and courage.”¹⁸¹ As a result, he informed his commander of the ethical conflict he was experiencing because he was gay.¹⁸² He then faced months of derision from his superiors, one of whom admitted on the record that he downgraded

173. *Id.*

174. Article 133 of the Uniform Code of Military Justice, 10 U.S.C. § 933 (1956).

175. Article 134 of the Uniform Code of Military Justice, 10 U.S.C. § 934 (1956).

176. Michelle Benecke, *In Memory of Rich Richenberg (Former Captain, US Air Force)*, SERVICEMEMBERSLEGALDEF.NETWORK (May 31, 2011) [hereinafter Benecke, *In Memory of Rich Richenberg*], <http://www.sldn.org/blog/archives/in-memory-of-rich-richenberg-former-captain-us-air-force/>.

177. SLDN FIRST ANNUAL REPORT, *supra* note 55, at 12; Benecke, *In Memory of Rich Richenberg*, *supra* note 176.

178. Benecke, *In Memory of Rich Richenberg*, *supra* note 176.

179. *Id.*

180. *Id.*

181. *Id.*

182. *See id.*

Richenberg's performance evaluation and recommended against his promotion solely because he was gay.¹⁸³

In the end, Richenberg was discharged.¹⁸⁴ Furthermore, "[t]o add insult to injury, the Air Force gratuitously downgraded the characterization of his discharge—to 'General'" (under honorable conditions) instead of "Honorable"—despite his impeccable performance of his duties.¹⁸⁵

Richenberg "challenged his discharge in federal court with the help of volunteer lawyers . . . at Robins Kaplan law firm."¹⁸⁶ He was among the first plaintiffs to challenge a discharge under DADT; however, "the courts were not yet ready to overturn DADT."¹⁸⁷ At SLDN, we fought to have Richenberg's discharge upgraded through military channels.¹⁸⁸ Richenberg finally received the Honorable discharge characterization that he deserved, but only after taking his case through the entire chain of Air Force authority until he reached the Secretary of the Air Force.¹⁸⁹ In this regard, his case represents a turning point.

For decades, military officials forced gay military members to accept downgraded discharge characterizations on the theory that being gay, alone, was an affront to military standards of conduct.¹⁹⁰

183. Amended Verified Complaint for Declaratory and Injunctive Relief at 12, *Richenberg v. Perry*, 909 F. Supp. 1303 (D. Neb. 1995) (No. 8 Civ. 95-393).

184. Benecke, *In Memory of Rich Richenberg*, *supra* note 176.

185. *Id.* Administrative discharge characterizations are supposed to reflect the quality of a member's service. SLDN SURVIVAL GUIDE, *supra* note 117, at 43. An Honorable discharge characterization is given when the quality of a military member's service has generally met the standards of acceptable conduct and performance of duty for military personnel. *See id.* at 43–44. As a practical matter, the overwhelming majority of military members receive honorable discharges. A characterization of General (under honorable conditions) is typically reserved for instances where significant negative aspects of a military member's conduct or performance of duty outweigh any positive aspects. Referred to colloquially as a "General" discharge, this characterization will normally bar a service member from reenlisting or entering a different military service, and may jeopardize a service member's Montgomery G.I. Bill benefits. *Id.* at 44. An Other Than Honorable (OTH) discharge is given when the reason for separation is based on a pattern of behavior that constitutes a significant departure from the conduct expected of members of the Military Service. *Id.* Often, an OTH is given in lieu of criminal charges that would otherwise result if the military member was facing prosecution in the criminal system. *See id.*

186. Benecke, *In Memory of Rich Richenberg*, *supra* note 176.

187. *Id.*; *see Richenberg v. Perry*, 73 F.3d 172, 172–73 (8th Cir. 1995) (taking a deferential view toward military regulations); *Richenberg v. Perry*, 909 F. Supp. 1303, 1316 (D. Neb. 1995) (finding that DADT did not violate constitutional rights); *see also Richenberg v. Perry*, 97 F.3d 256, 261–62 (8th Cir. 1996) ("We join six other circuits in concluding that the military may exclude those who engage in homosexual acts Military life requires servicemembers to sacrifice privacy" (citations omitted)); *Thomasson v. Perry*, 80 F.3d 915, 949 (4th Cir. 1996) (supporting the policy "as a permissible exercise of the Legislature's plenary authority to prescribe regulations for the military").

188. Benecke, *In Memory of Rich Richenberg*, *supra* note 176.

189. *Id.*

190. U.S. GEN. ACCOUNTING OFFICE, GAO/NSIAD-92-98, DEFENSE FORCE MANAGEMENT: DOD'S POLICY ON HOMOSEXUALITY 2 (1992), available at <http://archive.gao.gov/d33t10>

In other cases, military investigators forced gay people to accept less than honorable discharge characterizations and leave quietly by threatening them with prosecution and prison.¹⁹¹

Richenberg's case brought this discriminatory practice into the national spotlight and challenged the notion that being gay outweighed one's ability to perform his duties.¹⁹² As we transition to a post-DADT world, the practice of downgrading gay military members' discharge characterizations is now well documented.¹⁹³ This should assist veterans who seek to have their characterizations upgraded in the future. Additionally, civilian applicants and employees of the federal government and its contractors, who often must possess security clearances, have this precedent to rely upon in explaining less than honorable discharges they may have received because they are gay.¹⁹⁴

*F. Holding Leaders Accountable: The Murder of PFC Barry Winchell*¹⁹⁵

Private First Class (PFC) Barry Winchell was an infantryman in the elite 101st Airborne Division at Fort Campbell, Kentucky.¹⁹⁶ Standing at more than six feet tall and weighing over 200 pounds, Winchell was a natural choice to serve as the heavy weapons man for his squad. By all accounts, he was an ideal soldier who wanted to make a career in the Army.¹⁹⁷

/146980.pdf. "U.S. forces have had policies prohibiting homosexuals from serving in the military since the beginning of World War II. DOD's current policy on homosexuality was formalized in 1982 and specifically states that: 'Homosexuality is incompatible with military service.'" *Id.*

191. See *supra* Part II.A, "Early Challenges: Fighting the Pentagon to Stop 'Asking' and 'Pursuing'" (describing the ferreting and intimidation tactics used to discover gay or lesbian military members).

192. Benecke, *In Memory of Rich Richenberg*, *supra* note 176 ("The vicious means by which senior Air Force officers sought to harm [Richenberg] . . . moved many to support both [him] and DADT repeal.").

193. SLDN SIXTH ANNUAL REPORT, *supra* note 114, at 30 n.58; see also SLDN FIRST ANNUAL REPORT, *supra* note 55, at 12 (documenting Lieutenant Colonel Trask's admission that he downgraded discharge characterizations simply because the officer was homosexual).

194. See Benecke, *In Memory of Rich Richenberg*, *supra* note 176.

195. This section is adapted from Michelle M. Benecke, *The Murder of PFC Barry Winchell: Lessons for Don't Ask, Don't Tell Repeal Implementation* (June 21, 2011) (unpublished manuscript) (on file with author). Many of the statements in this section are drawn from the author's personal involvement in the SLDN investigation that followed Winchell's murder.

