ACLU LESBIAN GAY BISEXUAL TRANSGENDER PROJECT

SERVICEMEMBERS LEGAL DEFENSE NETWORK

August 30, 2010

By Facsimile and First Class Mail

Dr. Clifford L. Stanley
Undersecretary of Defense for Personnel and Readiness
Department of Defense
1600 Defense Pentagon
Washington, DC 20301-1000

Re: Automatic 50% Reduction in Separation Pay
for Lesbian, Gay, and Bisexual Service Members

Dear Secretary Stanley:

We write on behalf of the ACLU and Servicemembers Legal Defense Network to ask that the Department of Defense (the "Department"), as part of its ongoing review of military policy related to "Don't Ask Don't Tell," revise DoD Instruction No. 1332.29 to eliminate "homosexuality" or "homosexual conduct" from the list of conditions that trigger an automatic reduction in separation pay for service members with honorable discharges who are involuntarily separated from service.

As discussed below, we have contacted the Department several times over the past year to explain how the current policy -- which is not mandated by 10 U.S.C. § 654, colloquially known as "Don't Ask, Don't Tell," or any other statute -- is unfair and unconstitutional.[1] In particular, we have discussed the harm suffered by Richard Collins, an ACLU client who served the Air Force ably and honorably for nine years before being involuntarily separated from the service. Mr. Collins was separated pursuant to "Don't Ask Don't Tell" after two civilian co-workers observed him exchange a kiss with his civilian partner while he and his partner were in a car stopped at an intersection ten miles off base and while Mr. Collins was off duty and out of uniform. Even though he received an honorable discharge, Mr. Collins' separation pay was automatically cut in half pursuant to DoD Instruction No. 1332.29 -- from $25,702.48 to $12,351.24 -- solely because Mr. Collins is a gay man.

[1] The Secretaries of the military departments have also promulgated implementing instructions for their departments consistent with DoD Instruction No. 1332.29. *See* DoD Instruction No. 1332.29 § 4.3.2. A non-exhaustive list of analogous language from the various services can be found at: MILPERSMAN 1920-040 ¶ 5; MCO P1900.16F Ch. 2 ¶ 1308; COMDTINST 1910.1 ¶ 4b; AR 635-200 ¶ 1-6; and AR 600-8-24 ¶ 1-14.

On its face and as applied to Mr. Collins, the Department's policy concerning separation pay violates the Fifth Amendment's guarantees of equal protection and due process. *Cf. Witt v. Dep't of Air Force*, 527 F.3d 806, 819 (9th Cir. 2008). We write this letter in the hope that the Department will revise DoD Instruction No. 1332.29 and restore Mr. Collins' full separation pay. Unless we are able to reach a resolution on this issue on or before **September 30, 2010**, we intend to file suit on behalf of Mr. Collins

## I. SUMMARY OF PAST COMMUNICATIONS

In a letter to Secretary Gates dated November 29, 2009 (attached as Exhibit A) the ACLU and Servicemembers Legal Defense Network first outlined how the Department's current separation-pay policy is outdated, unfair, and unconstitutional. We also explained the harm that this policy has inflicted on Mr. Collins in particular. In light of the Department's full authority to change its Instructions, as well as the Administration's clear policy position on the exclusion of lesbian and gay service members, we were surprised and profoundly disappointed to receive a response to our letter from Deputy Undersecretary William J. Carr dated December 22, 2009 (attached as Exhibit B) stating that the Department would not make this change or provide Mr. Collins with full separation benefits.

Shortly after we received the Department's response, Senator Levin drew attention to the Department's unfair and discriminatory separation-pay policy during the February 2, 2010 hearing on "Don't Ask Don't Tell" before the Senate Armed Services Committee. Senator Levin asked Secretary Gates to include this issue in the 45-day review of "Don't Ask Don't Tell," stating as follows:

> LEVIN:
> One other comment, and that has to do with what can be done interim. You're going to be looking at that -- without legislative change. Secretary, it's my understanding that when service members are discharged under the "Don't Ask/Don't Tell" policy with an honorable discharge, that DOD policy now is that they only receive half of their separation pay which is authorized by statute. You're authorized to either give half or full. Would you take a look at that as something we can do in the interim here to indicate a greater sense of fairness about this issue?

