



12 November 2009

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

Re: Failure to hold accountable those involved in the hazing and harassment of sailors,  
Military Working Dog Division, Naval Security Force Bahrain, 2004 through 2006

Dear Mr. Secretary:

Servicemembers Legal Defense Network (SLDN) is deeply concerned about SCPO Michael Toussaint's hazing and harassment of sailors under his command in the Military Working Dog (MWD) Division at Naval Security Force Bahrain from 2004 through 2006. We are also distressed about apparent failures in Navy leadership in addressing this matter. While the Secretary of the Navy has censured Toussaint and he is being "forced" into early retirement, we do not believe the response up and down the chain of command has been sufficient. SLDN has three requests. First, we ask that you ensure accountability - that all those responsible for the hazing and harassment be held accountable for violations of the Uniform Code of Military Justice (UCMJ) and Navy Regulations. Specifically, we ask that Toussaint stand court martial prior to his retirement for all the violations of the UCMJ documented in the Navy's original investigation. Second, we ask that your office investigate the repeated failures of command leadership - why all those whom the Navy ultimately found responsible for these actions have not been held sufficiently accountable, even as this matter has been reviewed by the highest levels of the Navy.<sup>1</sup> And third, we ask that you examine why the Command Investigation targeted PO1 Jennifer Valdivia but then failed to address her suicide.

While Toussaint hazed and harassed many sailors, SLDN believes Toussaint singled out PO3 Joseph Rocha for the most egregious abuse because he perceived Rocha to be gay. Rocha and others believed they could not come forward to report abuses because of 10 USC § 654, otherwise known as "Don't Ask, Don't Tell" (DADT). SLDN is therefore representing Rocha in this matter.<sup>2</sup>

#### Facts

The 16 January 2007 Command Investigation lays out 21 findings of fact, including numerous incidents of abuse and harassment based, at least in part, on perceived sexual orientation.<sup>3</sup> The Command Investigation, paired with Rocha's personal accounts, confirms that Rocha suffered degrading "physical[]

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<sup>1</sup> According to press reports, the Navy itself recognized the need for someone *outside* the Navy to investigate this matter when it appointed a Marine as the original Investigating Officer.

<sup>2</sup> SLDN is a national, non-profit legal services, watchdog and policy organization that provides free confidential assistance to service members who are affected by DADT and related policies. SLDN is the only national legal aid and policy organization assisting service members impacted by DADT. Since 1993, SLDN has answered nearly 10,000 requests for assistance. SLDN therefore has a vested interest in making sure that lesbian, gay, and bisexual service members are not targeted for hazing and harassment and that service members are not inappropriately treated under DADT.

<sup>3</sup> First Endorsement, 12 April 2007, Commanding Officer, Naval Support Activity Bahrain; Second Endorsement, 30 May 2007, Commander, Navy Installations Command, Staff Judge Advocate; Third Endorsement, 28 June 2007, Commander, Navy Installations Command.

and emotional[] . . . torment[]” while stationed in the kingdom of Bahrain.<sup>4</sup> His primary tormenter was Chief Petty Officer Michael Toussaint.

Rocha states that the abuse he suffered at the hands of Toussaint and others included being locked inside of a feces-filled dog kennel, being forced to simulate sex acts with another man, and being spanked.<sup>5</sup> More specifically, the Command Investigation and Rocha’s personal accounts confirm that Rocha was tied up and bound to a chair, taken outside and “put on display,” rolled back inside, and ultimately locked inside a feces-filled dog kennel, where he stayed “until someone came and released” him. The Command Investigation and Rocha’s personal accounts confirm that Toussaint required Rocha to simulate oral sex during a video-taped training. And both the Command Investigation and Rocha’s personal accounts confirm that Rocha was called into Toussaint’s office, made to bend over, and each handler spanked him roughly twenty times. The Navy report states, “[Redacted] told [redacted] to bend over a filing cabinet and copy machine before being spanked and hit by MWD handlers that [redacted] called into [redacted] office.”<sup>6</sup> Rocha states he was the person on the receiving end of the abuse and that Toussaint gave the orders. Toussaint is quoted in the Command Investigation as saying, “God help anyone who airs our dirty laundry.”

