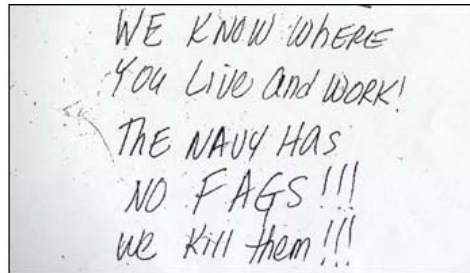
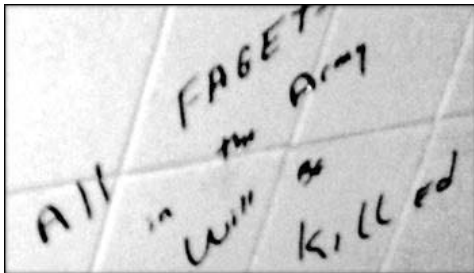


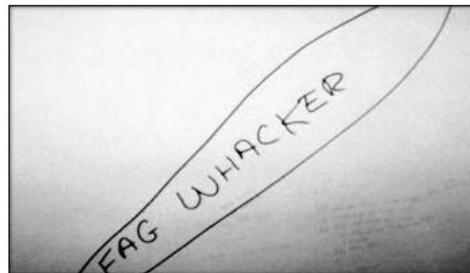
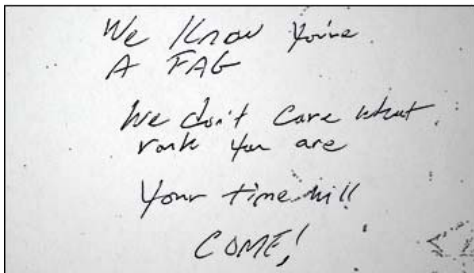


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We don't want you here, the Navy does't want you either. You should have just stayed in your own freakin homo world, with your own kind, at least then youd be somewhat safe, HERE YOUR NOT.....And as long as your in our world you never will be.....



Excerpt from a letter left on the windshield of a female sailor's car. [Spelling and typographical errors from original.]

Top left and bottom right: Graffiti found on the walls at Fort Campbell, Kentucky, after a soldier killed another soldier perceived to be gay by beating him with a baseball bat. Bottom left: Written threat left on the windshield of a Marine's car, 2001. Top right: Written threat left on the vehicle of a sailor, 1996.

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UNIFORM DISCRIMINATION: The "Don't Ask, Don't Tell" Policy of the U.S. Military

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UNITED STATES

**UNIFORM DISCRIMINATION:
The “Don’t Ask, Don’t Tell” Policy of the U.S. Military**

I. SUMMARY2

II. RECOMMENDATIONS.....5

III. BACKGROUND.....6

 Homosexuals And The Military Before “Don’t Ask, Don’t Tell”6

 Military Sodomy Laws.....6

 Administrative Restrictions On Homosexuals.....9

 Rationales For Anti-Gay Restrictions9

IV. “DON’T ASK, DON’T TELL”11

 “Don’t Tell”13

 “Don’t Ask”14

V. DISCHARGES OF HOMOSEXUALS.....15

VI. LIFE IN AN ANTI-GAY ENVIRONMENT.....21

 Threats And Verbal Harassment.....23

 Violent Assaults.....25

 The Murder Of Private Barry Winchell.....26

 Army Inspector General’s Report On Fort Campbell.....28

 Fort Carson, Colorado30

VII. IMPACT ON WOMEN31

VIII. INTRUSIVE INVESTIGATIONS34

IX. HUMAN RIGHTS AND U.S. LEGAL STANDARDS.....36

 Human Rights Law36

 Right To Privacy36

 Equal Rights And Nondiscrimination39

 U.S. Law40

 Right To Privacy41

 Right To Equal Protection41

 First Amendment.....43

X. UNIT COHESION: A RATIONALE IN SEARCH OF EVIDENCE.....45

 THE U.S. MILITARY AND RACIAL INTEGRATION48

XI. CONCLUSION49

APPENDIX A: NOTE ON U.S. ARMED FORCES’ RESPONSES TO HUMAN RIGHTS WATCH’S
REQUESTS FOR BASIC INFORMATION50

APPENDIX B: ANTI-HARASSMENT ACTION PLAN51

ACKNOWLEDGMENTS53

Between October 2001 and September 2002, the army discharged ten trained linguists—seven of them proficient in Arabic—because they were homosexuals. Two of the linguists broke visitation rules, leading to a search of one of their rooms and the discovery of personal letters and photographs that revealed that they were gay.

In April 2001, Navy Airman Paul Peverelle told his commanders that he was gay, wanting them to know that a homosexual was doing highly praised work. His commander initially thought that Peverelle was lying about being gay, and the military did not initiate discharge proceedings. Instead, weeks later he was deployed on a six-month tour of duty on the USS Enterprise, with the ship eventually being dispatched to Afghanistan as part of Operation Enduring Freedom. On the ship, Peverelle became the focus of threats and harassment. Two members of his squadron called him names such as: “faggot” and “gay bitch,” and threatened to “beat his ass.” Once he returned to Norfolk, Virginia, Peverelle was discharged under the “don’t ask, don’t tell” policy in January 2002. The USS Enterprise was the same ship where the words “high jack this fags” were written on a bomb attached to a fighter jet.

In September 2000, a drill sergeant at Fort Jackson called Army Private First Class Ron Chapman, a “faggot.” After the drill sergeant’s comment, another soldier told Chapman that he had better watch out. Shortly thereafter, a group of soldiers attacked Chapman. He wrote home the next day: “I have some bad news for you. I got beat up last night. Someone came to my bed—a group of someones—and they were hitting me with blankets and soap. I am aching all over my body ... You guys have to help get me out of here ... This place is dangerous!”

I. SUMMARY

The U.S. military’s efforts in Operation Enduring Freedom prompted President George W. Bush to express his pride in its servicemembers and to proclaim the United States had “the finest military ever assembled.” But thousands of servicemembers are at risk of discharge, no matter how well or bravely they serve their country, merely because of their sexual orientation. Instead of being a model for tolerance, the U.S. military remains a bastion of officially sanctioned discrimination against homosexuals.

The U.S. prohibited homosexuals from serving in the military for most of the twentieth century. In 1993, Congress passed new legislation replacing that prohibition with the “don’t ask, don’t tell” policy, a compromise between those, led by President Bill Clinton, who believed the prohibition was discriminatory and wrong, and those, including military leaders, determined to maintain the prohibition. Under the new policy, gay men, lesbians, and bisexuals would be able to serve as long as they kept their sexual orientation a secret and did not engage in homosexual conduct, including off base. In return for agreeing to remain silent and celibate, gay men, lesbians, and bisexuals were to be protected against unwarranted intrusions into their private lives. Private consensual sex by a servicemember with someone of the same sex remained a criminal offence under military law.

Although the “don’t ask, don’t tell” policy was intended to allow gay, lesbian, or bisexual servicemembers to remain in the military, discharges have steadily increased since the policy’s adoption. According to the Servicemembers Legal Defense Network (SLDN), from 1994 through the end of 2001, more than 7,800 men and women were discharged from the military because of their actual or perceived homosexuality. In 2001 alone, a record 1,256 were discharged, a figure nearly double the homosexual separation rate of 730 in 1992, prior to “don’t ask, don’t tell.” These thousands of servicemembers were not separated from the military because of a lack of skill, courage, commitment, or ability to work with fellow servicemembers. They were required to leave the armed forces because of a policy that reflects the bias of a heterosexual majority against a homosexual minority.

The “don’t ask” dimension of the policy was supposed to benefit homosexuals by ending unwarranted official efforts to uncover their sexual orientation. Human Rights Watch has not been able to measure the extent to which such inquiries have, in fact, diminished, yet servicemembers continue to report hundreds of instances each year in which the letter and the spirit of the policy have been violated. Even in the absence of “statements”

of homosexuality or of credible evidence of homosexual conduct, officials have inappropriately delved into the sexual orientation of men and women, eventually prompting their discharge. Gay and lesbian servicemembers believe violations of the “don’t ask” component of the policy are committed with impunity.

By establishing special rules for gays and lesbians that do not apply to heterosexuals, the “don’t ask, don’t tell” policy codified anti-homosexual discrimination. By stigmatizing homosexuality, the policy has also perpetuated prejudice against and invited harassment of gay servicemembers. In theory, all servicemembers are to be treated with dignity and respect regardless of sexual orientation. In practice, gay servicemembers endure anti-gay remarks, name-calling, threats, and even physical attacks. In the case of Private First Class Barry Winchell, homophobia led to murder: a fellow soldier wielding a baseball bat beat Winchell to death in 1999. Female servicemembers are subjected to an additional form of harassment—“lesbian-baiting”—whereby male servicemembers label as lesbians women who rebuff their sexual advances or who do not act “feminine” enough, a label that threatens their careers.

U.S. officials are well aware of the harassment that has flourished under the policy. Eighty percent of servicemembers surveyed by the Department of Defense in 2000 reported they had heard offensive speech, derogatory names, jokes, or negative remarks about homosexuals during the previous year. Eighty-five percent believed such comments were tolerated to some extent. Thirty-seven percent reported they had witnessed or experienced an incident they considered anti-gay harassment.

Servicemembers victimized by anti-gay abuse face a cruel dilemma. They can choose either to suffer in silence or to report the abuse. If they choose the latter course of action they risk disclosing their sexual orientation in the course of describing the incident or having it disclosed by others—and disclosure can lead to their discharge. Military officials have tried to reassure servicemembers who complain of harassment that they will not be investigated, but such assurances are not convincing since the policy requires the separation of any servicemember who “tells”—even if the statement was made unintentionally. Some cases in which homosexuals have reported harassment have led to extensive investigations into their private lives.

Anti-gay harassment and hostile treatment of servicemembers is committed with near total impunity, as are violations of the military rules against unauthorized or unduly intrusive investigations into a servicemember’s sexual orientation. According to the Servicemembers Legal Defense Network, not one servicemember was held officially accountable for asking, pursuing, or harassing during the policy’s first six years; in 2000, three officers were punished for their involvement in publicized incidents.

The military’s support system to help servicemembers and their families, including base or ship chaplains, social workers, and physicians, offers false promises to gay and lesbian servicemembers. Instead of respecting confidential communications, some chaplains and health professionals, including therapists, have turned in homosexual and bisexual servicemembers, often believing that it was their duty to report them. Chaplains have berated gay servicemembers, telling them that they were sick or going to hell.

Supporters of “don’t ask, don’t tell”—and of the blanket prohibition on homosexual service that preceded it—claim “unit cohesion” and military morale will suffer if known homosexuals are allowed to serve side-by-side and share close quarters with heterosexuals. Decades ago, the U.S. armed forces offered the same “unit cohesion” argument to oppose racially integrating military units. In 1948, President Truman rejected the argument and ordered the racial integration of the armed forces. But while U.S. military policy has rejected racial prejudice and discrimination, it continues to endorse discrimination based on anti-gay prejudice.

Anti-gay prejudice has led supporters of the military’s policies on homosexuality to overlook the utter lack of empirical evidence to support the “unit cohesion” claim. In the last decade, a number of countries, including the United Kingdom, Germany, Canada, and Israel, have eliminated restrictions on service by open homosexuals without impairing their armed forces’ effectiveness. Indeed, most members of NATO now permit open homosexuals to serve in their militaries.

Not only is there no evidence that the “don’t ask, don’t tell” policy is required to further the military’s mission, there is considerable reason to believe it is counter-productive. As noted above, the policy has resulted in the loss of thousands of capable, experienced personnel. At a time when U.S. forces are engaged in armed conflict and multiple peacekeeping missions, the average discharge of more than three servicemembers a day, many with exemplary records, simply for failing to keep secret that they are homosexual or bisexual, or for engaging in private, consensual sexual conduct, appears antithetical to military objectives.

The policy is also expensive. The military has had to spend an estimated \$218 million to recruit and train replacements for those removed as homosexuals. But the real cost of the policy is to be measured in the misery it has created in the lives of so many men and women whose wish was to serve their country.

“Don’t ask, don’t tell” is the only law in the United States today that authorizes the firing of a person from his or her job solely for acknowledging a homosexual or bisexual sexual orientation. Within certain military restrictions, e.g., the prohibition on fraternization between officers and enlisted personnel, heterosexual servicemembers are able to go on dates, hold hands and kiss publicly, have sexual relations, and talk with their servicemember friends about their personal lives. Homosexuals cannot.

Sexual orientation—be it heterosexual, homosexual or bisexual—defines a profound and deeply-rooted aspect of each individual’s personality and humanity. It reflects needs and desires that permeate one’s sense of self in ways both conscious and unconscious, and that are experienced inwardly as well as reflected outwardly through acts, gestures, and words. It is as intrinsic to the constitution and growth of a person as race, ethnicity, gender, or religious conviction. As with these other constitutive aspects of self, international human rights law protects individuals from prejudice-based discrimination on the basis of sexual orientation. The United Nations Human Rights Committee has held that sexual orientation is not a valid basis for distinguishing who may enjoy rights specified in the International Covenant on Civil and Political Rights, to which the United States is a party. The right to privacy is affirmed in the covenant—a right that includes sexual intimacy. Sodomy laws prohibiting consensual sex between adults violate that right.

The European Court of Human Rights, reviewing a prohibition against homosexuals in the United Kingdom military, concluded that it constituted prohibited discrimination with regard to intimate associations protected by the right to privacy. Confronting the United Kingdom’s contention that homosexuality was incompatible with military cohesion—the same argument used to support “don’t ask, don’t tell”—the European Court of Human Rights pointed out that discrimination against a disfavored minority to accommodate the prejudices of a majority violated the rights of homosexual servicemembers.

Military life is different from civilian life, and is characterized by laws, rules, and traditions that restrict personal behavior. While many of the strictures of military life are reasonable or necessary in light of the military’s unique mission, the codification of anti-gay prejudice is not. Unfortunately, U.S. courts have failed to look closely at “don’t ask, don’t tell”. Reluctant to intervene in matters of military judgment, the courts have left homosexual servicemen and women vulnerable to continued discrimination, harassment, and discharge.

As a presidential candidate, George W. Bush stated that he favored continuing the “don’t ask, don’t tell” policy. In August, 2001, Pentagon officials told Human Rights Watch that there were no plans to change the policy. When the U.S. military was deployed to Afghanistan in response to the September 11, 2001 attacks on New York City and the Pentagon, the “don’t ask, don’t tell” policy remained in place. On September 14, 2001, President Bush issued Executive Order 13223, authorizing each service branch to issue “stop-loss” orders—or suspensions of administrative discharges—for a set period of time while military actions in response to the September 11 attacks were planned and carried out. Each branch of the armed services issued stop-loss orders, but they did not apply to servicemembers facing discharge under the “don’t ask, don’t tell” policy. During Operation Desert Storm in 1991, however, President George Bush authorized stop loss orders that did apply to homosexuals; discharge proceedings against homosexuals were suspended until they returned home from combat.

As a U.S. military attack on Iraq is contemplated, the discrimination against homosexual servicemembers remains; no steps have been taken to end a policy that results in the loss of more than a thousand trained and dedicated servicemembers each year. The United States may wage war against those who disavow human rights, but it remains adamant against recognizing the fundamental rights of the homosexuals who volunteer to fight, and die, for their country.

II. RECOMMENDATIONS

The Bush Administration should:

- Suspend indefinitely all discharges of servicemembers for acknowledging homosexual orientation or engaging in homosexual conduct that does not otherwise violate military rules applicable to heterosexual conduct.
- Support legislation to repeal 10 U.S.C. 654 (“Policy concerning homosexuality in the armed forces”), codifying the “don’t ask, don’t tell” policy.
- Implement through the Department of Defense the policy recommendations made below and develop and implement such other measures as are needed to guarantee the rights and safety of homosexual servicemembers, including measures that specifically address the unique sexual harassment problems faced by women servicemembers—both heterosexual and lesbian—as a result of the “don’t ask, don’t tell” policy.

Congress should:

- Repeal the legislation codifying the “don’t ask, don’t tell” policy.
- Amend the Uniform Code of Military Justice to decriminalize all forms of adult, private, consensual sex between men and women and between same-sex partners.

The Department of Defense should:

- Ensure all members of the military are treated with respect regardless of their sexual orientation. It should take effective steps to prevent verbal or physical acts of anti-gay harassment or abuse, including implementation of the Department of Defense Anti-Harassment Action Plan, more extensive training about anti-gay harassment, and the use of disciplinary sanctions against or criminal prosecution of those who engage in such conduct.
- Encourage victims of anti-gay harassment or abuse to report incidents and seek assistance by:
 - establishing a confidential hotline for servicemembers to complain of abuse;
 - establishing a special unit within the Office of the Inspector General to investigate complaints of anti-gay harassment in a manner that will protect the victim from discharge or reprisal; and
 - clarifying the offices where servicemembers enduring anti-gay harassment may go for assistance, and what assistance each can provide.
- Monitor the nature and prevalence of anti-gay harassment and abuse and the steps taken to respond it by gathering and making publicly available statistics on incidents reported and the actions taken in response.

Until such time as the “don’t ask, don’t tell” policy is repealed:

- Hold accountable by disciplining and, where appropriate, prosecuting service personnel who engage in

unauthorized inquiries, or in investigations that exceed the permissible scope, into the sexual orientation or private lives of servicemembers who are or are perceived to be homosexual.

- Establish an “exclusionary” rule and other regulations as needed to prevent the use in discharge proceedings of improperly obtained information and to ensure that investigations are not initiated on less than credible, properly acquired evidence.
- Prohibit the use in discharge inquiries under the “don’t ask, don’t tell” policy of information gathered during investigations into anti-gay harassment complaints.
- Adopt and enforce a clear confidentiality policy for chaplains and health service providers.

III. BACKGROUND

Homosexuals and the Military Before “Don’t Ask, Don’t Tell”

Homosexuals have served in the U.S. armed forces from their earliest days. Indeed, Baron Frederick von Steuben, reportedly a homosexual, was one of Gen. George Washington’s key strategists during the war of independence and is credited with bringing order and discipline to the Continental Army. But the prejudice against homosexuals that has, until recent years, been widespread in U.S. society, has also been long entrenched in the military. The first known case of a soldier being discharged from the U.S. military for homosexual acts took place in February 1778: Lt. Gotthold Frederick Enslin was court-martialed after being discovered in bed with another soldier, and he was expelled from the Continental Army by order of Gen. Washington.¹

Although the U.S. military discharged soldiers for homosexual acts throughout the nineteenth century, U.S. military law did not expressly prohibit homosexuality or homosexual conduct until World War I. Since then, military law has criminalized homosexual sexual activity and, until 1994, military regulations expressly excluded homosexuals from service.

Military Sodomy Laws

The Articles of War of 1916, legislated by Congress and entering into effect in 1917, listed “assault with intent to commit sodomy” as a punishable offense. In 1920, a revision of the articles for the first time named consensual sodomy by servicemembers as a crime. The Uniform Code of Military Justice, adopted in 1951 to replace the Articles of War, maintained the criminalization of sodomy in Article 125:

(a) Any person subject to this chapter who engages in unnatural carnal copulation with another person of the same or opposite sex or with an animal is guilty of sodomy. Penetration, however slight, is sufficient to complete the offense.

(b) Any person found guilty of sodomy shall be punished as court-martial may direct.²

A servicemember who engages in consensual sex with an adult of the same sex faces a maximum penalty for sodomy of five years’ imprisonment, forfeiture of all pay and allowances, and dishonorable discharge.³ Same-sex sexual activity can also be prosecuted under Article 133, which prohibits “conduct unbecoming an officer and

¹ Randy Shilts, *Conduct Unbecoming: Gays and Lesbians in the U.S. Military* (New York: World Publications, 1997), p. 11.

² 10 U.S.C. 925 (2002). According to the explanation provided in the Military Manual for Courts Martial:

It is unnatural carnal copulation for a person to take into that person’s mouth or anus the sexual organ of another person or of an animal; or to place that person’s sexual organ in the mouth or anus of another person or of an animal; or to have carnal copulation in any opening of the body, except the sexual parts, with another person; or to have carnal copulation with an animal.

U.S. Department of Defense, *Manual for Courts-Martial*, 1998, 51(c).

³ *Manual for Courts-Martial*, 1998, 51(e)(4).

gentleman” and Article 134, which prohibits offenses that undermine good order and discipline or that “bring discredit upon the armed forces.”⁴

Article 125 does not draw a distinction between homosexual and heterosexual couples, and anecdotal reports suggest that heterosexuals in fact appear to be court-martialed under Article 125 in greater numbers than homosexuals. But the majority of heterosexuals court-martialed under Article 125 are charged with sodomy in the context of rape or child sexual abuse; charges of consensual, adult, heterosexual sodomy generally only appear in two instances: as plea bargains in cases where the original charge was rape, and when they supplement charges of adultery.⁵

A few examples illuminate the way the military’s sodomy law has been used against homosexuals in recent decades. In 1982, Air Force Lt. Joann Newak was convicted of three counts of consensual sodomy (for conduct that took place off-base, in the privacy of her bedroom), three minor narcotics charges, and conduct “unbecoming an officer.” She was sentenced to seven years’ hard labor in the military prison at Fort Leavenworth.⁶ The case against Lieutenant Newak began when Donna Ryan, stationed at the same Air Force base as Lieutenant Newak, was arrested for drunk driving and, following her arrest, offered to become an informant for the Air Force Office of Special investigations (OSI). Ms. Ryan befriended Lieutenant Newak, whom she suspected of being a lesbian, and gathered evidence to support a charge of sodomy against her. Based on Ms. Ryan’s testimony, the OSI proffered charges against both Lieutenant Newak and her lover, Lynne Peelman (against whom charges were later dropped in return for her testimony).

Corporal Barbara Baum, a twenty-three-year-old military policewoman at the Marine Corps Recruit Training Depot at Parris Island, South Carolina, was a victim of one of the most extensive “witch hunts” known to have occurred against gays and lesbians in the military.⁷ Between 1986 and 1988, almost half of the post’s 246 women were questioned about alleged lesbian activities, with sixty-five women eventually leaving the Marines as a result of the inquiry.⁸

In 1988, when Baum was about to begin a new assignment in Hawaii, the Naval Investigative Service questioned her at Parris Island because officials sought her assistance in the ongoing investigation of alleged lesbian activities. Baum refused to help them, and was tried by a general court-martial. Based on testimony provided by her former lover, Lance Corp. Diane Maldonado, who testified in exchange for immunity, she was tried, convicted of sodomy, indecent acts (Article 134), and obstruction of justice. Three weeks into her imprisonment, Baum accepted a promise of clemency and an upgraded discharge in return for giving investigators the names of more than seventy-seven women she knew or suspected to be lesbians. Baum was imprisoned for six months. In 1990, her conviction was overturned by a military appeals court, which found that two of the jury members in her trial had extrajudicial knowledge of the evidence and an interest in the outcome of the case, and that the judge had allowed uncorroborated testimony.⁹

⁴ Ibid., 90(b)(3).

⁵ Human Rights Watch interview with Lt. Commander Anthony J. Mazzeo, Judge Advocate General’s Corps, Norfolk Naval Station, Norfolk, Virginia, May 21, 1999. No branch of the U.S. military was able to provide Human Rights Watch with statistics regarding the number of Article 125 prosecutions, disaggregated by sexual orientation.

⁶ Newak’s seven-year sentence was reduced on appeal to six years; after a sentence rehearing, she was sentenced to fourteen months’ confinement, dismissal from the services, and forfeiture of all pay and allowances. Her sodomy conviction was eventually overturned after the Court of Military Appeals found that she had received improper counsel. Shilts, *Conduct Unbecoming: Gays and Lesbians in the U.S. Military*, pp. 393-394, 398-399, 436-437. Facts as described in Brief for the United States in Opposition *Joanne C. Newak v. United States of America*, In the Supreme Court of the United States, Petition for a Writ of Certiorari to the United States Court of Military Appeals, No. 89-757 (1989).

⁷ Michelle Benecke and Kirsten Dodge, *Military Women in Nontraditional Job Fields: Casualties of the Armed Forces’ War on Homosexuals*, Harvard Women’s Law Journal, vol. 13 (1990), p. 221.

⁸ Ibid., p. 221; Randy Shilts, *Conduct Unbecoming*, p. 640. Three women Marines were jailed due to the investigation, including Baum—see Shilts, pp. 561-563, 576.

⁹ Michelle Benecke and Kirsten Dodge, *Military Women in Nontraditional Job Fields*, pp. 226-228.