196. SLDN SIXTH ANNUAL REPORT, *supra* note 114, at 1.

197. Pat & Wally Kuttles, *Murdered Soldier's Parents: Repeal 'Don't Ask, Don't Tell,'* CNN (Aug. 17, 2010), http://articles.cnn.com/2010-08-17/opinion/kuttles.dadt.son_1_barry

In the pre-dawn hours of Monday, July 5, 1999, Winchell was bludgeoned to death with a baseball bat as he lay sleeping in his barracks.¹⁹⁸ He was struck with such ferocity, his face so obliterated, that his mother and stepfather, Patricia and Wally Kutteles, could barely identify him.¹⁹⁹ Winchell never regained consciousness; he died the next day of massive head injuries.²⁰⁰ He was 21 years old.²⁰¹

Soldiers later testified that Winchell's murder followed months of anti-gay harassment.²⁰² Winchell never stated his sexual orientation publicly.²⁰³ He confided that he was gay to a fellow soldier and the soldier's wife, but they appear to have kept his confidence.²⁰⁴ At the time of his murder, Winchell was dating a transgender woman.²⁰⁵ Regardless of his actual sexual orientation, the testimony of Winchell's NCOs and fellow soldiers at trial established that he was murdered because he was labeled as being gay.²⁰⁶

The harassment against Winchell started after another soldier in the unit, Specialist (SPC) Justin Fisher, spread rumors that Winchell had gone to a gay bar, and began calling Winchell anti-gay epithets.²⁰⁷ A younger soldier, Private (PVT) Glover, followed Fisher's lead in harassing Winchell.²⁰⁸ Winchell did not report the harassment, telling friends in his unit that he feared being labeled as "gay" and kicked out under Don't Ask, Don't Tell.²⁰⁹

The harassment only worsened.²¹⁰ At one point, Fisher hit Winchell in the head with a metal dustpan, opening a wound on his face that required stitches.²¹¹ Other soldiers in the unit became so

-winchell-fort-campbell-army-commendation-medals?_s=PM:OPINION ("He loved the Army. He loved serving our country. And he was among the best in his company. Barry was awarded two Army Commendation Medals and one Army Achievement Medal with the Oak Leaf Cluster. He wanted to be the best he could be and eventually become a helicopter pilot.").

198. SLDN SIXTH ANNUAL REPORT, *supra* note 114, at 1.

199. Pat & Wally Kutteles, *supra* note 197.

200. SLDN *Investigates Murder of Army Soldier*, ALL THINGS QUEER, <http://www.rslevinson.com/gaylesissues/features/collect/winchell/blwinchell01.htm> (last visited Nov. 2, 2011).

201. Pat & Wally Kutteles, *supra* note 197.

202. SLDN SIXTH ANNUAL REPORT, *supra* note 114, at 1.

203. *Id.*

204. *Id.* at 12, 50.

205. Francis X. Clines, *Killer's Trial Shows Gay Soldier's Anguish*, N.Y. TIMES, Dec. 9, 1999, <http://www.nytimes.com/1999/12/09/us/killer-s-trial-shows-gay-soldier-s-anguish.html>.

206. SLDN SIXTH ANNUAL REPORT, *supra* note 114, at 1.

207. *Id.*

208. *Id.* at 1, 51.

209. *Id.* at 1, 50.

210. *Id.* at 50.

211. *Id.*

concerned that they reported the harassment to their supervisors, who were noncommissioned officers (NCOs).²¹² Nothing was done to stop the harassment.²¹³

Instead, the NCOs, started an ad hoc investigation into Winchell, based on the rumor that he had gone to a gay bar.²¹⁴ They questioned other soldiers in the unit about Winchell's sexual orientation in violation of DADT.²¹⁵ In addition, the NCOs began joining in the harassment by calling Winchell anti-gay epithets.²¹⁶ Testimony indicates the NCOs viewed the name calling as "normal" banter, joshing or poking fun.²¹⁷ This continued even after, as one NCO testified, they noticed that Winchell was becoming visibly depressed by the comments directed at him, which had become a daily event.²¹⁸

Finally, the harassment escalated to a point where even two of the NCOs became alarmed and sought help from the unit First Sergeant, the top enlisted leader in Winchell's unit.²¹⁹ Rather than stopping the harassment, the First Sergeant also began referring to Winchell using anti-gay slurs.²²⁰ This prompted the NCOs to report the First Sergeant to their company commander and, in an unprecedented step, the base Inspector General.²²¹ Again, nothing was done.²²²

Things escalated again over the July 4th weekend, during which there was drinking and little to no supervision in the barracks.²²³ Early in the weekend, Glover began yelling anti-gay epithets at Winchell.²²⁴ He pushed, and then shoved Winchell in an effort to get a reaction.²²⁵ When Winchell did not respond in kind, Glover punched Winchell.²²⁶ At that point, Winchell hit him back.²²⁷ In one punch, Winchell bested Glover.²²⁸ Fisher then taunted Glover for letting a "faggot" beat him up.²²⁹

212. SLDN SIXTH ANNUAL REPORT, *supra* note 114, at 50.

213. *Id.*

214. *Id.* at 12, 49.

215. *Id.* at 49.

216. *Id.* at 49–50.

217. *See id.* at 50, 68 ("As the cases . . . point out, many non-gay service members view terms such as 'fag,' 'faggot,' 'queer' and 'dyke' as a normal part of military life.").

218. SLDN SIXTH ANNUAL REPORT, *supra* note 114, at 50.

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.* at 50–51.

224. Clines, *supra* note 205.

225. SLDN SIXTH ANNUAL REPORT, *supra* note 114, at 50.

226. *Id.*

227. Clines, *supra* note 205.

228. *Id.*

229. SLDN SIXTH ANNUAL REPORT, *supra* note 114, at 51.

On that Monday, Glover attacked Winchell while he slept in a cot that he had placed in the hallway of the open-air barracks.²³⁰

It was suspected that Fisher encouraged the attack and was present in his room with the door open to view Glover's actions.²³¹ This could not be proven sufficiently at trial due to compromised evidence.²³² Soldiers have said that, on the morning of July 5th, only hours after Winchell was attacked, the First Sergeant ordered them to paint over the scene.²³³ This spoiled much of the evidence before it could be adequately collected and analyzed. Soldiers were also confined to the barracks and given a direct order not to discuss the incident or contact anyone outside the unit.²³⁴

Upon Winchell's passing the next day, the Fort Campbell public affairs office published a press release stating that Winchell died from injuries sustained in a "physical altercation" in the barracks, suggesting he was in a mutual fight with another soldier.²³⁵

After these events, soldiers defied orders and snuck out of the barracks to use a pay phone—this was before cell phones were widely available.²³⁶ The soldiers believed Winchell was murdered and they feared Fort Campbell leaders were covering up the circumstances of his death. They called the only gay authority figure they knew, one soldier's uncle. They told of anti-gay harassment against Winchell.²³⁷ The uncle called the Human Rights Campaign (HRC), a national gay rights organization, and HRC called SLDN. This occurred on Friday, July 9th.²³⁸

SLDN immediately dispatched investigators to Fort Campbell and nearby Nashville.²³⁹ The information gathered over the weekend indicated that concerns that Winchell was murdered in a hate crime were well founded.²⁴⁰

230. *Id.* at 1.

231. *See id.* at 1, 48–49.

232. *See id.* at 49.

233. *Id.*

234. *Hate Crime on Military Base*, LOG CABIN REPUBLICANS (Aug. 9, 1999), <http://www.lcrga.com/news/PFC-Barry-Winchell-Murder-Gay-Hate-Crime-Military-Fort-Campbell/199908091557.shtml>.

235. SLDN SIXTH ANNUAL REPORT, *supra* note 114, at 49.

236. Michelle Benecke & C. Dixon Osburn, *SLDN Letter—Request for Meeting Regarding the Alleged Murder of PFC Barry Winchell*, ALL THINGS QUEER (July 12, 1999) [hereinafter, Benecke & Osburn, *SLDN Letter*], <http://www.robertslevinson.com/gaylesissues/features/collect/winchell/blwinchell02.htm>.

237. SLDN SIXTH ANNUAL REPORT, *supra* note 114, at 49.

238. Benecke & Osburn, *SLDN Letter*, *supra* note 236.

239. Michelle M. Benecke & C. Dixon Osburn, *SLDN Memorandum*, ALL THINGS QUEER (July 14, 1999), <http://www.rslevinson.com/gaylesissues/features/collect/winchell/blwinchell04.htm> (last visited Nov. 2, 2011).

240. *See* Benecke & Osburn, *SLDN Letter*, *supra* note 236 (“Based on . . . preliminary findings, . . . it appears that concerns about the possibility of an anti-gay hate crime are well-grounded and deserve full investigation.”).

