

**CONDUCT UNBECOMING:
THIRD ANNUAL REPORT ON “DON’T ASK, DON’T TELL, DON’T PURSUE”**

FEBRUARY 28, 1996 - FEBRUARY 26, 1997

EXECUTIVE SUMMARY

“Don’t Ask, Don’t Tell, Don’t Pursue” is evolving into a Machiavellian system where the ends justify the means. In 1996, the armed forces repeatedly excused violations of current law including witch hunts, seizure of personal diaries, and threatening servicemembers with prison unless they accused others as gay -- all in an effort to target and ferret out gay men and women who serve our country. The result is that gay discharges have soared to a five-year high at a cost exceeding \$25 million in 1996.¹ (Exhibit 1)

The findings of the third annual report by Servicemembers Legal Defense Network (SLDN) on “Don’t Ask, Don’t Tell, Don’t Pursue” include:

1. DOD discharged 850 people under “Don’t Ask, Don’t Tell, Don’t Pursue” in fiscal year 1996 -- a five-year high, and the highest rate of discharge since 1987.² (Exhibit 2)
2. SLDN documented 443 specific violations where suspected gay servicemembers were asked, pursued and harassed.³ (Exhibit 3)
3. Women were disproportionately targeted, accounting for 29% of gay discharges, despite making up only 13% of the active force. In the Army, women accounted for 41% of gay discharges, three times their presence in the service. Women are often accused as gay after rebuffing men’s sexual advances or reporting sexual abuse, regardless of their actual orientation. (Exhibit 4)
4. DOD continues to criminally prosecute servicemembers for allegations of gay, but not straight, consensual relationships, contrary to regulations requiring even-handed treatment in the criminal system.
5. The physical torture of suspected gay servicemembers seems to have ended. Tactics under prior policies included forced “neurological testing,” like that endured by former Lieutenant Jay Hatheway, and locking military members in broom closets with no personal breaks until they “confessed” to being gay.⁴

RECOMMENDATIONS

SLDN concludes that many military members continue to ask, pursue and harass servicemembers in direct violation of "Don't Ask, Don't Tell, Don't Pursue." The violations result from a lack of leadership, training and recourse to stop illegal investigations. Some commanders, criminal investigators and inquiry officers blatantly disregard the clear limits on gay investigations. Others simply do not know any better, as the services have failed to implement adequate, ongoing training in the field. Lastly, those accused under "Don't Ask, Don't Tell, Don't Pursue" have no recourse to stop improper investigations before it is too late. SLDN recommends that DOD take the following steps to stop the continuing abuses of the law:

1. Train all military personnel about the letter and intent of "Don't Ask, Don't Tell, Don't Pursue," emphasizing the limits placed on investigations into gay accusations. Most servicemembers report that they have received no training or only cursory, one-time training three years ago, when the law was implemented.
2. Discipline commanders who disobey the limits on investigations and who tolerate harassment. The law and regulations will be respected when commanders know that they will be held accountable for their actions.
3. Allow women to report sexual abuse without fear that they will be accused and discharged as lesbians in retaliation. Officials should adopt, as a first step, the 1989 recommendation of the Defense Advisory Committee on Women in the Services⁵ to train commanders on the potential misuse of gay accusations.
4. Provide servicemembers with a way to report anti-gay harassment, including death threats and hate crimes, without fear of retribution and discharge.
5. Exclude evidence that has been wrongfully obtained from being used at an administrative discharge board, as suggested by a 1995 report by the Advisory Board on DOD Investigative Capability.⁶
6. Stop selective criminal prosecution of servicemembers for allegations of adult, consensual gay relationships in circumstances where heterosexuals would not be prosecuted, as required by the regulations.
7. Revise and replace obsolete recruiting forms written in January 1989 (DD Form 1966/1) with ones that do not ask recruits about their sexual orientation or

conduct.

8. Require commanders to reveal in writing to the servicemember the specific reason an inquiry or investigation has been initiated against the servicemember so that (s)he knows what the allegations are and can provide commanders an appropriate response to expeditiously resolve and end unwarranted investigations.
9. Require commanders to not intrude into private conversations between gay servicemembers and their families, doctors and other health care professionals and not use such statements as the basis for retribution, investigation and discharge.
10. Make clear to commands that, under current law, inquiries and investigations can only be started with credible information. Not all information is credible, such as rumors or retaliatory accusations. Commanders cannot start inquiries on the theory that they will discover credible information if they investigate.
11. Discharge expeditiously individuals who come out as gay to commanders rather than launch costly, wide-ranging investigations to establish bases for criminal charges or reduced benefits against the servicemember.
12. Rescind the Department of Defense, Air Force and Navy memoranda that provide confusing and contradictory guidance to military personnel regarding the original letter and intent of the law not to pursue suspected gay servicemembers.

DOD should adopt these recommendations as a first step to bring itself into compliance with the current law and regulations. These recommendations, if fully implemented, would marginally improve the safety of servicemembers' daily lives. They would not eliminate or alter "Don't Ask, Don't Tell, Don't Pursue," which requires administrative separation of servicemembers who say that they are gay, engage in affectional or sexual conduct with someone of the same gender, or attempt to marry a person of the same gender. These recommendations would in no way cure the constitutional defects of the law, which punishes gay servicemembers for saying and doing the same things permitted to their straight counterparts.

OVERVIEW

Four years ago, President Clinton assumed office and announced that he would issue an Executive Order to prohibit the mandatory discharge of gay personnel honorably serving their country. Congress opposed President Clinton's efforts and codified into law the same rules that had been in effect since 1981 -- that servicemembers would be discharged from military service if they stated that they were gay, engaged in handholding, hugging or other affectional or sexual conduct with a person of the same gender, or attempted to marry someone of the same gender.

President Clinton, Congress and the Pentagon, however, agreed to end the affirmative efforts to ferret out suspected gay members. They agreed to stop asking servicemembers about their sexual orientation, end witch hunts and prevent anti-gay harassment. They agreed to implement the law with due regard for the privacy of servicemembers. They agreed to treat servicemembers in an even-handed manner in the criminal system, by stopping the criminal investigation and prosecution of servicemembers for allegations of gay consensual relationships when the services would not normally proceed in the same fashion regarding allegations of heterosexual conduct. The law became known as "Don't Ask, Don't Tell, Don't Pursue" to signify the new limits on gay investigations. While the law did not mark an end to treating lesbian, gay and bisexual servicemembers differently than their heterosexual counterparts for saying and doing the same things, it did mark what was to be a more humane policy of co-existence. The Department of Defense promulgated regulations implementing the current law on February 28, 1994.

For the past three years, the reality of "Don't Ask, Don't Tell, Don't Pursue" has been anything but humane as many commanders have continued to ask, pursue and harass suspected

gay servicemembers with impunity. One result is that, according to the Department of Defense's own figures, gay discharges have soared to 850 in fiscal year 1996, a five-year high, and up 42% since 1994. The rate of gay discharges is at its highest level since 1987.⁷

This report details the violations of current law documented by Servicemembers Legal Defense Network (SLDN) from February 28, 1996 to February 26, 1997. Located in Washington, D.C., SLDN is the sole national legal aid and watchdog organization for those targeted under "Don't Ask, Don't Tell, Don't Pursue," and the only means currently available to document abuses. DOD has instituted no method of identifying, documenting or correcting command violations.

In the past year, SLDN has documented 443 violations of current law and regulations in 256 cases. SLDN has detected the same types of basic violations in each of the past three years, raising serious concerns about the good faith of the Department of Defense in ensuring command compliance with "Don't Ask, Don't Tell, Don't Pursue." Examples of the violations SLDN has detected are given throughout this report and the accompanying exhibits. SLDN records only those violations in cases handled and verified by SLDN and its network of more than 250 cooperating attorneys from private firms nationwide. The servicemembers and attorneys who have assisted SLDN on the cases reported here are available to speak upon request, except in cases where servicemembers could suffer retaliation from speaking publicly. Attorney/client confidentiality and protecting servicemembers from potential reprisal requires SLDN to omit the names of some servicemembers in this report.