Although infrequent, sodomy prosecutions have continued since enactment of the “don’t ask, don’t tell” policy. In 1996, for example, Air Force Major Debra Meeks was court-martialed under the sodomy statute. Meeks, a twenty-year-veteran, was about to retire when a civilian claimed that Meeks had threatened her at gunpoint if she told anyone of their alleged affair. No action was taken because the Air Force considered the evidence inconclusive, but then, just before she was to retire, Meeks was charged with conduct unbecoming an officer (Article 133). She pleaded not guilty, and then charges of sodomy were added.¹⁰ Meeks, who faced up to eight years in prison and forfeiture of her entire pension if convicted, was acquitted of all charges. In May 2001, the Commission on the 50th Anniversary of the Uniform Code of Military Justice (UCMJ)—a panel of legal and military experts—recommended that Congress repeal the sodomy provisions of the UCMJ.¹¹ The commission held hearings and solicited written comments on several military justice issues, including the criminalization of sodomy. According to the commission: “[T]he issue of prosecuting consensual sex offenses attracted the greatest number of responses from both individuals and organizations. The commission concurs with the majority of these assessments in recommending that consensual sodomy and adultery be eliminated as separate offenses in the UCMJ and the Manual for Courts-Martial.”¹² It concluded:

[T]here remain instances in which consensual sexual activity, including that which is currently prosecuted under Articles 125 and 134 [prohibiting offenses that undermine good order and discipline] may constitute criminal acts in a military context. Virtually all such acts, however, could be prosecuted without the use of provisions specifically targeting sodomy and adultery.¹³

The Commission’s recommended that the sodomy and other “outdated” sex offense provisions of military law be replaced with a modern criminal sexual conduct statute similar to that of most states¹⁴ while realistically reflecting the offenses, such as fraternization, that should be proscribed under military law. In November 2002, the Pentagon disclosed that it would not implement the commission’s recommendation regarding the anti-sodomy statute.¹⁵ The General Counsel’s office wrote that Pentagon officials had agreed that the report’s recommendations “do not warrant adoption.”¹⁶

Although sodomy prosecutions are not common, the potential for such action remains a concern for homosexuals in the military. Since the “don’t ask, don’t tell” policy was enacted, servicemembers have reported that the threat of court-martial under Article 125 has motivated them to accept administrative discharge. Indeed, the very existence of the sodomy law supports the discriminatory treatments of gays and lesbians embodied in the “don’t ask, don’t tell” policy.

¹⁰ “Court-martial stirs ‘don’t ask, don’t tell’ debate; Military prison, not pension, could be lot of Air Force major facing sodomy charges,” *Austin American-Statesman*, August 11, 1996. Maria F. Durand, “Lackland accused of witch hunt to give lesbians boot,” *San Antonio Express-News*, August 13, 1996. Servicemembers Legal Defense Network, *Conduct Unbecoming: The Fifth Annual Report on “Don’t Ask, Don’t Tell, Don’t Pursue,”* March 15, 1999, p. 9 and Exhibit 9.

¹¹ National Institute of Military Justice, *Report of the Commission on the 50th Anniversary of the Uniform Code of Military Justice*, May 2001, Section D, at <http://uppmjlj.hypermart.net/coxreport.html> (accessed October 10, 2002). The commission’s chair was Walter T. Cox III, former chief judge, U.S. Court of Military Appeals for the Armed Services. The other members were Capt. (ret.) Guy R. Abbate Jr., senior instructor at the Naval Justice School and a consultant to the Defense Institute of International Legal Studies and the Naval Justice School; Mary M. Cheh, professor of law, George Washington University Law School, who serves as a member of the Rules Committee of the U.S. Court of Appeals for the Armed Forces; Rear Admiral (ret.) John S. Jenkins, senior associate dean for administrative affairs at the George Washington University Law School; and Air Force Lt. Col. (ret.) Frank Spinner, an attorney in private practice who represents military personnel in courts-martial.

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ As of December 2002, only fourteen states criminalized consensual sexual relations between adults of the same sex. Sodomy Laws, *Laws in the USA*, at <http://www.sodomylaws.org/usa/usa.htm>, (accessed January 6, 2003).

¹⁵ Letter, William J. Haynes, II, general counsel of the Department of Defense to Eugene R. Fidell, president of the National Institute of Military Justice, November 7, 2002. Copy on file with Human Rights Watch.

¹⁶ *Ibid.*

Administrative Restrictions on Homosexuals

Prior to World War II, Army enlisted personnel suspected of engaging in homosexual acts were often considered unsuitable for military service and discharged.¹⁷ During the mass mobilization of troops for World War II, new regulations barred homosexuals from serving, and the military relied on psychiatrists to help keep those with “homosexual tendencies” out of the armed forces.¹⁸ There was a shift from a focus on homosexual acts to servicemembers’ homosexuality itself, even if they had not engaged in prohibited acts.¹⁹

During the war, each branch of the military issued its own policies concerning homosexual personnel. In 1949, the newly established Department of Defense issued a memorandum setting forth a unified policy: “Homosexual personnel, irrespective of sex, should not be permitted to serve in any branch of the Armed Services in any capacity, and prompt separation of known homosexuals from the Armed Forces be made mandatory.”²⁰

Between 1950 and 1993, the ban on homosexuals remained unchanged, although different services periodically revised the policy’s actual wording.²¹ A 1981 Department of Defense Directive stated, “homosexuality is incompatible with military service.”²² Under the directive, the discharge of “open” homosexuals was mandatory. Nevertheless, commanders continued to exercise a considerable degree of discretion, at times opting not to investigate or discharge highly valued servicemembers.²³ Military statistics indicate that gay discharges dropped sharply in years when military personnel were most needed, for example, during the Korean and Vietnam wars.²⁴

Rationales for Anti-Gay Restrictions

Over the last half century, the rationale for restrictions against homosexuals in the military has changed. During World War II, the military embraced the view of homosexuality as mental illness.²⁵ During the post-war period, gays and lesbians were said to be security risks, i.e. their desire to keep their homosexuality secret would make them susceptible to blackmail. In 1957, however, a U.S. Navy report prepared under the direction of Navy Captain S.H. Crittenden, Jr. disputed that claim: “The concept that homosexuals pose a security risk is unsupported by any factual data.... The number of cases of blackmail as a result of past investigations of homosexuals is negligible. No factual data exist to support the contention that homosexuals are a greater risk than heterosexuals.”²⁶

A similar conclusion was reached three decades later in a 1988 report the Department of Defense had commissioned to review homosexuality and breaches of security. Emphasizing the absence of any evidence that homosexuals posed a security or blackmail risk, the report noted: “In the 30 years since the Crittenden report was submitted, no new data have been presented that would refute its conclusion that homosexuals are not greater

¹⁷ RAND Corporation, National Defense Research Institute, *Sexual Orientation and U.S. Military Personnel Policy: Options and Assessment*, MR-323-OSD, 1993, p. 4.

¹⁸ Shilts, *Conduct Unbecoming*, pp. 16-17.

¹⁹ RAND Corporation, *Sexual Orientation*, pp. 5-6.

²⁰ *Ibid.*, p. 6.

²¹ Department of Defense Directive 1332.14, as revised in 1981, and RAND Corporation, *Sexual Orientation*, p. 8.

²² RAND Corporation, *Sexual Orientation*, pp. 7-8.

²³ The Navy, in particular, appears reluctant to discharge servicemembers who make statements acknowledging that they are homosexuals. Servicemembers Legal Defense Network reported in September 2002 that commanders did not initiate discharge proceedings for at least two servicemembers (an ensign and a hospitalman) at two different bases, despite the servicemembers’ concerns over anti-gay statements and threats and, consequently, their own safety. Servicemembers Legal Defense Network, press release, September 24, 2002.

²⁴ Shilts, *Conduct Unbecoming*, pp. 69-70.

²⁵ *Ibid.*, pp. 16-17.

²⁶ United States Navy, “*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 Homosexuality*,” Chairman S.H. Crittenden (Washington, D.C.: Government Printing Office, 1957), quoted in Craig A. Rimmerman, ed., *Gay Rights, Military Wrongs* (New York and London: Garland Publishing, Inc., 1996), pp. 272-3. The Navy refused to release the report for twenty years and even then complied only after a court ordered its release.

security risks than heterosexuals.”²⁷ The report not only refuted the military’s contention that homosexuals posed a heightened security risk, but it also called on the military to reexamine its policy of barring homosexuals from military service: “If homosexuality is unrelated to job performance ... then the central issue is the validity of the long-time practice of denying military employment to homosexuals solely on the basis of their sexual orientation.”²⁸ According to the report, “atypical” orientation did not influence job performance: “Studies of homosexual veterans make clear that having a same-gender or an opposite-gender orientation is unrelated to job performance in the same way as is being left- or right-handed.”²⁹

Beginning in the 1980s, the military emphasized a new justification for excluding homosexuals from service—that of the supposedly detrimental impact homosexuals would have on “unit cohesion.”³⁰ Regardless of how well a servicemember actually performed his or her duties, the homophobia or discomfiture of other soldiers might result in moral or unit cohesion problems. As one general told Human Rights Watch, “You’ve got to understand that a man’s biggest fear is a sexual assault.”³¹ The solution of the Pentagon was not to address the prejudice or fears of heterosexuals, or to develop codes of sexual conduct that would apply to all servicemembers. Instead it used the “unit cohesion” argument to insist on the exclusion of open homosexuals from the military.

As discussed below in chapter X, there is abundant research disproving the “unit cohesion” rationale for excluding open homosexuals from military service.³² In 1993, for example, both the General Accounting Office and the RAND Corporation published studies of the military experience in other countries that showed open homosexuals could be successfully integrated into military units without an adverse impact on unit cohesion, effectiveness or discipline.³³ Indeed, RAND concluded that the most appropriate policy on homosexuals in the military would be standards of professional conduct that were neutral with regard to sexual orientation.³⁴ The Pentagon nevertheless refused to retreat from its position on homosexuals. The “unit cohesion” argument remains the principal underpinning for the “don’t ask, don’t tell” policy.³⁵

The “unit cohesion” justification for “don’t ask, don’t tell” is premised on the assumption that heterosexual servicemembers would react in an overwhelmingly negative way if known homosexuals were allowed to serve. It is important therefore to note the changing attitudes in America – among the general public and within the armed forces – about homosexuals. According to the Gallup Organization in 2002, 86 percent of Americans believed

²⁷ Defense Personnel Security Research and Education Center, “*Nonconforming Sexual Orientations and Military Suitability*,” PERS-TR-89-002, December 1988, p. 29.

²⁸ *Ibid.*, p. ii.

²⁹ *Ibid.*, p. 33, quoting C.I. Williams and M.S. Weinberg, *Homosexuals in the Military* (New York: Harper and Row, 1971).

³⁰ For all of the focus on the need for unit cohesion in the armed forces, there is no one definition of “unit cohesion.” Cohesion is often divided into at least two types: social cohesion and task cohesion. Social cohesion develops when members of a group develop emotional bonds with each other. Social scientists have noted that high social cohesion may in fact be detrimental to unit performance, whereas moderate social cohesion may be beneficial. Task cohesion—considered by experts to be more necessary than social cohesion for good performance—is the shared goal that members are motivated to achieve together. RAND Corporation, *Sexual Orientation*, pp. 290-1.

³¹ Human Rights Watch interview, Fort Jackson, South Carolina, January 18, 2000. This general was a member of the task force that created the July 2000 Action Plan to combat anti-gay harassment.

³² Chairman S.H. Crittenden, United States Navy, “*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 Homosexuality*” (Washington, D.C.: Government Printing Office, 1957), and Defense Personnel Security Research and Education Center, “*Nonconforming Sexual Orientations and Military Suitability*,” PERS-TR-89-002, December 1988.

³³ General Accounting Office, “*Homosexuals in the military: policies and practices of foreign countries*,” (GAO/NSIAD-93-215), June 1993; RAND Corporation, *Sexual Orientation and U.S. Military Personnel Policy: Options and Assessment*, MR-323-OSD, 1993.

³⁴ RAND also recommended that the military’s sodomy statute be rescinded and that military law should only criminalize nonconsensual sexual activity, sex with minors, or acts on duty, on base, or in violation of anti-fraternization regulations.

³⁵ C. Dixon Osburn, *A Policy in Desperate Search of a Rationale: The Military’s Policy on Lesbians, Gays and Bisexuals*, *University of Missouri-Kansas City Law Review*, Vol. 64, No. 1 (Fall 1995), pp. 204-213.

homosexuals should have equal rights with respect to job opportunities.³⁶ According to a May 2001 Gallup poll, 72 percent of Americans said that homosexuals should be hired in the armed forces, up from 57 percent in 1992.³⁷ In an earlier January 2000 Gallup poll, respondents were asked about the military's policy regarding homosexuals. Forty-one percent of the respondents said homosexuals should be allowed to serve openly in the military, 38 percent said they should be allowed to serve under the current ("don't ask, don't tell") policy, and 17 percent said that they should not be allowed to serve at all.³⁸ A Massachusetts Institute of Technology study released in 2001 showed that a majority of Americans (56 percent) were in favor of allowing gays to serve openly in the military.³⁹

Military sociologists Charles Moskos and Laura Miller have conducted periodic surveys within the armed forces regarding attitudes towards homosexuals. In 1992, they found that 77 percent of army men and 34 percent of army women opposed or strongly opposed gays in the military. In August 1998, the percentage had dropped to 52 percent among men and 25 percent among women.⁴⁰ In another study, researchers found a significant change in the attitudes of Navy officers over a five-year period in the 1990s. In 1994, 58 percent agreed or strongly agreed that they felt uncomfortable in the presence of gays. By 1999, that percentage had dropped to 36 percent.⁴¹ In the same study, 39 percent said they personally knew a homosexual servicemember.⁴²

IV. "DON'T ASK, DON'T TELL"

During the 1992 presidential election campaign, Bill Clinton pledged to end the ban against gay men and lesbians in the military. As president, Clinton continued to press for an end to what he viewed as outdated, unfair, unnecessary, and discriminatory treatment against homosexuals, and on January 29, 1993 he directed Secretary of Defense Les Aspin to submit a draft executive order ending discrimination on the basis of sexual orientation in determining who may serve in the U.S. military.

President Clinton's efforts to permit homosexuals to serve openly in the military met strong resistance from military leaders and some members of Congress. Senators warned Clinton that any attempt to lift the ban would be overturned by the U.S. Congress. "It will be extremely difficult to sustain any legislation that would change that policy today, tomorrow or six months from now," said senate minority leader Robert Dole.⁴³ At the same time, military leaders met with the president and expressed strong opposition to any change in the policy prohibiting homosexuals from serving.⁴⁴ Others warned that servicemembers identified as homosexuals would be targeted for violent attacks. Military sociologist Charles Moskos told a reporter, "Soldiers say: 'We'll take care of them in our own way'—you hear that a lot." An Air Force officer told a reporter, "I hate to say this, but if two guys are seen holding hands, I think something would happen to them in a physical sense ... I think they'd be beaten up."⁴⁵

³⁶ Frank Newport, *In-Depth Analyses: Homosexuality*, The Gallup Organization, at <http://www.gallup.com/poll/analysis/ia020911iii.asp>, (accessed December 23, 2002).

³⁷ *Ibid.*

³⁸ Frank Newport, *In-Depth Analyses: Homosexuality*, The Gallup Organization, at <http://www.gallup.com/poll/analysis/ia020911v.asp>, (accessed December 23, 2002).

³⁹ "Polls show reduction of soldiers' opposition to gays; surveys examine shifting attitudes among military, civilians," Associated Press, August 6, 2001.

⁴⁰ Dave Moniz, "Military adjusts to 'don't ask, don't tell;,' In six years, views have softened toward homosexuality, but some still report bias," *Christian Science Monitor*, July 13, 1999.

⁴¹ John W. Bicknell, *Study of Naval Officers' Attitudes Toward Homosexuals in the Military*, Naval Post-Graduate School, March 2000, p. 62, Table 7. The 1994 statistics cited in Bicknell's study stem from that year's Naval Post-Graduate School survey of naval personnel using similar criteria.

⁴² *Ibid.*, p. 176.

⁴³ Frank J. Murray, "Clinton tells top brass gay ban will not stand," *Washington Times*, January 26, 1993.

⁴⁴ See testimony (below) and "Clinton firm on revoking gay ban, joint chiefs rebuffed at meeting," *St. Louis Post-Dispatch*, January 26, 1993.

⁴⁵ "Clinton firm on revoking gay ban, joint chiefs rebuffed at meeting," *St. Louis Post-Dispatch*, January 26, 1993.

From March through July 1993, the Armed Services Committee of the U.S. House of Representatives and U.S. Senate held public hearings on the question of homosexuality and military service. The Department of Defense conducted its own review of the question as well. During the congressional hearings, military leaders, including General Colin Powell, strongly supported a ban on military service by open homosexuals. According to General Powell:

To win wars, we create cohesive teams of warriors who will bond so tightly that they are prepared to go into battle and give their lives if necessary for the accomplishment of the mission and for the cohesion of the group ... We cannot allow anything to happen which would disrupt that feeling of cohesion within the force.⁴⁶

General H. Norman Schwarzkopf, during the same hearings, noted that: "In my years of military service, I have experienced the fact that the introduction of an open homosexual into a small unit immediately polarizes that unit and destroys the very bonding that is so important for the unit's survival in time of war."⁴⁷

In the face of strong opposition to end all restrictions on homosexuals, President Clinton accepted a compromise, dubbed "don't ask, don't tell." Secretary Aspin announced the new policy on July 19, 1993, and it became law as part of the National Defense Authorization Act for Fiscal Year 1994.⁴⁸ The law permits homosexuals to serve in the military as long as they do not acknowledge their sexual orientation through word or deed. In return for homosexuals not "telling," the military is to refrain from "asking" whether servicemembers are homosexual or bisexual—hence the colloquial name for the policy, "don't ask, don't tell." The policy was later expanded to include injunctions to the military not to "pursue" or "harass" homosexual servicemembers. In his speech announcing the proposed new policy, President Clinton acknowledged, "It is not a perfect solution."⁴⁹ In fact, it has proved to be no solution at all.

In a Department of Defense memorandum describing the new policy, Secretary Aspin wrote that "sexual orientation is considered a personal and private matter, and homosexual orientation is not a bar to service entry or continued service unless manifested by homosexual conduct."⁵⁰ As enacted, the "don't ask, don't tell" policy ended the blanket ban on homosexual servicemembers that had been in effect prior to 1993. But the new policy was nonetheless predicated on the view that "homosexuality is incompatible with military service. The presence in the military environment of persons who engage in homosexual conduct or who, by their statements, demonstrate a propensity to engage in homosexual conduct, seriously impairs the accomplishment of the military mission."⁵¹

Announcing the policy, President Clinton noted:

[T]here have been and are homosexuals in the military service who serve with distinction ... [T]here is no study showing them to be less capable or more prone to misconduct than heterosexual soldiers.

⁴⁶ General Colin Powell, written responses to questions by Senator Nunn, U.S. Senate Committee of Armed Services. *Policy Concerning Homosexuals in the Armed Forces: Hearings before the Committee of Armed Services*, July 20, 1993, S. Hrg. 103-845, p. 708.

⁴⁷ *Ibid.*, Ex. JX-1, p. 595-96.

⁴⁸ 10 U.S.C. 654 (2002). While "don't ask, don't tell" is thus law, military officials and others generally refer to it as a policy, a convention we have adopted as well in this report. The policy is reflected in the Department of Defense Directive that became effective February 28, 1994.

⁴⁹ Speech by President Clinton, National Defense University, Fort McNair, Washington, DC, July 19, 1993.

⁵⁰ Secretary of Defense memorandum to Secretaries of the Army, Navy, and Air Force and the Chairman of the Joint Chiefs of Staff, "*Policy on Homosexual Conduct in the Armed Forces*," July 19, 1993. No reference is made to the central phrase "ending discrimination on the basis of sexual orientation" used by the president in his January 1993 memorandum to the secretary of defense.

⁵¹ 32 CFR Pt. 41, App. A, Section H, July 1, 1997.

Indeed, all of the information we have indicates that they are not less capable or more prone to misbehavior.⁵²

Nevertheless, the law establishing “don’t ask, don’t tell” affirmed the “unit cohesion” theory as justification for denying homosexuals and bisexual servicemembers the ability to acknowledge their sexual orientation in word or deed. In a series of findings accompanying the legislation enacted to codify the policy, Congress declared that “success in combat requires military units that are characterized by high morale, good order and discipline, and unit cohesion.” It further stated that:

the prohibition against homosexual conduct is a longstanding element of military law that continues to be necessary ... [Servicemembers] who demonstrate a propensity or interest to engage in homosexual acts ... create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capabilities.⁵³

The chairman of the Senate Armed Services Committee stated that the legislation was “as fair as we can be to the individuals involved, while, at the same time, maintaining the kind of unit cohesion and military effectiveness” that the country expects.⁵⁴

“Don’t Tell”

Under the policy, homosexuals are permitted to join and remain in the military as long as they do not reveal their sexual orientation by engaging in homosexual conduct. Homosexual conduct is defined as oral or written statements as well as sexual activity. According to the Department of Defense Directive governing discharges under the policy, homosexual conduct includes:

homosexual acts, a statement by a member that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage. A statement by a member that demonstrates a propensity to engage or intent to engage in homosexual acts is grounds for separation not because it reflects the member’s sexual orientation, but because the statement indicates a likelihood that the member engages in or will engage in homosexual acts.⁵⁵

Homosexual “acts” are not limited to intercourse. They include:

Any bodily contact, actively undertaken or passively permitted, between members of the same sex for purposes of satisfying sexual desires and any bodily contact (for example, hand-holding or kissing, in most circumstances) that a reasonable person would understand to demonstrate a propensity or intent to engage in such an act.⁵⁶

If a servicemember makes a statement indicating he or she is a homosexual or bisexual, that statement creates “a rebuttable presumption that the Servicemember engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.”⁵⁷ The statement, “I am gay” is sufficient to trigger the presumption.⁵⁸ The military directive further clarified that propensity “to engage in homosexual acts means more

⁵² Speech by President Clinton, National Defense University, Fort McNair, Washington, DC, July 19, 1993.

⁵³ 10 U.S.C. § 654 (a) (6), (13) and (15).

⁵⁴ *Congressional Record*, 139th Cong., 1993, pt. S11205 (daily ed. September 9, 1993).

⁵⁵ Department of Defense Directive 1332.14, “*Enlisted Administrative Separations*,” December 21, 1993. Similar directives apply to officers.

⁵⁶ *Ibid.* There are similar directives regarding the policy that apply to officers. No other federal, state, or local law prohibits men or women from holding hands or kissing a person of the same gender.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

than an abstract preference or desire to engage in homosexual acts; it indicates a likelihood that a person engages in or will engage in homosexual acts.”⁵⁹

When a statement establishes a servicemember’s “propensity,” the servicemember, to avoid discharge, must affirmatively disprove the likelihood that he or she has engaged in or would engage in homosexual sexual acts.⁶⁰ Evidence that can be used to rebut—or confirm—the presumed propensity includes whether the member has engaged in homosexual acts, his or her credibility, testimony of others about the servicemember’s conduct or character, and any other relevant evidence.⁶¹ A servicemember who has engaged in homosexual acts can avoid discharge if he or she can establish that the conduct was a departure from the servicemember’s normal behavior; that it was unlikely to recur; that he or she did not coerce another person to engage in prohibited sexual acts; that the servicemember does not have a propensity or intent to engage in homosexual acts; and that “under the particular circumstances of the case, the member’s continued presence in the armed forces is consistent with the interests of the armed forces in proper discipline, good order, and morale”⁶²

The military claims that, under the “don’t ask, don’t tell” policy, men and women are discharged for homosexual conduct, not for “being” homosexual. But since the conduct that can lead to discharge need not be more than a verbal affirmation of homosexuality, the distinction between “orientation” and “conduct” is in fact a distinction without a difference. As a practical matter, homosexual servicemembers are only able to serve if their orientation remains hidden. They must be silent and celibate if they wish to serve their country.