Of the next few weeks, Pat Kutteles has said that much of what the Army told them was untrue and that everything I told them turned out to be true. As a result, the Kutteleses asked for SLDN's assistance. SLDN advised the Kutteleses throughout their ordeal and, on their behalf, prodded Army officials to more fully investigate the case.²⁴¹ Among others, SLDN asked Pentagon officials to send a team of more experienced homicide investigators to Fort Campbell.²⁴² Investigators from the Fort Campbell Criminal Investigation Division initially denied that Winchell's death was a hate crime—without ever having investigated the possibility.²⁴³ Investigators continued to deny to SLDN finding any evidence of a hate crime into late August 1999, even though at that point it was indisputable.²⁴⁴

At his widely publicized trial, PVT Glover was convicted of premeditated murder and sentenced to life with the possibility of parole for the murder of PFC Winchell.²⁴⁵ SPC Fisher received a sentence of twelve years on lesser charges as part of a pretrial agreement.²⁴⁶

After Winchell's murder, harassment at Fort Campbell skyrocketed.²⁴⁷ Dozens of soldiers called SLDN in fear for their lives because of the escalating situation.²⁴⁸ Talk of "killing fags" went unchecked and became commonplace in many units; it was accompanied by general threats to kill anyone found to be gay.²⁴⁹ Time and again, soldiers told SLDN, "If it can happen to a guy like Winchell, it can happen to me."

Graffiti appeared throughout Fort Campbell that glorified the killing of Winchell and encouraged the murder of gay people generally.²⁵⁰ The graffiti was so widespread that it included public venues such as the Family Support Center, where a large two to three foot long drawing of a baseball bat with the words "Fag Whacker" written inside of it appeared on a bathroom wall.²⁵¹ At a base recreation center, this graffiti appeared: "All Fagets [sic] in the Army will be killed."²⁵² Officers and NCOs who used these facilities every day could not miss seeing it, yet nothing was done about it.²⁵³

241. SLDN SIXTH ANNUAL REPORT, *supra* note 114, at 52.

242. *Id.*

243. *Id.* at 49.

244. *Id.*

245. *Id.*

246. *Id.*

247. SLDN SIXTH ANNUAL REPORT, *supra* note 114, at 52 (describing "increased anti-gay epithets, comments and graffiti at Fort Campbell").

248. *Id.* at 3; *Hate Crime Military Base*, *supra* note 234.

249. SLDN SIXTH ANNUAL REPORT, *supra* note 114, at 52.

250. *Id.*

251. *Id.*

252. *Id.* (alteration in original) (internal quotation marks omitted).

253. *Id.* at 52–53.

Meanwhile, NCOs began calling “jodies,” rhyming jingles that keep running formations in step, praising Winchell’s murder.²⁵⁴ One soldier reported the following jody to SLDN: “Faggot, faggot, down the street. Shot him, shot him, till he retreats.”²⁵⁵ Some soldiers indirectly referenced Winchell, joking about baseball bats and killing “faggots.”²⁵⁶

In this command climate, many soldiers felt they had no choice but to come out and accept a discharge under DADT as their only recourse to protect their lives.²⁵⁷ Winchell’s murder and the escalating harassment destroyed any illusion that they could protect themselves and “fit in” by pretending to be straight.²⁵⁸ In dozens of cases, SLDN intervened to protect military members and obtain speedy discharges to remove them from threatening command climates.²⁵⁹ No soldier with whom we worked wanted to leave the military, but for the threats he or she experienced.

Throughout this time, SLDN sounded the alarm and repeatedly asked the Commanding General to take action to send a different message and stem the harassment.²⁶⁰ Nothing was done. Instead, Major General Robert Clark had the audacity to suggest that the soaring numbers of gay discharges in the wake of PFC Winchell’s murder were the result of gays voluntarily leaving because they wanted a so-called easy way out of the military.²⁶¹

Pat and Wally Kutteles found it deeply disturbing that leaders were mocking their son’s murder and contributing to harassment against others. A quiet Midwestern couple, they reluctantly decided to go public out of concern that other soldiers might be killed. Lisa Myers of NBC News broke the story of Winchell’s murder and the growing harassment at Fort Campbell,²⁶² which raised the issue to national attention.

254. *Id.* at 51.

255. SLDN SIXTH ANNUAL REPORT, *supra* note 114, at 3 (internal quotation marks inserted); Clines, *supra* note 205.

256. *See, e.g.*, SLDN SIXTH ANNUAL REPORT, *supra* note 114, at 52 (relating how one soldier, responding to another’s comment of “You are a faggot,” added, “That’s right, and I will beat you with a baseball bat” (internal quotation marks omitted)).

257. *Id.* at 2–3.

258. *See* Clines, *supra* note 205.

259. *See, e.g.*, SLDN SIXTH ANNUAL REPORT, *supra* note 114, at 43 (discussing case of Petty Officer Second Class Barbe, discharged after increasingly menacing threats from her supervisor).

260. JEFFREY M. CLEGHORN ET AL., SERVICEMEMBERS LEGAL DEF. NETWORK, CONDUCT UNBECOMING: THE EIGHTH ANNUAL REPORT ON “DON’T ASK, DON’T TELL, DON’T PURSUE, DON’T HARASS” 15 (2002).

261. Elizabeth Becker, *Policy on Gays Part of the Drill at Army Base*, N.Y. TIMES, Feb. 14, 2000, at A1.

262. *Today: Questions Emerging About Why Soldier Was Beaten To Death In Kentucky* (NBC television broadcast Aug. 11, 1999) (transcript available on LexisNexis).

In the wake of the Winchell case, public debate surrounding DADT reached its highest level since the policy was first announced in 1993. Political candidates,²⁶³ the public,²⁶⁴ and newspaper editorial boards²⁶⁵ all called for repeal of the law. White House and Pentagon officials hastened to respond.²⁶⁶ The Commanding General left his command early, citing family medical issues, and was delayed his anticipated promotion.²⁶⁷ It was widely perceived that his early departure was related to the Winchell case.²⁶⁸ For the first time, a high ranking leader faced consequences for tolerating anti-gay violence and harassment.

Additionally, White House and Pentagon officials implemented a number of systemic changes to stem harassment at Fort Campbell and across the Army.²⁶⁹ Three months after Winchell's murder, President Clinton signed an Executive Order that amended the Manual for Courts-Martial.²⁷⁰ The newly amended manual provided for sentence

263. SLDN SIXTH ANNUAL REPORT, *supra* note 114, at 6 & nn.10–15 (citing *Rejecting "Don't Ask, Don't Tell,"* N.Y. TIMES, Dec. 10, 1999, at A34 ("Hillary Rodham Clinton was exactly right when she told a gay audience at a fund-raiser in SoHo this week that homosexuals ought to be able to serve openly in the United States military."); Ceci Connolly & Bradley Graham, *Gore Vows New Policy on Gays in Military*, WASH. POST, Dec. 14, 1999, at A1; Sandra Sobieraj, *Bradley: Civil Rights Act Protection, Open Military Service for Gays*, ASSOCIATED PRESS, Sept. 16, 1999; *Excerpts from the Debate Among G.O.P. Candidates*, N.Y. TIMES, Jan. 7, 2000, at A15; James Warren, *McCain Says Gore Wrong on Military Gays Policy*, CHI. TRIB., Dec. 15, 1999, http://articles.chicagotribune.com/1999-12-15/news/9912150086_1_sen-john-mccain-gore-criticism-gore-aides; *Radio Interview of President Clinton* (CBS radio broadcast Dec. 11, 1999) (transcript on file with U.S. Department of State Office of International Information Programs)).

264. *Id.* at 6 & nn.16–17 (citing ALAN S. YANG, FROM WRONGS TO RIGHTS: PUBLIC OPINION ON GAY AND LESBIAN AMERICANS MOVES TOWARD EQUALITY 12–13 (1999); Ronald G. Shafer, *The Wall Street Journal/NBC News Poll*, WALL ST. J., at A1 ("DON'T CARE: The public, by 74% to 22%, favors allowing gays to serve in the military.")).