DON'T ASK

The "Don't Ask" regulations state that servicemembers will not be asked about or required to reveal their sexual orientation.⁸ As recently as January 27, 1997, Secretary of Defense William Cohen stated on the *Larry King Live* show that asking "is a clear violation of law."⁹ And yet, SLDN documented 89 "Don't Ask" violations in the past year where servicemembers were asked about their sexual orientation. (Exhibit 5)

SLDN has found, for example, that the armed forces continue to use a January 1989 recruiting form which asks recruits:¹⁰ "(a) Are you a homosexual or a bisexual? and (b) Do you intend to engage in homosexual acts?" While recruiters are supposed to line through this section, some do not. One recruiter even circled the forbidden questions as ones that had to be answered. (Exhibit 6) The complaints SLDN has received to date on this issue focus primarily on the East Coast Coast Guard recruiting stations. SLDN noted similar complaints at last year's press conference regarding the Coast Guard and no steps appear to have been taken by either the Department of Transportation¹¹ or the Department of Defense to remedy the situation. In general, we are concerned that the Department of Defense, which is responsible for promulgating the recruiting form, has yet to take the very simple step of redesigning the form to ensure that no unintentional or intentional questioning of recruits occurs in any service.

SLDN also remains gravely concerned that some military commanders continue to ask servicemembers about their sexual orientation despite clear and unambiguous regulations prohibiting such questions. In Spring 1996, Lieutenant Colonel Abraham Turner at the United States Military Academy at West Point confronted Cadet Nicole Galvan about her sexual orientation in front of four cadet eyewitnesses.¹² She refused to answer his questions. At the

suggestion of a faculty member, Galvan submitted a memorandum complaining about Lieutenant Colonel Turner's harassing actions. Within weeks, Lieutenant Colonel Turner ordered the seizure of Galvan's personal diary under the ruse of investigating a reported fight between Galvan and another cadet. Grief counselors at West Point had suggested that Galvan keep the diary to help her deal with the death of her mother. Facing investigation into her sexual orientation and private life based on information contained in her diary and disillusioned by Turner's actions, Galvan resigned from West Point.

In a case this past summer, Captain Howell of the *USCGS Coutwell* reportedly asked SS3 Kelli Sprague, "Have you ever told anyone on the ship that you are gay? Have you ever been confused about the way you are? Have you ever acted on the confusion?" Captain Howell reportedly threatened SS3 Sprague with criminal prosecution for making a false official statement if she did not answer his questions and answer them truthfully. Under great pressure, she admitted to being a lesbian. In a contemporaneous memorandum for record, she stated, "When your Commanding Officer asks you a question and informs you that lying is against the UCMJ, what choice do you have, but to tell the truth." (Exhibit 7) SS3 Sprague has been discharged based on her response to Captain Howell's questioning. She plans to file a complaint with the Inspector General.

In a disturbing case discussed more fully in the "Don't Pursue" section of this report, Airman Sean Fucci was asked by his supervisor if he were gay after he reported receiving a death threat – a note placed in his room that read "DIE FAG!" (Exhibit 8) Questioning servicemembers about their sexual orientation when they report death threats could force some servicemembers to have to choose between their lives and their careers, because any acknowledgment that one is

indeed gay leads to mandatory discharge processing.

SLDN is also concerned about a growing trend involving coworkers who intimidate servicemembers into revealing their sexual orientation and then turn them over to the command for discharge. At Lackland Air Force Base in San Antonio, for example, an airman was hounded by unit members who asked him at least ten times if he were gay during the course of a week. Not knowing how to stop the harassment, he finally answered truthfully that he is gay. The airman's command at Lackland subsequently discharged him based on his response to his coworkers.

"Don't Ask" violations increased 16% over last year's figures reported by SLDN. The Coast Guard, which had no "Don't Ask" violations in 1995, contributed to the increase with six violations this year. SLDN documented comparable levels of "Don't Ask" violations for the other services for both 1995 and 1996. (See Exhibit 5)

DON'T TELL

"Don't Tell" requires gay, though not heterosexual, servicemembers to keep their sexual orientation a "personal and private" matter. "Don't Tell," however, does not prohibit all statements about sexual orientation. Indeed, the current regulations specifically permit statements to lawyers, chaplains, and security clearance personnel.

During the national debate in 1993, some politicians conjured up images of servicemembers standing on the mess hall tables, shouting out their sexual orientation. The reality is that gay and lesbian servicemembers are far more concerned about maintaining their privacy than broadcasting their sexual orientation. Decision-makers called "Don't Ask, Don't Tell, Don't

Pursue” a compromise and promised that servicemembers would be left alone if they didn’t “flaunt” their orientation by engaging in such public declarations. As the law has come to be implemented, however, there is no privacy for gay servicemembers as promised in 1993.

In their zealous pursuit of suspected gay military members Pentagon officials have expanded "Don't Tell" in ways that most Americans are not aware, to include private statements to family members, close friends, doctors and psychologists. Servicemembers must keep their sexual orientation an absolute secret, hidden even from their families, or risk investigation and discharge. Unlike “Don’t Ask” and “Don’t Pursue,” which limit command activities, this misguided interpretation of “Don’t Tell” is being enforced with vigor against servicemembers. This is contrary to common sense, decency and President Clinton’s charge that the Pentagon “carry out this policy with fairness, with balance and with due regard for the privacy of individuals.”¹³

The services, for example, have reportedly instituted the disturbing practice of requiring health care providers in the military and those contracted to the military to turn in gay servicemembers who seek their help in private counseling sessions. An airman who contacted SLDN for assistance this year received a letter of notification informing him that he was being considered for discharge solely because “...the evidence suggests you made statements to a civilian clinical psychologist that you had engaged in homosexual acts, had enjoyed a homosexual relationship, and had a ‘basic’ homosexual attraction.” (Exhibit 9) The airman was ultimately retained because he had never actually made such statements to his psychologist, not because he could invoke any sort of confidentiality regarding his conversations with the psychologist and not because the regulations recognize that certain statements are supposed to be private and off-limits.

In another case, an airman stationed in California sought counseling at the mental health clinic on base due to considerable stress he was facing from verbal harassment and a hostile command climate, which tolerated anti-gay slurs and gay-baiting comments directed against him. The airman was unable to respond in a way that would diffuse the rumors about his sexual orientation or cease the intimidation he faced, so he sought advice on how to deal with the situation. The psychologist reportedly did not tell the airman that he would not protect his confidences, and indeed, turned the airman in to the command after he revealed that he is gay. In addition, the psychologist reportedly asked the airman to reveal information concerning whether he had engaged in any sexual conduct, without reading him his rights or advising him of the potentially serious consequences that could befall him, including possible criminal charges under the Uniform Code of Military Justice. The airman has been discharged as a result of this counseling session.

One positive note under “Don’t Tell” is the apparent decreased use of parents as witnesses against their children. Last year, SLDN reported on an Air Force memorandum by Colonel Richard A. Peterson, a top Air Force lawyer, that instructed inquiry officers to interrogate parents about the sexual orientation and private lives of their children to obtain information against the servicemembers for the purpose of discharge or other punishment. (Exhibit 10) The Air Force has issued a modified memorandum stating that the questioning of parents is now optional rather than mandatory. (Exhibit 11) While SLDN is encouraged that its cases reflect a decrease in incidents where military officials have interfered with private family conversations, we remain concerned that, without further clarification, some military officials will continue to police family relationships.

SLDN documented 31 “Don’t Tell” violations in the past year, up 72% from the previous year. The Navy accounted for the sharp rise in overall violations this year. Navy “Don’t Tell” violations jumped from 4 in 1995 to 17 in 1996, a 325% increase. Mental health care providers, who reportedly have been ordered to turn in gay servicemembers who seek their help, are partially responsible for this sharp increase. (Exhibit 12)

DON’T PURSUE

In the words of General Colin Powell, “Don’t Pursue” means that “We won’t witch hunt. We won’t chase. We will not seek to learn orientation.”¹⁴ The current regulations and guidelines echo General Powell’s words. Witch hunts are prohibited: commanders cannot expand investigations beyond the instant allegations¹⁵ by (1) asking servicemembers to identify suspected gays and lesbians or (2) fishing for information about a servicemember to see what they can turn up. Commanders must have “credible information”¹⁶ of a statement, act or marriage before launching an inquiry or investigation. Not all information is deemed credible, including rumors, speculation and reports from unreliable individuals.¹⁷ Lastly, commanders are not to use the criminal system against suspected gay servicemembers for consensual, adult sexual activities when they would not investigate or prefer criminal charges against heterosexuals for the same activities.¹⁸ These clear limits on investigations and criminal prosecutions were intended to prohibit the far-ranging, punitive and heavy-handed investigations that have characterized prior policies. These limits have been roundly ignored.