“Don’t Ask”

The counterpart of restrictions on homosexual servicemembers’ speech and conduct are restrictions on official inquiries into their sexual orientation and private lives and a prohibition on hostile treatment. According to a Department of Defense directive: “Commanders or appointed inquiry officials shall not ask, and members shall not be required to reveal, whether a member is a heterosexual, a homosexual, or a bisexual.”⁶³ As part of the policy, the military is not authorized to ask recruits about their sexual orientation during the enlistment process or following enlistment.⁶⁴ Fact-finding inquiries into homosexual conduct are also restricted: First, only the member’s commander is authorized to initiate such an inquiry. Second, a “commander may initiate a fact-finding inquiry only when he or she has received credible information that there is basis for discharge. Commanders are responsible for ensuring that inquiries are conducted properly and that no abuse of authority occurs.”⁶⁵

The “credible information” that may prompt an inquiry should not include “activity such as going to a gay bar, possessing or reading homosexual publications, associating with known homosexuals, or marching in a gay rights rally in civilian clothes.”⁶⁶ In addition, an inquiry should not be opened simply on the basis of the opinions of others that a member is homosexual, or because of “rumor, suspicion, or capricious claims.”⁶⁷ On the other hand, credible information exists if:

⁵⁹ Ibid.

⁶⁰ 10 U.S.C. §654(b)(1)(D). As noted by a federal judge overturning the dismissal of a veteran nurse with the Washington State National Guard who had acknowledged she was a lesbian, the military does not make similar presumptions in other cases. For example, if a servicemember is an alcoholic or rehabilitated drug addict, it is not presumed that the individual is engaging in misconduct absent actual evidence. *Margarethe Cammermeyer v. Les Aspin*, 850 F. Supp. 910 (W.D.Wa., June 1, 1994).

⁶¹ Department of Defense Directive 1332.30, at 2-2(c)(1)(b).

⁶² 10 USC §654(b)(1)(D).

⁶³ Department of Defense, *Guidelines for Fact-Finding Inquiries into Homosexual Conduct*, Section D.3, attachment to Department of Defense Directive 1332.14, “*Enlisted Administrative Separations*,” December 21, 1993.

⁶⁴ Despite this clear language banning such inquiries upon enlistment, as recently as June 2002, Air Force reserve applications included direct questions, asking “are you a homosexual?” and “do you intend to engage in homosexual acts?”

⁶⁵ Department of Defense, *Guidelines for Fact-Finding*, Section A.1.

⁶⁶ Ibid., Section C. 3.

⁶⁷ Ibid.

a reliable person states that he or she observed or heard a Servicemember engaging in homosexual acts, or saying that he or she is a homosexual or bisexual or is married to a member of the same sex; or a reliable person states that he or she heard, observed, or discovered a member make a spoken or written statement that a reasonable person would believe was intended to convey the fact that he or she engages in, attempts to engage in, or has a propensity or intent to engage in homosexual acts; or a reliable person states that he or she observed behavior that amounts to a non-verbal statement by a member that he or she is a homosexual or bisexual; i.e., behavior that a reasonable person would believe was intended to convey the statement that the member engages in, attempts to engage in, or has a propensity or intent to engage in homosexual acts.⁶⁸

The Department of Defense has recognized that homosexual servicemembers may be afraid to report incidents of anti-gay harassment for fear the subsequent investigation may uncover their sexual orientation. A 1997 memorandum by Under Secretary of Defense Edwin Dorn explained that, “the fact that a servicemember reports being threatened because he or she is said or is perceived to be a homosexual shall not by itself constitute credible information justifying the initiation of an investigation of the threatened servicemember.”⁶⁹ In 1999, the Pentagon issued a revised guidance addressing the same problem. The guideline stated:

The fact that a service member reports being threatened or harassed because he or she is said or is perceived to be a homosexual shall not by itself constitute credible information justifying the initiation of an investigation of the threatened or harassed service member. Credible information exists only when information, considering its source and the surrounding circumstances, supports a reasonable belief that a service member has engaged in homosexual conduct....⁷⁰

V. DISCHARGES OF HOMOSEXUALS

Proponents of the “don’t ask, don’t tell” policy thought it would reduce the number of discharges due to homosexuality and enable homosexuals and bisexuals to serve in the military.⁷¹ As Secretary of Defense Les Aspin stated “Under the old policy, a homosexual servicemember had to lie and actively hide his or her orientation. In other words, they had to work hard to keep off the radar screen. Under the new policy, they will have to work to get onto the radar screen. That is progress.”⁷² Unfortunately, Aspin’s predictions were incorrect. Following adoption of the policy, the number of administrative separations, i.e. discharges, has soared. Under the “don’t ask, don’t tell” policy, plenty of servicemembers get on “the radar screen.”

According to the Servicemembers Legal Defense Network, as of the end of 2001, 7,793 servicemembers had been discharged since the inception of “don’t ask, don’t tell” because of their actual or perceived homosexuality.⁷³ In 2001, the Department of Defense discharged 1,256 men and women for acknowledging their

⁶⁸ Ibid., Section C. 4.

⁶⁹ Under Secretary of Defense Edwin Dorn memorandum to secretaries of the military departments, chairman of the joint chiefs of staff, and inspector general, “*Guidelines for Investigating Threats Against Servicemembers Based on Alleged Homosexuality*,” March 24, 1997.

⁷⁰ Under Secretary of Defense for Personnel and Readiness, “*Guidelines for Investigating Threats Against or Harassment of Servicemembers Based on Alleged Homosexuality*,” August 12, 1999, quoting Under Secretary of Defense for Personnel 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*,” April 1998.

⁷¹ Discharges for “homosexual conduct” declined consistently from the early 1980s until the early 1990s. In 1993 and 1994, discharges remained steady (682 and 617, respectively) at about .04% of the active forces. In 1995 there were 757 discharges. Under Secretary of Defense for Personnel and Readiness, *Review of the Effectiveness*, April 1998, Table I.

⁷² Statement of Secretary of Defense Les Aspin, U.S. Senate Committee of Armed Services, *Policy Concerning Homosexuals in the Armed Forces: Hearings before the Committee of Armed Services*, U.S. Senate, July 20, 1993, S. Hrg. 103-845, p. 703.

⁷³ In general, servicemembers who are discharged under the “don’t ask, don’t tell” policy receive “honorable” discharges.

homosexual orientation, or engaging in homosexual acts.⁷⁴ The number of discharges in 2001 was nearly double the homosexual separation figure of 730 in 1992, prior to the adoption of the “don’t ask, don’t tell” policy.⁷⁵

“Don’t ask, don’t tell” costs the military millions of dollars each year to recruit and replace experienced servicemembers dismissed because of their sexual orientations. Human Rights Watch estimates conservatively that the policy has cost the military at least \$218 million simply to replace discharged servicemembers.⁷⁶

The preponderance of discharges under the policy have been “statement” cases, i.e., cases in which a servicemember acknowledges orally or in writing that he or she is a homosexual or bisexual.⁷⁷ Many statements were intentionally made to secure a discharge because the servicemember was no longer willing to endure anti-gay abuse or a life of secrecy. Other statements were made inadvertently or in the context of conversations thought to be confidential. Underlying all is the dilemma faced by bisexual and homosexual servicemembers who try to live up to core military values—including the value of integrity—but who are forced to lie about their lives due to the “don’t ask, don’t tell” policy. When asked about this dilemma, a military lawyer told Human Rights Watch, “It’s a voluntary force, they know the rules.”⁷⁸

The following cases in which servicemembers deliberately acknowledged their homosexuality exemplify the dilemmas faced by homosexuals in the military:

- Staff sergeant Leonard Wayne Peacock joined the army in 1995, went to paratrooper jump school at Fort Benning, Georgia, became a certified paratrooper with over seventy jumps, and was then stationed at Fort Bragg until he was discharged under the policy in 2001.⁷⁹ Rumors about his sexual orientation circulated among peers, he was taunted, and he was often asked if he was gay and why he never was seen with women. Anti-gay comments were common on the base.

In April 2000, Peacock returned to his truck at a base parking lot and found a handwritten note on the windshield that said “fag.” He thought that reporting it would raise suspicions about him, so he did not pursue a complaint. A year later, he was in the platoon sergeants’ office and one of them said “we were classifying people—and we classified you as being gay.” After that, he found notes on his humvee vehicle that said “proud to be bald and gay” and “rainbow warrior.” The comments about his sexual orientation and the general anti-homosexual climate at the base led him to write a letter to his commander acknowledging he was gay and seeking a discharge in November 2001, which was granted. Peacock told Human Rights Watch he had wanted to stay in the military and make it his career, but he could not reconcile the core army value of integrity and the “don’t ask, don’t tell” policy.

⁷⁴ Servicemembers Legal Defense Network, *Conduct Unbecoming: The Eighth Annual Report on “Don’t Ask, Don’t Tell,”* March 14, 2002, p. 1. This number excludes U.S. Coast Guard discharge figures, since the Coast Guard is not part of the Department of Defense, and the figure was revised in March when it was discovered that Fort Bragg, NC officials had failed to report twenty discharges under the policy.

⁷⁵ Office of the Under Secretary of Defense (Personnel and Readiness), *Review of the Effectiveness*, April 1998, Table I.

⁷⁶ In 1992, the General Accounting Office estimated that the average replacement costs were \$28,000 for each enlisted member and \$120,000 for each officer. General Accounting Office, *Defense Force Management Statistics Related to DOD’s Policy on Homosexuality*, 1992, (GAO/NSIAD 92-98S.) There were 7,800 discharges under the policy as of March 2002.

⁷⁷ “First, we found the large majority of discharges for homosexual conduct are based on the statements of service members who identify themselves as homosexual, as opposed to cases that involved homosexual acts.” Office of the Under Secretary of Defense (Personnel and Readiness), *Review of the Effectiveness*, April 1998, p. 3.

⁷⁸ Human Rights Watch interview with Robert Reed, General Counsel’s office, Department of Defense, Washington D.C., August 10, 2001. All the military branches stress integrity as a core military value. A gay former airman told a reporter, “I wanted to live up to the standards that the military instilled in me. You have to have honesty and integrity.” Jim Oliphant, “Under Friendly Fire: Don’t Ask, Don’t Tell: How the Policy is Enforced in the Field,” *Legal Times*, January 3, 2000.

⁷⁹ Human Rights Watch telephone interview with Staff Sergeant Leonard Wayne Peacock, February 19, 2002. Peacock recalled being asked if he was a homosexual and whether he ever wanted to sleep with someone of the same sex during the recruitment process in Montgomery, Alabama.

- Prior to a February 2000 “don’t ask, don’t tell” training course that Lt. Paul Sprague was conducting at Fort Totten, New York, a captain told Sprague that he would not attend since he [the captain] was not “a homo.” When Sprague, who was the 354th Transportation Battalion Headquarters Detachment commanding officer, explained that the class was for everyone, the captain asked Sprague if he was a “homo.” Another time, after Sprague completed the “don’t ask, don’t tell” training course, including training on the prohibition against anti-gay harassment, a sergeant major stood up and told the class a graphic anti-gay joke. As he left the training, a soldier approached Sprague and told him how much he hated homosexuals and that he and his friends used to seek out men perceived to be gay in New York City and beat them up. Sprague, who was awarded three Army achievement medals during ten years of active and reserve service, left the army reserves soon after these incidents. In his memorandum to his commander he stated, “... the Army applauds and rewards my efforts as a soldier and denounces my sexual orientation as a human being ... the Army’s policy to silence gays and lesbians will not work, nor do I believe it will stop the harassment of gays and lesbians who serve our country with pride.”⁸⁰
- A gay sailor, Brandon DuBroc, entered the Navy in 1997, thinking the “don’t ask, don’t tell” policy would protect him.⁸¹ He excelled, attained a leadership position in boot camp, and graduated first in a class of six hundred. In training, he heard anti-gay comments and offensive language; while wanting to help others who were being harassed, he did not go to his superior for fear that he would be investigated. Once stationed in Norfolk, Virginia, he made friends with gay and lesbian servicemembers there whose orientation was suspected. Other sailors questioned him about his sexual orientation and told him there were rumors that he was gay. As a specialist in radio communications, he was assigned to the *USS Saipan* and heard anti-gay comments during weeklong tours at sea. When he heard one sailor say to another, “If we find another fag on the ship, we’re going to throw them overboard,” he began to fear violence but did not think he could confide in anyone without being investigated.

As a six-month tour loomed, he submitted a letter to his command stating that he was a homosexual, and he was discharged in June 1999. He told Human Rights Watch he made the statement because of fear and his knowledge of a 1992 case in which a gay seaman was beaten to death, in what is widely believed to be a killing motivated by anti-gay hatred.⁸²

- On board the *USS Eisenhower* in September 1997, Barry Waldrup and three other sailors were repeatedly harassed. Waldrup was asked numerous times if he was gay and, because he feared for his safety, slept in the common room so that he would never be alone. Someone wrote, “You’re a dead faggot” on his bunk. Another sailor found a note tacked to his bunk that said “Leave or Die Fag,” while another found “Leave

⁸⁰ Human Rights Watch telephone interview, February 9, 2000; Servicemembers Legal Defense Network, *Conduct Unbecoming: The Seventh Annual Report on “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass,”* March 15, 2001, Exhibit 67-69.

⁸¹ Human Rights Watch telephone interview with Brandon DuBroc, August 25, 1999.

⁸² Twenty-two-year-old seaman Allen R. Schindler was based on the *Belleau Wood*, an amphibious assault ship based in Japan. His mother, Dorothy Hajdys, told reporters that her son referred to the ship in letters home as the “Helleau Wood.” According to several friends of his, Schindler had complained repeatedly of anti-gay harassment to his chain of command in March and April 1992, citing incidents such as the gluing-shut of his locker and frequent comments from shipmates like “There’s a faggot on this ship and he should die.” On October 27, 1992, Schindler was brutally beaten to death in a public restroom three blocks from the Navy base at Sasebo, Japan. His body was identifiable only by tattoos on his forearms. Airman Terry Helvey, one of Schindler’s shipmates, pleaded guilty and was sentenced to life imprisonment. Although Helvey maintained that he did not kill Schindler because he was gay, Navy Investigator Kevin Privette testified at the trial that Helvey had said, after his arrest, that he hated homosexuals and “I’d do it again.” In the wake of Schindler’s murder, the Navy denied that it had received any complaints of harassment and refused to speak publicly about the case or to release the Japanese police report on the murder. A few months later, in January 1993, the *Navy Times* ran an article in which an unnamed Marine at the El Toro Marine Corps Air Station was asked what he would do if he learned a homosexual lived in his barracks. His response: “I’d have to kill him, I guess.” H.G. Reza, “Homosexual sailor beaten to death, Navy confirms crime,” *Los Angeles Times*, January 9, 1993; Cheryl Lavin and Merrill Goozner, “A gay sailor’s death personalizes debate,” *Chicago Tribune*, January 31, 1993.

Fag” written in ketchup on his bunk. The fourth sailor’s car was vandalized. Days later unknown assailants beat him unconscious while calling him a “faggot.” Fearing additional attacks and harassment, the four sailors told the commander of the *USS Eisenhower* that they were gay and were subsequently discharged.⁸³

- On September 26, 1997, two men called Marine Lance Corporal Kevin Smith a “faggot,” and beat him outside a gay bar in San Angelo, Texas.⁸⁴ Smith told the police officers who responded to the attack that he did not want to press charges against the civilian assailants because he was in the Marines. One of the officers reportedly told him, “If you can’t say you were here, why did you come here?” Smith became angry and told the officer to just do his job. Smith believes the officer decided to report the incident to the Military Police, because his platoon sergeant questioned Smith the next day about how he had sustained a black eye and a bruised knee. The sergeant expressed little concern about Smith’s physical state following the attack but questioned Smith about whether he had been to the gay bar before. The sergeant told him that there would be a criminal investigation by the Naval Investigative Service, the naval criminal investigative agency, and that they were very thorough.⁸⁵ Smith wanted to stay in the military but feared the investigation, so he submitted a letter stating he was gay in October 1997 and was honorably discharged two months later. In a preliminary statement Smith said, “the price of serving my country is too high if the military puts more of a premium on investigating my private life than in assisting me with bringing those who assaulted me to justice.”⁸⁶
- While based at Camp Pendleton, California in 1999, a Marine lance corporal heard frequent threats by marines against homosexuals including such comments as: “If I see a faggot, I’m gonna kill him;” “I’ll beat those goddamned homos until they’re dead;” “Let’s go to a gay bar this weekend and fuck some queers up.”⁸⁷ Fearing for his own safety, the corporal sought a discharge under the “don’t ask, don’t tell,” policy. In his letter to his commander acknowledging his homosexuality he stated, “... the only way I can protect myself from this very real threat of verbal and physical harassment or a possible investigation into my sexual orientation is by making this disclosure to you.”⁸⁸
- In 1999, a petty officer on the *USS Barry* wrote a letter to a civilian friend confiding that he was bisexual. The letter disappeared before he was able to mail it. A short time later, he was kicked in the face while sleeping onboard. Threatening statements and acts from shipmates followed, with one stating that he had heard “the guy who was kicked ... is a fag. I’d like to find the guy who kicked him because he deserves a medal.” While in the bathroom, other sailors told the petty officer, “We don’t need faggots on ship” and that something should be done to “get rid of them.” Fearing for his safety, the petty officer sought and was granted a discharge under the policy.⁸⁹
- In 1999, two female airmen at the Defense Language Institute (DLI) in Monterey, California acknowledged they were lesbians and sought discharges because of anti-gay harassment.⁹⁰ Fellow airmen had repeatedly asked them whether they were involved with each other; the airmen called them “lipstick lesbians.” A male airman asked one why she would want a woman when she could “have this,” pointing to himself. Another airman called them “pussy suckers.” According to the women, anti-gay comments and threats were common at DLI, with one of them stating that another student had said, “If I ever found out someone is a faggot, I

⁸³ Servicemembers Legal Defense Network, *Conduct Unbecoming: The Fourth Annual Report on “Don’t Ask, Don’t Tell, Don’t Pursue,”* February 19, 1998, pp. 46-49.

⁸⁴ Human Rights Watch telephone interview with Kevin Smith, February 16, 2000.

⁸⁵ Servicemembers Legal Defense Network, *Conduct Unbecoming: The Fifth Annual Report on “Don’t Ask, Don’t Tell, Don’t Pursue,”* March 15, 1999, p. 8 and Exhibit 5.

⁸⁶ Press statement by Kevin Smith, February 19, 1998, on file with Human Rights Watch.

⁸⁷ Servicemembers Legal Defense Network, *Conduct Unbecoming: The Sixth Annual Report on “Don’t Ask, Don’t Tell, Don’t Pursue,”* March 9, 2000, p. 61, and copy of Marine’s letter to commander.

⁸⁸ Servicemembers Legal Defense Network, *Conduct Unbecoming*, March 9, 2000, p. 61.

⁸⁹ *Ibid.*, p. 60.

⁹⁰ *Ibid.*, p. 37, Exhibit 37.

would kill him because faggots do not belong in the military.” One of the women wrote in her statement acknowledging that she was gay that she sought a discharge because she was in “constant fear of being investigated by the command or harmed by servicemembers because of the constant comments and rumors about my sexual orientation.” She also wrote, “I cannot serve my country in good conscience knowing that my classmates don’t want me here and could possibly physically harm me if they suspected or learned that I am in fact gay.”

Some homosexuals have made verbal or written statements in private or with expectations of confidentiality, only to find those statements became the basis for separation from the military. Even statements to psychiatrists and chaplains have been used against servicemembers. The Navy’s *General Medical Officer Manual*, updated in May 1996, instructed Navy doctors: “Homosexuals should not be referred to psychiatry. This is not a medical matter, but a legal matter. The referral should be made to the command legal officer or judge advocate general.”⁹¹

- In 1994, a Navy psychiatrist reported Marine Corp. Kevin Blaesing’s homosexuality to Blaesing’s commanding officer. Although Blaesing succeeded in overturning his discharge after the psychiatrist acknowledged that Blaesing had never revealed his sexual orientation, his new commanding officer, Lieutenant Colonel Martinson, disapproved his application to re-enlist.⁹²
- In 1996, after West Point Cadet Nicole Galvan’s commander questioned her about her sexual orientation in the presence of other cadets, she filed a complaint about the commander’s inappropriate questioning. The commander subsequently confiscated Galvan’s diary. Thinking that she faced a battle with her commander she could not win, and fearing an investigation of her private life, Galvan resigned from West Point.⁹³
- During 2000, Derjuan Tharrington, a seaman on the *USS Dubuque*, told the ship’s chaplain that he was gay while he was describing persistent anti-gay harassment he had suffered on the ship. After Tharrington met with the chaplain, his lieutenant asked him what they had discussed, and Tharrington refused to answer. The lieutenant said he would have to find out on his own. Tharrington believes the lieutenant asked the chaplain about their discussion and that the chaplain disclosed Tharrington’s admission that he was gay. An inquiry was initiated under the “don’t ask, don’t tell” policy and Tharrington was discharged.⁹⁴
- In 1997, the Navy began separation proceedings against Senior Chief Timothy R. McVeigh (no connection to the Timothy J. McVeigh who was sentenced to death for the 1995 Oklahoma City bombing) based on information obtained from the internet service provider America Online. McVeigh, a highly decorated sailor with seventeen years in the Navy, came under investigation after sending an e-mail message about a toy drive for his shipmates’ children. The recipient of the message, a civilian member of an organization supporting Navy wives, looked up the sender’s user profiles—a personal

⁹¹ U.S. Department of Defense, Department of the Navy, NAVMED P-5134, *General Medical Officer Manual*, May 1996, quoted in Servicemembers Legal Defense Network (SLDN), *Conduct Unbecoming*, March 15, 1999, p. 35-37. As a result of SLDN complaints about the manual, it was later revised and specific reference to homosexuals was deleted from the online version. And, as noted below in footnote 92, the Lackland psychologists also thought it their duty to turn in gay servicemembers.

⁹² Servicemembers Legal Defense Network, *Conduct Unbecoming*, March 15, 1999, p. 10; Art Pine, “Few benefit from new military policy on gays,” *Los Angeles Times*, February 6, 1995. At Lackland Air Force Base, where the discharge rate under “don’t ask, don’t tell” was unusually high, psychologists believed they should report anyone who told them he or she was a homosexual or bisexual. Servicemembers Legal Defense Network, *Conduct Unbecoming*, March 9, 2000, p. 23. In another case, a psychotherapist at Keesler Air Force Base said she was required to report an Air Force captain who had disclosed her bisexuality; the inquiry led to the captain’s discharge.

⁹³ Servicemembers Legal Defense Network, *Conduct Unbecoming: The Third Annual Report on “Don’t Ask, Don’t Tell, Don’t Pursue,”* February 1997, p. 4.

⁹⁴ Servicemembers Legal Defense Network, *Conduct Unbecoming*, March 15, 2001, p. 25.

description which many America Online subscribers choose to make available—and discovered that his marital status was listed as “gay.” She passed this information along to the Navy’s legal department, which called America Online and confirmed that the user profile belonged to McVeigh. In federal court, McVeigh successfully fought the Navy’s efforts to discharge him.⁹⁵ Among other violations, the judge ruled that the Navy had misapplied “don’t ask, don’t tell” in McVeigh’s case by initiating an investigation and seeking his discharge without sufficient cause.⁹⁶ The Navy eventually reached a settlement with McVeigh and he was granted early retirement, full benefits, and legal costs.⁹⁷

- The case of Steve May is highly unusual, because of the context in which his “statement” of homosexuality was made, the publicity his case garnered, and his ability to defeat the army’s discharge effort. A Republican state legislator in Arizona, May had served in the Army as a lieutenant and then became a reservist. In a heated debate in the Arizona state legislature about health care benefits for same-sex partners in February 1999, during which other representatives made anti-gay comments and said that homosexuals were immoral, May could not contain himself. He stated that “this legislature takes my gay tax dollars, and my gay tax dollars spend the same as your straight tax dollars. If you’re not going to treat me fairly, don’t take my money.”⁹⁸ As a result of his statement, the Army moved to discharge him.