265. *Id.* at 6–7 & n.18 (citing *"Don't Ask, Don't Tell" Policy Doesn't Work*, ARIZ. REPUBLIC, Dec. 15, 1999, at B8; Editorial, *Enforcing 'Don't Harass' 'Don't Ask, Don't Tell,'* BOS. GLOBE, Feb. 7, 2000, at A14; *Don't Lie: Clinton Admits "Don't Ask Don't Tell" is a Policy Failure*, PLAIN DEALER (Cleveland), Dec. 20, 1999, at 8B; *Military's Gay Policy: Time to Get Real*, DAYTON DAILY NEWS, Dec. 15, 1999, at 14A; *Gays in Military: Clinton Admits "Don't Ask, Don't Tell" Is a Failure*, HOUS. CHRON., Dec. 21, 1999, at 34; David P. Sheldon, *Don't Expect a Change in "Don't Ask . . ."*, NEWSDAY, Dec. 16, 1999, at A65; *Bigotry in the Military*, N.Y. TIMES, Aug. 30, 1999, at A18; *Rethink "Don't Ask, Don't Tell,"* PROVIDENCE J.-BULLETIN, Dec. 15, 1999, at 6B; Deborah Mathis, *Anti-homosexual Policy Avoids Reality*, SEATTLE POST-INTELLIGENCER, Aug. 19, 1999, at A11; *Don't Ask*, WASH. POST, Dec. 15, 1999, at A46).

266. *Id.* at 2.

267. *National News Briefs: Fort Campbell General Is Reassigned Again*, N.Y. TIMES, July 26, 2000, at A16; *Slain Gay Soldier's Case Slows a General's Rise*, N.Y. TIMES, May 18, 2003, at N32.

268. Steven Lee Myers, *Transfer of General at Site of Anti-Gay Killing Is Protested*, N.Y. TIMES, June 9, 2000, at A24.

269. SLDN SIXTH ANNUAL REPORT, *supra* note 114, at 4.

270. *Id.* at 69.

enhancement regarding hate crimes based on race, gender, sexual orientation, and disability²⁷¹—a first for the military. The recommendation from the military's Joint Service Committee had been on the President's desk for more than one year; it was signed too late to be used in Winchell's case.²⁷²

The Department of Defense added "Don't Harass" to its description of the law: "Don't Ask, Don't Tell, Don't Pursue, Don't Harass."²⁷³ Through sheer repetition, SLDN had been successful in changing the accepted reference from "Don't Ask, Don't Tell" to "Don't Ask, Don't Tell, Don't Pursue" to underscore the need to halt investigations designed to ferret out GLB military members. The Pentagon also strengthened harassment guidelines, making it clear from the first time that anti-gay epithets such as "faggot," "fag," "queer" and "dyke"—the most prevalent form of abuse—constituted harassment.²⁷⁴ In response to a long-standing SLDN request, the Secretary and Chief of each service issued statements denouncing anti-gay harassment.²⁷⁵

The Army Inspector General, at SLDN's request, launched an investigation into the command climate at Fort Campbell.²⁷⁶ Secretary

271. *Id.* The Executive Order's hate crime provision states in part, "Evidence in aggravation may include evidence that the accused intentionally selected any victim or any property as the object of the offense because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability or sexual orientation of any person." *Id.* (quoting Executive Order No. 13,140 (1999) (internal quotation marks omitted)).

272. *Id.* at 5.

273. Linda D. Kozaryn & Jim Garamone, *Cohen Adds 'Don't Harass' to Homosexual Policy, Says It Can Work*, DEP'T OF DEF. (Dec. 29, 1999), <http://www.defense.gov/news/newsarticle.aspx?id=41912>.

274. SLDN SIXTH ANNUAL REPORT, *supra* note 114, at 4. These were more specific in regard to anti-gay comments than prior guidance issued one month after Winchell's murder stating that "[c]ommanders must take appropriate actions [when incidents of harassment are reported], with due consideration given to the safety of persons who report threats or harassment, and see that persons found to have made threats or engaged in threatening or harassing conduct are held fully accountable." Memorandum from Rudy de Leon, Undersec'y of Def. for Pers. & Readiness, Guidelines for Investigating Threats Against or Harassment of Servicemembers Based on Alleged Homosexuality (Aug. 12, 1999), available at <http://dont.stanford.edu/regulations/memo1.htm>. The guidelines reiterated a March 1997 memorandum issued by the same office by Undersecretary of Defense for Personnel and Readiness, Edwin Dorn, to the secretaries of the military departments, Chairman of the Joint Chiefs of Staff and Inspector General. See Memorandum from Edwin Dorn, *supra* note 144 (stating that service members should feel comfortable reporting crimes to commanders).

275. SLDN SIXTH ANNUAL REPORT, *supra* note 114, at iv.

276. STACEY L. SOBEL ET AL., SERVICEMEMBERS LEGAL DEF. NETWORK, CONDUCT UNBECOMING: THE SEVENTH ANNUAL REPORT ON "DON'T ASK, DON'T TELL, DON'T PURSUE, DON'T HARASS" 77 (2001) [hereinafter SLDN SEVENTH ANNUAL REPORT], available at http://sldn.3cdn.net/cb11db6afdb882794_jbm6iidrb.pdf (citing DEP'T OF THE ARMY INSPECTOR GEN., FORT CAMPBELL TASK FORCE, DAIG SPECIAL ASSESSMENT OF ALLEGATIONS OF VIOLATIONS OF THE DOD HOMOSEXUAL CONDUCT POLICY AT FORT CAMPBELL (2000)).

Cohen also ordered a Department of Defense Inspector General investigation into anti-gay harassment throughout the military.²⁷⁷ The Inspector General conducted random surveys of 71,570 active duty military members from all services concerning the frequency of anti-gay harassment.²⁷⁸ In March 2000, the Inspector General released the survey results, which showed that anti-gay harassment was commonplace and tolerated by a significant number of leaders.²⁷⁹ At the press conference releasing the report, the Pentagon's spokesman acknowledged, "[W]e need to do more work on this policy. In short . . . offensive comments about homosexuals were commonplace and the majority believed that . . . these offensive comments[] were tolerated to some extent within the military."²⁸⁰

Following the release of the Inspector General's survey results, Secretary of Defense William Cohen formed a working group of top Defense Department leaders and charged them to produce recommendations to combat harassment.²⁸¹ In July 2000, the working group produced a thirteen-point action plan addressing policy, training, reporting, and discipline for those who harassed GLB military members.²⁸² Unfortunately, the recommendations were never implemented.²⁸³ Additionally, Secretary Cohen ordered mandatory training for all service members on the investigative limits of "Don't Ask,

277. SLDN SIXTH ANNUAL REPORT, *supra* note 114, at iv.

278. OFFICE OF INSPECTOR GEN., DEPT OF DEF., EVALUATION REPORT: MILITARY ENVIRONMENT WITH RESPECT TO THE HOMOSEXUAL CONDUCT POLICY i, 4 (2000).

279. *Id.* at i–ii, 6, 10–11.

80 percent of the 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 [incident] that they considered to be harassment based on perceived homosexuality. About 5 percent believed that [it] was tolerated by someone in their . . . chain of command, and 10 percent believed [harassment] was tolerated by other unit members.

Id. at i–ii. One-third of the respondents, roughly 23,600 service members, provided more information on incidents they had experienced or witnessed. *Id.* at 10. Twenty-two percent (or 5,192 service members) said the incident was witnessed by a senior officer, and of these, 73 percent (or 3,790 service members), stated that the senior officer did nothing immediately to stop the harassment. *Id.* at 11. The Marine Corps led the branches with 45 percent reporting "they had heard offensive comments often or very often," followed by the Army at 37 percent. *Id.* at 6.

280. Kenneth Bacon, Assistant Sec'y of Def. for Pub. Affairs, Department of Defense News Briefing with Deputy Undersecretary of Def. for Planning Frank Rush (Mar. 24, 2000), <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=1136>.

281. *Id.*

282. Department of Defense Working Group, Anti-Harassment Action Plan, July 21, 2000, *available at* <http://www.defense.gov/news/Jul2000/plan20000721.htm>.

283. SLDN SEVENTH ANNUAL REPORT, *supra* note 276, at vii.

Don't Tell, Don't Pursue, Don't Harass."²⁸⁴ The order partially adopted a long-standing SLDN recommendation.

Upon taking command, the new Commanding General of Fort Campbell invited SLDN to address his leadership. He sent a message by requiring every Battalion-level Commander and Command Sergeant Major to attend a mandatory meeting to discuss the Winchell case and make recommendations to prevent such a tragedy from occurring again. Finally, a leader at Fort Campbell weighed in against violence and harassment against suspected GLB soldiers.