Last year, for example, we reported the case of Seaman Amy Barnes, one of up to sixty women reportedly targeted in a witch hunt onboard the *USS Simon Lake* in Sardinia, Italy. Since

our report last year, there have been several disturbing developments that the Navy and Department of Defense have not addressed. First, two servicemembers filed sworn affidavits in federal court alleging that the command's investigators threatened them with prison unless they confessed to being lesbian or accused Seaman Amy Barnes as lesbian. In an affidavit dated March 26, 1996, Heather Hilbun states under oath that she was told by an investigator, TM1 Sleeman, "If you do not tell the truth, you will go to jail for 10-15 years." He then proceeded to interrogate her about her own sexual orientation and that "of at least six other women by name." (Exhibit 13)

Another sailor who remains on active duty also filed a sworn affidavit dated April 27, 1996 stating, "Command Investigators threatened and intimidated me into giving involuntary statements by telling me I would be violating Article 78 of the Uniform Code of Military Justice [Accessory After the Fact] and would go to jail if I did not answer their questions and cooperate.... Being forced into giving statements which had the potential to be used against RMSN Barnes, who is my friend, was extremely upsetting." (Exhibit 14) Threatening servicemembers with prison unless they accuse others or confess as gay to being gay themselves is patently offensive and in direct conflict with the spirit and letter of the law.

The second noteworthy development in the Barnes case is that the Navy, without ever conceding that a witch hunt transpired onboard the *USS Simon Lake*, argued before a district court that a servicemember has no right to challenge a witch hunt or other violations of "Don't Pursue." The government argued that "regardless of whether the record contains evidence showing the Navy's reason for commencement of the investigation, or the manner in which the investigation was conducted, plaintiff has no legal basis upon which to challenge those events

here.”¹⁹ The government further argued that the “Don’t Ask, Don’t Tell, Don’t Pursue” guidelines “create no enforceable rights”²⁰ for servicemembers targeted in a witch hunt or by other improper command actions. The government has essentially argued that the services can do whatever they want to hunt down, discharge or imprison suspected gay servicemembers. The ends justify the means.

The same remarkable disregard for servicemembers’ rights of due process is reflected in the Air Force’s actions at Hickam Air Force Base in Honolulu, Hawaii. On January 25, 1996, Air Force officials entered into a pre-trial agreement with Airman Bryan Harris. (Exhibit 15) Airman Harris was facing life in prison for an alleged rape of another man and other charges. Air Force prosecutors agreed to reduce his sentence to twenty months on the condition that he turn over the names of all military men with whom he had allegedly engaged in consensual sex.²¹ Airman Harris served only eleven months of his sentence. To our knowledge, the Air Force has never entered a similar pre-trial agreement with a man charged with raping a woman for the sole purpose of discharging or criminally prosecuting his consensual female partners.

According to the Report of Investigation, Airman Harris accused seventeen men, five of whom were in the Air Force. (Exhibit 16) The Air Force has discharged the four enlisted men accused. The fifth man, an officer, faces a general court-martial on March 5, 1997 and up to thirty years in prison based on the allegations of consensual sex made as part of the pre-trial agreement.

On January 10, 1997, the Air Force Inspector General concluded that the pre-trial agreement in which the Air Force effectively purchased the names of seventeen men did not constitute a witch hunt.²² (Exhibit 17) The Air Force Inspector General report also concluded

that the following questions asked by an Air Force prosecutor of the co-workers of one of the accused airmen, Technical Sergeant Daryl Gandy, did not constitute questions about sexual orientation²³:

- (1) Do you have any reason to believe that TSgt Gandy doesn't like girls?
- (2) Have you ever had the feeling that Tsgt Gandy is interested in men?
- (3) Have you ever seen TSgt Gandy hug, kiss, or hold hands with another man in a way that was more than just a means of saying hello?
- (4) Would you be surprised to find out that TSgt Gandy is gay?
- (5) What is it like to work in a unit with so many homosexuals?
- (6) Has TSgt Gandy ever talked about women to you, you know, the way men talk about women?
- (7) Where does TSgt Gandy hang out? With whom?
- (8) Has TSgt Gandy ever had a girlfriend?
- (9) Do you think it is unusual for him not to have a girlfriend?
- (10) Does anyone in your office know that TSgt Gandy is gay?

These are only a few of the glaring command violations in the Hickam witch hunt and it is simply astounding that the Air Force Inspector General would so easily dismiss the actions taken by Air Force officials in this case.

Despite promises by spokespersons for the Army and Navy that their services would not pursue men accused by Airman Harris,²⁴ SLDN has documented that those services have indeed taken action against some of the accused and that there are others whose liberty remains at risk. Additionally, the Marine Corps specifically pulled Sergeant Bryan Clark off of terminal leave in Texas, where he had moved to start his civilian life, to potentially press criminal charges against him. The Marine Corps interrogated Clark and questioned his coworkers about Clark's sexual orientation and private life. After Clark retained a civilian attorney, the Marine Corps backed off, allowing him to leave the service. Marine Corps officials, however, placed derogatory comments in his file and a bar to future reenlistment in his records..

Senator Sam Nunn, former Chairman of the Senate Armed Services Committee, stated in 1993 that “I do not believe we should have sex squads looking for ways to investigate servicemembers’ private, consensual behavior.”²⁵ And then Senator Cohen, now Secretary of Defense, in questioning then DOD General Counsel Jamie Gorelick, asked whether the “Don’t Ask, Don’t Tell, Don’t Pursue” policy would “prevent the military from prying into private life?” Gorelick’s response: “Yes.”²⁶

The word that “Don’t Ask, Don’t Tell, Don’t Pursue” placed limits on gay investigations apparently did not reach prosecutors at Hickam Air Force Base or the other bases that have initiated action against those accused by Airman Harris. Even Professor Charles Moskos, one of the architects of the “Don’t Ask, Don’t Tell, Don’t Pursue” policy, stated on *Nightline* on September 11, 1996 that the pre-trial agreement entered into by the Air Force in this case violated the spirit of the policy he helped create.²⁷ SLDN will ask the DOD Inspector General to conduct its own investigation into this matter.

SLDN will also ask the Department of Defense Inspector General to investigate a witch hunt that occurred in Spring 1996 targeting up to thirty women at the United States Military Academy at West Point, mentioned briefly in the “Don’t Ask” section of this report. The witch hunt started when Master Sergeant Stoneking, at the direction of Lieutenant Colonel Abraham Turner, seized the personal diary of Cadet Nicole Galvan. In a letter notifying Galvan of a hearing to determine whether she had violated any regulations, Lieutenant Colonel Kerry Pierce confirms that Galvan was pursued based on her personal diary. In Paragraph 7, Lieutenant Colonel Pierce states that “Cadet Nicole Galvan...did...violate...regulations...by making various statements *in her diary* indicating a propensity or intent to engage in homosexual acts or

conduct....” (emphasis added) (Exhibit 18) The allegations in all other paragraphs contained in the notification letter stemmed from her personal diary that had been seized by her commander.

Air Force Major Debra Meeks made headlines this past year in her fight against allegations that she had been in a consensual lesbian relationship. The Air Force specifically held Major Meeks beyond her retirement date in order to criminally prosecute her and potentially imprison her for eight years based on the allegations. SLDN knows of no case where a servicemember has been charged with consensual heterosexual sodomy under similar circumstances, though the regulations require evenhanded treatment. Major Meeks was acquitted at court-martial and allowed to retire, but only after risking her very liberty.

Air Force Major Terry Nilson was not so lucky. He was pursued on charges of sodomy when an employee of a MotoPhoto franchise [made an extra set of the Major's photographs and turned them into](#) the Office of Special Investigations (OSI), the criminal investigative service of the Air Force. The photos showed the Major with his arm around another man, not sex or any other activity that could justify a sodomy charge. Nevertheless, the OSI launched a full-scale investigation [against](#) the Major. Having lost his career and pension, Major Nilson has filed suit against MotoPhoto, its franchisee and the employee who turned over the photos. To date, MotoPhoto has denied liability.