May’s fellow officers defended him and flatly denied that May’s “coming out” affected unit cohesion or morale. His Army reserve commander read about May’s sexual orientation in a news article and wrote in a sworn statement that May’s performance had been “nothing less than outstanding” and that “the vast majority of personnel in the unit have knowledge of the article, however such knowledge has in no way affected morale in his platoon or the other platoons. In fact, the HQ section is functioning better than it has for my past tenure as commander.”⁹⁹ Another officer from May’s reserve unit wrote, “I do not believe that this knowledge has in any way been detrimental to the morale of my troops or the morale of the troops directly under Lt. May’s command. I firmly believe that whether Lt. May’s sexual orientation is as suspected by the investigating parties, the fact is and should be considered irrelevant...”¹⁰⁰

In March 2000, after an investigation under the “don’t ask, don’t tell” policy, the Army asked May to resign, and his case was sent to a discharge board for resolution.¹⁰¹ In September 2000, an Army panel ruled that May should be granted an honorable discharge. May immediately stated he would appeal the ruling and seek retention under the policy’s exceptions that would allow him to serve for the “good of the service.”¹⁰² May told reporters that “this [policy] is an old dinosaur that is an embarrassment to the nation.”¹⁰³ In January 2001, the Army announced that it would cease its efforts to discharge May and would allow him to complete his term as a reservist. May said, “I have always served my country with honor, integrity, and loyalty, and it hurt me deeply that the Army would try to fire me—not for anything I did in the Army, but for who I am and for doing my legislator’s job.”¹⁰⁴

⁹⁵ *McVeigh v. Cohen*, 983 F. Supp. 215 (D.D.C. 1998).

⁹⁶ Laura Myers, “Navy settles ‘don’t ask, don’t tell’ lawsuit,” *Associated Press*, June 12, 1998. Professor Charles Moskos, the author of “don’t ask, don’t tell,” submitted a declaration in the case urging the Navy to drop its efforts to discharge McVeigh and instead to undertake an inquiry into the Navy’s conduct in investigating McVeigh. See, <http://www.geocities.com/Pentagon/9241/MOSKOS.HTML>.

⁹⁷ *Ibid.*

⁹⁸ James Sterngold, “An unlikely ‘don’t tell’ candidate: Lawmaker may face discharge,” *New York Times*, August 26, 1999.

⁹⁹ Signed statement of May’s direct commander, August 8, 1999, Servicemembers Legal Defense Network, *Conduct Unbecoming*, March 9, 2000, Exhibit 3. Name not made public.

¹⁰⁰ *Ibid.*, Exhibit 4. Name not made public.

¹⁰¹ Electronic mail message to Human Rights Watch from Steve May, April 6, 2000, on file with Human Rights Watch.

¹⁰² “Gay army reservist in Ariz. faces honorable discharge,” *Washington Post*, September 18, 2000.

¹⁰³ *Ibid.*

¹⁰⁴ “Army drops effort to boot gay legislator from the reserves,” *Agence France Presse*, January 16, 2001.

VI. LIFE IN AN ANTI-GAY ENVIRONMENT

Although prejudice against homosexuality was the underpinning of “don’t ask, don’t tell,” the military nonetheless insisted that harassment or abuse of homosexuals was not to be condoned. An attachment to the July 1993 memorandum describing the policy to the secretaries of the Army, Navy, and Air Force from Secretary Aspin stated that: “All servicemembers will be treated with dignity and respect. Hostile treatment or violence against a servicemember based on a perception of his or her sexual orientation will not be tolerated.”¹⁰⁵

While the Department of Defense asserts its commitment to protecting all servicemembers from prejudice and intimidation,¹⁰⁶ it has been remarkably unsuccessful at protecting homosexual servicemembers. Hostility and harassment pervade their lives. On March 14, 2002, the Servicemembers Legal Defense Network reported that there were 1,075 reports of anti-gay verbal and physical harassment in 2001, an increase of 23 percent from the 871 incidents reported in 2000.¹⁰⁷

The Pentagon’s own research confirms gay servicemembers’ reports of hostility. In March 2000, the Department released the results of a random survey of 71,570 active-duty servicemembers to determine the frequency and magnitude of anti-gay comments or harassment. The survey found:

- Eighty percent of respondents stated that they had heard offensive speech, derogatory names, jokes, or remarks about homosexuals during the previous year, and 85 percent believed such comments were tolerated to some extent.¹⁰⁸
- Thirty-seven percent reported that they had witnessed or experienced an incident that they considered anti-gay harassment.¹⁰⁹
- Ten percent believed harassment was tolerated by their peers, while 5 percent believed it was tolerated by someone in their chain of command.¹¹⁰
- One-third of the respondents, roughly 23,600 servicemembers, provided more detailed information on incidents they had experienced or witnessed.
- Twenty-two percent (or 5,192) said the incident was witnessed by a senior officer, and of these, 73 percent (or 3,790), stated that the senior officer did nothing immediately to stop the harassment.¹¹¹

At the press conference releasing the report, the Pentagon’s spokesman acknowledged, “We need to do more work on this policy. In short...offensive comments about homosexuals were commonplace and the majority

¹⁰⁵ Attachment to Secretary of Defense Les Aspin’s memorandum to secretaries of the Army, Navy, Air Force and Chairman of the Joint Chiefs of Staff, “*Policy Guidelines on Homosexual Conduct in the Armed Forces*,” July 19, 1993.

¹⁰⁶ On July 26, 1998, at a Department of Defense conference titled “Building Cohesion From Our Growing Diversity,” U.S. Deputy Secretary of Defense John H. Hamre declared, “Our goal is to have an all-volunteer force that has all the diversity of America.” He went on to say that the Department of Defense must strive to guarantee four guiding freedoms to all who serve in the armed forces: freedom from prejudice, freedom from indifference or apathy, freedom from ideologies of hate, and freedom from intimidation: “We should make sure that every soldier, sailor, airman and Marine knows that bias is a four-letter word and will not be tolerated.” Rudy Williams, “Hamre Says There’s No Place for Hatemongers,” *American Forces Information Service*, (n.d.) on file with Human Rights Watch.

¹⁰⁷ Servicemembers Legal Defense Network, *Conduct Unbecoming*, March 14, 2002, p. 2.

¹⁰⁸ Office of the Inspector General, Department of Defense, “*Evaluation Report: Military Environment with Respect to the Homosexual Conduct Policy*,” Report No. D-2000-101, March 16, 2000, p. 6. The Marine Corps led the branches with 45 percent reporting offensive comments “often or very often,” followed by the Army at 37 percent.

¹⁰⁹ *Ibid.*, p. 4.

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*, p. 11.

believed that these offensive comments were tolerated to some extent within the military.”¹¹² The Department of Defense periodically issued rules intended to curtail and hold accountable those who engage in anti-gay harassment. Under Defense Department anti-harassment guidelines issued in 1999, for example:

[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...¹¹³

Gay and lesbian servicemembers believe reports of harassment are inadequately investigated and those responsible rarely held accountable. According to the Servicemembers Legal Defense Network, not one servicemember was held officially accountable for asking, pursuing, or harassing during the policy’s first six years; in 2000, three officers were punished for their involvement in publicized incidents.¹¹⁴ Anti-gay prejudice may have contributed to the inadequate implementation of the 1999 guidelines. One Marine lieutenant colonel’s private response to the guidelines vividly manifests that prejudice:

Due to the “hate crime” death of a homo [Barry Winchell, see below] in the Army, we now have to take extra steps to ensure the safety of the queer who has “told”. Commanders now bear 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.¹¹⁵

In March, 2000, following the release of the military’s harassment survey, Secretary of Defense William Cohen announced a working group of Defense Department leaders to come up with an “action plan” to combat harassment.¹¹⁶ In July 2000, the task force produced a thirteen-point “action plan,” that included general recommendations regarding overall Pentagon policy, training, reporting, discipline for those who engage in harassment, and a monitoring program to ensure the reforms were implemented fully.¹¹⁷ While many of the recommendations reiterated previous guidelines, some aspects of the Action Plan went further. For example, the plan contained the recommendation that anti-gay gestures or comments be prohibited.¹¹⁸

The announcement of the Action Plan appeared to be a positive, albeit overdue, development and a genuine effort to address anti-gay harassment in the military. But the good intentions were never implemented as policy

¹¹² Department of Defense news briefing, Pentagon spokesperson Kenneth Bacon, Office of the Assistant Secretary of Defense for Public Affairs, March 24, 2000, at http://www.defenselink.mil/news/Mar2000/t03242000_t0324asd.html (accessed December 14, 2002).

¹¹³ The August 1999 guidelines were issued a month after Private Winchell’s murder. Memorandum from Rudy de Leon, Under Secretary of Defense for Personnel and Readiness to the secretaries of the military departments, “*Guidelines for investigation threats against or harassment of service members based on alleged homosexuality*,” August 12, 1999. The guidelines reiterated a March 1997 memorandum issued by the same office by Under Secretary 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, “*Guidelines for Investigating Threats Against Servicemembers Based on Alleged Homosexuality*,” March 24, 1997.

¹¹⁴ Servicemembers Legal Defense Network, *Conduct Unbecoming: The Seventh Annual Report on “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass,”* March 15, 2001, p. ii.

¹¹⁵ Electronic-mail message from Marine Lt. Col. Edward Melton of the Twenty Nine Palms, California Marine Base, October 1999. On file with Human Rights Watch.

¹¹⁶ Department of Defense Working Group, *Anti-Harassment Action Plan*, July 21, 2000, at <http://www.defenselink.mil/news/Jul2000/plan20000721.htm> (accessed November 26, 2002).

¹¹⁷ Complete text of the Action Plan is attached as Appendix B.

¹¹⁸ At the press briefing on the Action Plan, Under Secretary of Defense for Personnel and Readiness Bernard D. Rostker stated that the task force members had been surprised to learn that only the Navy had a prohibition against verbal abuse. He noted, “It’s unfortunate that sometimes we have to take what we all understand is the way we should behave and put it down on a piece of paper for those few people who don’t get it.” Under Secretary of Defense for Personnel and Readiness Bernard D. Rostker, Department of Defense news briefing, July 21, 2000, at http://www.defenselink.mil/news/Jul2000/t07212000_t721rost.html (accessed October 17, 2002).

or practice. As of September 2002, the Pentagon had failed to issue directives and instructions to implement the Action Plan.

The cases noted below illustrate the kind of anti-gay experiences that servicemembers endure, from verbal harassment to violence. They also illustrate how harassment can create such an intolerable work climate that servicemembers choose to secure a discharge by acknowledging their homosexuality. Many who have endured hostile treatment leave the services because they do not believe those responsible for harassment will be held accountable.

Threats and Verbal Harassment

Name calling, e.g. “faggot” and “queer,” is standard fare for servicemembers perceived to be homosexual. Sometimes the vituperation escalates to vicious oral and written threats. In recent years, SLDN reported notes sent to gay servicemembers with such statements as: “fags die in the military,”¹¹⁹ “you’re going to die,”¹²⁰ “Die faggot! We know who you are!”¹²¹ “We know you’re a fag ... Your time will come,”¹²² “I fucking heard about you, you faggot. I’m gonna kill you if I ever catch you looking at my ass.”¹²³

- Navy Airman Paul Peverelle told his commander that he was gay, because he wanted his superior to know that a homosexual was doing work that had been highly praised.¹²⁴ His commander thought that Peverelle was lying about being gay, and the military did not initiate discharge proceedings. Instead, weeks later Peverelle embarked on a six-month tour of duty on the *USS Enterprise*, eventually being sent to Afghanistan as part of Operation Enduring Freedom. On the ship, Peverelle became the focus of threats and harassment. Two members of his squadron called him names like “faggot” and “gay bitch” and threatened to “beat his ass.” Upon his return to Norfolk, Virginia in January 2002, Peverelle was discharged under the “don’t ask, don’t tell” policy.
- In 1998, the Naval Reserve Officers’ Training Corps (NROTC) at Cornell University expelled Midshipman Mark Navin after the relentless harassment of his peers led him to declare his bisexuality to his commanding officer.¹²⁵ From his first weeks in the program in 1995, he was subjected to frequent jokes and questions about his sexual orientation. Fellow recruits made comments in the presence of a superior officer, who did nothing to intervene. The harassment grew worse during his first and second summers in the program, when Navin was assigned to Navy cruises. During the summer of 1997, on a late-night watch, an enlisted crewman threatened Navin, “You’d better not be queer, because in the Navy we kill our fags.” Navin was repeatedly asked whether he was gay and teased about an alleged relationship with another NROTC student, Midshipman Robert Gaige. Navin and Gaige’s instructor in the NROTC program, a major, took part in this harassment on numerous occasions. According to Navin, on one occasion, upon seeing a red AIDS ribbon on Gaige’s jacket, the major asked, “What are you, some kind of fucking homo?” Both Navin and Gaige ultimately disclosed their bisexuality to their commanding officers, citing harassment and fear for their physical safety. “Everything I had experienced with harassment led me to believe that the people I would go to would not be responsive,” said Navin.¹²⁶
- At Andrews Air Force Base, Senior Airman José de Leon wrote a letter to his commander in October 1999, acknowledging that he was gay, and was subsequently discharged. He wrote, “I mostly fear getting

¹¹⁹ Servicemembers Legal Defense Network, *Conduct Unbecoming*, March 15, 2001, p. 81.

¹²⁰ Ibid.

¹²¹ Servicemembers Legal Defense Network, *Conduct Unbecoming*, March 9, 2000, p. 64.

¹²² Servicemembers Legal Defense Network, *Conduct Unbecoming*, March 14, 2002, p. 34. Base name withheld.

¹²³ Servicemembers Legal Defense Network, *Conduct Unbecoming*, March 9, 2000, p. 63.

¹²⁴ Servicemembers Legal Defense Network, *Conduct Unbecoming*, March 14, 2002, Exhibit 48.

¹²⁵ Human Rights Watch telephone interview with Mark Navin, April 29, 1999; Servicemembers Legal Defense Network, *Conduct Unbecoming*, March 15, 1999, pp. 20-22.

¹²⁶ Human Rights Watch telephone interview with Mark Navin, April 29, 1999.

beat because of the way I am. I always watch my back where ever I go.”¹²⁷ In his letter, he referred to an incident in which an airman who became angry during a basketball game told de Leon, “If you ever touch me again, I’ll kick your faggot ass!” He said that anti-gay comments were common on the base and that rumors about his sexual orientation were circulating.¹²⁸ De Leon’s squadron commander, Lt. Col. Dave Howe, told Human Rights Watch that the airman who had harassed de Leon was given “fair warning” that he might be disciplined if he did something similar again.¹²⁹

- In August 1999, during training in Pensacola, Florida, superiors and peers repeatedly questioned Marine Private First Class Timothy Smalley, Jr. about his sexual orientation because of the way he stood and walked. A corporal told him, “If I beat you up, would you tell anyone? In the fleet, some people wake up with black eyes for no reason.”¹³⁰ After training, he was assigned to the same base as the officer who had threatened to assault him. Fearing for his safety, he sought and was granted a discharge under the “don’t ask, don’t tell” policy. He was discharged in December 1999. An investigation into the harassment and threats was initiated, but Human Rights Watch does not know the outcome.
- Senior Airman Lauren Brown did not think much about “don’t ask, don’t tell” when she enlisted in January 1996.¹³¹ Beginning in October 1999, while on training exercises in Egypt, she started receiving anonymous death threats. One written on the windshield of her government-leased vehicle stated, “Die you fucking dyke.” In November 1999, after she returned to Shaw Air Force Base in South Carolina, a note left on her vehicle stated, “God hates queers and so do we, die you fucking dyke.” She decided not to report the threats, because she thought it would jeopardize her career. Then, in December 1999, she found the car torched and destroyed, and two of its tires slashed. She reported the arson and told Air Force and local police investigators about the earlier threats and vandalism. Months later she received another note on her vehicle stating, “Gun, knife, bat. I just can’t decide which one. It’s not over dyke.” The harassment continued after she reported that incident to the Air Force Office of Special Investigations.

After the torching of her car, Brown went to the Air Force Equal Opportunity Office and filed a report, but never received a response. Brown was later herself tried by court-martial for the arson to her car, but was ultimately acquitted. Throughout her investigation and trial, Brown never disclosed her sexual orientation. But because Brown felt terrified for her safety and did not think any of the threats against her were adequately investigated, she chose to leave the services in November 2000 with an honorable discharge. In her letter to her commander she stated, “I am still in fear of my life from whomever it is that has threatened me, and still, the Air Force has made no significant effort to have me transferred from Shaw [Air Force Base] or to ‘welcome me back into the fold.’” She concluded, “The Air Force has done nothing to protect me.”¹³²

- Navy seaman Jeremy Manders was asked by his superior, a chief petty officer on the *USS Carl Vinson*, if he was gay.¹³³ After Manders said he was not, the superior said, “I am not the one you want to tell that you are gay; I will discharge you from the Navy and send you home in a box.” Manders also heard his

¹²⁷ Letter, Senior Airman José de Leon to Commanding Officer, 89th Civil engineer squadron, October 13, 1999.

¹²⁸ Ibid.

¹²⁹ Human Rights Watch interview with Lt. Col. Dave Howe and other squadron commanders, Andrews Air Force Base, Maryland, March 17, 2000.

¹³⁰ Servicemembers Legal Defense Network, *Conduct Unbecoming*, March 9, 2000, p. 59.

¹³¹ Human Rights Watch telephone interview with Lauren Brown, May 23, 2001; Servicemembers Legal Defense Network, *Conduct Unbecoming*, March 15, 2001, pp. 74-75.

¹³² Memorandum, Sr. Airman Lauren Brown to Commander, CENTAF, November 30, 2000, cited in Servicemembers Legal Defense Network, *Conduct Unbecoming*, March 15, 2001, Exhibit 43.

¹³³ Letter, Jeremy Manders to Capt. Bruce Clinan, Commanding Officer, *USS Carl Vinson*, January 28, 2000; Servicemembers Legal Defense Network, *Conduct Unbecoming*, March 9, 2000, p. 57 and Exhibit 65.

Chief Petty Officer tell others, “I hate faggots. They have no right to be in the Navy.” In January 2000, the seaman wrote to the ship’s commander acknowledging his homosexuality and seeking a discharge.

Violent Assaults

Although bias-motivated assaults are not frequent, violent attacks do occur. The absence of reliable anti-gay harassment reporting mechanisms or related data compilation makes characterizing the level of violence difficult. More than 3,700 respondents in the Inspector General’s 2000 survey said they had witnessed anti-gay physical abuse, “once/twice or sometimes.” The number is only an approximation—some respondents may have been reporting the same incident, and some incidents may not have had witnesses.¹³⁴

The following cases illustrate how unchecked verbal harassment can lead to violent assault or patterns of violent attacks against suspected homosexuals:

- In 1996, during advanced training at Fort Meade, Maryland, two women harassed Air Force recruit Jennifer Dorsey in her dormitory because they believed she was homosexual. Dorsey found a red swastika drawn on her door and reported it to her commander. The unit received a verbal briefing that harassment was not tolerated, but no disciplinary action followed. One night in April 1996, the same women who had been harassing Dorsey attacked her in the latrine. They repeatedly struck her in the legs and stomach, and called her a “sick dyke.” Her commander, in response to her recitation of the events, stated that a “don’t ask, don’t tell” inquiry would be initiated. The commander affirmed, “If that’s your lifestyle, you had better cease and desist. You can be sure there will be an investigation.” Dorsey and her legal counsel filed a complaint with the Inspector General’s office, but despite repeated attempts to obtain information about the inquiry’s outcome and any disciplinary actions against the assailants, the Inspector General’s office provided no information.¹³⁵

After training, Dorsey was transferred to Vandenberg Air Force Base, where rumors about her sexual orientation started again. A sergeant at the base told her, “I’ve heard you were under investigation at Ft. Meade. I suspect it has followed you. I advise you to get a separation before you face court martial.”¹³⁶ Then, during a visit to an Air Force psychiatrist to discuss her grief over her grandmother’s death, the psychiatrist “hypothetically” asked Dorsey if she was a lesbian. She filed a complaint about the harassment and inappropriate questioning with the Inspector General in March 1997. Ten months later that office had still not contacted her, nor advised of the results of an investigation. Dorsey requested a discharge from the services in 1997 because she feared that harassment and inappropriate questioning would continue.¹³⁷

- On September 7, 2000, Army Private First Class Ron Chapman’s drill sergeant at Fort Jackson called him a “faggot.” Chapman believes the drill sergeant used the epithet because Chapman had pierced ears and wore earrings before joining the army. After the drill sergeant’s comment, another soldier threatened that Chapman had better watch out. Shortly thereafter, fellow soldiers attacked Chapman using their fists and soap wrapped in a blanket.¹³⁸ Chapman wrote home the next day: “I have some bad news for you. I got beat up last night. Someone came to my bed—a group of someones—and they were hitting me with blankets and soap. I am aching all over my body ... You guys have to help get me out of here ... This place is dangerous!”¹³⁹

Superiors asked Chapman what had happened, but he feared that complaining would put him in more danger or that he would be “recycled” back to the beginning of basic training—as his drill sergeant had

¹³⁴ Office of the Inspector General, *Military Environment*, March 16, 2000, pp. 8-10.

¹³⁵ Servicemembers Legal Defense Network, *Conduct Unbecoming*, February 26, 1997, p. 20.

¹³⁶ Letter, Servicemembers Legal Defense Network to the Department of Defense Inspector General, March 13, 1997.

¹³⁷ Jennifer Dorsey, statement made at the SLDN press conference, February 19, 1998, on file at Human Rights Watch.

¹³⁸ Servicemembers Legal Defense Network, *Conduct Unbecoming*, March 15, 2001, pp. 67-68, Exhibits 65-66.

¹³⁹ *Ibid.*, Exhibit 65.

allegedly threatened to do. Harassment and threats continued, and the battalion command sergeant major questioned him about the incidents. One of his harassers was present when Chapman was questioned, and he feared discussing the beating in his presence.

Chapman received an honorable discharge after “telling” that he was gay because he feared for his safety. Chapman’s legal counsel pressed his superiors to conduct an investigation into the attack and provided the details about the beating and harassment. Chapman’s counsel told Human Rights Watch that an investigation of the command’s response to the reported attacks concluded that the command had acted appropriately. An investigation of Chapman’s allegations of verbal and physical abuse found the verbal abuse complaint “substantiated,” but the physical abuse complaint “unsubstantiated.” The counsel was unaware of any discipline stemming from the substantiated verbal abuse complaint.¹⁴⁰

The Murder of Private Barry Winchell

On July 5, 1999, soldiers murdered twenty-one-year-old Army Private First Class Barry Winchell, at Fort Campbell, Kentucky. The murder followed months of anti-gay harassment.¹⁴¹ During the accused soldiers’ courts-martial, the public learned that a fellow private, Calvin Glover, taunted Winchell the night before the killing and that a fistfight ensued, which Winchell won easily. Glover then told Winchell that “it ain’t over.” The next night, while Winchell slept, Glover beat him to death with a baseball bat provided by Specialist Justin Fisher, Winchell’s roommate. Private Glover was court-martialed and convicted of premeditated murder and sentenced to life in prison. Specialist Fisher pleaded guilty to making false statements and obstructing justice for his role in the killing; he was sentenced to twelve and a half years in prison, with the possibility of parole after four years.¹⁴²

The Army initially characterized Winchell’s murder as the outcome of a “physical altercation” and said there was no evidence that it was an anti-gay hate crime.¹⁴³ As the facts emerged, however, it became clear that Private Glover was motivated by anti-gay hatred, and that Army superiors had failed to end a pattern of harassment prior to the murder. After the verdict, Winchell’s mother, Patricia Kutteles, filed a wrongful death lawsuit against the Army.¹⁴⁴ “I do not want another parent to have to endure what we are going through,” she stated. “The Army failed to stop the daily harassment our son faced, and it led to his murder.”¹⁴⁵

According to soldiers and superiors who testified at the murder trial, Winchell had endured four months of anti-gay verbal and physical abuse before he was killed. According to his friends, Winchell had been worried about the harassment and rumors about his sexual orientation, and feared being discharged under the “don’t ask, don’t tell” policy.¹⁴⁶ One of his staff sergeants testified at the court-martial that every day fellow servicemembers subjected Winchell to anti-gay epithets and that “everybody was having fun.” But instead of assisting and protecting Private Winchell, his staff sergeants violated policy by asking him if he was gay. Eventually, the staff sergeants who had tolerated the harassment realized that the First Sergeant, the highest-ranking enlisted member in the unit, had gone too far. He had called Winchell “faggot” and appeared to have unfairly punished him. The staff sergeants reported the First Sergeant’s actions to their commander and to the Inspector General of the base,

¹⁴⁰ Human Rights Watch interviews with Sharra Greer, legal director, Servicemembers Legal Defense Network, September 23 and December 17, 2002.

¹⁴¹ Winchell dated a pre-operative transsexual, and was labeled as gay by other soldiers.

¹⁴² Servicemembers Legal Defense Network, *Conduct Unbecoming*, March 9, 2000, p. 49; “Soldier pleads guilty in barracks killing,” *Washington Post*, January 9, 2000.

¹⁴³ Fort Campbell press release, July 7, 1999. The Servicemembers Legal Defense Network reports that the base’s Criminal Investigation Division ruled out the possibility that the beating death was a hate crime until August 1999.