Additionally, Rocha maintains that Toussaint accused him of being gay, inquired about Rocha’s sexual orientation, and – when women reported incidents of harassment and abuse – he accused those women of being gay so as to intimidate the women into not going forward with their allegations.

### Analysis

Based on SLDN’s analysis of the Command Investigation, when paired with Rocha’s personal accounts of the facts, it is clear that Toussaint committed acts that are in violation of Navy Policy and can and should be prosecuted under the UCMJ. Examining just one of the many incidents of misconduct, the spanking incident is a violation of several UCMJ provisions, including Article 92 (Failure to obey order or regulation), Article 93 (Cruelty and maltreatment), Article 120 (Rape, sexual assault, and other sexual misconduct), Article 128 (Assault), and Article 134 (Soliciting another to commit an offense), through Article 77 (Principals).<sup>7</sup>

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<sup>4</sup> Joseph Rocha, *I Didn’t Tell. It Didn’t Matter*, The Wash. Post, Oct. 11, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/10/09/AR2009100902570.html>.

<sup>5</sup> See generally U.S. Naval Support Activity Bahrain, *First Endorsement on Command Investigation Into the Facts and Circumstances Surrounding Allegations Within the MWD Division of Naval Security Force Bahrain* (2007) (detailing the extensive abuse which took place).

<sup>6</sup> *Id.*

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**Article 77 (Principals):** One who “causes an act to be done which if directly performed by him would be punishable . . .” under another article of the UCMJ “is equally guilty of the offense as one who commits it directly, and may be punished to the same extent.” Toussaint aided, abetted, commanded, or caused acts to be done in violation of other articles of the UCMJ. He is therefore equally guilty of spanking and the other misconduct as if he had committed the offense(s) himself.

**Article 92 (Failure to obey order or regulation):** “Any person” who “violates or fails to obey any lawful general order or regulation . . . shall be punished as a court –martial may direct.” **SECNAV Instruction 1610.2A - Policy:** “Hazing is prohibited and will not be tolerated.” Toussaint’s actions constitute hazing, as defined by the Navy, because he “cause[d] another military member . . . to suffer or be exposed to an[] activity which [was] cruel, abusive, humiliating, oppressive, demeaning, or harmful.” Navy policy states that “soliciting or coercing another to perpetrate any such activity is also considered hazing.” Furthermore, “[a]ny violation . . . or solicitation of another to violate this policy subjects involved members to appropriate administrative action and/or the Uniform Code of Military Justice (UCMJ), Art. 92 . . .”

As with the spanking incident, most of the other incidents of physical and mental mistreatment inflicted upon Rocha and others also qualify as hazing, in violation of SECNAV Instruction 1610.2A, Department of the Navy Policy on Hazing, 15 July 2005. For example, on one occasion, Rocha was “hogtied” and “force-fed dog biscuits.” The Navy prohibition on hazing states that “forcing or requiring the consumption of food, alcohol, drugs, or any other substance,” is a form of hazing. Per the UCMJ and the Navy hazing prohibition, Toussaint is culpable even if he merely orchestrated the incident; that is, he did not have to be the one physically forcing the dog biscuits into Rocha’s mouth.

#### Failed Investigations, Failure of Command, Failure of Leadership

While the Navy has investigated and detailed – and thus admitted to - the egregious harassment and abuse that took place, SLDN is alarmed with what to date appears to be the Navy’s inadequate response. The initial investigation confirmed 93 incidents of misconduct. Nonetheless, a Navy source told National Public Radio that while the initial investigation’s recommendations called for Toussaint and another Non-Commissioned Officer to be court-martialed, the recommendations were not acted upon. Instead, someone in Toussaint’s chain of command gave him a “non-punitive letter of caution” and closed the case. Indeed, Toussaint was later promoted.