Even these unprecedented developments would not stop harassment on their own. The DADT law itself branded GLB Americans as "lesser" and thereby encouraged less than equal treatment. Further, so long as military leaders were missing in action, harassment would continue to fester. Marine Lieutenant Colonel Edward Melton is one example of the kind of intransigent leader with whom SLDN frequently dealt.²⁸⁵ In October 1999, Melton sent the following e-mail to his boss and subordinates at Twenty-Nine Palms, California in response to Department of Defense guidance to train one's troops on the need to properly apply the "Homosexual Conduct Policy" and to stop anti-gay harassment.²⁸⁶ Without a trace of irony, Melton callously wrote in his e-mail:

Due to the "hate crime" death of a homo in the Army, we now have to take extra steps to ensure the safety of the queer who has 'told' (not kept his part of the DOD "don't ask, don't tell" policy). Commanders now bear the responsibility if someone decides to assault the young backside ranger. Be discreet and careful in your dealings with these characters. And remember, little ears are everywhere.²⁸⁷

Rather than set the example for his marines, this officer chose to undercut the new leadership guidance and convey to his subordinates that they need not take it seriously.²⁸⁸

The developments in the wake of Winchell's murder, however, provided SLDN and the families of military members with a greater chance of holding leaders accountable. Shocked by Melton's disregard for their son's murder, for example, Pat and Wally Kutteles sought accountability in a letter to the Commandant of the Marine Corps,

284. Memorandum from Rudy de Leon, *supra* note 274.

285. See SLDN SIXTH ANNUAL REPORT, *supra* note 114, at 55.

286. *Id.*

287. *Id.* (quoting an e-mail from Lt. Col. Edward Melton to his subordinates and copying his superior officer (Oct. 20, 1999)). This e-mail excerpt was part of a chain of e-mails from the end of October, 1999. *Id.*

288. *Id.*

General J. L. Jones, and the base commander, Major General Clifford Stanley.²⁸⁹ While they did not receive a reply, on January 26, 2000, the *San Diego Union-Tribune* reported the statement of a combat center spokesman: “Administrative action has been taken against Col. Melton, and he has been transferred.”²⁹⁰

Perhaps more than any other event in the DADT era, the murder of PFC Barry Winchell revived the public debate over DADT. Winchell’s brutal murder and the military’s callous inaction stood as stunning contradictions to the oft-repeated assertions of military officials that “the policy is working.”²⁹¹ By this time, SLDN had by and large overcome initial skepticism on the part of journalists through our accurate reporting and mountains of evidence. Pentagon spokespersons, however, continued to try to dismiss our findings.²⁹² These included prior warnings about the likelihood of another murder if leaders did not take measures to stop anti-gay harassment.²⁹³ In the Winchell case, it became clear that harassment and abuse were the norm, not the exception. The military establishment acquiesced in, if not condoned, abuses.²⁹⁴ The Pentagon’s credibility never recovered.

G. Protecting Use of New Media

Senior Chief Petty Officer Timothy McVeigh was a senior enlisted leader onboard the nuclear submarine USS Chicago when the

289. *Id.* Their letter said, in part, “Melton’s e-mail [also] shows a lack of concern for the men and women who serve under him and may be in need of his guidance, leadership or protection. We request that Lt. Col. Melton is held accountable” *Id.* (alteration in original) (quoting letter from Patty & Wally Kutteles to Gen. J. L. Jones and Melton’s base commander, Maj. Gen. Clifford Stanley).

290. Stephen Green, *Don’t Ask, Don’t Tell’ Training to Be Set Up; Pentagon Will Stress ‘Don’t Harass’ as Well*, SAN DIEGO UNION-TRIB., Jan. 26, 2000, at A-1 (internal quotation marks omitted).

291. *See, e.g.*, Bernard D. Rostker, Undersec’y Def. (Pers. & Readiness), Department of Defense News Briefing (July 21, 2000), <http://www.defense.gov/Transcripts/Transcript.aspx?TranscriptID=1537> (defending DADT as a good law that protects privacy and will continue to work well with additional training).

292. *See* SLDN SIXTH ANNUAL REPORT, *supra* note 114, at 47. The following quote is just one example:

What has been alleged is that there is a lot of harassment of homosexual service members within the military. We have always said that every time we have clear evidence of harassment, we will investigate that. . . . We don’t believe that there has been escalating harassment of gays in the military, and I don’t believe that the evidence shows that. . . . [I]t’s not an issue that generally comes up, that this is a problem for commanders.

Id. (alteration in original) (quoting Kenneth Bacon, Defense Department Spokesman, Dec. 9, 1999).

293. *See, e.g.*, SLDN THIRD ANNUAL REPORT, *supra* note 18, at 19 (recounting Seaman Allen Schindler’s murder and the “dangerous” dismissal of death threats).

294. *See, e.g.*, SLDN FIFTH ANNUAL REPORT, *supra* note 22, at 24–25 (providing accounts of harassment in the Marine Corps and Navy); SLDN SIXTH ANNUAL REPORT, *supra* note 114, at v, 12, 49–50 (detailing pervasive abuse at Fort Campbell).

Navy tried to discharge him in 1997 based on information that it obtained about McVeigh's identity from America Online (AOL).²⁹⁵ McVeigh, then 36, had risen quickly through the ranks to earn this senior position after 17 years in the Navy.²⁹⁶

McVeigh's case reminds one of the saying, "No good deed goes unpunished." McVeigh's troubles began in the course of his work on a toy drive for the families of sailors onboard his submarine. On September 2, 1997, McVeigh mistakenly used his personal e-mail account when corresponding with the civilian organizer, the wife of another senior enlisted sailor on the USS Chicago.²⁹⁷ McVeigh's e-mail addressed administrative and logistical details of the toy drive and was signed, "Tim."²⁹⁸

The screen name on McVeigh's personal account was "boysrch."²⁹⁹ The organizer searched through AOL's member profile directory and found that "boysrch," an AOL subscriber, was a military member named Tim who lived in Honolulu, Hawaii.³⁰⁰ She also found that "Tim" identified his marital status as "gay."³⁰¹ The organizer and McVeigh had e-mailed back and forth about the toy drive on several prior occasions.³⁰² Although the profile did not include a full name or any other specific information tying it to McVeigh, the organizer suspected it was his profile.³⁰³ She turned over the e-mail to her husband and the e-mail made its way to McVeigh's commanding officer and the submarine's legal adviser, a Navy lawyer.³⁰⁴

The legal advisor set out to prove the e-mail and profile belonged to McVeigh.³⁰⁵ She directed a paralegal to call AOL and elicit information that would link McVeigh to the profile and screen name.³⁰⁶ The paralegal called AOL's technical support number and spoke to a representative named "Owen."³⁰⁷ At McVeigh's subsequent discharge hearing, the paralegal admitted that he lied to "Owen" by claiming to be a friend of McVeigh's who was "in receipt of a fax sheet and wanted

295. SLDN FOURTH ANNUAL REPORT, *supra* note 14, at 24.

296. *McVeigh v. Cohen*, 983 F. Supp. 215, 217 (D.D.C. 1998); SLDN FOURTH ANNUAL REPORT, *supra* note 14, at 24.

297. *McVeigh*, 983 F. Supp. at 217.

298. *Id.*

299. *Id.*

300. *Id.*

301. *Id.*

302. *Id.*

303. *McVeigh*, 983 F. Supp. at 217.