¹⁴⁴ Andrea Stone, “Mother of slain soldier to sue Army: Says it failed to stop harassment of gay son,” *USA Today*, April 25, 2000. The army rejected her lawsuit, and her appeal to the Secretary of the Army was also denied in May 2001. Nancy Zuckerbrod, “Army rejects appeal in Fort Campbell wrongful death case,” Associated Press, May 22, 2001. Procedures for most civil lawsuits filed against the U.S. military are different from those used in civilian courts, and are governed by the Military Claims Act.

¹⁴⁵ Francis X. Clines, “For gay soldier, a daily barrage of threats and slurs,” *New York Times*, December 12, 1999.

¹⁴⁶ Testimony of specialist Phillip Lewis Ruiz and his wife, Melanie Ruiz, during Article 32 hearing, August 17, 1999. Article 32 hearings are a cross between preliminary hearings and grand jury proceedings in civilian courts.

but, as they later testified, they had been unaware of any action taken against the first sergeant.¹⁴⁷ At trial, soldiers also testified that Fisher had previously threatened to kill Winchell. Winchell's sergeant testified that a few months before the murder, Fisher had attacked Winchell with a metal dustpan and that Winchell required stitches to his face as a result.

Anti-gay tensions at Fort Campbell did not abate following Winchell's death. A large drawing of a baseball bat, with the words "Fag Whacker" written on it, appeared on a bathroom wall in the base's family support center. Graffiti at the base's recreation center stated, "all fagets [sic] in the army will be killed." The soldier who reported the graffiti ultimately told his commander he was gay and feared for his safety at Fort Campbell:

[I]t is clear to me that I must be vigilant every second of every day in order to protect my personal safety. I have struggled enough with having to live a double life in order to prevent being investigated and thrown out of the army, Barry's death has made it clear to me that my career is not the only thing I could lose because of who I am.¹⁴⁸

In a sworn affidavit, Private Javier Torres described the anti-gay climate at Fort Campbell and his experience of constant anti-gay harassment and his fears for his safety.¹⁴⁹ He recalled a staff sergeant's cadence during a run, after Winchell was killed, as: "Faggot, faggot down the street, shoot him, shoot him, 'til he retreats," or words to that effect.¹⁵⁰ Torres stated that he heard soldiers say, "So what if he [Winchell] was killed? He was gay," and "Who cares? He was just a fag." According to Torres, when he expressed concern to other soldiers about Winchell's killing, they responded by asking about his own sexual orientation. In August 1999, a specialist warned Torres that he had heard other soldiers discussing Torres' sexual orientation and that one seemed angry. The specialist expressed his concern for Torres' safety.

According to Torres, during a briefing on the "don't ask, don't tell" policy in late August 1999, a sergeant told Torres's unit that it was a "fag briefing" and as he finished the briefing, told the soldiers, "Enough about the fags, let's move on."¹⁵¹ The army discharged Torres in September 1999 after he made a statement acknowledging his homosexuality.

The number of discharges from Fort Campbell under "don't ask, don't tell" underscores the tension following Winchell's murder. In Fiscal Year (FY) 1999 there were seventeen such discharges; in FY 2000, there were 161; and in FY 2001 there were 222.¹⁵² Questioned in 2000 by reporters about the number of homosexual discharges at the base, Maj. Gen. Robert T. Clark stated that it was simply homosexuals "wanting an easy way out of the Army."¹⁵³ In October 1999, as a result of the Winchell killing, and the extensive publicity it received,

¹⁴⁷ Servicemembers Legal Defense Network, *Conduct Unbecoming*, March 9, 2000, p. 50.

¹⁴⁸ Letter, Specialist Michael McCoy to commander, November 30, 1999. Servicemembers Legal Defense Network, *Conduct Unbecoming*, March 9, 2000, Exhibit 59.

¹⁴⁹ Sworn affidavit of Private Javier Torres, October 19, 1999, as cited in Servicemembers Legal Defense Network, *Conduct Unbecoming*, March 9, 2000, Exhibit 55. The affidavit was submitted to his commander when Torres sought discharge from the services. Torres stated that he was also harassed at other bases. While at basic training at Ft. Benning, he was harassed on an "almost daily basis" about his sexual orientation by his peers. His drill sergeant called him a faggot and another trainee provoked a fight with Torres because he believed he was gay. He stated that anti-gay comments and epithets are used routinely among the infantry in the Army.

¹⁵⁰ *Ibid.* In an e-mail communication to Human Rights Watch (June 1, 2000), Torres wrote that he was unaware of any investigation into his allegations or of punishment of those responsible other than the Inspector General's command climate review of the base.

¹⁵¹ Sworn affidavit of Private Javier Torres, October 19, 1999, as cited in Servicemembers Legal Defense Network, *Conduct Unbecoming*, March 9, 2000, Exhibit 55.

¹⁵² Roberto Suro, "Military's discharge of gays increase; army base where anti-gay murder occurred had record number of departures," *Washington Post*, June 2, 2001; Servicemembers Legal Defense Network, *Conduct Unbecoming*, March 14, 2002, p. 11.

¹⁵³ Elizabeth Becker and Katharine Q. Seelye, "Policy on gays part of the drill at army base," *New York Times*, February 14, 2000. Despite criticism of Major General Clark's leadership at Fort Campbell, including his failure to address anti-gay
Human Rights Watch

President Clinton signed an executive order amending the Uniform Code of Military Justice. (UCMJ) and the *rules for courts-martial* to include anti-gay hate crimes as aggravating factors in military criminal sentencing. The order stated: "... 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 ... sexual orientation of any person."¹⁵⁴ The Pentagon recommended the change to conform with many state hate-crimes statutes. The October 1999 revisions reportedly had been pending for a year, and would have been available for Winchell's killers had they been promptly enacted. Human Rights Watch does not know the extent to which the anti-gay motivation provision has been deemed an aggravating factor in sentencing because such factors are not tracked by judge advocate general's offices.¹⁵⁵

Army Inspector General's Report on Fort Campbell

In July 2000, the Army's Inspector General issued a report titled "Assessment of Allegations of Violations of the DOD Homosexual Conduct Policy at Fort Campbell."¹⁵⁶ The report presented the findings of a special task force of the Inspector General reviewing the command climate at the base, the actions taken by Private Winchell's peers and superiors prior to his murder, and the results of its investigations into the allegations of anti-gay harassment made by Javier Torres (noted above). The Inspector General's investigation also looked more broadly at the implementation of the "don't ask, don't tell" policy at Fort Campbell. This constituted the first assessment of how the policy was being taught and implemented since it was put in place.

The report concluded that the general command climate at Fort Campbell was good,¹⁵⁷ but that an "abusive" non-commissioned officer (NCO) headed Winchell's company. When the report was released, a year after Winchell's killing, that NCO had been transferred from Winchell's unit because of his generally abusive behavior, but no other disciplinary action had been taken against him.¹⁵⁸

The report substantiated some of Private Torres' claims of anti-gay harassment at the base. The Inspector General found that officers had used derogatory language during training and cadences at Fort Campbell, and confirmed the presence of the anti-gay graffiti as Torres and others had reported. The Inspector General was not able to substantiate Torres's allegations that the sergeant used derogatory language during a "don't ask, don't tell" policy briefing. The Inspector General also found that Torres had endured "routine harassment" at Fort Benning and "occasional harassment" at Fort Knox—bases where he had been stationed prior to Fort Campbell.¹⁵⁹

The Inspector General's staff interviewed servicemembers who said joking, inappropriate comments, and bantering were common, but also said that individuals were rarely singled out for anti-gay verbal harassment. Of the 568 interviewed during these sessions, only twenty-one said they had knowledge of oral or written harassment

harassment at the base and his failure to address anti-gay harassment directly following Private Winchell's murder, President George W. Bush recently nominated Clark for a promotion to Lieutenant General, the army's second-highest rank.

¹⁵⁴ President William J. Clinton, *Executive Order No. 13140*, amending R.C.M. 1001 (b)(4), October 6, 1999.

¹⁵⁵ The judge advocate general's offices of the navy and army reported that they do not track the use of hate crimes as aggravating factors. Human Rights Watch telephone interview with Lt. Com. William Condron, Criminal Law Division Chief, Office of the Judge Advocate General, Department of the Army, December 16, 2002, and e-mail communication from Carolyn Alison, Public Affairs Officer, Office of the Judge Advocate General, Department of the Navy, December 20, 2002. In its electronic-mail message, the navy responded to Human Rights Watch's inquiry by acknowledging, "...whether a military judge considers the criteria for 'hate crimes' aggravation in sentencing is not tracked with any reliable accuracy so that numbers would not prove helpful." The U.S. Air Force directed Human Rights Watch to file a Freedom of Information Act request to obtain information about the application of the hate crimes provision of the UCMJ. Telephone inquiry, December 17, 2002.

¹⁵⁶ Department of the Army Inspector General, Fort Campbell Task Force, *DAIG Special Assessment of Allegations of Violations of the DOD Homosexual Conduct Policy at Fort Campbell*, July 2000.

¹⁵⁷ Department of the Army Inspector General, *Fort Campbell Task Force*, July 2000, pp. C-88-C-101.

¹⁵⁸ Eric Shinseki, Chief of Staff of the Army, press briefing, July 21, 2000.

¹⁵⁹ Department of the Army Inspector General, *Fort Campbell Task Force*, July 2000, pp. 2-19, 2-20. Neither Torres nor the Servicemembers Legal Defense Network, which helped Torres pursue these complaints, were advised of any disciplinary action taken against those involved in the harassment allegations found to be credible.

towards individuals perceived to be homosexuals. The report noted that “one of the challenges associated with determining the extent and nature of harassment stems from the fact that until recently, harassment was not specifically defined in Army training briefs.”¹⁶⁰ In addition to interviews, the Inspector General’s assessment of the command climate at Fort Campbell drew heavily from answers to a questionnaire by 1,385 soldiers—211 of whom included additional written comments. Curiously, although a bias-motivated murder and allegations of anti-gay harassment had prompted the investigation, the questionnaire’s ninety-six questions included only two that related to the “don’t ask, don’t tell policy,” and none that referred specifically to harassment based on perceived sexual orientation. A section requesting information about personal harassment failed to include “sexual orientation” in the definition of harassment, yet it listed race, religion, and gender (sex).¹⁶¹

The report nevertheless confirmed the danger of anti-gay harassment and violence. It noted that commanders suspect that some soldiers claim they are gay to secure a discharge, when in fact they might not be homosexuals. Despite these doubts about the servicemembers’ claims, the commanders generally grant the discharge because they fear “the possibility of incidents involving harassment, threats, or bodily injury,” against soldiers who have said they are homosexual.¹⁶² Indeed, 40 percent of the commanders “expressed concerns that the policy as currently written placed them in an intractable position of ensuring soldier safety.” In other words, despite the conclusion that the command climate at Fort Campbell was good, one of the main reasons commanders discharged soldiers who made statements under the “don’t ask, don’t tell” policy was because they feared those servicemembers would be harmed if others on the base knew of their admission.

In reviewing the reasons some soldiers offered for “coming out” and being discharged under the policy, the report stated:

The Task Force also determined that information exists suggesting that some of the soldiers may have been the unintended targets of innuendos against the homosexual lifestyle or bantering between soldiers, and these comments may have been perceived to be harassment or threats given that a soldier was murdered at Fort Campbell.¹⁶³

The task force failed to appreciate the hostile environment such jokes created and the importance of curtailing them. Indeed, it appeared to condone offensive jokes not directed at a particular servicemember. The task force described a situation in which a person who made general anti-gay comments explained he did not know the person he addressed was a homosexual and thus, would be offended.¹⁶⁴ Of course, under the “don’t ask, don’t tell” policy, soldiers are not *supposed* to know.

The report found that “most soldiers, NCOs and officers at Fort Campbell lacked an understanding and working knowledge of the policy prior to July 5, 1999 [the day Private Winchell was killed].”¹⁶⁵ It stated:

... currently, commanders, leaders, and soldiers at Ft. Campbell do not have a clear understanding of the policy because training and information materials do not adequately convey the substance of the policy ... [and] contain key words (don’t ask, don’t tell) that are not defined in doctrine ... Training provided on the policy is not clearly written, not tailored to specific audiences based on

¹⁶⁰ Ibid., p. 2-12. Another problem in assessing the prevalence of anti-gay harassment at the base stemmed from the lack of training on the “don’t ask, don’t tell” policy. The task force report notes “several of the alleged violations reported during this assessment appeared not to have made it to the company commander/first sergeant level, thus the chain of command was unable to take appropriate action against potential Policy violations. This was exacerbated by the fact that many NCOs and soldiers were not sufficiently trained on the policy so that violations such as harassment and lack of sensitivity were perpetuated at the lowest levels.” Ibid., p. 2-11.

¹⁶¹ Ibid., pp. C-88—C-101.

¹⁶² Ibid., p. 2-43.

¹⁶³ Ibid., p. 2-45.

¹⁶⁴ Ibid., p. 2-45.

¹⁶⁵ Ibid., p. ES-6.

rank and duty positions, fails to adequately convey the substance of the policy, and is presented in a format that does not foster open and meaningful discussion on the issues.¹⁶⁶

With regard to anti-gay harassment, the report stated: “training does not adequately advise victims how and where to report harassment and does not advise soldiers whether they have a duty to report observed harassment.”¹⁶⁷ Discipline for harassment, the report found, was not clear because commanders were not told which options they had available when allegations of harassment were substantiated.¹⁶⁸

Fort Carson, Colorado

During 2001, Private Mike Wooten, based at Fort Carson, Colorado, endured an anti-gay environment that included widespread public speculation—by peers and officers—about the sexual orientation of Wooten and other soldiers. This speculation was often accompanied by comments such as “I wish I could kick their ass.”¹⁶⁹ The comments offended Wooten, and he began to fear for his safety. He nevertheless tried to ignore them and even tried to deflect attention from himself by chiming in with anti-gay comments. Then, a staff sergeant told him that he “hates faggots” and would want to kill Wooten if he learned he was gay. In a subsequent statement to his commanding officer, Wooten wrote, “all I can think about is the soldier back in 1999 that was killed at Fort Campbell for his perceived sexuality.”¹⁷⁰

After the Servicemembers Legal Defense Network notified the commanding officer at Fort Carson about Private Wooten’s allegations, steps were taken to protect Wooten until he was discharged under the policy, and an investigation was initiated focusing on F Troop—Wooten’s unit.¹⁷¹ The investigation found that Wooten’s superiors had engaged in and condoned anti-gay comments, that anti-gay comments were “part of the unit’s normal atmosphere,” and that there was no record of training on the “don’t ask, don’t tell” policy.¹⁷²

In his report, the investigating officer recommended that troops immediately receive the required refresher training on the “don’t ask, don’t tell” policy, that troop commanders develop a system for tracking subsequent training requirements, that the squadron commander consider administrative or disciplinary actions for three named sergeants for their “inappropriate and indecent language,” and, in the case of the staff sergeant for failing to correct subordinates engaging in inappropriate conduct; that those sergeants conduct training on the role of

¹⁶⁶ Ibid., p. ES-7. Frustrations over the policy are not limited to Fort Campbell. Since “don’t ask, don’t tell” was conceived and implemented, the U.S. military has been grappling with a policy that satisfies no one, including commanders and other officers. Human Rights Watch asked officers at Fort Jackson (Army), Norfolk (Navy), and Andrews (Air Force) bases their opinions of the policy. Responses varied. The commanding officer at Andrews Air Force Base acknowledged that implementation of the “don’t ask, don’t tell” policy is difficult because it is “too gray,” it is a compromise, and no one is happy with it. Before “don’t ask, don’t tell” he said, it was “cleaner” and better. Human Rights Watch interview, Wing Commander Hawkins, Andrews Air Force Base, Washington D.C., March 17, 2000. A drill sergeant at Fort Jackson told Human Rights Watch that some soldiers get a “light bulb” over their heads that using the “don’t ask, don’t tell” policy would be a way to get out, because they could claim to be “feather dusters”—an apparent reference to homosexuals. Human Rights Watch interview with a group of six drill sergeants at Fort Jackson, South Carolina, January 18, 2000.

¹⁶⁷ Department of the Army Inspector General, *Fort Campbell Task Force*, July 2000, p. 2-36.

¹⁶⁸ The report points out that the options include verbal or written counseling, letters of concern or reprimand, or Uniform Code of Military Justice (criminal) action. Ibid., pp. 2-27, 2-28.

¹⁶⁹ Servicemembers Legal Defense Network, *Conduct Unbecoming*, March 14, 2002, pp. 16-17, Exhibits 24-25.

¹⁷⁰ Ibid., Exhibit 24.

¹⁷¹ Maj. Richard French, Investigating Officer, Department of the Army Headquarters, 7th Infantry Division and Fort Carson, Memorandum for Chief of Staff, Headquarters, 7th Infantry Division, Ft. Carson, “Allegation of Solider Harassment Based on Suspected Sexuality and the Threatening of Life by a Noncommissioned Officer,” September 18, 2001.

¹⁷² The investigation report noted that many soldiers said anti-gay comments and jokes and “were made in fun and to ease tension and stress.” Memorandum for Chief of Staff, Headquarters, 7th Infantry Division, September 18, 2001, p. 3. According to the report, during an equal opportunity class addressing sexual harassment, the commander referred to female mechanics who fix TOW missiles as “TOW hos,” *ibid.*, p. 5. The report also acknowledged that Private Wooten did not submit his complaint through the chain of command because he did not trust them to handle it properly and confidentially. Other members of his troop shared this concern, *ibid.*, p. 6

NCOs in preventing and circumventing harassment of any kind. He also called on senior officials to demonstrate the values of the Army and policies of the Army's Equal Opportunity Program, emphasized the importance of maintaining confidentiality when dealing with soldiers' personal issues, and recommended that a course be taught—separate from the other blocks of instruction—that describes not only the legal aspects of the homosexual conduct policy, but also how harassment due to perceived sexual orientation is in violation of the Army's Equal Opportunity Program.¹⁷³

VII. IMPACT ON WOMEN

The “don't ask, don't tell” policy does not distinguish between men and women. In practice, however, the policy has had a much greater adverse impact on women than men. In 2001, women constituted about 14 percent of the armed forces, yet 30 percent of the “don't ask, don't tell” discharges.¹⁷⁴ The overall rate of discharges of women under the policy has been increasing: in 1997, they constituted only 22 percent of discharges.¹⁷⁵

The exact causes of the far higher discharge rates for women are not known. Nevertheless, our research suggests lesbian and straight women in the military are victims of both homophobia and sexual harassment, as well as a vicious hybrid of the two—lesbian-baiting. Women who rebuff sexual advances by male soldiers face the prospect of being called a lesbian or a “dyke.”¹⁷⁶ Because of the risk of military discharge that follows such allegations, the “don't ask, don't tell” policy provides sexual harassers with a tool to threaten women who decline their sexual overtures or to intimidate women who hold non-traditional jobs, such as pilots, drill instructors, mechanics, or heavy-equipment operators, as well as those who hold leadership positions.¹⁷⁷

A July 1997 Secretary of the Army's Senior Review Panel Report on Sexual Harassment noted:

One particular form of sexual harassment not addressed in the survey but commented on in a few focus groups and by other female soldiers in informal discussions, was the fear of being accused of being a homosexual. Female soldiers who refuse the sexual advances of male soldiers may be

¹⁷³ Memorandum for Chief of Staff, Headquarters, 7th Infantry Division, September 18, 2001, pp. 7-9.

¹⁷⁴ In 2001, women constituted 19 percent of the Air Force, but 43 percent of Air Force discharges under the policy. They constituted 6 percent of the Marine Corps, but 18 percent of Marine discharges; they constituted 15 percent of the Army, but 34 percent of Army discharges. Only in the Navy was the percentage of female “don't ask, don't tell” discharges proportionate to women's representation overall. Servicemembers Legal Defense Network, *Conduct Unbecoming*, March 14, 2002, p. 41, based on Department of Defense figures.

¹⁷⁵ *Ibid.*

¹⁷⁶ Lesbian-baiting is long-standing problem in the military. A 1992 report on sexual harassment prepared for the Department of the Army, 91st Division (Training) by the Inspector General and the Equal Opportunity Office noted, “the prohibition against homosexuals in the Army results in a subtle ‘billy club’ for anyone to use against single women in the Army. When they turn down a ‘date’ with another soldier, it is often whispered unjustifiably, that she is a ‘lesbian.’” Department of the Army 91st Division (Training), *Sexual Harassment and Sexual Discrimination*, October 20, 1992, p. 2.

As one male Marine stated in 1988:

I thank God every day that I am a male Marine in this male Marine Corps ... If a woman Marine is a little too friendly, she's a slut. If she doesn't smile at all, she's a dyke. I personally believe that a woman Marine in the normal course of a day confronts more stress and more bullshit than a male Marine would in twenty years.

Testimony of Captain Guy Richardson, U.S. Marines, at Article 39(a) Hearing of Sergeant Mary Kyle, 1988, quoted in Michelle M. Benecke and Kirstin S. Dodge, *Military Women in Nontraditional Job Fields*, p. 232.

¹⁷⁷

“Servicewomen in nontraditional job fields expend an enormous amount of energy seeking to walk the fine line between effective competence and nonthreatening femininity; they must be feminine enough to reduce harassment, but must avoid the danger of being considered inferior or incompetent by virtue of this femininity. Because of the threat of harassment against women who associate together in groups, servicewomen cannot even turn to each other for relief and support in the face of this daily challenge.”

Michelle M. Benecke and Kirstin S. Dodge, “Military Women: Casualties of the Armed Forces,” in *Gay Rights, Military Wrongs*, edited by Craig A. Rimmerman (New York and London: Garland Publishing, 1996), p. 85.

accused of being lesbians and subjected to investigation for homosexual conduct. As in the case of men falsely accused of sexual harassment, women accused of lesbianism believe that the mere allegation harms their careers and reputations irreparably.¹⁷⁸

The following cases illustrate the sexual harassment and lesbian-baiting that servicewomen face and the discharge that often results:

- In October 1998, Lori Smith, a seaman apprentice, began working in the galley of the *USS Eisenhower*. While on the ship, she refused to date a married petty officer who repeatedly asked her if she was a lesbian. When she was off ship in Norfolk, Virginia, she rebuffed another sailor's sexual advances. When he was rejected, this sailor stated in front of other sailors, "You're a fucking dyke."¹⁷⁹ Smith was subjected to repeated anti-gay comments and harassment and then in March 1999, found a typed message on her car's windshield [spelling and typographical errors from original]:

Let me start iff by saying if you think you're hiding it, you're dead wrong, yeah you know what I'm talking about, you dyke ass bitch. And if you don't care, well you're doing a good job so far. We all know about you and your butch ass girlfriend, the entire ship knows. You homo's are sickening, the Navy, has no room for you twisted freaks. You queers, like being stared at, talked about, and laughed at? because it happens, whenever you show your faces!

You are so wrong in what your doing, we haven't, and never will stand for it, you know you bitches are going to rot in hell. Your a perfect example of why there decieses, and Aids, (hell you dykes started the freakin' thing).

Your constantly being watched, your every move, every step, you're getting closer and closer to what you vitchs deserve, it's only a matter of time before we to get you back, and teach you a lesson. One that you'll never, ever forget. Your pasrt overdue for a beatdown!!!!!! Theres no way to hide, you know theres no where to run! You live on the ship!

SO YOU BETTER WATCH YOUR ASS!!!!!!!!!!!!!!!!!!!!!!!!!!!!!!

We don't want you here, the Navy does'nt want you either. You should have just stayed in your own freakin homo world, with your own kind, at least then youd be somewhat safe, HERE YOUR NOT.....And as long as your in our world you never will be, you fuckin' Dykes.....¹⁸⁰

Concerned for her physical safety, Smith informed her commanding officer that she was a lesbian and was discharged.

- Former Army Sgt. Victoria Casper was forced out of the Army in 1997 by lesbian-baiting.¹⁸¹ According to Casper, her male co-worker regularly made degrading comments about her, such as: "Casper is a fucking lesbian," "carpet muncher," "faggot," "queer," and a "dyke," and accused her of advancing professionally by giving sexual favors. She filed a sexual harassment complaint against the co-worker with the base Equal Opportunity Office. Shortly thereafter, Sergeant Casper was accused by a close

¹⁷⁸ *The Secretary of the Army's Senior Review Panel Report on Sexual Harassment*, vol. 1, July 1997, p. 66.