The government’s all-out effort to identify lesbian and gay servicemembers sometimes reaches the absurd. In the case of one Marine Corps Corporal, the inquiry officer determined, among other findings, that attending the Dinah Shore golf tournament and giving popular Anne Rice vampire novels to a friend constituted homosexual conduct. (Exhibit 19) The corporal has since been discharged.

A Navy training slide presented to commanders in the Atlantic Fleet sums up the desire of military leaders to seek out suspected lesbian, gay and bisexual servicemembers. (Exhibit 20) The slide states “Don’t Ask, Don’t Tell, Does Not Mean Don’t Investigate.” The slide further instructs that the “member must be interrogated.” “Questions you can ask,” according to the slide, include “(a) Has member engaged in homosexual acts or marriages?” or “(b) Attempted to engage in homosexual acts or marriages?” Imagine a different slide -- one that reads “Don’t Ask, Don’t Tell, Don’t Pursue’ Places Limits On Investigations.” The slide would then set forth the investigative limits. The tone of the message would be entirely different and would signal to commanders that they should, as President Clinton ordered, “carry out this policy with fairness and with due regard to the privacy of servicemembers.”²⁸

The push to launch gay investigations even infects simple coming out cases. Servicemembers who state that they are gay to their commanders face mandatory processing. Many commands, however, order intense and unnecessary investigations against these members to fish for additional information to subject these men and women to further pain and punishment, including criminal penalties, recoupment and loss of benefits. This goes way beyond the bounds of what was contemplated under “Don’t Ask, Don’t Tell, Don’t Pursue.” As then DOD General Counsel Jamie Gorelick said in explaining the parameters of “Don’t Ask, Don’t Tell, Don’t Pursue,” “Once you establish the elements of the offense or basis for discharge, you go no further.”²⁹

When Navy cryptologist David Compton came out to his command at Ft. Meade, Maryland, for example, the inquiry officer appointed to his case immediately told him that it was his job to “prove that the servicemember was lying.” Further, the inquiry officer stated that, if

Compton was lying, he would be imprisoned for making a false official statement. The inquiry officer then demanded that Compton give him the phone numbers for his parents, siblings, friends and clergy so that he could verify Compton's sexual orientation. He also demanded that Compton "prove" that he is gay. What the inquiry officer did not tell Compton is that the Navy could use any conversation with his family members and other confidants against him, to justify punishment beyond being discharged. The inquiry officer also did not inform Compton that the Navy could press criminal charges against him if the inquiry officer found that Compton had engaged in any sexual or affectional conduct with another man.

An Army Captain faced a similar experience. After she came out to her command, the appointed inquiry officer asked her questions fishing for additional information that could be used to harm her. The inquiry officer asked in writing: "(16) How do you know that you are gay? (21) Do you have a propensity to engage in homosexual acts? (22) Who else knows that you are gay? (23) What evidence or witnesses, if any, can you provide to support your statement that you are gay?" (Exhibit 21) These now appear to be standard questions asked of gay personnel who come out in all branches of service.

Gay servicemembers who are honest with their leaders are in a lose-lose situation. They often are told to "prove" they are gay or else face criminal charges for a false official statement. If, however, they "prove" they are gay by admitting to a gay relationship, they face the risk of criminal charges for consensual sexual conduct and other punishment.

A final piece of correspondence from the field provides a window on the prevailing climate regarding "Don't Pursue." A self-identified marine recently summed up his intent to ferret out gay military members in a posting on America Online on January 31, 1997. JarheadDoc stated, "My

marines and myself have weeded out every known faggot in our unit – we are doing our part.”

(Exhibit 22)

SLDN documented 191 “Don’t Pursue” violations in 1996, up 35% over last year’s numbers. As we reported last year, the Air Force and the Navy are the worst abusers of the “Don’t Pursue” provision. (Exhibit 23) In 1996, Air Force “Don’t Pursue” violations jumped from 61 to 77, a 26% increase. Navy violations of “Don’t Pursue” jumped from 38 to 58, a 53% increase. Both Air Force and Navy commanders are guilty of launching investigations and inquiries without credible information, and initiating far-reaching investigations to fish for information against servicemembers in an attempt to dig up information that can subsequently be used to justify discharge or court-martial.

DON’T HARASS

The “Don’t Harass” portion of the new regulations makes explicit that “the Armed Forces do not tolerate harassment or violence against any servicemember, for any reason.”³⁰ Violations of “Don’t Harass” include physical abuse and threats (including death threats), verbal harassment, and hostile command climates marked by constant anti-gay slurs. Violations also include sexual harassment of women through lesbian-baiting, the practice of pressuring and harassing women by calling, or threatening to call them, lesbians. Women frequently are accused as lesbians in retaliation for rebuffing sexual advances by men or reporting sexual abuse.

SLDN is pleased to report that, in 1996, the Department of Defense restated its commitment to end anti-gay harassment. In a letter dated April 18, 1996, Lieutenant General Samuel E. Ebbesen stated on behalf of the Department of Defense, “We oppose harassment – of any kind – to any of our

military personnel. And we will investigate carefully any such complaint...[and] take strong disciplinary action.” (Exhibit 24) General Ebbeson wrote this letter in response to inquiries made by Representative Barney Frank (D-MA) after last year’s report by SLDN on “Don’t Ask, Don’t Tell, Don’t Pursue.”

In another positive development, the Naval Justice School highlighted the need to protect the safety of sailors potentially threatened by anti-gay harassment in *A Commander’s Quick Reference Manual For Legal Issues*, dated May 1996. (Exhibit 25)

The problem remains, however, that servicemembers have no guarantees from the Pentagon that reporting harassment will not lead to their own investigation and discharge. In addition, many commanders simply do not take allegations of anti-gay harassment seriously.

The case of Airman Sean Fucci demonstrates the difficulties and dangers facing a servicemember threatened because of perceptions regarding his sexual orientation. Airman Fucci’s story begins in early 1995, when, while stationed in Panama, Fucci confided to his commander his realization that he is gay. Airman Fucci wanted to remain in the Air Force. After successfully rebutting the regulations’ presumption that he engaged in gay conduct, he was retained by a discharge board. Airman Fucci is one of only eight servicemembers in three years to be retained under this provision.

Airman Fucci spoke privately with his commander and never intended for his sexual orientation to become a matter of public record. His commander, however, responded by launching an extensive inquiry into Airman Fucci’s sexual orientation, fishing for information that could be used against him. There was none. In the process, however, the inquiry officer “outed”

Airman Fucci to his entire unit by questioning his friends and coworkers about his sexual orientation and whether he had ever discussed the matter with them.

In October 1995, Airman Fucci was transferred to Ft. Meade, Maryland. He never mentioned his sexual orientation or the discharge board to anyone at his new duty assignment. In mid-December, Airman Fucci found the annotation “Smiley (sic) Fag” on a pad of paper in his room. Though he was concerned about this incident, he shrugged it off as a one-time event and did not report it to his command. Two days before Christmas, however, Airman Fucci awoke from an afternoon nap to find a note on his desk. It read “DIE FAG.”

Airman Fucci reported the threat to his commander, who took no action either to determine who had made the threat or to guarantee Airman Fucci’s safety. In a memorandum for record, the commander wrote, “I contacted OSI and learned that they had no interest in investigating the incidents. [. . .] It is an issue of anonymous intimidation for which there is not much that can be done” (Exhibit 26) Subsequently, Airman Fucci faced direct questioning from his supervisor about his sexual orientation, an entirely inappropriate response to his complaint of the death threat. Airman Fucci resorted to living off base at his own expense, though he lacked financial resources, out of fear for his safety.