304. *Id.*

305. *Id.*

306. *Id.*

307. *Email Press Release: Fears of Cyber-Spying Escalate, as Navy Prepares to Discharge Sailor, America Online and Navy May Have Violated Law, Experts Say*, WIRED STRATEGIES (Jan. 12, 1998), <http://www.wiredstrategies.com/email9.htm>.

to confirm the profile sheet, [and] who it belonged to.”³⁰⁸ The para-legal did not reveal that he was in the Navy, or that he was calling as part of a Navy investigation.³⁰⁹ AOL’s “Owen” verified the profile belonged to McVeigh.³¹⁰

Based on “Owen’s” identification, the Navy moved to discharge McVeigh, claiming he had violated DADT by making a statement of homosexuality in his AOL profile.³¹¹ An administrative discharge board met on November 7, 1997, and voted to discharge McVeigh.³¹²

SLDN and McVeigh’s military attorney collected ample evidence that the Navy had violated its own limits against investigations under DADT.³¹³ The Navy’s legal advisor had engaged in a fishing expedition based on an anonymous profile, which was not “credible information” sufficient to start an inquiry.³¹⁴ SLDN had argued since the inception of the law to exclude information obtained by the military in violation of its own limits on investigations.³¹⁵ Within the military’s administrative system, however, there was no such provision.³¹⁶

While there was no chance of saving McVeigh’s career within the military’s process, the case had broader implications for internet privacy for all Americans.³¹⁷ We sought help from some of the nation’s foremost internet privacy experts.³¹⁸ They volunteered many hours and, with SLDN, intervened with top Defense Department lawyers and officials, members of Congress and the press, raising the case to national attention. An intensive internet advocacy campaign launched on McVeigh’s behalf was, on its own, a landmark at the time.³¹⁹

308. *McVeigh*, 983 F. Supp. at 217 (alteration in original) (internal quotation marks omitted).

309. *Id.*

310. *Id.*

311. *Id.*

312. *Id.* at 217–18.

313. *Id.* at 219–20.

314. *McVeigh*, 983 F. Supp. at 219.

315. *See, e.g.*, SLDN SEVENTH ANNUAL REPORT, *supra* note 276, at xi (recommending an exclusionary rule for illegally obtained evidence).

316. *Legal Services FAQ*, U.S. NAVY JUDGE ADV. GEN.’S CORPS, http://www.jag.navy.mil/legal_services/legal_services_faq.htm (last visited Nov. 2, 2011) (“The Military Rules of Evidence generally do not apply to boards and a board’s decisions . . .”).

317. *McVeigh*, 983 F. Supp. at 221 (“Certainly, the public has an inherent interest in the preservation of privacy rights In this case in particular, where the government may well have violated a federal statute in its zeal to brand [McVeigh] a homosexual, the actions of the Navy must be more closely scrutinized . . .”).

318. These included the Electronic Privacy Information Center, the Center for Technology and Democracy, Wired Strategies, and SLDN cooperating attorneys from the Proskauer Rose law firm.

319. *See, e.g.*, David Sobel, *Email Press Release: Internet Lawyer Writes Navy*, WIRED STRATEGIES (Jan. 14, 1998), <http://www.wiredstrategies.com/email15.htm> (“[T]his case raises serious questions concerning the Navy’s compliance with federal privacy law.

In a coordinated effort, SLDN cooperating attorneys filed for a preliminary injunction on McVeigh's behalf to prevent the Navy from discharging him.³²⁰ McVeigh argued that the Navy violated his rights under the Electronic Communications Privacy Act (ECPA) as well as DADT and the 4th and 5th Amendments to the U.S. Constitution.³²¹

Professor Charles Moskos, the author of DADT who first suggested the law to Senator Sam Nunn, filed an affidavit on behalf of McVeigh stating that the Navy's actions violated the policy he created:

In my opinion, the Navy's actions in this case violated the "Don't Ask, Don't Tell" policy. In simple terms, Senior Chief McVeigh did not "tell" in a manner contemplated under the policy In my opinion, this sort of heavy-handed "enforcement" by the Navy will inadvertently undermine the "Don't Ask, Don't Tell" policy by eroding confidence among servicemen that the Navy will not "ask" if they do not "tell."³²²

Further, Moskos declared that McVeigh's discharge should be halted to send a message to the Navy to refrain from heavy handed investigations and to preserve DADT.³²³

In a strongly worded opinion, Judge Stanley Sporkin enjoined the Navy from discharging McVeigh, based on both DADT and the ECPA.³²⁴ Judge Sporkin found "the Navy has gone too far," and chastised the Navy for "embark[ing] on a search and 'outing' mission" against McVeigh.³²⁵

Prior to the litigation, SLDN met with top AOL officials to apprise them of the company's role in having McVeigh fired. AOL executives were genuinely shocked to learn the facts of the case. The company cooperated with McVeigh's attorneys and provided information showing that the Navy illegally obtained McVeigh's identity.³²⁶

The case was ultimately settled in June of 1998.³²⁷ McVeigh, who had been denied a promotion because of his case, was permitted

Specifically, [it] appears to have violated the Electronic Communications Privacy Act ("ECPA") during the course of its investigation of Mr. McVeigh.").

320. Plaintiff's Reply Memorandum in Support of His Motion for a Temporary Restraining Order, Jan. 21, 1998, *McVeigh v. Cohen*, 983 F. Supp. 215 (D.D.C. 1998) (No. 98-116).

321. *Id.* at 8.

322. Declaration of Professor Charles Moskos, *supra* note 11, ¶¶ 7-8.

323. *Id.* ¶¶ 5, 9.

324. *McVeigh v. Cohen*, 983 F. Supp. 215, 219-22 (D.D.C. 1998).

325. SLDN FOURTH ANNUAL REPORT, *supra* note 14, at 20, 22.

326. *McVeigh*, 983 F. Supp. at 221; *see also* SLDN FOURTH ANNUAL REPORT, *supra* note 14, at 24.

327. Bradley Graham, *Gay Sailor Takes Navy Retirement Settlement; AOL Also Will Pay for Privacy Violation*, WASH. POST, June 13, 1998, at A3.

to retire as a Master Chief Petty Officer, the senior rank he had earned.³²⁸ The Navy also agreed to pay his legal fees.³²⁹ Separately, AOL agreed to pay damages to McVeigh for disclosing his identity to the Navy.³³⁰

The impact of McVeigh's case far exceeded his immediate situation. McVeigh's willingness to challenge the Navy's actions secured the use of the internet for military members to reach out from their isolation and connect with others—albeit anonymously under DADT—to seek legal help, to bring abuses against them to public attention or simply to find community.³³¹ Reaching out was still fraught with risk; service members were discharged throughout the DADT era after co-workers or family members snooped on their e-mail and turned them in to military officials. Nonetheless, later groups of military members, such as OutServe and Servicemembers United, used the power of the internet to enable service members to contribute their experiences to the debate leading up to the Congressional vote to end DADT.³³² McVeigh's legacy empowers servicemembers of today.

H. Limiting the Scope of “Don't Tell”

In announcing the new policy, President Clinton assured Americans that there would be “due regard for the privacy of individuals.”³³³ Yet, Corporal Kevin Blaesing, serving with the Marine Security Force in Charleston, South Carolina, was turned in by a Navy psychologist, simply because he asked about sexuality during private counseling.³³⁴ Blaesing's first commander did not act on this information.³³⁵ After that commander left for a new assignment, the incoming commander took action to discharge Blaesing, despite being informed by the Navy psychologist that Blaesing never said he was gay or discussed his own sexual orientation, and despite being advised by his legal advisors not

328. *Id.*

329. *Id.*

330. *Id.*

331. Air Force Major Mike Almy was discharged after investigators read his personal e-mails. Nick Wing, *Mike Almy, Soldier Discharged After Air Force Searched His Private Emails, “Dumbfounded” by McCain Comments*, HUFFINGTON POST (Sept. 22, 2010, 1:23 AM), http://www.huffingtonpost.com/2010/09/22/mike-almymccain-gay_n_734726.html. Almy subsequently testified before the Senate Armed Forces Committee and spoke to news outlets, refuting claims “that the military was not ‘seeking out’ servicemembers who were gay.” *Id.*

332. See OUTSERVE, www.outserve.org (last visited Nov. 2, 2011); SERVICEMEMBERS UNITED, www.servicemembersunited.org (last visited Nov. 2, 2011).