(CQ Congressional Transcripts, Feb. 2, 2010).

Following Senator Levin's comments, we sent a letter dated February 24, 2010 (attached as Exhibit C) to General Counsel Jeh Charles Johnson reiterating our request that the Department provide Mr. Collins with full separation pay and revise DoD Instruction No. 1332.29 to remove "homosexuality" or "homosexual conduct" as a basis for automatically halving the separation pay of involuntarily discharged service members.

Also, in March 2010, we spoke by telephone with Mr. Jonathan Lee, Special Assistant to Mr. Johnson. Mr. Lee advised us of some of the Department's concerns about revising the Instruction and told us that Dr. Clifford L. Stanley will be leading the Department's review of its separation-pay policy. Mr. Lee requested that we send a letter to Secretary Stanley outlining our specific suggestions for how the Department's current policy should be changed. Those suggestions are set forth in this demand letter.

## II. THE DEPARTMENT'S SEPARATION-PAY POLICY IS UNFAIR, OUTDATED, AND NOT REQUIRED BY "DON'T ASK DON'T TELL."

In order to ease service members' transition to civilian life, Congress has provided separation pay for long-serving members who are involuntarily separated from service. Under 10 U.S.C. § 1174, any "regular enlisted member of an armed force who is discharged involuntarily . . . and who has completed six or more, but less than 20 years of active service immediately before that discharge is entitled to separation pay" calculated based on the member's years of active service and current monthly basic pay. 10 U.S.C. § 1174(b)(1). The statute also authorizes the Department of Defense to establish criteria under which a discharged member's separation pay may be cut in half. *Id.* at § 1174(b)(2).

Under current policy, the Department awards full separation pay to, among others, enlisted service members who:

(i) Are on active duty and have completed at least six years, but fewer than 20 years, of active service, *see* DoD Instruction No. 1332.29 § 3.1.1.1;
(ii) Receive an honorable discharge, *see id.* at § 3.1.2;
(iii) Are fully qualified for retention, but are denied reenlistment or continuation, *see id.* at § 3.1.3.1; and
(iv) Have entered into a written agreement to serve in the Ready Reserve, *see id.* at § 3.1.4.

Mr. Collins meets all four of these criteria. But because he was separated from service pursuant to "Don't Ask Don't Tell," the Department has deemed him to be not "fully qualified for retention" and therefore ineligible for full separation pay. *See* Ex. B. (12/22/09 Ltr. from Mr. Carr stating that "a person who engaged in homosexual conduct . . . is not fully qualified for retention"). Under current policy, the Department provides only half separation pay to enlisted members such as Mr. Collins who are otherwise entitled to full separation pay but are deemed to be "not fully qualified for retention and [are] denied reenlistment or continuation" because of "[h]omosexuality." *See* DoD Instruction No. 1332.29 § 3.2.3.1.4. The requirement that a service member must be "fully qualified for retention" is not mandated by statute or defined in the Department's regulations. The Department has nevertheless concluded that service members who are

separated pursuant to "Don't Ask Don't Tell" are categorically "not fully qualified for retention" and barred from receiving full separation pay.

Even under its current separation-pay policy, the Department has discretion to award full separation pay to service members who are deemed to be not "fully qualified for retention" in circumstances where "the specific reasons for separation and the overall quality of the member's service has been such that denial of such pay would be clearly unjust." DoD Instruction No. 1332.29 § 3.2. But despite the clear statements by current military leadership that separations under "Don't Ask Don't Tell" are unjust -- and despite Mr. Collins' exemplary service record -- the Department has refused to award Mr. Collins full separation pay despite its clear discretion to do so.

Nothing in "Don't Ask Don't Tell" or any other statute requires the Department to cut separation pay in half for service members who are involuntarily separated pursuant to "Don't Ask Don't Tell." The Federal Court of Claims has held that the Department of Defense's "[s]eparation [p]ay [p]olicy is not part of the regulations prescribed by § 654" and is therefore not "part of DADT's implementing regulations." *Watson v. United States*, 49 Fed. Cl. 728, 732 (Fed. Cl. 2001). Indeed, the relevant portions of DoD Instruction No. 1332.29 were promulgated on June 20, 1991 -- several years *before* the enactment of "Don't Ask Don't Tell."