¹⁷⁹ Servicemembers Legal Defense Network, *Conduct Unbecoming*, March 9, 2000, Exhibit 73; Human Rights Watch telephone interview with Lori Smith, May 16, 2000.

¹⁸⁰ Human Rights Watch telephone interview with Lori Smith, May 16, 2000; Copy of written threat in Servicemembers Legal Defense Network, *Conduct Unbecoming*, March 9, 2000, Exhibit 70.

¹⁸¹ Servicemembers Legal Defense Network, *Conduct Unbecoming*, February 18, 1998, pp. 57-8; Human Rights Watch interview, Washington, D.C., January 28, 1999.

friend of the co-worker of engaging in a homosexual marriage—an allegation that Casper denied. Casper concluded that fighting the allegations might jeopardize the honorable discharge that she had been offered to avoid an inquiry, and she decided to leave the military.

- Lt. Commander Jill Szymanski was a Navy nurse for twelve and a half years and achieved the rank of lieutenant colonel before she chose to resign her commission in 1998.¹⁸² She described to Human Rights Watch a work environment of anti-gay jokes, and said she feared that an investigation into her private life under the “don’t ask, don’t tell” policy could be initiated at any time. Before she rose in the ranks, officers sexually harassed her. When she chose not to date one of them, he spread a rumor that she was a lesbian. To avoid an investigation, she went on dates with men. Although she did not want to leave the Navy and enjoyed being in the Navy nurse corps, she believed she was giving “150 percent” to a military that would discharge her if it found out who she was, and that the “don’t ask, don’t tell” policy prevented her from reporting harassment. “I was afraid [of an investigation] every single day,” she said.¹⁸³
- In 2001, while she was based at Fort Hood, Texas, male soldiers repeatedly told Sgt. Tracey Cade that she was not “feminine enough.” Cade, who was an army military policewoman with nearly five years of outstanding service, chose to acknowledge that she was a lesbian to escape persistent anti-gay harassment. She sought, and was granted, a separation under the “don’t ask, don’t tell” policy and was discharged in late 2001.¹⁸⁴
- Cadet Elizabeth Moseanko was in the Army Reserve Officers’ Training Corps (ROTC) program at Seattle University and hoping to become an officer, when her instructor told her in late 1999 that she was not feminine enough. She became the target of widespread, harassing speculation about her sexual orientation. Her peers asked her if she was a lesbian because some of her friends had short hair. An ROTC instructor learned of the rumors about Moseanko and the harassment. Instead of addressing the inappropriate comments by her peers, he ordered her into his office and told her to grow her hair longer, wear earrings, and apply make-up. She reported the instructor’s actions and dropped out of the ROTC program in early 2001.¹⁸⁵
- Carol Melnick, former specialist in the Army, was subjected to constant anti-gay harassment as soon as she entered the Army in 1996. During the first week of basic training her sergeant lectured her after she casually put her hand on another female trainee’s shoulder. In front of her platoon, the sergeant told Melnick that she would be “in a lot of trouble” if she did anything like that again. Apparently assuming that she was a lesbian, Melnick recounted how he stated “people like her” “disgusted him” and “shouldn’t be allowed in the Army. They don’t belong here.”¹⁸⁶ After the sergeant’s public diatribe, fellow servicemembers labeled Melnick a lesbian and continually harassed her. In one incident, a platoon sergeant pointed at Melnick and a female friend and yelled through the barracks that they were lesbians. They reported this to the head drill sergeant, who did nothing in response but smile.

In another incident while she was based at Fort Bragg, North Carolina, Melnick was in a vehicle with several noncommissioned officers and an Equal Opportunity Office representative. A sergeant started telling sexually explicit joke about lesbians, and kept saying to Melnick, “Don’t take this personally.” All laughed and checked for Melnick’s response. In a language class that Melnick attended, students repeatedly made anti-gay jokes, and one student reportedly stated, “There’s nothing wrong with killing a few fags.” Melnick concluded that “lewd comments and jokes about gays were prevalent and appeared to

¹⁸² Human Rights Watch telephone interview with Jill Szymanski, March 4, 1999. Unlike enlisted personnel, officers may resign and, in a case like this, would not have to make a statement under the policy to be removed from the services.

¹⁸³ Jim Oliphant, “Under Friendly Fire,” *Legal Times*, January 3, 2000.

¹⁸⁴ Human Rights Watch telephone interview with Tracey Cade, March 19, 2002; Servicemembers Legal Defense Network, *Conduct Unbecoming*, March 14, 2002, p. 42.

¹⁸⁵ Servicemembers Legal Defense Network, *Conduct Unbecoming*, March 15, 2001, pp. 70-71.

¹⁸⁶ *Ibid.*, pp. 67-9.

be as much a part of the Army culture as the uniform.” Worried about her mental and physical health and tired of the harassment, Melnick made a statement that she was a lesbian and was discharged in 1998.

In March 1997, Under Secretary for Defense Edwin Dorn alluded to lesbian-baiting in a memorandum containing guidelines for addressing the investigation of anti-gay threats against servicemembers based on alleged homosexuality. The memo acknowledged “information we have received that some servicemembers have been threatened with being reported as homosexual after they rebuffed sexual advances or themselves reported acts of sexual misconduct by others.”¹⁸⁷ The memo was never distributed or implemented. When the memo was “reissued” in August 1999, its reference to lesbian-baiting had been deleted. During an August 10, 2001 meeting with Pentagon officials, Human Rights Watch asked why the reference had been deleted, but the officials had no explanation.¹⁸⁸

VIII. INTRUSIVE INVESTIGATIONS

“Don’t ask, don’t tell” was intended to stop unwarranted, intrusive inquiries into the private lives of homosexual or bisexual servicemembers. Under the policy, only commanders are authorized to inquire into servicemembers’ sexual orientation, and then, only on the basis of credible information. Servicemembers nevertheless report frequent questions by officers without authorization, inquiries launched on the basis of rumors, and extremely intrusive questions into their private lives—as well as the private lives of others. Servicemembers who have endured a hostile work environment and anti-gay harassment have then faced the harassment of intrusive inquiries by military officials.

According to Department of Defense policy, the April 1998 *Review of the Effectiveness of the Application and Enforcement of the Department’s Policy on Homosexual Conduct in the Military* and the August 1999 memorandum *Implementation of Recommendations Concerning Homosexual Conduct Policy*, “little or no investigation” should be conducted following a statement of sexual orientation.¹⁸⁹ The servicemember should only be asked if he or she understands the repercussions—discharge—that may result from the statement. But commanders or others may conduct inquiries to determine whether a statement of homosexuality was “fabricated in an effort to avoid [a deployment or] a service obligation.”¹⁹⁰ An inquiry into the truth of the statement necessarily entails the same intrusive inquiry that the policy theoretically proscribes.

The following cases illustrate the problem of unauthorized inquiries and intrusive investigations that violate the “don’t ask” component of the policy:

- In March 1999, rumors prompted a master sergeant and senior airman at the Defense Language Institute (DLI) to ask two female airmen about their sexual orientation.¹⁹¹ The master sergeant asked one airman if

¹⁸⁷ Memorandum, Under Secretary of Defense Edwin Dorn to secretaries of the military departments, chairman of the joint chiefs of staff, and inspector general, “Guidelines for investigating threats against servicemembers based on alleged homosexuality,” March 24, 1997.

¹⁸⁸ Human Rights Watch interview with Principal Deputy Assistant Secretary of Defense for Force Management Gail McGinn and Robert Reed, General Counsel’s office, Department of Defense, Washington D.C., August 10, 2001.

¹⁸⁹ Office of the Under Secretary of Defense (Personnel and Readiness), *Report to the Secretary of Defense*, April 1998, pp. 9-10; Memorandum, Under Secretary of Defense (Personnel and Readiness) Rudy de Leon to Secretaries of the Military Departments, “Implementation of Recommendations Concerning Homosexual Conduct Policy,” August 12, 1999.

¹⁹⁰ Office of the Under Secretary of Defense (Personnel and Readiness), *Report to the Secretary of Defense*, April 1998, pp. 9-10; Memorandum, Under Secretary of Defense (Personnel and Readiness), *Implementation of Recommendations*. The April 1998 review included mention of “a deployment or a service obligation” while the August 1999 guidelines simply stated “a service obligation.”

¹⁹¹ Servicemembers Legal Defense Network, *Conduct Unbecoming*, March 9, 2000, p. 30; Jane Haseldine and Kathleen Wong, “Bias at DLI Alleged; 14 cases of anti-gay harassment in past year, report claims,” *Monterey County-Herald*, March 10, 2000; Doug Ireland, “Search and Destroy: Gay-Baiting in the military under ‘don’t ask, don’t tell,’” *The Nation*, July 10, 2000. Throughout 1999 and early 2000, a dozen airmen, male and female, at the DLI were discharged after they were

she had become “a little too friendly” with another female airman, and then he and the senior airman asked fellow airmen about the two women’s sexual orientation. The master sergeant asked a third airman, Deanna Grossi, if she had a “propensity to like the same kind of people” after asking about the two female airmen originally approached.

Grossi’s classmates and a civilian instructor subsequently verbally harassed her, but she felt she could not stop the harassment without making the situation worse. In a memorandum to a lieutenant colonel describing the anti-gay climate and harassment at DLI, she wrote: “I have endured more over the course of the past year than I have in the sum of the first 19 years of my existence. Treatment like I received needs to be stopped. No one deserves to be targeted because of an inability to defend one’s self.”¹⁹² Grossi sought, and was granted, a discharge under the “don’t ask, don’t tell” policy.

- A male DLI student made a statement acknowledging homosexuality in May, 1999, seeking a discharge “to avoid becoming the target of harassment or a witch hunt in the future.” The inquiry officer asked him about his sexual experiences before joining the services, about other gay airmen, and asked for telephone numbers of people who could verify that he was gay. His friends were subsequently questioned, despite his request that the matter be handled confidentially.¹⁹³
- John Petrozino, an airman at DLI, was subjected to anti-gay jokes and hostile remarks. At one point, an airman shouted, “We still have a faggot on flight,” and Petrozino believed the airman was referring to him. Faced with harassment and the anti-gay climate, Petrozino informed his master sergeant that he was gay.¹⁹⁴ An inquiry officer subsequently questioned Petrozino, delving into his personal life with questions touching upon which family members knew he was gay and how they could be contacted, whom he dated, how frequently, who his friends were, and how to contact them. In the course of her investigation, the inquiry officer found that:

... a hostile and intolerant environment existed in [Petrozino’s] flight group and the squadron. Both A1C [Airman First Class] Milani and A1C Shell admit to spreading rumors that the subject was gay and making derogatory comments about homosexuals in general. It is clear that absent the subject’s admission there would be insufficient credible evidence to support a finding that he has the propensity to engage in homosexual conduct. The fact that a hostile environment exists, provides the motive for his disclosure.¹⁹⁵

Problems at DLI continued. Between October 2001 and September 2002, the army discharged for being homosexual at least seven linguists who were trained in Arabic.¹⁹⁶ The army also discharged two linguists proficient in Korean and one proficient in Mandarin Chinese under the “don’t ask, don’t tell” policy. Two of the linguists were discharged after the men broke visitation rules, leading to a search of one of their rooms and the discovery of personal letters and photographs that revealed that they were gay. The eight other language students informed their commanders that they were homosexuals because they did not want to live in enforced silence under the policy or because they faced anti-gay verbal

inappropriately “asked” about their sexual orientation. The Department of Defense initiated an inquiry into the DLI allegations of harassment, but never made its findings public.

¹⁹² Servicemembers Legal Defense Network, *Conduct Unbecoming*, March 9, 2000, Exhibit 37.

¹⁹³ *Ibid.*, Exhibit 30.

¹⁹⁴ Memorandum, Major Terry A. O’Brien, Department of the Air Force, July 31, 1999. Servicemembers Legal Defense Network, *Conduct Unbecoming*, March 9, 2000, Exhibit 33.

¹⁹⁵ *Ibid.*

¹⁹⁶ “Gay Army Linguists Say They Were Ousted,” *New York Times*, November 14, 2002; CNN, “Gay army translator dismissed,” *Wolf Blitzer Reports*, November 29, 2002; Alastair Gamble (Op-ed), “A military at war needs its gay soldiers,” *New York Times*, November 29, 2002; Servicemembers Legal Defense Network press release, November 14, 2002.

harassment.¹⁹⁷ Both the September 11, 2001 attacks on the United States, which involved hijackers from Arabic-speaking countries, and the possible war with Iraq have highlighted the shortage of Arabic speakers in the military and in intelligence agencies working with the military. Critics of the DLI discharges have questioned the wisdom of a policy that deprives the U.S. military of personnel with much needed language skills.¹⁹⁸

- Airman Jeremy Cruz, based at Holloman Air Force Base in New Mexico, sought discharge from the Air Force in May 1999 because he was gay, not sexually active, and was tired of not being able to talk about his private life.¹⁹⁹ Without command authorization, a first sergeant questioned Cruz and told him he was being investigated for violating the sodomy law. Cruz initially stated that he had not had sex with men, but was attracted to them and was not attracted to women. He was subsequently questioned again about his sex life, and eight other people were questioned about his sexual conduct. During repeated, invasive questioning, the first sergeant asked Cruz “how do you know you’re gay if you’ve never had sex with a man?” and “to tell me about it ... the number of men or how many times?” Cruz ultimately revealed details about his sexual conduct and at the first sergeant’s insistence wrote down the names of all of the sexual partners he had had prior to joining the military. He was discharged under the policy and no sodomy charges were filed. The first sergeant filed a report stating that she had told Cruz during one interrogation that “there’s [sic] other avenues to pass the time than just with any gay community. I recommended sports, Community Activity Center, the hobby shop, and volunteering.”²⁰⁰

IX. HUMAN RIGHTS AND U.S. LEGAL STANDARDS

All human beings are born free and equal in dignity and rights.

-Universal Declaration of Human Rights, article 1

The discrimination against homosexuals embodied in and sanctioned by “don’t ask, don’t tell,” should embarrass the United States—a country that holds itself out internationally as a human rights champion. The policy cannot survive scrutiny under internationally affirmed human rights principles protecting the right to privacy and prohibiting discrimination. Unfortunately, U.S. constitutional jurisprudence has not incorporated those international human rights law protections: the U.S. Supreme Court has refused to extend the due process right of privacy to sexual relations between homosexuals, and federal courts of appeal have rejected arguments that discharging service members who acknowledge their homosexuality violates the constitutional prohibition on discrimination.

Human Rights Law

Right to Privacy

The International Covenant on Civil and Political Rights (ICCPR), which the United States ratified in 1992, expressly affirms the right to privacy (Article 17). So do regional human rights treaties such as the American Convention on Human Rights (Article 11) and the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 8). Under Article 17 of the ICCPR, “No one shall be subjected to arbitrarily or unlawful interference with his privacy” and everyone has “the right to the protection of the law against such interference.”²⁰¹

The scope of the internationally protected right to privacy extends beyond home, family, correspondence, or property, to include “that particular area of individual existence and autonomy that does not touch upon the sphere

¹⁹⁷ E-mail communication from the Servicemembers Legal Defense Network responding to Human Rights Watch query, December 16, 2002.

¹⁹⁸ Nathaniel Frank, “Real Evidence on Gays in the Military,” *Washington Post*, December 3, 2002.

¹⁹⁹ Servicemembers Legal Defense Network, *Conduct Unbecoming*, March 9, 2000, pp. 40-1, Exhibit 45.

²⁰⁰ *Ibid.*, Exhibit 45.

²⁰¹ International Covenant on Civil and Political Rights (ICCPR), G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976, art. 17.

of liberty and privacy of others.”²⁰² The Human Rights Committee—the international body responsible for interpreting obligations under the ICCPR—and the European Court of Human Rights have both recognized that protected privacy includes adult consensual sexual activity in private.

In 1992, the Human Rights Committee ruled that sodomy legislation in the Australian state of Tasmania, which criminalized private sexual contact between men, constituted an impermissible interference with the right of privacy.²⁰³ The committee rejected claims by Tasmanian authorities that the law was justified on moral grounds.²⁰⁴ Pointing to the repeal of laws criminalizing homosexual sex throughout the rest of Australia, and the fact that even in Tasmania the law was not enforced, the committee concluded that the sodomy law was not “essential to the protection of morals in Tasmania” and thus arbitrarily interfered with the right to privacy.

The European Court of Human Rights (ECHR) has also found that laws criminalizing homosexual sexual activity between adult men impermissibly interfered with the right to privacy protected by Article 8 of the European Convention on Human Rights.²⁰⁵ In *Dudgeon v. The United Kingdom* (1981), the court assessed the validity of nineteenth century laws still in force in Northern Ireland that criminalized acts of buggery and gross indecency between males of any age, whether in public or private. Characterizing private sexual activity as “an essentially private manifestation of the human personality,” the court agreed that laws criminalizing such activity implicated the right to privacy affirmed by Article 8.²⁰⁶ Under Article 8, interference with the right to privacy is permitted only to “the extent necessary in a democratic society in the interests of national security, public safety ... for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”²⁰⁷

Turning to whether the criminalization of homosexual activity was a permissible interference, the court acknowledged that some degree of regulation of male homosexual conduct, “as indeed of other forms of sexual conduct” is necessary, e.g. laws to protect against the exploitation and corruption of minors. But there was no “pressing social need” addressed by the challenged law, “there being no sufficient justification provided by the risk of harm to vulnerable sections of society requiring protection or by the effects on the public.”²⁰⁸ The belief by some in Northern Ireland that homosexuality is immoral was not an adequate justification for interfering with the right to privacy:

Although members of the public who regard homosexuality as immoral may be shocked, offended or disturbed by the commission by others of private homosexual acts, this cannot on its own warrant the application of penal sanctions when it is consenting adults alone who are involved.... In particular, the moral attitudes towards male homosexuality in Northern Ireland and the concern that any relaxation in the law would tend to erode existing moral standards cannot, without more, warrant interfering with the applicant’s private life to such an extent.²⁰⁹

²⁰² Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (Kehl am Rhein, Germany: N.P. Engel, 1993), p. 294.

²⁰³ *Nicholas Toonen v. Australia* (1994), U.N. Doc. CCPR/c/50/D/488/1992.

²⁰⁴ The Committee also found that criminalization of homosexual sex was not a reasonable or proportionate means to prevent the spread of HIV/AIDS.

²⁰⁵ *Dudgeon v. The United Kingdom*, 4 Eur. Ct. H.R. 149, para. 41, September 23, 1981; U.N. Human Rights Committee, *Toonen v. Australia* (1994); *Norris v. Ireland*, 13 Eur. H.R. Rep. 186, (1986); *Modinos v. Cyprus*, 16 Eur. H.R. Rep. 485 (1993).

²⁰⁶ *Dudgeon v. The United Kingdom*, 4 Eur. Ct. H.R. 149, para. 60, September 23, 1981.

²⁰⁷ Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature Nov. 4, 1950, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953), art. 8(2).

²⁰⁸ *Dudgeon v. The United Kingdom*, 4 Eur. Ct. H.R. 149, para. 60-61, September 23, 1981.

²⁰⁹ *Ibid.*

In subsequent cases, the European Court of Human Rights has reiterated its view that that laws criminalizing private consensual sex between adult males are impermissible infringements on the right to privacy.²¹⁰

Applying the standards and reasoning employed in *Dudgeon* and its successor cases, the European Court of Human Rights ruled against the United Kingdom's policy prohibiting homosexuals from serving in the armed forces. The policy required the immediate discharge of any homosexual servicemember, regardless of the individual's conduct or service record. In *Lustig-Prean v. The United Kingdom*, the court held unanimously that the exclusion of homosexuals from the United Kingdom's armed forces was an impermissible interference with the respect for private life guaranteed in Article 8 of the European Convention on Human Rights.²¹¹

The court's reasoning is illuminating as a point of reference for challenges to "don't ask, don't tell." There was no dispute that the policy interfered with privacy interests as it addressed "a most intimate part of an individual's private life." The court therefore considered whether the interference was "necessary in a democratic society"²¹² The court "underline[d] the link between the notion of 'necessity' and that of a 'democratic society,' the hallmarks of the latter including pluralism, tolerance and broadmindedness."²¹³ It considered "whether, taking account of the margin of appreciation open to the state in matters of national security, particularly convincing and weighty reasons exist by way of justification" for discharging members of the armed forces simply because of their homosexuality.²¹⁴

The United Kingdom did not try to justify its policy by arguing homosexuals lacked the physical capability, courage, dependability, or other skills necessary to serve in the armed forces. Rather, relying heavily on interviews with a sample of service members, it argued that the presence of open or suspected homosexuals in the armed forces would have a substantial negative effect on military morale, and, consequently, the fighting power and operational effectiveness of the armed forces. Although the court recognized the importance of deference to military judgment with regard to military policies and operations, it nonetheless refused to accept the military's reasons as adequate justification for the policy. The court noted that the United Kingdom had presented no evidence of actual problems arising on account of homosexual members. More importantly, it concluded that the alleged adverse impacts on morale and esprit would arise from the negative attitudes of heterosexual personnel towards those who are homosexual:

[T]he perceived problems [identified in interviews] and threat to the fighting power and operational effectiveness of the armed forces were founded solely upon the negative attitudes of heterosexual personnel towards those of homosexual orientation... [T]hese attitudes, even if sincerely felt by those who expressed them, ranged from stereotypical expressions of hostility to those of homosexual orientation, to vague expressions of unease about the presence of homosexual colleagues. To the extent that they represent a predisposed bias on the part of a heterosexual majority against a homosexual minority, these negative attitudes cannot, of themselves, be considered by the court to amount to sufficient justification for the interference [with the right to privacy] any more than similar negative attitudes towards those of a different race, origin or colour.²¹⁵

Refusing to uphold a policy predicated on a heterosexual majority's bias against a homosexual minority, the court insisted that the United Kingdom would have to permit homosexuals to serve in its armed forces.²¹⁶ While the court recognized that certain difficulties might arise as the military adjusted to a new policy, it believed that

²¹⁰ *Norris v. Ireland*, 13 Eur. H.R. Rep. 186, (1986); *Modinos v. Cyprus*, 16 Eur. H.R. Rep. 485 (1993), *A.D.T. v. The United Kingdom*, Eur. Ct. H.R., Application no. 35765/97 (July 31, 2000).

²¹¹ *Lustig-Prean and Beckett v. The United Kingdom*, 29 Eur. Ct. H.R. 548, (Applications nos. 31417/96 and 32377/96) judgment, Strasbourg, France, September 27, 1999.

²¹² *Ibid.*, para. 80.

²¹³ *Ibid.*, para. 80.

²¹⁴ *Ibid.*, para. 87.

²¹⁵ *Ibid.*, para. 89-90.

²¹⁶ *Ibid.*, para. 95.

inappropriate behavior—by homosexuals or heterosexuals—could be addressed by strict codes of conduct and disciplinary rules, and that education, training, and leadership could help address prejudice and intolerance, as it had when the military permitted women and members of racial minorities to serve. The United Kingdom argued that homosexuality raised problems of a type and intensity that race and gender did not, and pointed to the particular problems that might be posed by homosexuals and heterosexuals sharing communal accommodations. The court nevertheless remained “of the view that it has not been shown that the conduct codes and disciplinary rules ... could not adequately deal with any behavioral issues arising on the part either of homosexuals or of heterosexuals.”²¹⁷ Finally, the court pointed to the notable and widespread changes in the domestic laws of European countries permitting the admission of homosexuals into the armed forces, noting that only a small minority of European countries had a blanket legal ban against homosexuals in their armed forces.

Equal Rights and Nondiscrimination

The Human Rights Committee and the European Court of Human Rights have also considered “equal rights” challenges to rules criminalizing homosexual conduct or otherwise drawing distinctions between homosexuals and heterosexuals.

Article 26 of the ICCPR affirms that “all persons are equal before the law and are entitled without any discrimination to the equal protection of the law.” The guarantees of equality before the law and the equal protection of the laws prevent a government from arbitrarily making unfavorable distinctions among classes of persons in promulgating and enforcing its laws. As the Human Rights Committee has concluded, Article 26 “prohibits discrimination in law or in fact in any field regulated and protected by the public authorities,” whether or not the legislation covers a right guaranteed in the covenant.²¹⁸ In particular, under Article 26, “the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status.”²¹⁹

A related provision of the ICCPR provides that the state may not discriminate in securing the fundamental rights and liberties guaranteed in the convention. Article 2 of the ICCPR requires states parties to “respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status.”