In lieu of going after the ringleader, Toussaint’s chain of command apparently chose to scapegoat PO1 Jennifer Valdivia, second in command of Rocha’s unit, and also a victim of Toussaint’s abuse. Press reports and the Command Investigation into the hazing indicate that Valdivia and another woman were ordered to participate in a videotaped training, where Valdivia was handcuffed to a bed and appeared naked under a sheet, as the two played “lesbian lovers.” Valdivia committed suicide on or about 12 January 2007.<sup>8</sup> According to the Command Investigation into Valdivia’s death, on 20 October 2006, someone in Valdivia’s chain of command questioned her and others about the harassment and abuse. Upon leaving the interview, she stated, “they’re accusing me.” In December 2006, Valdivia reportedly, “may have realized that she might be held responsible for at least some of the alleged misconduct in her division.” On 11 January 2007, the day before Valdivia is assumed to have committed suicide, someone in Valdivia’s chain of command told her she was being placed on administrative legal hold and was being

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**Article 93 (Cruelty and maltreatment):** To satisfy Article 93, one may be “cruel toward, or oppress[], or maltreat[] [a] person [who is] subject to the orders of the accused.”

**Article 120 (Rape, sexual assault, and other sexual misconduct):** **Section (m)** makes it a crime to engage in wrongful sexual contact. Sexual contact is defined as “the intentional touching, either directly or through the clothing, of the . . . buttocks of another person . . . with an intent to abuse, humiliate, or degrade any person...” A person is guilty of wrongful sexual contact if “without legal justification or authorization, [that person] engages in sexual contact with another person without that other person’s permission....”

**Article 128 (Assault):** One is guilty of assault consummated by battery when “the accused [does] bodily harm to a certain person” with “unlawful force or violence.” Bodily harm means, “any offensive touching of another, however slight.”

**Article 134 (Soliciting another to commit an offense):** (1) the person charged “solicited or advised” someone to commit an offense punishable under the UCMJ, (2) “[t]hat the accused did so with the intent that the offense actually be committed,” and (3) that the solicited acts were “to the prejudice of good order and discipline in the armed forces or [were] of a nature to bring discredit upon the armed forces.” The spanking incident, like the other egregious abuse and harassment, gravely impacted good order and discipline and brought discredit upon the Navy.

<sup>8</sup> Both The Naval Criminal Investigative Service (NCIS) and Valdivia’s command investigated the suicide. NCIS released its Report of Investigation (ROI) on 16 January 2007. The command issued its investigative report on 13 May 2007 (First Endorsement, 29 May 2007, Commander, U.S. Naval Forces Central Command).

relieved of her duties pending the command investigation and possible legal action. According to Rocha, Valdivia tried more than anyone to stop the abuse in the unit. And Rocha has stated, “[t]he idea that she could have stopped the abuse is, to me, unfair and unreasonable. The Navy itself failed to stop him.” But Navy Spokesperson CAPT Bill Fenick has said he is not aware of *any* other sailors, whether enlisted or officers, who were placed on an administrative legal hold as a part of the investigation into the hazing in Bahrain. Valdivia’s family deserves a full explanation of how and why she was targeted and who made the decision target her. We request that your investigation address why PO1 Jennifer Valdivia was targeted. And we request that you provide full and un-redacted copies of the findings of this investigation and the previous investigations to her family.

On 16 January 2007, the day NCIS found Valdivia’s body and confirmed her death, the command released its much delayed investigation into the abuse and harassment of Rocha and others in his unit. The command could have delayed the release of the investigation to account for Valdivia’s suicide. The subsequent endorsements should have accounted for it as well. The failure of the Command Investigation into the hazing and abuse, or any of its endorsements, to account for the apparent targeting of Valdivia and her subsequent suicide, once again calls into question the chain of command’s handling of this entire matter.