Far from implementing the "Don't Ask Don't Tell" statute, DoD Instruction No. 1332.29 reflects an outdated policy of equating sexual orientation with misconduct. The Instruction thus lists "Homosexuality" along side "Drug abuse rehabilitation failure" and "Alcohol abuse rehabilitation failure" as conditions that prevent a service member from being "fully qualified for retention." The instruction also refers to "[h]omosexuality" as grounds for involuntary separation, which reflects the Department's view in 1991 that a service member's private sexual orientation could itself be grounds for separation whether or not the service member engaged in any "homosexual conduct."

When Congress enacted "Don't Ask Don't Tell" in 1993, it rejected the Department's previous view that homosexuality is a form of misconduct. As the Department has recognized in its regulations implementing 10 U.S.C. § 654, when Congress enacted "Don't Ask Don't Tell," it concluded that "[a] member's sexual orientation is considered a personal and private matter, and is not a bar to continued military service . . . unless manifested by homosexual conduct." DoD Instruction No.1332.30, encl.2, ¶ 3; *accord* Ex. B. (12/22/09 Ltr. from Mr. Carr). The separation-pay policy thus rests on an outdated policy toward "homosexuality" that Congress rejected almost 20 years ago.

## III. THE CURRENT POLICY IS UNCONSTITUTIONAL AND CANNOT BE SUPPORTED BY THE SAME RATIONALES USED TO DEFEND "DON'T ASK DON'T TELL."

By cutting in half service members' separation pay solely on the basis of "homosexuality" or "homosexual conduct," DoD Instruction No. 1332.29 unconstitutionally infringes upon service members' Fifth Amendment rights to equal protection and due process. The Constitution "afford[s] the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984); *accord Lawrence v. Texas*, 539 U.S. 558 (2003). "[W]hen the government attempts to intrude upon the personal and private lives of homosexuals" in a manner that implicates those liberty interests, "the government must advance an important governmental interest, the intrusion must significantly further that interest, and the intrusion must be necessary to further that interest." *Witt*, 527 F.3d at 819.

There is no sound justification for the Department's current policy of automatically cutting in half the separation pay of service members who are involuntarily separated from the military as a result of "Don't Ask Don't Tell" -- much less a justification that could survive the heightened scrutiny required by *Witt*. Congress has cited the promotion of unit cohesion and military efficiency as justifications for "Don't Ask Don't Tell." Even if those concerns justified the discriminatory "Don't Ask Don't Tell" policy -- and they do not -- they have no bearing on whether it is appropriate to automatically reduce a former service member's separation pay after that member has already been removed from service.

The Federal Court of Claims has already recognized this crucial distinction. In *Watson*, the court held that a plaintiff who had unsuccessfully challenged the constitutionality of his discharge under "Don't Ask Don't Tell" in the Ninth Circuit could still bring a separate lawsuit challenging the constitutionality of the Department's separation-pay policy. The court explained:

> A conclusion about the constitutionality of a discharge under DADT does not require a conclusion about halving separation pay. The Ninth Circuit found a government interest in "discharging service members on account of homosexual conduct in order to maintain effective armed forces," and went on to conclude that plaintiff's discharge was constitutional. In reaching this decision it was not necessary for the Ninth Circuit to consider whether the halving of separation pay -- which is only done under the Separation Pay Policy after discharge -- was also constitutional.

*Watson*, 49 Fed. Cl. at 732 (citations omitted). Indeed, the Department's discriminatory separation-pay policy is even more vulnerable to a constitutional challenge than Don't

Ask Don't Tell." Although the courts may sometimes defer to the military's decisions regarding armed forces operations, this deference has not extended to matters of employee pay and benefits. *See Frontiero v. Richardson*, 411 U.S. 677 (1973).