333. Clinton, *supra* note 12, at A12.

334. SLDN FIRST ANNUAL REPORT, *supra* note 55, at 10.

335. “Don't Ask, Don't Tell”—*Marine Style*, NEWSWEEK (June 12, 1994), <http://www.thedailybeast.com/newsweek/1994/06/12/don-t-ask-don-t-tell-marine-style.html>.

to proceed.³³⁶ Blaesing was discharged in December 1994.³³⁷ Contrary to the recommendations of Blaesing's supervisors, the commander gave Blaesing the lowest possible recommendation for re-enlistment, an insult given Blaesing's honorable service.³³⁸

Blaesing's story illustrates the falsehood of one of the primary initial defenses of the DADT policy: that it would merely restrict public statements of sexual orientation, not private ones. During the 1993 debate, Senator Sam Nunn and others conjured up the specter of GLB military members standing on tables in military mess halls, shouting out their sexual orientation.³³⁹ Military scholar Professor Charles Moskos pitched DADT to Nunn, in part to address the "public broadcasting" scenario: the military would not intrude, but gay service members would not go public.³⁴⁰ Congress latched onto the proposal and, with the writing on the wall, the Administration capitulated.³⁴¹

When implementing DADT, the Department of Defense again underscored that it "would protect a 'zone of privacy' for all service-members,"³⁴² and termed sexual orientation a "personal and private matter."³⁴³ The new regulations specifically permitted statements to security clearance personnel, as described above, and the military already had provisions respecting attorney-client privilege and chaplain-penitent privilege, similar to civilian law.³⁴⁴

In reality, the military enforced "Don't Tell" in ways so intrusive that most Americans would never have contemplated the possibility. The military discharged service members who confided in parents, other "family members, close friends, church members, doctors, psychologists and other health professionals"—even chaplains.³⁴⁵

336. SLDN FIFTH ANNUAL REPORT, *supra* note 22, at 10; SLDN FIRST ANNUAL REPORT, *supra* note 55, at 10.

337. *Courage Under Fire*, ADVOCATE, Apr. 15, 1997, at 25, 25.

338. SLDN FIRST ANNUAL REPORT, *supra* note 55, at 12.

339. *See, e.g., Policy Hearings*, *supra* note 13, at 482–83 (statement of Sen. John F. Kerry) (documenting the debate between Senator Kerry and Senator Nunn).

340. *See id.* at 421–22 (transcribing Professor Charles Moskos's reply to questioning about "Don't Ask, Don't Tell").

341. *See* DEPT. OF DEF. DIRECTIVE NO. 1304.26 (Dec. 21, 1993), *available at* <http://biotech.law.lsu.edu/blaw/dodd/corres/html2/d130426x.htm>.

342. SLDN SECOND ANNUAL REPORT, *supra* note 39, at 4.

343. *Id.* at 5 (internal quotation marks omitted).

344. *Id.* at 4.

345. *Id.* More frequently, chaplains told GLB military members to turn themselves in, without informing them of the consequences. SLDN FOURTH ANNUAL REPORT, *supra* note 14, at 18–19. Military chaplains are not required to minister to a military member in cases where they feel it violates their religious precepts. The alternative is to refer the military member in question to another chaplain. Instead, many chaplains ignored this alternative, berated GLB military members who sought their spiritual guidance, and turned them in or advised military members to turn themselves in. *Id.* at 18–19.

At SLDN, we called this attempt to enforce a “gag rule” in communications between military members and their families, professional health care providers and spiritual advisors “chilling.”³⁴⁶ We believed that “[m]ost Americans would be appalled to learn that their tax dollars are being spent on such unprecedented invasions into relationships that are widely accepted as private and confidential.”³⁴⁷

A combination of past practices and new Pentagon guidance conspired to make this a virulent trend. The Navy erroneously instructed therapists that they had a duty to turn in GLB military members.³⁴⁸ Air Force memoranda,³⁴⁹ as described above, directed inquiry officers to locate and question parents, close civilian friends, mentors such as high school guidance counselors, and other confidants about the sexual orientation and activities of GLB military members.³⁵⁰ The memoranda provided a “laundry list of twenty-five questions” that inquiry officers should ask about the military members’ private lives,³⁵¹ in an effort to dig up additional information that could be used against them. Parents, like the mother of Air Force Captain Earl Brown,³⁵² described being “shocked” when Air Force officials showed up at their homes and proceeded to question them about their children’s sexual orientation and sex lives.³⁵³ Brown was just one of numerous military members targeted in this manner.³⁵⁴ The mentality reflected in the Air Force memoranda infected all the services.

Even more insidiously, this approach to enforcing DADT created incentives for hatemongers to harass and assault suspected GLB service members, who were unable to report the abuse to any of the usual officials.³⁵⁵ They could not report crimes against them to law

346. SLDN SECOND ANNUAL REPORT, *supra* note 39, at 7.

347. *Id.*

348. See SLDN FIFTH ANNUAL REPORT, *supra* note 22, at 35–36 (discussing the instructions in the *General Medical Officer Manual*).

349. The Air Force memoranda first arose in the context of military members who faced discharge after attending college or professional schooling funded by the service. In these cases, the Air Force adopted a “prove you are gay” policy that not only violated DADT, but that potentially subjected Air Force members to criminal prosecution and prison if information about their sexual activities came to light. In effect, the Air Force wielded the hammer of criminal prosecutions to force “valuable” GLB military members to stay tightly in the closet, and send a message to others to stay silent as well. These memoranda spread well beyond their original context to infect all gay inquiries.

350. An Air Force memorandum by Colonel Richard A. Peterson, a top Air Force lawyer, instructed inquiry officers to interrogate parents about the sexual orientation and private lives of their children to obtain information against the service members for the purpose of discharge or other punishment. SLDN SECOND ANNUAL REPORT, *supra* note 39, at 6–7; SLDN THIRD ANNUAL REPORT, *supra* note 18, at 7.

351. SLDN THIRD ANNUAL REPORT, *supra* note 18, at 29.

352. SLDN FIRST ANNUAL REPORT, *supra* note 55, at 10.

353. *Id.*; SLDN SECOND ANNUAL REPORT, *supra* note 39, at 6.

354. See SLDN SECOND ANNUAL REPORT, *supra* note 39, at 6.

355. SLDN FIFTH ANNUAL REPORT, *supra* note 22, at 1, 35.

enforcement, confide in their families, or seek treatment for physical injuries or trauma (e.g., PTSD) without a high risk of being “outed” to their commanders and discharged under DADT.³⁵⁶

This problem was acutely highlighted in the Winchell case, and the resulting escalation of harassment at Fort Campbell in the wake of his murder.³⁵⁷ During the Pentagon study that followed, I once again sought help from an unlikely source, Professor Charles Moskos, to bolster SLDN’s long-standing argument that “Don’t Tell” did not preclude all statements by service members concerning their sexual orientation and private lives. Moskos’s interest was directly contrary to ours; he wanted to preserve DADT and viewed military “overreaching” as a threat to the viability of the law. He agreed to co-write a Washington Post op-ed with me.³⁵⁸ Together, we wrote:

Military members who reveal their sexual orientation during private medical treatment, or in the course of reporting harassment or assaults, are not “telling” in a manner contemplated by “Don’t Ask, Don’t Tell, Don’t Pursue.” The Department of Defense must order inspectors general, law enforcement officials, psychologists and doctors not to out gay service members who seek their help. It should forbid military judges and members of discharge boards from considering statements from these officials as evidence of homosexuality.³⁵⁹

If “implacable foes” like us, the father of DADT and a leader of the group that was fighting DADT, “c[ould] find common ground,” we wrote, then “anyone c[ould].”³⁶⁰

By 2002, through painstaking work in our cases, annual reports and media scrutiny, SLDN was successful in having the Navy and Air Force memoranda rescinded or rendered unenforceable.³⁶¹ The official practice of proactively seeking out parents, close civilian friends, and others ended, although GLB military members would continue to be discharged if information shared with confidants came to light in other ways. For example, military members were discharged in cases where parents themselves turned over the information or when other service members snooped on e-mail correspondence.³⁶²

356. *Id.* at 35; Moskos & Benecke, *supra* note 9, at A23.

357. See SLDN SIXTH ANNUAL REPORT, *supra* note 114, at 50–51 (describing the increased harassment occurring at Fort Campbell after Winchell’s death).

358. Moskos & Benecke, *supra* note 9, at A23.

359. *Id.*

360. *Id.*

361. SLDN THIRD ANNUAL REPORT, *supra* note 18, at 7.

362. See, e.g., SLDN FIFTH ANNUAL REPORT, *supra* note 22, at 53 (discussing a case in which an investigator questioned a friend of the officer and gained access to the officer’s e-mail).