Airman Fucci next reported the death threat higher in the chain of command. Though Fucci’s First Sergeant berated him for going over his commander’s head, higher officials took appropriate steps to protect Airman Fucci’s safety. An inquiry was opened by the Air Force into the death threat. The inquiry officer performed his duties in a professional manner, focusing on the source of the threats rather than Airman Fucci’s sexual orientation. It is unfortunate, however, that “Don’t Ask, Don’t Tell, Don’t Pursue,” as implemented, barred Airman Fucci and

the inquiry officer from fully discussing matters related to his orientation that might have been relevant to the inquiry. Despite an honest, diligent effort, the inquiry did not identify the source of the threats.

Airman Fucci moved back onto the base after the conclusion of the inquiry. Within weeks, he received yet another written threat, stating “You can’t hide, fag.” Because Fort Meade is an Army base, the Air Force turned this matter over to the Army’s military police to conduct a criminal investigation into the continued threats. To SLDN’s knowledge, Investigator Carlos V. Arrieta, who was assigned this case, failed to investigate the threats against Airman Fucci despite repeated prompting by SLDN. Airman Fucci subsequently left the Air Force in January 1997 at the end of his enlistment.

Four and a half years ago, Seaman Allen Schindler told his commanding officer that he was gay and thought his life was in danger, but the command took no action. Within days, two fellow sailors had beaten Schindler to death, rupturing every organ in his body and obliterating every identifying feature except a tattoo on his torso. By now, authorities should understand that dismissing anti-gay death threats is counterproductive and downright dangerous.

Seaman Schindler’s shocking murder seems to have had no effect on the command of his ship, the *USS Belleau Woods*. Last year, a twenty-one year old enlisted man assigned to the ship reports he was told by his Chief Master at Arms that he would face the same fate as Seaman Schindler if he exercised his right to a discharge board to fight allegations of gay conduct that had been made against him. “The same thing will happen to you,” the Chief Master at Arms is reported to have told this sailor, “you will be killed.” The sailor did not fight the allegations and was discharged.

In yet another frightening example of anti-gay harassment, an Army drill instructor at Fort Benning in Columbus, Georgia reportedly informed his recruits at formation, “You should know that there are homosexuals here. I hate homosexuals. If you find one, you should beat the shit out of him.” The Inspector General of the Army is investigating this incident upon SLDN’s request and officers there are to be commended for their rapid response to the complaint. SLDN is withholding the name of the drill instructor pending the Inspector General’s review. (Exhibit 27)

In the summer of 1996, Airman Jennifer Dorsey, also in the Air Force at Fort Meade like Airman Fucci, saw her report of anti-gay harassment turn into a potential investigation against herself. Airman Dorsey filed a written complaint with Master Sergeant Robert L. Thomas, her First Sergeant, alleging that she had been harassed by two enlisted women in her dorm who were spreading rumors that Dorsey was gay. (Exhibit 28) Though Master Sergeant Thomas promised to speak with the women, the abuse continued. In a subsequent memorandum for record, Airman Dorsey details how the women attacked her in the latrine, repeatedly striking her in the stomach and chest while telling her, “You sick fucking dyke!” (Exhibit 29)

Airman Dorsey next went to her commander, Major Richard C. Roche, to no avail. Airman Dorsey then filed a formal complaint with the social actions office. Subsequently, her command lectured her unit about harassment in general terms, but failed to take disciplinary action against the two women who were the subject of Airman Dorsey’s complaint. Instead, Major Roche reportedly threatened Airman Dorsey with an investigation, stating “If that’s your lifestyle, you need to cease and desist. I’m sure there will be an investigation.” After much soul-searching, continued harassment and an unresponsive command, Airman Dorsey came to the

realization that she must come out as a lesbian and leave the Air Force for her well-being and safety. As a next step, Ms. Dorsey will file an Inspector General complaint regarding her case.

Many servicemembers who would otherwise serve quietly for years come out specifically to escape hostile environments or threats to their safety. Air Force Major Robert L. Kittyle is an example. Though the inquiry officer appointed in Major Kittyle's case initially tried to prove that Kittyle was not gay, he finally concluded that, "It appears Major Kittyle made this announcement after he could not tolerate derogatory comments concerning homosexuals." Nothing was done to end the derogatory comments. (Exhibit 30)

In the Coast Guard, a young man endured daily verbal harassment, such as being called "faggot," "homosexual" and "----sucker." One of his coworkers told him, "If I ever find out for sure you're a fag, I'll kick your ass." The Coast Guard member had also frequently found pictures of underwear clad men taped to his rack. Finally, his car was vandalized after the rumors about his sexual orientation spread from his cutter to the local civilian population.

Derogatory comments appear commonplace even among the "cream of the crop." At a Naval War College conference this past fall, a Marine Major said to considerable applause. "I can't imagine a more basic violation of the natural law than homosexuality. They are not worthy of our trust. It's intolerable."³¹

Violations of "Don't Harass" also include lesbian-baiting, a form of sexual harassment. Women, straight and gay, are accused as lesbians when they rebuff advances by men or report sexual abuse. Women who are top performers in nontraditional fields also face perpetual speculation and rumors that they are lesbians. Too often, commanders respond by investigating the women under the guise of enforcing "Don't Ask, Don't Tell, Don't Pursue," rather than

disciplining men who start such rumors or who perpetrate sexual abuse. As a result, many women do not report sexual harassment or assault out of fear that they will be accused as lesbian, investigated and discharged. Other women report that they give in to sexual demands specifically to avoid being rumored to be a lesbian.

The toll lesbian baiting takes on women is evident in DOD's own statistics for 1996. Though women comprise only thirteen percent of the active duty force, they constitute twenty-nine percent of those kicked out under "Don't Ask, Don't Tell, Don't Pursue." In the Army, women comprise forty-one percent of those discharged under the gay policy, an astounding figure that is three times women's presence in this service. (Exhibit 31) While women have been disproportionately targeted under the military's gay policies for years, the 1996 figures reflect a sharp increase from 1995.

Last year, we reported the experience of a Private First Class who was falsely accused of "lesbian activities" in retaliation for reporting an attempted rape. After she refused to accuse other women as suspected lesbians, she was sent to a court-martial and, when that effort failed for lack of evidence, her command attempted to discharge this soldier based on the same false accusations. This occurred notwithstanding an Inspector General report in her favor. Though the attempted rape was undisputed, the soldiers were never disciplined for the attack.

"A Dedicated Army Warrant Officer" describes a recent incident in a letter to Senator Feinstein (Exhibit 32) in which two male junior soldiers planted a gay newspaper in the unit's common area, and then spread rumors that it belonged to the warrant officer. "These troops knew as well as I did that, if I formally addressed their slanderous 'joke,' I ran the risk of triggering a gay investigation." The unit's leaders actually advised this warrant officer not to

report this incident, under the threat that her report would, indeed, result in an investigation into her sexual orientation. Thus, the warrant officer was forced to choose between enduring this harassment or risking her career by demanding that it stop.

Like most women, as revealed by DOD's own surveys,³² the warrant officer chose not to press a sexual harassment complaint for fear of reprisal. "The ever-present threat of an investigation into our private lives that is designed to keep us quiet is doing just that," writes this warrant officer. "Very few women will publicly address these issues for fear of the repercussions. I regret that I am unable to identify myself, for fear of setting off a new round of rumors and speculation that I am a lesbian, with a high likelihood of my command carrying through on the threat to investigate me under "Don't Ask, Don't Tell."

Chief Warrant Officer Virginia Bueno, a recently retired Marine, best sums up the insidious effect of lesbian-baiting in a letter sent to Senator Robb in the wake of the recent Senate hearings on the Aberdeen scandal. "To be the victim of sexual harassment is, in its own right, one of the most degrading and emotionally injurious positions one can be placed in, especially in the military. But to be blackmailed for supposedly being a lesbian so that the sexual harassment can continue goes beyond the pale." (Exhibit 33)

The use of lesbian-baiting to harass women is not a new phenomenon, dating back to World War II according to the official history of the Women's Army Corps and other established sources.³³ More recently, in 1989, the Defense Advisory Committee on Women in the Services (DACOWITS) heard testimony from military women who had been accused as lesbian and faced discharge in retaliation for reporting sexual abuse. The DACOWITS members, appointees of Presidents Reagan and Bush, were so disturbed by this testimony that they recommended training

for all commanders on the potential misuse of such allegations.³⁴ The armed forces have never implemented the DACOWITS recommendation.