Based on our communications with the Department, we understand that the Department is concerned that revising the separation-pay policy would somehow bestow a special benefit on gay and lesbian service members that is unavailable to their heterosexual counterparts. We have been informed that, because the Department has not implemented any force reductions in recent years, heterosexual soldiers -- unlike their gay and lesbian colleagues -- are rarely removed from service involuntarily unless they have committed some form of misconduct and have received a dishonorable discharge, and are therefore rarely provided any separation pay at all. By contrast, the discriminatory "Don't Ask Don't Tell" policy imposes a unique penalty on gay and lesbian service members by involuntarily expelling them from service even though they have not engaged in any misconduct. But that is no justification for imposing additional discrimination on gay and lesbian service members by cutting in half their separation pay after they have been discharged. In awarding military benefits, the Department may not "rely on the effects of . . . past discrimination as a justification for heaping on additional economic disadvantages." *Frontiero*, 411 U.S. at 689 n.22. If the Department does not want to award separation pay to gay and lesbian members, it should stop involuntarily discharging them.

## IV. CONCLUSION

Discriminating against service members on the basis of their sexual orientation is both unfair and unconstitutional. By revising its separation-pay policy as outlined below, the Department has the opportunity to remedy a clear example of such discrimination:

1. Amend Section 3.1.3 to provide that service members who are involuntarily separated pursuant to "Don't Ask Don't Tell" shall be considered "fully qualified for retention" for purposes of awarding separation pay.
2. Amend Section 3.2 to provide that, a denial of full separation pay would be clearly unjust in situations where a service member is separated pursuant to 10 U.S.C. § 654 and that such service members should therefore be awarded full separation pay.
3. Delete 3.2.3.1.4, which currently lists "[h]omosexuality" as a basis for awarding half separation pay.

The Department could implement the foregoing revisions without seeking any additional congressional authorization. These revisions would be simple to implement and would involve a negligible expenditure of additional funds in light of the pending repeal of the larger "Don't Ask Don't Tell" policy.

The Department should do the right thing by revising DoD Instruction No. 1332.29 and providing Mr. Collins with an additional $12,351.24 in separation pay, plus interest. Unless we are able to reach a resolution on this issue on or before **September 30, 2010**, we intend to file suit on behalf of Mr. Collins

Very truly yours,

James D. Esseks
Project Director
Lesbian, Gay, Bisexual, Transgender Project
ACLU Foundation

Aaron D. Tax
Legal Director
Servicemembers Legal Defense Network

cc: Hon. Carl Levin, Chairman
Senate Armed Services Committee

Hon. Ike Skelton, Chairman
House Armed Services Committee

Hon. Jeh C. Johnson, General Counsel
Department of Defense

Mr. Jonathan Lee
Special Assistant to Jeh C. Johnson

# Exhibit A

ACLU LESBIAN GAY BISEXUAL TRANSGENDER PROJECT

LEGAL DEFENSE

November 25, 2009

By Facsimile and First Class Mail

Dr. Robert M. Gates
Secretary of Defense
1000 Defense Pentagon
Washington, DC 20301-1000

Re: Automatic 50% Reduction in Separation Pay
for Lesbian, Gay, and Bisexual Service Members

Dear Secretary Gates:

We write on behalf of the ACLU and Servicemembers Legal Defense Network to ask the Department of Defense to revise Department of Defense Instruction No. 1332.29 so that service members discharged based on "homosexuality" or "homosexual conduct" no longer suffer an automatic 50% reduction in separation pay. This policy is outdated, unfair, and unconstitutional. We urge the Department to revise the instruction and eliminate "homosexuality" and "homosexual conduct" from the list of conditions that trigger a reduction in otherwise applicable separation pay.

This issue is of particular relevance for Robert Collins, an ACLU client who served the Air Force ably and honorably for nine years before being involuntarily separated from the service under 10 U.S.C. § 654 (policy concerning homosexuality in the armed forces), colloquially known as "Don't Ask, Don't Tell." He was awarded separation pay upon his discharge, but that separation pay was cut in half because he is a gay man. Mr. Collins does not seek to challenge his involuntary separation under "Don't Ask Don't Tell." Rather, he seeks only fair treatment with respect to his separation pay.

During his time in the Air Force, Mr. Collins rose quickly to the rank of Staff Sergeant, overseeing millions of dollars worth of equipment and training hundreds of other service members. He received numerous commendations, including an Air Force Good Conduct Medal, an Air Force Achievement Medal, a Kosovo Campaign Medal, and the General Leo Martinez Award as the best weapons loader on any Air Force base in the country.