Neither Article 2 nor Article 26 of the ICCPR explicitly prohibits discrimination based on sexual orientation. Nevertheless, the examples of impermissible bases for discrimination are not exclusive; the articles also refer to “other status.” The ICCPR’s reference to “other status” was an effort to encompass persons or groups distinguished by characteristics that are immutable and/or that constitute essential elements of a personality or identity. According to Manfred Nowak, a leading scholar on the scope of rights guaranteed by the ICCPR, “In the final analysis, every conceivable distinction that cannot be objectively justified is an impermissible discrimination.”²²⁰

²¹⁷ Ibid., para. 96.

²¹⁸ United Nations, Office of the High Commissioner for Human Rights, Human Rights Committee, *General Comment 18: Nondiscrimination*, para. 12, 37th sess., 1989, in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.1, p. 26 (1994).

²¹⁹ The Human Rights Committee understands Article 26 to prohibit both discriminatory intent and discriminatory effect. It has concluded that “the term ‘discrimination’ as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.” Ibid., para. 7 (emphasis added). See also Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), art. 1, (“effect or purpose”); International Convention on the Elimination of All Forms of Racial Discrimination, art. 1(1) (“purpose or effect”).

²²⁰ Manfred Nowak, U.N. Covenant on Civil and Political Rights: CCPR Commentary (Arlington: N.P. Engel, 1993), p. 45.

Human Rights Watch considers sexual orientation to qualify as a “status” protected against discrimination. Although sexual orientation is only one aspect of a person’s identity, in many countries, including the United States, individuals who are gay or lesbian are frequently viewed as a distinct class of persons, a view often expressed through laws discriminating against them, and/or through private acts of bias and discrimination. Homosexuals in the United States and in other countries are also often subjected to harassment, violence, and other discrimination solely because of their sexual orientation.

The Human Rights Committee has not ruled whether sexual orientation constitutes an “other status.” But in the *Toonen* matter, discussed above, it interpreted the ICCPR’s prohibition on discrimination based on sex in Article 2 and Article 26 to include a prohibition on discrimination on the basis of sexual orientation.²²¹ Although the committee did not explain its reasoning, many cases of discrimination on the basis of sexual orientation also constitute discrimination on the basis of sex. This is particularly true of cases that involve same-sex relationships. For example, a female soldier dismissed under the “don’t ask, don’t tell” policy for dating another woman is discriminated against on the basis of sex as well as sexual orientation, because she would not be dismissed in the same circumstances if she were a man.

The prohibition of discrimination does not mean that every distinction is impermissible. As the Human Rights Committee observed, “not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.”²²² To date the committee has not directly ruled on whether laws penalizing consensual adult homosexual conduct violate Article 26. In the *Toonen* case, the government of Australia recognized that Tasmania’s sodomy laws, while specifically targeting “unnatural sexual intercourse,” also had the purpose of distinguishing an identifiable class of individuals—male homosexuals—and prohibiting certain of their acts, a purpose the public clearly understood. There was little dispute that if the laws unreasonably interfered with homosexuals’ privacy interests, that they would also constitute a violation of Article 2(1), which requires state parties to ensure all individuals are able to enjoy rights protected under the ICCPR without discrimination. In this context, the Human Rights Committee limited itself to a finding of violations under Articles 17(1) and 2(1) and deemed it unnecessary to consider whether there had also been a violation of Article 26.

The European Court of Human Rights has dealt similarly with claims that laws against homosexual conduct are discriminatory as well as an interference with the right to privacy. In *Dudgeon*, once it found a violation of Article 8 on privacy, the ECHR refused to consider whether the laws criminalizing male homosexual conduct also constituted discrimination in violation of Article 14.²²³

In *Lustig-Prean*, the court also refused to rule on the merits of the claim of discrimination under Article 14. It ruled that the applicants’ complaints of discrimination amounted “in effect to the same complaint, albeit seen from a different angle, that the court has already considered in relation to Article 8 of the convention [right to privacy.]”²²⁴

U.S. Law

²²¹ United Nations, Office of the High Commissioner for Human Rights, Human Rights Committee, *Views of the Human Rights Committee under art. 5, para. 4, of the Optional Protocol to the International Covenant on Civil and Political Rights concerning Communication No. 488/1992: Australia*, para. 8.7, 50th sess., U.N. Doc. CCPR/C/50/D/488/1992 (April 4, 1994).

²²² Human Rights Committee, General Comment 18, Nondiscrimination, para. 13, 37th sess., (1989).

²²³ *Dudgeon v. The United Kingdom*, 4 Eur. Ct. H.R. 149, para. 69, September 23, 1981. The court stated:

Once it has been held that the restriction on the applicant’s right to respect for his private sexual life gives rise to a breach of Article 8 ... by reason of its breadth and absolute character ... there is no useful legal purpose to be served in determining whether he has in addition suffered discrimination as compared with other persons who are subject to lesser limitations on the same right.

²²⁴ *Lustig-Prean and Beckett v. The United Kingdom*, 29 Eur. Ct. H.R. 548, para. 108, September 27, 1999.

Right to Privacy

Unlike the ICCPR and the European Convention, the U.S. Constitution contains no express provision affirming the right to privacy. As a state party to the ICCPR, however, the United States is bound to honor the rights affirmed in that covenant.²²⁵

The U.S. Supreme Court has established that the right to substantive due process protected by the Fifth and Fourteenth Amendments embraces certain privacy interests—including the right to make personal decisions regarding family, marriage, and procreation—perceived as inherent in the concept of liberty on which the constitution was predicated. Nevertheless, in *Bowers v. Hardwick*, a five-to-four majority of the Supreme Court upheld the constitutionality of a Georgia law that criminalized sodomy.²²⁶ Hardwick was charged with violating that law after police entered his bedroom and caught him engaged in oral sex with another adult male. The federal court of appeals held that the Georgia statute violated Hardwick’s fundamental rights because his homosexual activity was a private and intimate association beyond reach of state regulation under the due process clause of the fourteenth amendment. In reversing, the Supreme Court did not analyze the case in terms of the values that underlie and inform the constitutional right to privacy, nor did it explore whether sex between consenting adults constituted the kind of intimate decision-making and association that should be left free from government interference. It did not view the case, as the dissent believed, as requiring consideration of the fundamental “right to be left alone.”²²⁷ Instead, it characterized the question before it simply as whether there was a fundamental right to engage in homosexual sodomy. Pointing to the longstanding history of criminalization of sodomy, it considered “facetious” the idea that the right to engage in such conduct was implicit in liberties protected by the constitution. Having disposed of the claim that the sodomy statute implicated a fundamental “right,” the court considered whether there was at least a rational basis for the law. It found such a basis in the presumed belief of a majority of Georgians that “homosexual sodomy is immoral and unacceptable.”²²⁸

Right to Equal Protection

With the U.S. Supreme Court having ruled that the U.S. Constitution does not forbid laws criminalizing homosexual sex, challenges to the U.S. military’s policies towards homosexuals have not been able to assert violations of protected privacy interests, as was done in *Lustig-Prean*. Servicemembers bringing constitutional challenges to “statement” discharges under “don’t ask, don’t tell” have argued instead that the policy violates their right to equal protection under the laws as well as the right to free expression. Their arguments have failed in the courts: not one of the four federal appeals courts that have considered “don’t ask, don’t tell” has found the policy unconstitutionally discriminatory or as impermissibly limiting free expression.²²⁹

The U.S. Constitution guarantees all persons equal protection of the laws.²³⁰ As the U.S. Supreme Court has noted, however, the right to equal protection “must co-exist with the practical necessity that most legislation

²²⁵ In ratifying the ICCPR, the U.S. made no reservations or understandings purporting to limit its obligations under or the scope of Article 17. The U.S. made a general declaration that none of the substantive articles of the ICCPR, including Article 17, are self-executing under U.S. law.

²²⁶ *Bowers v. Hardwick*, 478 U.S. 186 (June 30, 1986).

²²⁷ Justice Blackmun pointed out that the sodomy statute “denies individuals the right to decide for themselves whether to engage in particular forms of private, consensual sexual activity.” *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986).

²²⁸ *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986).

²²⁹ *Able v. United States of America*, 155 F.3d 628 (2nd Cir. 1998); *Thomasson v. Perry*, 80 F.3d 915 (4th Cir. 1996) (en banc); *Selland v. Perry*, 100 F.3d 950 (4th Cir. 1996); *Thorne v. Perry* 80 F.3d 915 (4th Cir. 1996); *Richenberg v. Perry*, 73 F. 3d 172 (8th Cir. 1995); *Philips v. Perry*, 106 F.3d 1420 (9th Cir. 1997), and *Holmes/Watson v. California Army Nat’l Guard*, 124 F.3d 1126, 1133 (9th Cir. 1997) two separate cases consolidated on appeal.

²³⁰ U.S. states are bound by the equal protection clause of the Fourteenth Amendment, which provides that “[n]o State shall ... deny to any person within its jurisdiction the equal protection of the laws.” U.S. Constitution, Amendment XIV, § 1. The federal courts have interpreted the due process clause of the Fifth Amendment to require the federal government to observe substantially similar norms of equal treatment. See, for example, *Bolling v. Sharpe*, 347 U.S. 497 (1954) (invalidating racial segregation in District of Columbia public schools under the due process clause of the Fifth Amendment). The due process clause provides that “[n]o person shall be deprived of life, liberty, or property, without due process of law.” U.S. Constitution, Amendment V.

classifies [people] for one purpose or another, with resulting disadvantage to various groups or persons.”²³¹ In determining whether a legislative classification is unconstitutionally discriminatory, U.S. courts use different standards of scrutiny depending on whether a protected right is being burdened and according to the nature of the classification. A state must show a compelling justification for laws that impose burdens on fundamental rights, such as the right to vote or to have access to the courts.²³² When a state has created classifications based on race, ancestry, sex, and illegitimacy, the courts also subject the laws to heightened scrutiny.²³³ All other classifications need only meet the lesser, and often toothless, standard of having a rational basis.²³⁴

In *Romer v. Evans*, the U.S. Supreme Court confronted a Colorado state constitutional amendment directed at homosexuals that prohibited any legislative or judicial action protecting against discrimination on the basis of sexual orientation.²³⁵ The court said that the proper standard of scrutiny was simply that of ascertaining whether the amendment had a rational basis—although in fact it subjected the law to a more searching inquiry.

Even when the state distinguishes among people in ways that do not implicate fundamental rights or create “suspect” classifications, it cannot act out of prejudice or out of a desire to harm a politically unpopular group.²³⁶ In finding the Colorado amendment unconstitutional, the U.S. Supreme Court held:

We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do. A state cannot so deem a class of persons a stranger to its laws.²³⁷

²³¹ *Romer v. Evans*, 517 U.S. 620, 631 (1996) (citing *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 271-72 (1979); *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)).

²³² In addition, U.S. courts accord some, but not all, intimate personal choices as fundamental rights, recognizing a “private realm of family life which the state cannot enter” without a compelling justification. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). For example, states may not enact laws that interfere with personal decisions to marry a person of the opposite sex, to have children, or not to have children. See *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (invalidating law against racial intermarriage); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (invalidating state law providing for sterilization of certain repeat felons); *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (invalidating state statute criminalizing use of contraceptives); *Roe v. Wade*, 410 U.S. 113 (1973) (holding that only a compelling state interest can justify state regulation of a decision to end a pregnancy). But in *Bowers v. Hardwick*, 478 U.S. 186 (1986), the U.S. Supreme Court upheld Georgia’s sodomy statute, holding that the U.S. Constitution does not protect consensual sexual relations between members of the same sex in the privacy of their home. (The Georgia Supreme Court overturned the state’s sodomy law in 1998, finding that it violated the state constitution’s guarantee of the right to privacy. See *Powell v. State*, 510 S.E.2d 18, 26 (Ga. 1998)).

²³³ See, e.g., *McLaughlin v. Florida*, 379 U.S. 184, 191-92 (1964) (race); *Oyama v. California*, 332 U.S. 633 (1948) (ancestry); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 136 (1994) (sex); *Lalli v. Lalli*, 439 U.S. 259, 265 (1978) (illegitimacy).

²³⁴ Rational basis review is a deferential standard under which there is no constitutional violation if “there is any reasonably conceivable state of facts” that would provide a rational basis for the government’s conduct. *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993).

²³⁵ The amendment read:

No Protected Status Based on Homosexual, Lesbian, or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self executing.

Colorado Constitution, art. II, § 30b (adopted in a 1992 statewide referendum; invalidated by *Romer*, 517 U.S. at 635).

²³⁶ See, for example, *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985) (invalidating a zoning ordinance that created barriers to opening a group home for the mentally retarded); *U.S. Department of Agriculture v. Moreno*, 413 U.S. 528 (1973) (invalidating federal legislation restricting food stamp eligibility to households in which all members were related after finding that the restriction was intended to prevent “hippies” and “hippie communes” from participating in the program); *Plyler v. Doe*, 457 U.S. 202 (1982) (invalidating Texas law denying a free public education to the children of undocumented immigrants).

²³⁷ *Romer*, 517 U.S. at 635.

In upholding the constitutionality of “don’t ask, don’t tell,” the federal appellate courts have subjected the policy to a minimal standard of review, inquiring only whether the different rules for homosexual than for heterosexual servicemembers served a legitimate government interest. The courts’ decisions exhibit traditional judicial deference to Congress and the executive branch with respect to decisions regarding military affairs.²³⁸ They also exhibit a great reluctance to overturn a “carefully crafted national political compromise” that evolved from extensive negotiations between Congress and the executive branch and numerous congressional hearings.²³⁹ The courts accepted at face value the views of the policy’s proponents that preventing homosexual conduct by servicemembers is essential to protecting military morale and unit cohesion. They concluded that the discrimination against homosexuals embodied in the policy furthers the legitimate goal of protecting military combat effectiveness and thus was not unconstitutionally discriminatory.

The government presented no evidence in the “don’t ask, don’t tell” cases of actual problems arising from the presence of homosexuals in the U.S. military; it relied instead on the military’s views of what would happen. The courts of appeal did not inquire—as the European Court of Human Rights did in *Lustig-Prean*—whether the predicted harm to morale or unit cohesion from permitting open homosexuals to serve would be the result of heterosexual biases and prejudices. They thus avoided the question of whether the constitution should sanction military policies accommodating such prejudice.²⁴⁰ The dissent in one of the cases, *Thomasson v. Perry*, was willing to confront that question, concluding “... the same concept of liberty for all that protects our prejudices precludes their embodiment in the law ... But for fear and prejudice against homosexuals, the policy would be unnecessary.”²⁴¹

The appellate courts have also accepted the military’s view that “don’t ask, don’t tell” only punishes conduct—not the status of being homosexual. They have agreed that discharges based on statements acknowledging homosexuality are conduct discharges, because affirmations of homosexuality indicate a propensity to act. In the courts’ judgment, discharges based on statements acknowledging homosexuality were a reasonable way of diminishing the likelihood of homosexual conduct by servicemembers. As the court in *Thomasson* noted, a presumption of propensity to engage in prohibited sexual conduct is a “sensible inference raised by a declaration of one’s sexual orientation.”²⁴² Another court noted that even if legislative assumptions about the connection between acknowledgement and likelihood of acting were imperfect, they were nonetheless “sufficiently rational to survive scrutiny.”²⁴³ In dissent, one judge questioned how one could be punished for admitting an orientation that itself is not a bar to service. He concluded the policy was “fraught ... with patent disingenuousness.”²⁴⁴

First Amendment

Servicemembers have also claimed that military discharges based on no more than statements acknowledging homosexuality violate the freedom of speech protected by the First Amendment. These First

²³⁸ For example, one court noted:

... while we are not free to disregard the Constitution in the military context ... we owe great deference to Congress in military matters. Although deference does not equate to abdication of our constitutional role, in considering whether there is substance to the government’s justification for its action, courts are ill-suited to second-guess military judgments that bear upon military capability or readiness.

Able v. United States, 155 F.3d 628, 634 (2d Cir. 1998).

²³⁹ *Thomasson v. Perry*, 80 F.3d. at 921.

²⁴⁰ In *Phillips v. Perry*, 106 F.3d 1420, 1435-36 (9th Cir. 1997), the dissent pointed out that the only way gay servicemembers would disrupt unit cohesion and discipline is through other servicemember’s negative reaction to homosexuality. According to the dissent, “... accommodating the negative attitudes of those service members who oppose having gay men and lesbians in their ranks ... are not legitimate government interests.”

²⁴¹ *Thomasson*, 80 F. 3d. at 951 (Hall, J. dissenting). Thomasson, who was discharged once he disclosed that he was gay, unsuccessfully challenged the policy on equal protection and due process grounds.

²⁴² *Thomasson*, 80 F. 3d. at 930.

²⁴³ *Holmes v. California Army National Guard*, 124 F. 3d. 1126, at 1135.

²⁴⁴ *Holmes*, 124 F. 3d. at 1139

Amendment challenges to “don’t ask, don’t tell” have foundered on the courts’ willingness to accept the military’s argument that the policy punishes conduct, not speech. They have agreed that servicemembers discharged for acknowledging their homosexual orientation are penalized because their statements are presumptive evidence of the likelihood of impermissible conduct. According to the courts’ reasoning, since the military does not violate the constitution in making homosexual conduct the basis of discharge, it does not violate the constitution by trying to prevent such conduct by discharging those whose words indicate a propensity to engage in it.

In contrast, a lower court ruling—subsequently reversed on appeal—found that the policy violated the right of free speech. Characterizing the distinction between “orientation” and “propensity” as “nothing less than Orwellian,” Judge Eugene H. Nickerson stated:

Plaintiffs have done no more than acknowledge who they are, that is, their status. The speech at issue in this case implicates the First Amendment value of promoting individual dignity and integrity, and thus is protected by the First Amendment from efforts to prohibit it because of its content.... [The U.S. government] designed a policy that purportedly directs discharges based on “conduct” and craftily sought to avoid the First Amendment by defining “conduct” to include statements revealing one’s homosexual status. To say “I have a homosexual orientation,” a mere acknowledgment of status, is thus transmogrified into an admission of misconduct, and misconduct that the speaker has the practically insurmountable burden of disproving.²⁴⁵

Constitutional jurisprudence on gay rights, at least as regards sodomy laws, may soon change. On December 2, 2002 the U.S. Supreme Court agreed to hear *Lawrence v. Texas*, a case in which two gay men challenge a Texas law that treats same-sex couples as criminals for engaging in sexual practices that are legal when a man and a woman engage in them.²⁴⁶ While there is no guarantee that the court will overturn *Bowers*, it is unlikely that it would have agreed to take the case unless a majority of justices had concluded they wanted to revisit the courts jurisprudence with regard to criminal sodomy laws.

In *Romer v. Evans*, the Supreme Court’s decision that homosexuals may not be arbitrarily singled out for disfavored legal status seemed to undermine the *Bowers* ruling that belief in the immorality of homosexuality was a sufficient basis for sodomy laws. Moreover, since *Bowers*, there has been a dramatic change in public laws and attitudes towards homosexuals. At the time of the ruling in *Bowers*, twenty-four states and the District of Columbia had sodomy laws. Since then, ten states and the District of Columbia have either repealed the laws legislatively or state courts have ruled them impermissible under state constitutions. Indeed, the Georgia Supreme Court struck down, under the state constitution, the very law upheld in *Bowers*. In so doing it stated: “We cannot think of any other activity that reasonable persons would rank as more private and more deserving of protection from governmental interference than unforced, private, adult sexual activity.”²⁴⁷ Fourteen states and numerous municipalities also have laws protecting gays and lesbians from employment discrimination; federal civilian employees are protected from discrimination on the basis of sexual orientation by an Executive Order.²⁴⁸ Many

²⁴⁵ *Able v. United States of America*, 880 F. Supp. 968, 973-975 (E.D.N.Y. 1995), rev’d, 155 F.3d 628 (2d Cir. 1998).

²⁴⁶ *Lawrence v. Texas*, writ of certiorari granted, 2002 U.S. Lexis 8680 (December 2, 2002). In 1998, sheriff’s officers entered a private home and intruded on petitioners while they were having sex. Petitioners were convicted of violating a Texas statute that criminalizes deviant sexual intercourse, including anal or oral sex, with another person of the same sex. The petitioners appealed, claiming the statute violated constitutional rights to privacy and due process and their right to equal protection. A panel of the Texas Court of Appeals overturned their convictions under the state’s equal rights amendment, holding that the statute discriminates on the basis of sex. In a rehearing *en banc*, the Court of Appeals reinstated the convictions, rejecting petitioners federal privacy claim, citing *Bowers v. Hardwick*, and holding that the statute survived a rational basis review because it furthered the legitimate state interests of “preserving public morals.”

²⁴⁷ *Powell v. Georgia*, 510 S.E. 2d 18, 24 (Ga. 1994).

²⁴⁸ In 1998, President Clinton issued an executive order to prohibit anti-gay employment discrimination against federal workers. The order expanded the federal government’s equal opportunity policy by prohibiting employment discrimination based on sexual orientation by amending *Executive Order 11478* (signed August 8, 1969), which banned discrimination based on race, color, religion, sex, national origin, handicap and age. Within the Department of Defense, the ban on anti-gay

state and local government and private employers have also recognized committed homosexual relationships by enacting domestic partner laws and offering expanded employee benefits for same-sex couples.

If the U.S. Supreme Court were to rule in *Lawrence v. Texas* that laws uniquely penalizing homosexual sex were an unconstitutional infringement on expectations of privacy or violated equal protection it would undoubtedly give new life to constitutional challenges to “don’t ask, don’t tell.” But the likelihood of those challenges succeeding might nonetheless remain slim. Even under a heightened standard of scrutiny, the courts might still conclude that the goal of protecting unit cohesion in the military constituted a compelling state interest, that homosexual conduct threatened such cohesion, and that “don’t ask, don’t tell” was a narrowly tailored measure to protect cohesion. As long as courts accept the military’s view that homosexual conduct is the problem, not heterosexual prejudice, they may continue to uphold inequities for gay and lesbian servicemembers that violate their human rights.

X. UNIT COHESION: A RATIONALE IN SEARCH OF EVIDENCE

The “unit cohesion” rationale for “don’t ask, don’t tell” is profoundly flawed. As Dr. Lawrence J. Korb, the Assistant Secretary of Defense under President Ronald Reagan, pointed out in 1995:

There are at least three ... major problems with the “unit cohesion” argument. First, it represents a severe and somewhat defeatist underestimation of the ability of today’s servicemembers to keep their focus on professional military concerns; it also represents a uniquely curious (and, I believe, incorrect) admission that our soldiers and sailors could not effectively follow orders and do their jobs if we lifted the ban. Second, kowtowing to the prejudices of some by excluding others has never been an acceptable policy rationale, either in the military or in our society at large. And third, in the several units where acknowledged homosexuals are serving today (usually, by court order), there are no signs of unit disintegration or bad morale.²⁴⁹

The Pentagon has never produced empirical support for its insistence that permitting open or sexually active homosexuals to serve in the military would undermine “unit cohesion.” Moreover, the military experiences of other nations disprove the premise that open homosexuals impair military performance.

Open homosexuals are allowed to serve in the armed forces of at least twenty-three countries, including U.S. allies such as Australia, Belgium, Canada, France, Germany, Israel, the Netherlands, Spain, and the United Kingdom.²⁵⁰ Among NATO countries, only Turkey and Greece have bans on homosexuals in the military. In Hungary and Poland, homosexuals may only be discharged or denied promotions under limited circumstances.

discrimination extends only to civilian employees. President William J. Clinton, *Executive Order No. 13807*, March 28, 1998.

²⁴⁹ *Thomasson v. Perry*, 80 F.3d 915, 951-952 (4th Cir. 1996.).

²⁵⁰ General Accounting Office, *Homosexuals in the Military: Policies and Practices of Foreign Countries*, (GAO/NSIAD-93-215), June 1993, p. 5; RAND Corporation, National Defense Research Institute, *Sexual Orientation and U.S. Military Personnel Policy: Options and Assessment*, MR-323-OSD, 1993, pp. 65-105. The Center for the Study of Sexual Minorities in the Military (CSSMM) an independent research project, reports that open homosexuals can serve in the armed forces of Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Estonia, Finland, France, Germany, Ireland, Israel, Italy, Lithuania, Netherlands, New Zealand, Norway, Slovenia, South Africa, Spain, Sweden, Switzerland, and the United Kingdom. Details provided by Aaron Belkin, Director, CSSMM, by electronic mail, November 1, 2002. The International Lesbian and Gay Alliance identifies a somewhat different list of “countries that do not refuse lesbians and gay men the right to serve in the armed forces:” Australia, Austria, Bahamas, Belgium, Canada, Czech Republic, Denmark, Estonia, Finland, France, Ireland, Israel, Italy, Lithuania, Netherlands, New Zealand, Norway, Slovenia, South Africa, Spain, Sweden, Switzerland, and the United Kingdom. See, www.ilga.org/Information/legal_survey/Summary%20information/armed_forces.htm. Germany lifted all restrictions on homosexuals in its armed forces in January, 2001.