One of the women who testified before DACOWITS, former Navy Petty Officer Mary Beth Harrison, finally won her case this year on appeal to the Board for Correction of Naval Records, which ordered her reinstated with back pay. Nevertheless, after more than five years, too much time has elapsed for Harrison to salvage her Naval career, showing how the mere accusation of homosexuality can harm a woman's career beyond repair.

As SLDN has urged the past two years, the armed forces will only be able to address the issue of sexual harassment adequately when leaders confront the underlying factors that foster sexual harassment. One major factor is that women risk being accused as lesbian and losing their livelihoods when they report sexual abuse. Gay accusations give perpetrators a trump card to divert scrutiny away from their actions and onto their victims. This is wrong. No woman should have to submit to sexual abuse as a condition of serving our country.

An ironic exception to the prevalence of harassment in the ranks is found in the units where known gay men and lesbians are and have been serving. Prior to his retirement this past year, Petty Officer Keith Meinhold served as an openly gay man for 3½ years, during which time his crew was named the most combat ready in the Pacific Fleet. Petty Officer Meinhold's final evaluation stated that "his inspirational leadership has significantly contributed to the efficiency, training and readiness of my squadron." Marine Sergeant Justin Elzie retired on February 18, 1997 after serving for four years as an openly gay man at Camp LeJeune, North Carolina. During that time, Sergeant Elzie was named NCO of the Quarter and a top marksman for the base. His final fitness report stated that Elzie possessed "the leadership abilities to lead the Marine Corps into the twenty-first century." Meinhold and Elzie are just

two of many examples where units thrive with openly gay personnel.

It is clear that anti-gay harassment ends or diminishes when conditions allow gay and lesbian servicemembers to be honest with their colleagues about their sexual orientation, thus countering the myths and stereotypes of what it means to be gay. Likewise, sexual harassment will decrease when men cannot use “Don’t Ask, Don’t Tell, Don’t Pursue” to accuse women as lesbians in retaliation for reporting sexual harassment and abuse. Harassment occurs because of a unit's leadership, not despite it.

SLDN documented 132 “Don’t Harass” violations in 1996 compared with 127 violations the year before. (Exhibit 34) SLDN is encouraged by decreased reports of harassment in the Navy (down 28% from 1995 figures), including the Marine Corps (down 69% from 1995 figures). The reports of harassment in the Army, however, increased 33% in 1996, up from 33 reported violations in 1995 to 48 reported violations in this past year. Verbal abuse and hostile command climates appear to be the primary reasons for the Army’s increased harassment violations. We note that the Army is also currently under fire for sexual harassment scandals at the Army Proving Grounds at Aberdeen and other bases. The level of harassment remains very high in all the services, however, and requires concerted attention from military leaders.

ANALYSIS

Reasons Underlying The Continued Violations of “Don’t Ask, Don’t Tell, Don’t Pursue”

“Don’t Ask, Don’t Tell, Don’t Pursue” was intended to protect servicemembers from anti-gay harassment, selective criminal prosecution and witch hunts. Since its implementation,

however, command violations of the law have run rampant, ranging from continued direct questioning of military personnel about their sexual orientation to witch hunts such as the investigation onboard the *USS Simon Lake*, where sailors were threatened with jail unless they accused others as gay or confessed to being gay themselves. Many commanders have hunted suspected gay servicemembers with as much, if not more, fervor than before, causing gay discharges to soar.

Last year, in response to reporters' questions, then Secretary of Defense Perry promised to investigate the command violations reported by SLDN. Though SLDN offered in writing three times to provide information on command violations, the Department of Defense never contacted SLDN, the affected servicemembers, their military lawyers or, to our knowledge, their commanders.

Command violations of “Don’t Ask, Don’t Tell, Don’t Pursue” have continued because of a lack of leadership by military and civilian authorities. Basic steps, such as training, have been ignored. Blatant abuses have been tolerated and, in fact, justified in an ongoing pattern that has rendered the limits of the law meaningless. Personnel who commit or sanction abuses have not been disciplined. To make matters worse, there is no recourse for servicemembers who are improperly targeted by their commands. The result is a command climate where “anything goes” in the pursuit of suspected gay personnel. The ends have come to justify the means. While many commanders do not sanction inhumane treatment of suspected gay personnel, those who do are supported by the present leadership and command climate.

The outright disdain for the law is clear from the armed forces’ continued use of a form that asks recruits about their sexual orientation. No official could have emerged from the debates

in 1993 and not known that the services were now forbidden by law to ask servicemembers about their sexual orientation. A promise to mark out the questions on existing forms is inadequate, and subject to abuse. The Department of Defense, which promulgates the form, must replace once and for all the recruiting forms that ask recruits if they are gay.

In another glaring omission, the services have yet to institute ongoing training programs to teach commanders and servicemembers the limits under “Don’t Ask, Don’t Tell, Don’t Pursue.”³⁵

Colonel Brown at Hickam Air Force Base, the commander of the 15th Air Base Wing who authorized the pre-trial agreement in the Hickam witch hunt, confirmed during the Air Force Inspector General investigation into this matter that he has not been trained on the law or regulations. Indeed, twenty-seven witnesses interviewed by the Air Force Inspector General in connection with the events at Hickam Air Force Base, from commander to prosecutor to investigator to suspect, stated that they had received no training on the limits into gay investigations. On the other side of the world and in a different service, Lieutenant Colonel Turner at West Point, who ordered the seizure of Cadet Nicole Galvan’s diary to determine if she were lesbian, likewise conceded at Galvan’s administrative hearing that he had not received training on “Don’t Ask, Don’t Tell, Don’t Pursue.” Most, if not all, servicemembers who contact SLDN report that they have had no training whatsoever on “Don’t Ask, Don’t Tell, Don’t Pursue” and its limits.

SLDN has previously expressed concern about the lack of an ongoing, adequate training program. Moving into the fourth year under “Don’t Ask, Don’t Tell, Don’t Pursue,” the absence of training can fairly be characterized as a willful omission on the part of military leaders. Some servicemembers have specifically requested training assistance from the Defense Equal

Opportunity Management Institute (DEOMI). DOD, however, has reportedly forbidden DEOMI from teaching any courses on “Don’t Ask, Don’t Tell, Don’t Pursue.”

In the little guidance that has been provided to the field, officials have been more concerned to skirt the spirit and letter of the law rather than enforce it. The main point of the Navy training slide, mentioned earlier, is to encourage commanders to investigate suspected gay personnel. This slide sends a message contrary to the intent of “Don’t Ask, Don’t Tell, Don’t Pursue,” which is to place limits on investigations, and to make commanders stop and think before launching them.

SLDN has highlighted additional guidance in last year’s report that undercuts the limits on gay investigations. These are primarily legal memoranda written by Pentagon lawyers, upon whom senior military and civilian leaders have relied heavily. In June 1994, for example, the Navy’s appellate litigation group issued a memorandum suggesting that gay associational activities, such as belonging to a gay men’s chorus, are “inconsistent with good military character.” (Exhibit 35) This contradicts “Don’t Ask, Don’t Tell, Don’t Pursue,” which explicitly permits servicemembers to attend gay pride parades, gay bars and engage in other associational activities.

The memo further states that the Navy will provide additional legal support for the prosecution in any cases where a servicemember accused under “Don’t Ask, Don’t Tell, Don’t Pursue” seeks help from outside organizations, civilian lawyers, the press or members of Congress. The Navy’s attempt to chill freedom of association, access to the free press, the right to counsel and the right to petition members of Congress clearly signals strong antipathy for those even suspected of being gay.

Navy cryptologist David Compton experienced the kind of intimidation expressly contemplated in the Navy memo. The inquiry officer, Lieutenant Steve Pearson, appointed to investigate Compton attempted to intimidate him into not seeking legal assistance, persistently questioning him about whether he had sought outside help. Subsequently, Lieutenant Pearson called Servicemembers Legal Defense Network, demanding to know whether Compton had been in touch with us – information that we would never reveal – and showing the lengths to which inquiry officers will go in pursuing gay cases and intimidating those under investigation.