His involuntary separation was occasioned by two civilian co-workers observing him exchange a kiss with his civilian partner while he and his partner were in a car stopped at an intersection ten miles off base while he was off duty and out of uniform. Subsequent to his honorable discharge, he was surprised to learn that his separation pay of $25,702.48 would be automatically halved to $12,851.24.

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Servicemembers Legal Defense Network • PO Box 65301, Washington, DC 20035-5301 • Tel:(202) 328-3244 • Fax: (202) 797-1695 • www.sldn.org

The "Don't Ask Don't Tell" statute does not address separation pay. Consequently, the Department and the services are free to adopt whatever separation pay rule they wish. Nonetheless, all of the services continue to mandate that those discharged under "Don't Ask Don't Tell," who are otherwise entitled to receive full separation pay, receive only half.

The automatic 50% reduction in separation pay is a penalty on gay service members that violates their due process and equal protection rights, and that contravenes the very purpose of separation pay, *i.e.*, easing the return to civilian life. We urge the Air Force to make our client whole. Furthermore, we urge the Department of Defense and the service branches to exercise their discretion and rescind this penalty on gay service members. We note that, because the number of service members who find themselves in a situation comparable to that of our client is small, and the money to which they would otherwise be entitled is relatively insignificant to the Department (while being of great importance to individuals like Mr. Collins), such a change in policy would not be costly.

Under 10 U.S.C. § 1174, the Department of Defense has the statutory authority to establish the criteria under which the separation pay of an involuntarily separated service member is automatically halved:

> (b) Regular enlisted members. – (1) A regular enlisted member of an armed force who is discharged involuntarily or as the result of the denial of the reenlistment of the member and who has completed six or more, but less than 20, years of active service immediately before that discharge is entitled to separation pay computed under subsection (d) unless the Secretary concerned determines that the conditions under which the member is discharged do not warrant payment of such pay.
>
> (2) Separation pay of an enlisted member shall be computed under paragraph (1) of subsection (d), except that such pay shall be computed under paragraph (2) of such subsection in the case of a member who is discharged *under criteria prescribed by the Secretary of Defense.*
>
> * * *
>
> (d) Amount of separation pay. – The amount of separation pay which may be paid to a member under this section is –
>
> (1) 10 percent of the product of (A) his years of active service, and (B) 12 times the monthly basic pay to which he was entitled at the time of his discharge or release from active duty; or
>
> (2) one-half of the amount computed under clause (1).

10 U.S.C. § 1174 (emphasis added).

*Before* the enactment of "Don't Ask, Don't Tell," when homosexuality was considered a form of *misconduct*, the Department of Defense adopted a policy (Department of Defense Instruction No. 1332.29 (June 20, 1991)) under which involuntary separation on account of homosexuality (and now homosexual conduct) – like involuntary separation on account of failed drug or alcohol abuse rehabilitation or on account of a national security concern – results in an automatic 50% reduction in separation pay:

> 3.2. Half Separation Pay (Non-disability). Half payment of non-disability separation pay, computed as provided in paragraph 3.3., below, is authorized to members of the Regular and Reserve components involuntarily separated from AD who meet each of following four conditions: (In extraordinary instances, Secretaries of the Military Departments concerned may award full separation pay to members otherwise eligible for half separation pay when the specific reasons for separation and the overall quality of the member's service have been such that denial of such pay would be clearly unjust.)
>
> 3.2.1. The Service member meets one of the criteria for active service specified in subparagraph 3.1.1., above.
>
> 3.2.2. The Service member's separation is characterized as "Honorable" or "General" as defined in subparagraph E3.2.3.2.2. of DoD Directive 1332.14 (reference (e)), and none of the conditions in paragraph 3.4., below, apply.
>
> 3.2.3. The Service member is being involuntarily separated by the Military Service concerned through either the denial of reenlistment or the denial of continuation on AD or full-time National Guard duty, or the Service member is being separated instead of board action as provided in DoD Directive 1332.30 (reference (f)), under one of the following specific conditions:
>
> 3.2.3.1. The member is not fully qualified for retention and is denied reenlistment or continuation by the Military Service concerned as provided for in reference (e) or DoD Directive 1332.30 (reference (f)) under any of the following conditions:
>
> 3.2.3.1.1. Expiration of service obligation.
>
> 3.2.3.1.2. Selected changes in service obligation.