This lengthy travesty may have faded into obscurity but for the fact that one former sailor in the Bahrain unit filed a Freedom of Information Act request for the initial investigation report and shared it with Youth Radio, which broke the story of Rocha’s abuse in June, 2009. Once the story gained traction, Representative Joe Sestak wrote a letter to the Secretary of the Navy on 11 September 2009, asking for more information. This led to a review of the prior investigations; word came on 21 October 2009, that based on this most recent review, the Chief of Naval Operations, Admiral Roughead, ordered Toussaint’s enlistment extension canceled (effectively ending his Navy career in January 2010) and directed that a paygrade determination board be convened to suggest the appropriate level of rank and pay at which Toussaint should be retired (apparently the Secretary of the Navy will make the final decision as to this determination). On 21 October 2009, the Navy Secretary also issued a letter of censure (recommended by Roughead) to Toussaint. Finally, the Chief of Naval Operations has directed NCIS to conduct additional interviews re: the misconduct in Bahrain; Congressman Sestak announced that he was assured by the Secretary of the Navy that NCIS will look into, specifically, why the initial recommendations of punishment (with respect to Toussaint and others) were not implemented. He also stated that congressional hearings into the hazing which took place at Bahrain may be appropriate.

### Conclusions

Now, more than three years after the incidents in question, and more than two years after the command investigation, the protracted and inadequate Navy responses to the repeated offenses have allowed Toussaint to be *promoted* to Senior Chief, administratively slapped on the wrist, and allowed to retire. Justice has not been served. It appears that the Navy’s legal system has not only failed several brave sailors, but the Navy’s leadership has repeatedly failed them as well. This case was apparently repeatedly reviewed at the highest levels of the Navy and still the punishment to date does not fit the numerous offenses committed. There remains a need for all of the facts to come out and the next review should go beyond the Secretary of the Navy for a more thorough investigation of who was responsible for the underlying offenses, and why the chain of command, up to the Secretary of the Navy, failed to sufficiently hold these individuals accountable. We need a clear message from the Navy and Department of Defense that our military has zero tolerance for these documented instances of abuse, hazing, and harassment.

Rocha was an outstanding sailor with exemplary reviews and he was, by all accounts, a tremendous asset to the Navy. His most recent review states, "Petty Officer Rocha is an exceptionally outstanding young Sailor whose performance, initiative, and immeasurable energy makes him a model Master-At-Arms." There is no evidence that Rocha's sexual orientation ever harmed unit cohesion, morale, good order and discipline, yet it is evident to SLDN that while there were larger issues of abuse, DADT not only gave the perpetrators license to engage in these actions, it prevented those who braved the harassment from reporting it. As Rocha has stated, "I told no one about what I was living through. I feared that reporting the abuse would lead to an investigation into my sexuality. I did not want to forfeit my career." In fact, the Command Investigation indicates that DADT had such an impact on him that it took 90 minutes for the investigator to get him to talk. Rocha and SLDN insist that failing to hold individual wrongdoers accountable for the abuses against all those in the Bahrain MWD unit risks setting a far-reaching and dangerous precedent for the treatment of all service members – straight, lesbian, gay, and bisexual - who may face harassment in the military. We urge you to review this grave situation, detail why this process failed, hold all responsible accountable, and bring them to justice.

SLDN looks forward to your reply and assistance in this matter. Should you have any questions, please do not hesitate to contact me at 202-328-3244 (x 109), ASarvis@sldn.org, or at the mailing address on this letterhead.

Sincerely,

A handwritten signature in black ink, appearing to read "Aubrey Sarvis". The signature is fluid and cursive, with a long horizontal stroke at the end.

Aubrey Sarvis  
Executive Director

CC:

Honorable Jeh Charles Johnson  
General Counsel of the Department of Defense  
1600 Defense Pentagon  
Washington, DC 20301-1600