In a memorandum highlighted by SLDN last year, the Air Force instructs inquiry officers to conduct wide-ranging fishing expeditions against servicemembers who state they are gay. (See Exhibits 10 & 11) The November 3, 1994 memorandum and its November 17, 1995 successor are very specific, permitting interrogations of “parents and siblings,” “school counselors,” and “roommates and close friends,” among others. The memoranda provide officers with a laundry list of twenty-five questions to ask to fish for information about servicemembers’ private lives that can be used to press criminal charges and other harsh punishment against them. This is despite explicit prohibitions in “Don’t Ask, Don’t Tell, Don’t Pursue” against expanding the scope of inquiries. The Air Force is using “statements” cases to bootstrap inquiries into servicemembers’ private lives that could never be justified on their own, hoping to turn up something and then justify their actions in retrospect.

The Air Force memorandum also unequivocally states that “if...other military members are discovered during the proper course of the investigation...appropriate action may be taken.” No proper investigation under “Don’t Ask, Don’t Tell, Don’t Pursue” would ever turn up other people: that is a witch hunt. It is not a coincidence, we believe, that Air Force officials at Hickam

Air Force Base, with the blessing of the Air Force Inspector General, have attempted to argue that they did not engage in a witch hunt, but simply identified seventeen other military members during the course of prosecuting another servicemember.

In defending its memo, the Air Force claims it is necessary to protect against “fraud” in cases where servicemembers who have received funded education may state that they are gay to avoid a service obligation. The underlying assumptions of the memo are that the men and women who come out are either lying about being gay or lying about their desire to serve. These assumptions are profoundly offensive. As discussed previously, these assumptions reflect a complete misunderstanding of what it means to be gay, the sacrifice and risk to servicemembers’ safety involved in coming out, and the ethical dilemma created by the present regime, which requires servicemembers to lie even to their parents as a condition of military service.

Furthermore, despite Air Force assertions to the contrary, these memoranda are being used in almost all gay cases, not just those involving questions of funded education. Air Force officials using these memoranda are placing some servicemembers at great risk. Airman Sean Fucci, who received death threats after his command outed him to his entire unit under the pretense of investigating the honesty of his private statement to his commander, is just one example. These memoranda have created a climate of “anything goes” in the Air Force’s pursuit of suspected gay military members.

The Department of Defense, in its own memorandum dated August 18, 1995, seemingly approved the offensive tactics initiated by the Air Force and described above. (Exhibit 36) This memorandum by DOD General Counsel Judith Miller has fueled misguided efforts in all of the services to destroy any safe space whatsoever for gay servicemembers. This development marks

an unprecedented governmental infringement on the privacy of civilians, not only the servicemembers who confide in them, turning even parents into potential witnesses against their children.

SLDN asked that the Department of Defense, Air Force and Navy rescind these memoranda last year, but they have not.

The one exception to officials' efforts to skirt the law is the Navy's guidebook, *A Commander's Quick Reference Manual for Legal Issues*. (See Exhibit 25) In one-and-one-half pages, the "Homosexual Conduct" chapter of this guide accurately conveys some of the major limits on investigations. Our one concern is that the DOD General Counsel's letter described above has infected every service, including the Navy and its guidebook. Nevertheless, we commend the Navy for accurately telling commanders to place some limits on gay investigations in accordance with the spirit and intent of "Don't Ask, Don't Tell, Don't Pursue."

In addition to lack of leadership and lack of training, a final reason that violations continue under "Don't Ask, Don't Tell, Don't Pursue" is that servicemembers accused under the policy have no recourse if improperly targeted. They cannot stop an investigation once it has started. They cannot exclude illegally obtained evidence or hearsay at an administrative hearing that will determine their fate. They cannot effectively object to administrative discharge board members who express bald-faced animus toward them. And military officials have refused in case after case to stop emerging witch hunts, investigations started without credible information or the criminal prosecution of servicemembers accused of gay relationships.

Senior Airman Sonya Harden knows exactly what the obstacles to due process are. While stationed at Eglin AFB in Florida, she was accused by a former roommate of being a lesbian.

That accusation alone was enough to start an investigation that ultimately led to her discharge. It did not matter that Airman Harden was MSS Airman of the Quarter, MSS Airman of the Year in 1992, Personnel Specialist of the Year in 1993 or Hurlbert Field Airman of the Quarter in 1995. It did not matter that there was evidence that the accuser had threatened to accuse Airman Harden as a lesbian if she did not pay the accuser money. It did not matter that the accuser retracted her statement in a sworn affidavit prior to the discharge board and testified at the board that the accusations were false. It did not matter that Airman Harden produced witnesses that testified as to her heterosexual relationships. And it did not matter that Airman Harden objected to one of the board members who made a “thumbs-up” gesture to the Assistant Recorder during the administrative discharge hearing. Harden had no effective recourse to stop an investigation that was improper from beginning to end. Airman Harden has been discharged and is now contemplating whether she will file a complaint with the Air Force Inspector General. (Exhibit 37)

Another SLDN case highlights the same disregard when gay accusations are involved. In this case, Colonels who had been called to sit on a board of inquiry were asked questions to determine if they could render an impartial opinion. (Exhibit 38) The first Colonel stated, “I think homosexuals are immoral.” The second Colonel stated, “...I feel that they [gays] have either a physiological or psychological problem as deviant from society.” The third offered, “My religious beliefs are against homosexuality.” The defendant’s lawyer objected to all three members sitting on the panel and asked that they be removed. The Legal Advisor, a Lieutenant Colonel, ruled: “I think it would be hard to find three board members that would have an opinion different from

those already expressed.” This case is not unusual. Kangaroo courts such as this have no place in the United States military.

Commanders and troops know how to follow orders. Commanders and troops also know when to ignore certain guidelines that are not supported by the top. Congress and the Commander-in-Chief have given military leaders their marching orders to end asking, witch hunts and anti-gay harassment. It is incumbent upon military leaders in our democracy, which is based upon civilian authority and respect for the rule of law, to comply.

We are aware that some leaders view any issue remotely connected to “Don’t Ask, Don’t Tell, Don’t Pursue” as a thorny proposition. For these leaders, the Pentagon’s vast army of lawyers has provided a convenient dumping ground for these issues, resulting in repeated justifications of command abuses. Leadership is required. Sticking one’s head in the sand regarding the inhumane treatment of servicemembers, including those who are perceived as gay but who share with their colleagues a profound dedication to mission and country, will only result in further scandal. The interests of the military and our nation depend on leaders of courage who will step forward at this time and set things right.

A good first step would be to train all military commanders and servicemembers on the requirements and limits of current law and regulations. Commanders, in particular, must be trained to treat more critically evidence of gay accusations so that they do not start inquiries without credible information. As suggested by DACOWITS, commanders should be wary of gay accusations lodged against women who rebuff men’s sexual advances or report sexual abuse, and should not initiate inquiries based upon them. Instead, servicemembers who start such rumors or accusations should be disciplined.

Servicemembers need to have a way to object to improperly initiated investigations before the investigations go too far. Servicemembers should be able to obtain representation by military defense counsel at the onset of any investigation. We are highly concerned, however, that, among other reasons, the already heavy workload experienced by the sparse number of defense counsel typically found at any one base renders this mechanism ineffective as a means of stopping command abuses. A procedural way to deter command abuses is through the adoption of an exclusionary rule for administrative hearings, as suggested in a 1995 report by the Advisory Board on DOD Investigative Capability. In addition, commanders should be required to provide servicemembers written notice of the specific reason for any investigation under “Don’t Ask, Don’t Tell, Don’t Pursue.”

The exercise of leadership is the most important step that must be taken, however. When immediate commanders make mistakes in other areas, their superiors do not hesitate to correct those mistakes. The same should apply here. Asking, witch hunts and harassment will only stop when subordinate commanders understand that their leaders take these issues seriously, and will hold them accountable for abuses.

Our scarce tax dollars should be spent on purchasing the best equipment, providing the best training to our troops, and recruiting the most talented individuals to serve in the military. Spending time and resources to ferret out hardworking men and women who might be gay takes away from mission readiness and reveals a misguided set of priorities. We owe a lot to those who put their lives on the line for our country. A halt to asking, witch hunts and harassment of those who are or are perceived to be gay is the least to ask for them in return. As Secretary William

Cohen recently told Sam Donaldson on ABC's *This Week*, the limits of "Don't Ask, Don't Tell, Don't Pursue" "ought to be adhered to."³⁶ We agree.