> 3.2.3.1.3. Convenience of the Government.
>
> 3.2.3.1.4. *Homosexuality.*
>
> 3.2.3.1.5. Drug abuse rehabilitation failure.
>
> 3.2.3.1.6. Alcohol abuse rehabilitation failure.
>
> 3.2.3.1.7. Security.
>
> 3.2.3.2. The member is being separated under a Service-specific program established as a half-payment level by the Secretary of the Military Department concerned, as provided for in section 4., below.
>
> 3.2.3.3. The member, having been denied reenlistment or continuation on AD or full-time National Guard duty by the Military Service concerned under subparagraphs 3.2.3.1. and 3.2.3.2., above, accepts an earlier separation from AD.
>
> 3.2.4. The Service member has entered into a written agreement with the Military Service concerned to serve in the Ready Reserve as provided for in subparagraph 3.1.4., above.

Department of Defense Instruction No. 1332.29 (June 20, 1991) (emphasis added); *see also* DoD Financial Management Regulation Vol 7A, Chap 35, ¶ 350201.B; Air Force Instruction No. 36-3207 § A2.1.2 (officers); Air Force Instruction No. 36-3208, § 9.3 (enlisted). A non-exhaustive list of analogous language from the various services can be found at: MILPERSMAN 1920-040 ¶ 5; MCO P1900.16F Ch. 2 ¶ 1308; COMDTINST 1910.1 ¶ 4b; AR 635-200 ¶ 1-6; and AR 600-8-24 ¶ 1-14.

Reducing the severance pay of former service members because they are lesbian, gay, or bisexual penalizes them based on how they exercise their protected liberty to form intimate relationships in violation of *Lawrence v. Texas*, 539 U.S. 558 (2003); *Cook v. Gates*, 528 F.3d 42 (1st Cir. 2008); and *Witt v. Dep't of the Air Force*, 527 F.3d 806 (9th Cir. 2008). The government's current justification for such a penalty in the "Don't Ask Don't Tell" context – that it is necessary to ensure morale, good order, and discipline – does not make sense here because the penalty applies only once the service member has already been separated. Furthermore, while the courts often defer to the military's decisions regarding armed forces operations, this deference has not extended to matters of employee pay and benefits. *See Frontiero v. Richardson*, 411 U.S. 677 (1973).

We would prefer to resolve this issue through a change in DoD Instructions and corresponding changes in the rules for each of the services, along with payment of full separation pay to Mr. Collins. If we are unable to reach such a resolution, Mr. Collins is prepared to litigate this matter in the Federal Court of Claims.

We respectfully request a meeting with you or your representatives to discuss whether we can find a mutually satisfactory resolution.

Very truly yours,

James D. Esseks
Co-Director
Lesbian, Gay, Bisexual, Transgender Project
ACLU Foundation

Aaron D. Tax
Legal Director
Servicemembers Legal Defense Network

cc: Hon. Carl Levin, Chairman
Senate Armed Services Committee

Hon. Ike Skelton, Chairman
House Armed Services Committee

Hon. Jeh C. Johnson, General Counsel
Department of Defense

# Exhibit B

OFFICE OF THE UNDER SECRETARY OF DEFENSE
4000 DEFENSE PENTAGON
WASHINGTON, D.C. 20301-4000

PERSONNEL AND
READINESS

DEC 22 2009

Mr. James D. Esseks
ACLU Foundation
125 Broad Street, 18th Floor
New York, NY 13004-2400

Dear Mr. Esseks:

This is in reply to your recent letter, dated November 25, 2009, to Secretary of Defense, Robert M. Gates, on behalf of Mr. Collins regarding separation pay authorized by 10 USC 1174 for members discharged under 10 USC 654 (Policy concerning homosexuality in the Armed Forces). Regrettably, the Secretary cannot reply to every communication he receives; therefore, this office has been asked to respond.