The rest of NATO's member states either allow homosexuals to serve openly, supported by strict anti-discrimination policies, or have no official policy.²⁵¹

In 1993, the U.S. General Accounting Office (GAO) surveyed twenty-five countries with active armed forces of over 50,000 members and examined in detail four countries whose experiences were deemed to be most relevant to the United States: Canada, Israel, Sweden, and Germany. According to the GAO, military officials from Canada, Israel, and Sweden said that the inclusion of homosexuals in their militaries had not adversely affected unit readiness, effectiveness, cohesion, or morale.²⁵² Canada maintained restrictions on homosexuals in its military until 1992. Canadian Department of National Defence officials told the GAO that predictions of mass resignations, recruitment difficulties, and problems with morale and unit cohesiveness did not materialize when the country lifted the ban.²⁵³ In Germany, there was no specific ban on gays serving in the military, but there was a "suitability" requirement that had been used to exclude homosexuals from leadership positions; the policy allowed flexibility as to whether discharge, discipline, or no action is required when sexual orientation is discovered. German officials interviewed by the GAO study called the subject of gays in the military a "non-issue."²⁵⁴ In 2001, deciding that servicemember had a right to a "private life," Germany lifted all restrictions on military service by homosexuals, and permitted homosexuals to serve under the same rules as heterosexuals.²⁵⁵

Under contract with the Department of Defense, RAND Corporation's National Defense Research Institute reviewed seven countries representing a range of policies regarding gay and lesbian servicemembers. It found that tolerance for gays and lesbians can occur in the absence of full acceptance: "In none of these countries are heterosexuals fully comfortable living closely with homosexuals, but in none of these countries were there significant disciplinary problems caused by homosexuals within the ranks."²⁵⁶ Referring to Canada, the Netherlands, and Norway where policies against homosexual servicemembers were changed, the RAND report noted that "for all three countries, strong support from the highest levels of leadership, including the Minister of Defense and the highest ranks of military officers, communicated the acceptability of the new policy and the resolve of the military to accomplish the change."²⁵⁷

RAND concluded that restrictions on homosexuals serving in the military were inconsistent with its findings that homosexuality did not affect fitness to serve. It recommended that standards regarding professional conduct should be "neutral" with regard to sexual orientation and emphasized the need for clear standards of sexual conduct that would be fairly and strictly enforced against all servicemembers, whatever their sexual orientation. RAND also recommended that the Manual for Courts-Martial be revised so that only "non-consenting" sexual activity or sexual acts with minors would be prosecuted.²⁵⁸

After reviewing government and military documents and interviewing servicemembers and military leaders, the Center for the Study of Sexual Minorities in the Military (CSSMM) at the University of California, Santa Barbara, concluded in 2000 that the integration of homosexuals had not led to disruptions nor undermined unit cohesion in Canada, the United Kingdom, Israel, or Australia. In Canada, the CSSMM reviewed a 1998 harassment study conducted by the Canadian Forces which showed that, despite the fears of an increase in anti-gay violence or harassment following the lifting of the ban on homosexuals in 1992, no such increase had occurred. Canadian servicemembers reported harassment based on sexual orientation as one of the least common

²⁵¹ General Accounting Office, *Homosexuals in the Military*, June 1993. The United Kingdom rescinded its ban on homosexual servicemembers following the *Lustig-Prean* decision.

²⁵² *Ibid.*, p. 4.

²⁵³ *Ibid.*, p. 10.

²⁵⁴ General Accounting Office, *Homosexuals in the Military*, June 1993.

²⁵⁵ Human Rights Watch telephone interview with Lt. Col. Carl M. Wilke, ZentrumInnere Fuehring, German Armed Forces, January 6, 2003. The Zentrum Innere Fuehring is a policy-making office within the German Armed Forces.

²⁵⁶ RAND Corporation, *Sexual Orientation*, 1993, p. 103.

²⁵⁷ *Ibid.*, pp. 104-5.

²⁵⁸ *Ibid.*, pp. xxvi-xxvii and pp. 36-38.

forms of harassment.²⁵⁹ There were no reports of any negative change in military performance, and recruiters told researchers that they believed the end of the ban had helped recruitment efforts.²⁶⁰ Homosexual servicemembers told the CSSMM researchers that they believed they were doing a better job without the anxiety and fear relating to “being found out” under the ban.²⁶¹

With regard to Israel—where homosexuals have been allowed to serve in the military without any restrictions since 1993—the CSSMM concluded that: “there is no evidence that the long-standing inclusion of homosexuals in the IDF [Israel Defense Forces] has harmed operational effectiveness, combat readiness, unit cohesion, or morale in the Israeli military. In a security-conscious nation, this is simply not a concern among military personnel or the public more generally.”²⁶²

In a September 2000 study on Australia, the CSSMM found that the 1992 lifting of the ban on openly gay and lesbian soldiers did not lead to any “identifiable negative effects on troop morale, combat effectiveness, recruitment and retention, or other measures of military performance.”²⁶³ Despite predictions of widespread disruption if the ban was lifted, one Navy commodore stated, “There was no great peak ... where people walked out, and there was no great dip in recruiting. It really was a non-event.”²⁶⁴ Self-identified gay soldiers, officers, and commanders described good working relationships in an environment that emphasizes capable and competent job performance under uniform rules of conduct for all personnel.

Reviewing the first ten months after the end of the ban on homosexuals serving in the British Armed Forces, the CSSMM found that there had been no major problems associated with the policy change.²⁶⁵ The U.K. Ministry of Defense noted a “marked lack of reaction” and hailed the new policy as a “solid achievement.”²⁶⁶ According to the CSSMM, there were no mass resignations, no major reports of gay-bashing or harassment, and no perceived effect on morale, unit cohesion, or operational effectiveness.²⁶⁷

In addition to reviewing the experience of foreign militaries, RAND also assessed the experience of U.S. municipal police and fire departments.²⁶⁸ Like the military, such agencies are hierarchical, involve potentially life-threatening situations, rely on a high degree of teamwork, and members share locker rooms and living space with minimum privacy. RAND concluded that few problems arose from permitting acknowledged homosexuals to serve in these agencies.²⁶⁹ For example, its researchers found “[n]o case of a homosexual male sexually harassing a heterosexual male ...; indeed, the question itself sometimes evoked disbelief among those who had actually worked closely with homosexuals that such an event might occur.”²⁷⁰ RAND researchers encountered occasional reports by commanders that lesbians had stared at heterosexual women in locker rooms or made

²⁵⁹ Major J.E. Adams-Roy, *Harassment in the Canadian Forces: Results of the 1998 Survey*, (Ottawa: National Defense Headquarters, 1999); Center for the Study of Sexual Minorities in the Military, *Effects of the 1992 Lifting of Restrictions on Gay and Lesbian Service in the Canadian Forces: Appraising the Evidence* (University of California, Santa Barbara, April 2000).

²⁶⁰ Ibid.

²⁶¹ Ibid.

²⁶² Center for the Study of Sexual Minorities in the Military, *Effects of Lifting of Restrictions on Gay and Lesbian Service in the Israeli Forces: Appraising the Evidence* (University of California at Santa Barbara, California, June 2000.)

²⁶³ Center for the Study of Sexual Minorities in the Military, *Effects of Including Gay and Lesbian Soldiers in the Australian Defense Forces: Appraising the Evidence* (University of California at Santa Barbara, California, September 19, 2000.) Executive Summary.

²⁶⁴ Ibid.

²⁶⁵ Center for the Study of Sexual Minorities in the Military, *Effects of Including Gay and Lesbian Soldiers in the British Armed Forces: Appraising the Evidence* (University of California at Santa Barbara, California, November 2000.)

²⁶⁶ Ibid.

²⁶⁷ Ibid., Executive Summary.

²⁶⁸ RAND Corporation, *Sexual Orientation*, 1993, pp. 106-157. The cities studied—Chicago, Houston, Los Angeles, New York City, San Diego and Seattle—were chosen as large cities representative of different geographic regions.

²⁶⁹ Ibid. The study does note, however, that many homosexuals choose to keep their sexual orientation private at work.

²⁷⁰ Ibid., p. 129.

unwelcome advances, but “these were said to be rare, far more rare than incidents of heterosexual men harassing women.”²⁷¹ Similarly, public displays of affection among gays and lesbians were unusual, and “[gay and lesbian] officers overwhelmingly conformed to established conventions regarding professionalism while in uniform.”²⁷²

The U.S. Military and Racial Integration

Gays and lesbians are not the first group to have been told by the U.S. military that their presence would threaten combat readiness. Similar arguments were made to justify racial segregation of the armed forces. During the administration of Franklin D. Roosevelt, at a time when civilian life was racially segregated by law a military official explained to the Conference of Negro Editors and Publishers: “The Army is not a sociological laboratory ... Experiments to meet the wishes and demands of the champions of every race and creed for the solution of their problems are a danger to the efficiency, discipline and morale and would result in an ultimate defeat.”²⁷³ The military working group studying the proposed racial integration of the Navy in the 1940s concluded:

Enlistment for general service implies that the individual may be sent anywhere—to any ship or station where he is needed. Men on board ship live in particularly close association; in their messes, one man sits beside another; their hammocks or bunks are close together; in their common tasks they work side by side; and in particular tasks such as those of a gun’s crew, they form a closely knit, highly coordinated team. How many white men would choose, of their own accord that their closest associates in sleeping quarters, at mess, and in a gun’s crew should be of another race? How many would accept such conditions, if required to do so, without resentment and just as a matter of course? The general Board believes that the answer is “Few, if any,” and further believes that if the issue were forced, there would be a lowering of contentment, teamwork and discipline in the service.²⁷⁴

Despite military opposition, President Harry S. Truman yielded to civil rights groups’ pressure and integrated the armed forces by presidential order in 1948.²⁷⁵ The dire predictions about integration’s negative effects on the military never materialized. In fact, the military is credited with doing far more than many sectors of civilian society to combat racial intolerance. The military is today one of the most integrated institutions in American life and one of the few places where people of color commonly supervise whites.

One factor underlying the success of racial integration is a vast equal opportunity apparatus, headquartered at the Defense Equal Opportunity Management Institute in Florida, where since 1971 over twenty-thousand members of the armed forces, primarily service leaders and command staff, have received 15-week training courses to become equal opportunity representatives and to combat prejudice based on race, sex, or religion.²⁷⁶ Unfortunately, the Equal Opportunity offices, which deal with sexual and racial discrimination and other issues in the military, do not address anti-gay prejudice and harassment. According to the Office of the Deputy Under Secretary of Defense for Equal Opportunity, harassment based on sexual orientation is “not considered a protected category.”²⁷⁷ One senior Army official based at the Pentagon was quoted in a press report as stating, “We do not want our equal opportunity advisers to become associated with the homosexuality issue.”²⁷⁸ Describing the

²⁷¹ Ibid.

²⁷² Ibid.

²⁷³ Quoted in Randy Shilts, *Conduct Unbecoming*, p. 188.

²⁷⁴ Quoted in *Thomasson v. Perry*, 80 F.3d 915, 952 (4th Cir. 1996) (Hall, J., dissenting). See also footnote 238.

²⁷⁵ President Harry S. Truman, *Executive Order No., 9981*, July 6, 1948: “There shall be equality of treatment and opportunity for all persons in the armed services without regard to race, color, religion or national origin.”

²⁷⁶ R. Norman Moody, “Minorities face setbacks in the military,” *Florida Today*, April 3, 2002. See also <https://www.patrick.af.mil/deomi/deomi.htm>.

²⁷⁷ Human Rights Watch telephone interview with Col. Beverly Wright, Office of the Deputy Under Secretary of Defense for Equal Opportunity, U.S. Department of Defense, January 2, 2003. Colonel Wright stated that training at DEOMI does not address anti-gay bias or harassment in the military.

²⁷⁸ Roberto Suro, “Military’s differing lesson plans reflect unease on gay policy” *Washington Post*, March 4, 2000.

difference between racial and homosexual issues, the same senior Army official explained, “We are trying to keep the two very separate. When we say we want to celebrate diversity, that we want to ensure everyone gets a fair chance at advancement, we cannot apply that same spirit to people whose sexual conduct violates the law.”²⁷⁹

XI. CONCLUSION

Legitimate needs regarding discipline and military readiness have led the U.S. armed forces to impose restrictions on servicemembers that would not be appropriate in other spheres of employment. There is no justification in the military, however, for restrictions upon a particular class of persons based on their identity or status—in this case, homosexuality. Servicemembers, regardless of their sexual orientation, should be judged equally on standards of professionalism and discipline. “Don’t ask, don’t tell” unjustifiably requires homosexuals and bisexuals to adhere to rules not applicable to heterosexuals, and leads to their discharge when they do not.

The policy reflects and reinforces prejudice and hostility. There is no evidence to support the military’s contention that restrictions on gays and lesbians are necessary to maintain unit cohesion and military readiness. The presence of openly gay, lesbian, and bisexual individuals within the armed forces of numerous countries shows that prejudice against sexual minorities can be overcome without loss of military effectiveness. The U.S. military’s integration of African-Americans—a group that faced similar obstacles and arguments by those who opposed its inclusion—suggests that diversity can coexist with cohesion, and that steps can be taken to overcome bias among U.S. military personnel.

The “don’t ask, don’t tell” policy violates the human rights of servicemembers, helps maintain an anti-gay environment in the military, and creates a barrier to addressing anti-gay harassment. It is time for the United States to repeal the policy and permit the full and open integration of homosexuals and bisexuals into the U.S. military. In 1948, President Truman was courageous to insist on the integration of black servicemembers; more than fifty years later, it is time for political and military leaders to end a policy against homosexuals that is unworkable, unfair, unjust, and harmful to the institution it is supposed to protect.

²⁷⁹ Ibid.

APPENDIX A: NOTE ON U.S. ARMED FORCES RESPONSES TO HUMAN RIGHTS WATCH'S REQUESTS FOR BASIC INFORMATION

For its research, Human Rights Watch requested basic information from the U.S. military related to the “don’t ask, don’t tell” policy and anti-gay harassment. Our inquiries were in the form of Freedom of Information Act (FOIA) requests. We asked for information and statistics regarding anti-gay harassment, application of the “don’t ask, don’t tell” policy and anti-sodomy statute, complaints procedures, and training on the “don’t ask, don’t tell” policy and to address anti-gay harassment.

In general, the military was unable or unwilling to provide Human Rights Watch with the information we requested.²⁸⁰

The Marines responded in April 2000, one year after the original request. They were only able to provide information regarding separation data (one question answered out of eleven). Among the questions put forth by Human Rights Watch were: “What directives have commanders received about how to respond to incidents of harassment based on sexual orientation or perceived sexual orientation? What procedures are in place for responding to such incidents? How many perpetrators have been disciplined for responsibility in these incidents?” The only response: “Marines report any and all mistreatment in the same manner, through their chain of command.”

The Army’s response, a year after our request, provided no information regarding the number of incidents of harassment based on sexual orientation or a myriad of other questions.

The Inspector General failed to respond at all to a May 3, 1999 letter requesting information regarding anti-gay harassment.

We also requested information regarding criminal charges of sodomy filed against homosexual servicemembers as opposed to heterosexual members. Since all branches failed to provide information in response to our Freedom of Information Act request, it is impossible to know with any certainty whether homosexual or bisexual servicemembers are disproportionately charged with the offense of consensual sodomy. In June 1999, the Air Force responded that it could not respond to the questions posed regarding Article 125 sodomy prosecutions because the “database is designed to track military justice actions on active duty military members charged with an offense. Since only the charged offense code is collected, we have no way of verifying aggravating circumstances.”

The Defense Department’s FOIA office provided a general response to some questions contained in each inquiry sent to the four service branches. It attached a section of the 1999 Annual Report from the Secretary of Defense. In response to our questions regarding harassment based on sexual orientation, the equal opportunity office provided an analysis of “complaint trends” relating to formal complaints alleging sexual harassment and all other discrimination “(e.g., complaints based on race, sex, national origin, and religion) filed by military personnel.” According to SLDN, the Office of Equal Opportunity still does not tally anti-gay harassment complaints.²⁸¹

²⁸⁰ FOIA requests and responses on file with Human Rights Watch.

²⁸¹ Human Rights Watch telephone inquiry with C. Dixon Osburn, Servicemembers Legal Defense Network, December 16, 2002.

APPENDIX B: ANTI-HARASSMENT ACTION PLAN²⁸²

General Recommendations:

1. The Department of Defense (DoD) should adopt an overarching principle regarding harassment, including that based on sexual orientation:

“Treatment of all individuals with dignity and respect is essential to good order and discipline. Mistreatment, harassment, and inappropriate comments or gestures undermine this principle and have no place in our armed forces. Commanders and leaders must develop and maintain a climate that fosters unit cohesion, esprit de corps, and mutual respect for all members of the command or organization.”

2. The Department of Defense should issue a single Department-wide directive on harassment.

It should make clear that mistreatment, harassment, and inappropriate comments or gestures, including that based on sexual orientation, are not acceptable.

Further, the directive should make clear that commanders and leaders will be held accountable for failure to enforce this directive.

Recommendations Regarding Training:

3. The Services shall ensure feedback or reporting mechanisms are in place to measure homosexual conduct policy training and anti-harassment training effectiveness in the following three areas: knowledge, behavior, and climate.

4. The Services shall review all homosexual conduct policy training and anti-harassment training programs to ensure they address the elements and intent of the DoD overarching principle and implementing directive.

5. The Services shall review homosexual conduct policy training and anti-harassment training programs annually to ensure they contain all information required by law and policy, including the DoD overarching principle and implementing directive, and are tailored to the grade and responsibility levels of their audiences.

Recommendations Regarding Reporting:

6. The Services shall review all avenues for reporting mistreatment, harassment, and inappropriate comments or gestures to ensure they facilitate effective leadership response.

Reporting at the lowest level possible within the chain of command shall be encouraged.

Personnel shall be informed of other confidential and non-confidential avenues to report mistreatment, harassment, and inappropriate comments or gestures.

7. The Services shall ensure homosexual conduct policy training and anti-harassment training programs address all avenues to report mistreatment, harassment, and inappropriate comments or gestures and ensure persons receiving reports of mistreatment, harassment, and inappropriate comments or gestures know how to handle these reports.

8. The Services shall ensure that directives, guidance, and training clearly explain the application of the “don’t ask, don’t tell,” policy in the context of receiving and reporting complaints of mistreatment, harassment, and inappropriate comments or gestures, including:

Complaints will be taken seriously, regardless of actual or perceived sexual orientation;

Those receiving complaints must not ask about sexual orientation—questions about sexual orientation are not needed to handle complaints; violators will be held accountable; and

Those reporting harassment ought not tell about or disclose sexual orientation—information regarding sexual orientation is not needed for complaints to be taken seriously.

Recommendations Regarding Enforcement:

9. The Services shall ensure that commanders and leaders take appropriate action against anyone who engages in mistreatment, harassment, and inappropriate comments or gestures.

10. The Services shall ensure that commanders and leaders take appropriate action against anyone who condones or ignores mistreatment, harassment, and inappropriate comments or gestures.

²⁸² The anti-harassment action plan was announced on July 21, 2000. The Department of Defense working group responsible for developing the plan was chaired by Air Force Under Secretary Carol DiBattiste. Other members of the working group were: Stephen Preston, Navy general counsel; Patrick Henry, assistant Army secretary for Manpower and Reserve Affairs; Army Maj. Gen. Raymond Barrett, commander Fort Jackson, S.C.; Air Force Maj. Gen. John Brooks, special assistant to the chief of staff; Rear Adm. William Putnam, with the office of the chief of Naval Personnel and Marine Maj. Gen. Dennis McCarthy, director, Reserve Affairs Division. See Department of Defense, *Anti-Harassment Action Plan*, Accessed from <http://www.defenselink.mil/news/Jul2000/plan20000721.htm>, on December 17, 2002.

11. The Services shall examine homosexual conduct policy training and anti-harassment training programs to ensure they provide tailored training on enforcement mechanisms.

Recommendations Regarding Measurement:

12. The Services shall ensure inspection programs assess adherence to the DoD overarching principle and implementing directive through measurement of knowledge, behavior, and climate.

13. The Services shall determine the extent to which homosexual conduct policy training and anti-harassment training programs, and the implementation of this action plan, are effective in addressing mistreatment, harassment, and inappropriate comments or gestures.

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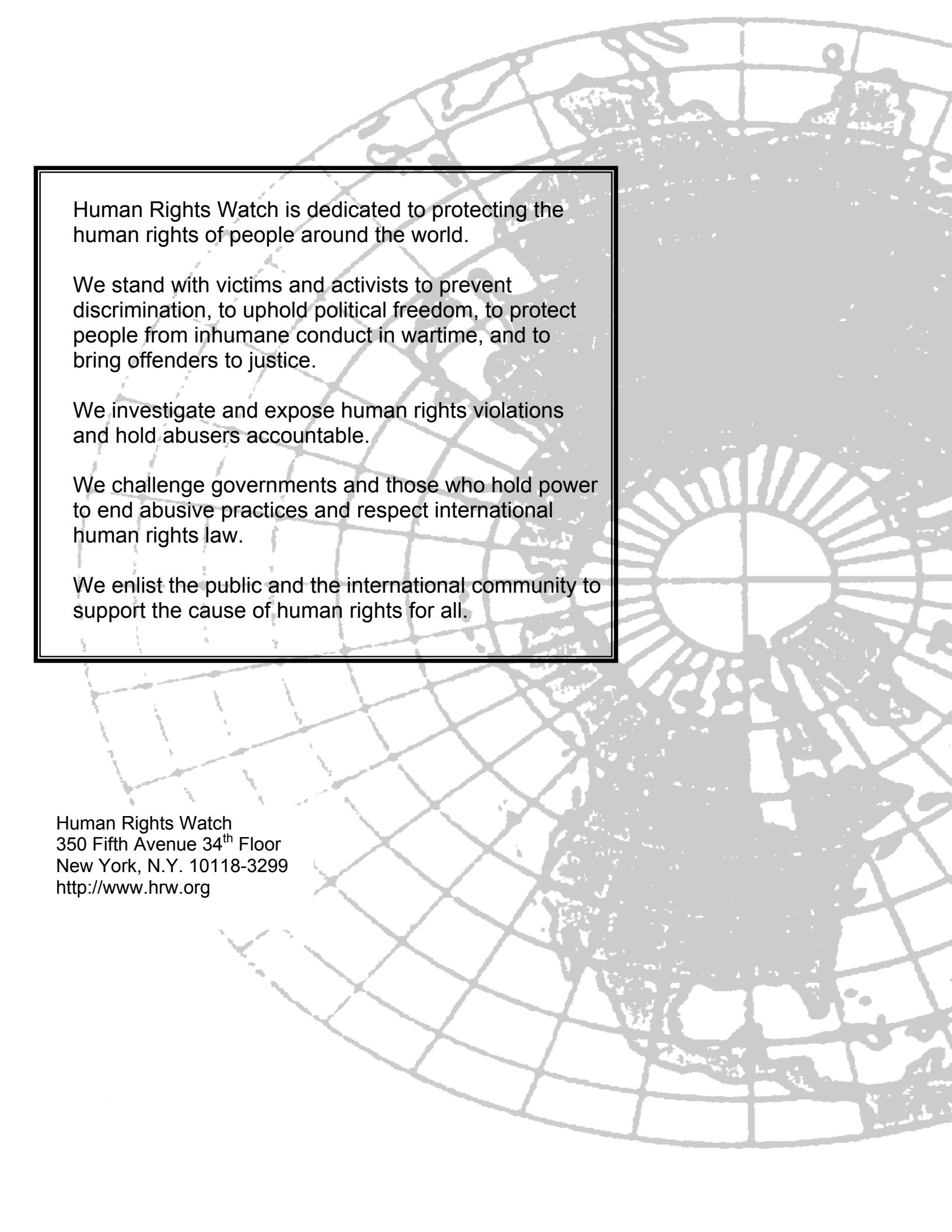
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