Throughout this time, we continued to press further in meetings with Pentagon officials and in our annual reports for adoption of an exclusionary rule barring information obtained in violation of the policy's limits on inquiries, including from private conversations.³⁶³ Additionally, we asked Defense Secretary Cohen to adopt a therapist-patient privilege and issue new guidance to the field.³⁶⁴ In 1998, Defense Secretary Cohen partially addressed this recommendation by making it clear there was no duty to turn in GLB military members who sought mental health services.³⁶⁵ In 1999, President Clinton signed an Executive Order providing for a limited psychotherapist privilege in the criminal system.³⁶⁶ Through independent discussions with the Army Inspector General, we came to an agreement allowing GLB military members to report harassment and its surrounding circumstances to Inspectors General without being "outed" and discharged.

The issue would come to a national forefront on and off throughout the DADT era. Years later, the well-publicized case of Air Force fighter pilot Lieutenant Colonel Victor Fehrenbach crystallized such abuses and made a powerful argument for ending DADT.³⁶⁷ Fehrenbach faced discharge under DADT because he cooperated with civilian police officers after he was falsely accused of rape by another man, who also made false allegations against others.³⁶⁸ Even though the allegations were proven to be false, civilian police turned over information about Fehrenbach's sexual orientation to the military.³⁶⁹ In this case, the Secretary of the Air Force "sat on" Fehrenbach's discharge paperwork, permitting Fehrenbach to retire with full benefits on September 30, 2011.³⁷⁰

Though we ultimately succeeded, SLDN and our allies actually had to fight to end official military support for using parents as witnesses against their children. In the Fehrenbach case alone, SLDN had to fight to prevent a single military member from being punished merely for speaking honestly with law enforcement. These battles were significant turning points in the overall effort against

363. See, e.g., *id.* at 84 (recommending the DoD stop prying in officers' lives); SLDN FOURTH ANNUAL REPORT, *supra* note 14, at 2 (stating that service members should not be discharged based on private conversations).

364. SLDN FOURTH ANNUAL REPORT, *supra* note 14, at 2.

365. SLDN SIXTH ANNUAL REPORT, *supra* note 114, at 22.

366. Exec. Order No. 13140, 64 Fed. Reg. 55115, 55116-17 (Oct. 12, 1999).

367. Ed O'Keefe, *'Don't Ask, Don't Tell' to Face Test in Court*, WASH. POST, Aug. 13, 2010, at B3.

368. *Id.*

369. *Id.*

370. *Full Rank, Pension for Fehrenbach*, ADVOCATE (Feb. 16, 2011, 10:50 AM), http://www.advocate.com/News/Daily_News/2011/02/16/Fehrenbach_to_Retire_with_Full_Rank_and_Pension/.

DADT, and the fact that our victories represented *changes* in the status quo further proves just how horrific and McCarthyesque that status quo was. It is small wonder that even an architect of DADT feared overreaching.

CONCLUSION

This piece describes the long-term strategy that changed public opinion and hastened the demise of DADT. This is the story of military members and their families who fought back against DADT with SLDN's assistance and, through their courage, toppled key pillars upholding this discriminatory law.³⁷¹ The men and women honored in this piece represent thousands of military members, many of whose stories will never be told, unless they so choose, because of the attorney-client privilege. As has been the case with other movements, "most of the movement's participants weren't the famous; they were the nameless—ordinary people who in extraordinary times did extraordinary things."³⁷² Representing every rank, service, specialty and geographic location and including men and women from every racial group, their example challenged dehumanizing stereotypes that were used to justify the gay bans and encourage abuse of people who were suspected of being gay. By fighting back against DADT, they transformed our nation and opened the door to a better future for those who follow.

DADT was a terrible law through which Congress and the Pentagon sought to enshrine the harsh status quo. GLB military members were silenced and kicked out on the exact same grounds as the prior gay bans. Meanwhile, publicly, Congressional and military leaders portrayed DADT as a benign compromise: we won't "ask," gays won't "tell." As a result, many Americans believed DADT was a more lenient policy and that the issue had been resolved. With public attention waning, military officials resumed "business as usual," witch hunting and pursuing criminal prosecutions against people who were suspected of being gay. The Pentagon nearly got away with this ruse.

371. This is not an exhaustive account. Other turning points, such as the military's firing of Arabic linguists who were gay and the resulting degradation of our nation's military capabilities, or the "90s plaintiffs" such as Grethe Cammermeyer and Zoe Dunning, who came out in support President Clinton's effort to lift the ban, have been well publicized. See Chris Durang, *Hey Bush—What's All This Firing of Gay Arabic Linguist Specialists?*, HUFFINGTON POST (Aug. 11, 2006, 9:24 AM), http://www.huffingtonpost.com/chris-durang/hey-bush-whats-all-this-f_1_b_27017.html; *supra* note 4 (citing examples of "90s Plaintiffs").

372. *2010 Civil Rights Tour with Julian Bond Goes from Memphis to New Orleans*, UVATODAY (Nov. 18, 2009), <http://www.virginia.edu/uvatoday/newsRelease.php?id=10510> (quoting Professor Julian Bond).

The formation of SLDN changed “business as usual.” We created levers of change and used them to pry open the military’s closed system. For the first time, a watchdog existed to document and challenge the military’s discriminatory treatment of servicemembers who were suspected of being gay. SLDN pushed back in ways that surprised military officials. We obtained “smoking gun” records of investigations and other internal documents. We initiated congressional inquiries and inspector general investigations. We engaged respected law firms to represent military members pro bono and assist in putting on defenses at administrative separation boards within the military. We used the media to spotlight abuses and educate the American public about the hypocrisy of DADT. We leveraged every possible tool—legal, policy, watchdog, media, grassroots—to create synergies that resulted in breakthrough opportunities. Over a number of years, our “guerrilla legal work” made it increasingly difficult for the military services to enforce DADT, generated political momentum (inside and outside the military) and put a human face on the issue.

SLDN fully engaged all three branches of the federal government. Outside of the field of public health, gay organizations tend to focus on the courts or the legislature as avenues for change; the federal administrative system is woefully underutilized. We plied the unglamorous waters of the executive branch and administrative system, eking out more than two dozen policy changes to improve the safety of military members’ daily lives and maintaining a constant presence on their behalf. Various litigation efforts and SLDN’s work with Members of Congress to introduce legislation overturning DADT, beginning in 2005, are better known. SLDN’s early work in the administrative system, however, built the foundation to end DADT.

SLDN built victories brick by brick in a way that made linkages with other advocates and activists possible as they emerged onto the national stage to create the movement to end DADT. Legions of family members, friends, “battle buddies,” veterans, academics,³⁷³ Members of Congress and their staffers, and Administration and military officials took risks to support GLB military members and advocate on their behalf, publicly and behind the scenes.

At the end, even military officials dropped the pretense that the law was working just fine. Defense Secretary Gates, Chairman of the Joint Chiefs of Staff, Admiral Mullen and other military leaders testified in favor of ending DADT in language reflecting the experiences

373. Academics such as Rhonda Rivera, Linda Grant De Pauw, Francine D’Amico, Diane Mazur and Elizabeth Hillman, among others, have long written about the military’s gay bans. The formation of the Palm Center by Aaron Belkin in 1999 solidified the field as a viable academic pursuit and connected research and study findings directly to the public policy debate.

of military members. They rightly found DADT to violate military values by requiring servicemembers to violate their integrity as a condition of military service, and exercised courageous leadership to bring our military's practices in line with our nation's ideals.

"Ending DADT is arguably one of the most significant civil rights achievements of the current generation. It signals that gay Americans are full citizens and should be treated equally."³⁷⁴ Our government's gag order on patriotic Americans who heed the call to duty is lifted. Now, servicemembers from every corner of our great Nation will work side by side with gay Americans and see for themselves that nothing bad happens as a result. While much work remains to be done to achieve full equality, DADT's demise marks the first time Congress has acted to end discrimination against GLB Americans, a significant development that paves the way for future progress. As we celebrate the end of DADT, it is fitting to salute the military members who sacrificed to make this moment possible.³⁷⁵

374. Osburn & Benecke, *supra* note 32.

375. *Id.*