As you noted in your inquiry, full separation pay under 10 USC 1174 is not an entitlement for all members leaving the military and in many cases is dictated by department policy under the provisions of 10 USC 1174(e). In general, department policy provides full separation pay to members who are eligible by law and are otherwise fully qualified for retention. The policy allows half separation payments to members not fully qualified to continue who are being involuntarily separated under honorable conditions. Further, the policy does not allow separation pay for members who are being separated under other than honorable conditions or as the result of court martial.

A person's sexual orientation is considered a personal and private matter and is not a bar to service entry or continued service. However, in accordance with 10 USC 654, a person who engages in homosexual conduct must be separated and is not fully qualified for retention. Therefore, in accordance with current Department policy, members who are separated under section 654 do not receive the same level of separation pay as those who are fully qualified for retention.

Thank you for your letter.

Sincerely,

William J. Carr
Deputy Under Secretary
(Military Personnel Policy)

# Exhibit C

ACLU LESBIAN GAY BISEXUAL TRANSGENDER PROJECT

LEGAL DEFENSE

February 24, 2010

By Facsimile and First Class Mail

Hon. Jeh C. Johnson, General Counsel
Department of Defense
1600 Defense Pentagon
Washington, DC 20301-1000

Re: Automatic 50% Reduction in Separation Pay
for Lesbian, Gay, and Bisexual Service Members

Dear Mr. Johnson:

We write on behalf of the ACLU and Servicemembers Legal Defense Network to ask that the Department of Defense, as part of its recently announced 45-day review of military policy related to "Don't Ask Don't Tell," revise Department of Defense Instruction No. 1332.29 so that service members discharged based on "homosexuality" or "homosexual conduct" no longer suffer an automatic 50% reduction in separation pay.

As we outlined in our November 29, 2009 letter to Secretary Gates (a copy of which is attached as Exhibit A), this policy is outdated, unfair, and unconstitutional. Importantly, the adverse treatment of lesbian and gay service members under this DoD Instruction is not required by the "Don't Ask Don't Tell" statute, 10 U.S.C. § 654; instead, the Department has the freedom to change this instruction on its own, without approval from Congress. Indeed, DoD Instruction No. 1332.29, 3.2, already authorizes full separation pay "when the specific reasons for separation and the overall quality of the member's service has been such that denial of such pay would be clearly *unjust*." (emphasis added). In light of the clear statements by current military leadership that separations under Don't Ask Don't Tell are unjust, the existing instructions should not result in reduced separation pay for service members like Mr. Collins, the ACLU's client discussed in our earlier letter. Thus, removing "homosexuality" from Instruction 1332.29 would simply bring the text of DoD rules into conformity with DoD policy on this issue.

In light of the Department's full authority to change its Instructions, as well as the Administration's clear policy position on the exclusion of lesbian and gay service members, we were surprised and profoundly disappointed to receive a response (copy attached as Exhibit B) to our November 29, 2009 letter stating that the Department would not make this change.

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Senator Levin raised the issue of the Department's unfair policy regarding separation pay during the February 2, 2010 hearing on "Don't Ask Don't Tell" before the Senate Armed Services Committee. Senator Levin asked Secretary Gates to include this issue in the 45-day review, stating as follows:

> LEVIN:
> One other comment, and that has to do with what can be done interim. You're going to be looking at that -- without legislative change. Secretary, it's my understanding that when service members are discharged under the "Don't Ask/Don't Tell" policy with an honorable discharge, that DOD policy now is that they only receive half of their separation pay which is authorized by statute. You're authorized to either give half or full. Would you take a look at that as something we can do in the interim here to indicate a greater sense of fairness about this issue?

(CQ Congressional Transcripts, Feb. 2, 2010 (copy attached as Exhibit C))

As part of its review of current DoD policies and regulations, we urge the Department to revise Instruction No. 1332.29 to eliminate "homosexuality" and "homosexual conduct" from the list of conditions that trigger a reduction in otherwise applicable separation pay.

We also request that DoD provide full separation pay to the ACLU's client, Robert Collins. Failing a full resolution of this separation pay issue, we will file suit against the Department in federal court.

We respectfully request a meeting with you to discuss whether we can find a mutually satisfactory resolution.

Very truly yours,

James D. Esseks
Co-Director
Lesbian, Gay, Bisexual, Transgender Project
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cc: Hon. Carl Levin, Chairman
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