CONCLUSION

Three years into "Don't Ask, Don't Tell, Don't Pursue," it is clear that military and civilian leaders have settled for business as usual. Rather than putting an end to asking, witch hunts or harassment as originally promised, leaders have sent a strong message that they will turn a blind eye to such violations. Servicemembers are caught in the trap. Military leaders have two choices: they must either be fully forthcoming and honest to the American public that they have no intention of putting an end to asking, witch hunts or harassment, or they must act in good faith to comply with the intent of the law. Implementing the recommendations outlined in this report is a necessary first step in bringing DOD into compliance with current law and regulations.

END NOTES

¹ See Exhibit 1. The cost of training replacements for those discharged in 1996 exceeded \$25 million, bringing the cost under the current policy to more than \$63.5 million, and the cost since 1980 to more than one-half billion dollars. These cost estimates do not include the substantial costs of investigating servicemembers, holding administrative discharge hearings or defending the new policy in federal court, which DOD has never provided. Costs are based on figures and percentages reported in a General Accounting Office study, Defense Force Management: Statistics Related to DOD's Policy on Homosexuality (June 1992).

² The numbers reported are based on Department of Defense discharge figures. The figures do not include discharges from the US Coast Guard.

³ See Exhibit 3. SLDN had documented 703 violations in the policy's first two years of operation, bringing the total now to 1121 documented violations since the policy started. The documented violations do not include violations that fall outside "Don't Ask, Don't Tell, Don't Pursue" but are nevertheless serious breaches of military regulations, such as denial of or ineffective assistance of counsel and violation of the servicemembers' rights under the Privacy Act.

⁴ Randy Shilts, Conduct Unbecoming (St. Martin's Press) 231-232, 570. Airman Steve Ward testified that he was placed in a broom closet until he confessed to being gay.

⁵ DACOWITS 1989 Spring Conference Recommendation 12, "Harassment. DACOWITS recommends DOD expand existing leadership training to include dealing with unfounded accusations of homosexuality against servicemembers."

⁶ "The Secretary's Board on Investigations and the Services should consider appropriate disincentives for abuse of subjects' rights during informal investigations. The Secretary of Defense should take a fresh look at the issue of imposing an exclusionary rule on administrative separation proceedings or nonjudicial punishment proceedings." Report of the Advisory Board on the Investigative Capability of the Department of Defense, Charles F.C. Ruff, Chairman, volume I, p. 103.

⁷ The Air Force claimed last year that it had instituted a new accounting mechanism to count gay discharges at basic training camps that it had not counted before FY 1995. We would welcome efforts by the Air Force to disclose accurate numbers for gay discharges in years prior to FY 1995.

⁸ "Guidelines for Fact-Finding Inquiries into Homosexual Conduct," DoDD 1332.14 [enlisted], Enclosure 4 and DoDD 1332.30 [officers], Enclosure 8, ¶ D(3).

⁹ "Larry King Live," CNN, 21:00 EST, January 27, 1997, Transcript # 97012700V22.

¹⁰ DD Form 1966/1, Jan 89, Question 27.

¹¹ The Coast Guard is part of the Department of Transportation in peacetime, but falls under DOD during wartime. All Coast Guard members are bound by DOD regulations, including the "Don't Ask, Don't Tell, Don't Pursue" policy.

¹² One of these cadets testified under oath at Galvan's administrative hearing that she heard Turner ask Galvan about her sexual orientation.

¹³ Martin Kasindorf, "Compromise; Gay military policy focuses on conduct," Newsday, July 20, 1993, Tuesday, at 7.

¹⁴ Federal News Service, Testimony Before Senate Armed Services Committee, July 21, 1993.

¹⁵ "Guidelines for Fact-Finding Inquiries into Homosexual Conduct," DoDD 1332.14 [enlisted], Enclosure 4 and DoDD 1332.30 [officers], Enclosure 8, ¶ A(3). In fact, the Guidelines require that (1) inquiries must be limited to the "factual circumstances surrounding the allegation," and (2) "At any given point, the commander or appointed inquiry officer must be able clearly and specifically to explain which grounds for separation he or she is attempting to verify and how the information being collected related to those specific separation grounds." *Id.*, ¶ D(4).

¹⁶ *Id.*, ¶ A(1). "Commanders shall exercise sound discretion regarding when credible information exists." *Id.*, ¶ D(2). Credible information is defined in the negative. See note 17.

¹⁷ *Id.*, ¶ E. A nonexhaustive list of examples where credible information does not exist is included in the regulations. Credible information does not exist where the only information is the opinions of others, the inquiry would be based on rumor, suspicion or capricious claims, or the only information is an associational activity such as going to a gay bar.

¹⁸ The military has two systems: administrative and criminal. Administrative separation boards recommend whether a servicemember should be retained in the service or discharged and what the characterization of any discharge should be. The criminal system determines whether a servicemember has committed a crime under military law. A servicemember who has said he or she is gay, has engaged in sexual activity with a person of the same gender, or married someone of

the same gender is subject to administrative discharge under the “Don’t Ask, Don’t Tell, Don’t Pursue.” Heterosexuals are not subject to administrative discharge for the same statements, acts or marriages. A servicemember who has engaged in sexual acts, such as consensual oral sex, whether heterosexual or homosexual, may also be subject to criminal prosecution under the Uniform Code of Military Justice. The military rarely criminally punishes heterosexuals for consensual sexual activities; the military, however, regularly selects suspected gay servicemembers for criminal prosecution for the same activities.

¹⁹ Defendants’ Opposition to Plaintiff’s Motion for Preliminary Injunction, *Barnes v. Perry*, Civil Action No. 96-591-ES, at 11.

²⁰ Defendants’ Response to Plaintiff’s Application for a Temporary Restraining Order, *Barnes v. Perry*, Civil Action No. 96-591-ES, at 16.

²¹ Exhibit 15, Pre-trial agreement, and Exhibit [Air Force Inspector General Report of Investigation, 11 September 1996, pp 7-9.

²² IG Report, p.26, para. 2.

²³ *Id.*, p. 27, para. 3.

²⁴ Lou Chibarro, Jr., “Witch Hunt Under Way in Hawaii,” The Washington Blade, September 20, 1996.

²⁵ Quoted in St. Louis Post-Dispatch editorial, “Powell at Harvard: Political Phenomenon,” June 17, 1993, 3C.

²⁶ S. Hrg. 103-845, “Policy Concerning Homosexuality in the Armed Forces,” p. 788.

²⁷ ABC News, Nightline, September 11, 1996.

²⁸ Martin Kasindorf, *supra*, note 12.

²⁹ S. Hrg. 103-845, “Policy Concerning Homosexuality in the Armed Forces,” p. 789.

³⁰ “Applicant Briefing Item on Separation Policy” issued with DoDD 1304.26.

³¹ Linda Borg, “Naval College Students Talk Ethics With Brass,” Providence Journal-Bulletin, November 14, 1996.

³² Norman Kempster, “Pentagon Survey Finds Much Sex Harassment,” Los Angeles Times, July 3, 1996, at A1. The 1995 DOD survey reported that 78% percent of the military women surveyed had been the object of some form of sexual harassment or abuse, however only 40% of those women had filed complaints regarding the harassment they faced.

³³ Christine L. Williams, *Gender Differences at Work: Women and Men in Nontraditional Occupations* 31 (1989). Mattie E. Treadwell devotes an entire chapter, Chapter 11, to the “Slander Campaign” in the official history of the Women’s Army Corps, available through the Office of the Chief of Military History, United States Army Special Studies. See also, Leisa D. Meyer, *Creating G.I. Jane: Sexuality and Power in the Women’s Army Corps During World War II* (1996); Lorry M. Fenner, *Ideology and Amnesia: The Public Debate on Women in the American Military 1940-1973* (forthcoming).

³⁴ DACOWITS, note 5, *supra*.

³⁵ At the outset of “Don’t Ask, Don’t Tell, Don’t Pursue,” the Army designed and distributed a noteworthy training program. However, this turned out to be a one-time event, as commanders in the field have not conducted training on this issue since that time.

³⁶ ABC News, This Week, January 26, 1997.