

FINDINGS

- ★ **“Don’t Ask” Violations Surge By 39%.** SLDN documented 124 “Don’t Ask” violations in 1997, up from 89 reported violations in 1996. The Navy led the services with 46 “Don’t Ask” violations.
- ★ **“Don’t Pursue” Violations Rank As Worst Problem.** SLDN documented 235 “Don’t Pursue” violations, up 23% from last year’s figure of 191. The Air Force led the services with 90 “Don’t Pursue” violations.
- ★ **“Don’t Harass” Violations Show Violent Increase.** Incidents of anti-gay harassment increased 38% from 132 reported incidents in 1996 to 182 incidents in 1997, including death threats and physical assaults.
- ★ **Total Command Violations Climb For Fourth Straight Year.** For the fourth year in a row, command violations of “Don’t Ask, Don’t Tell, Don’t Pursue” climbed, from 443 in 1996 to 563 in 1997, up 27%.
- ★ **Navy Commits Most Violations.** The Navy committed 193 violations of current rules. The Navy was worst in anti-gay harassment and asking.
- ★ **Commands Use Heavy-Handed Tactics To Pursue Gays.** SLDN documented frequent use of threats during gay investigations to extract confessions, including threats of criminal charges, confinement, non-judicial punishment and “outing.”
- ★ **Commands Need Training on Limits To Gay Investigations.** SLDN documented only one case this year where military members had been trained on the limits to investigations under “Don’t Ask, Don’t Tell, Don’t Pursue.”
- ★ **Commands Need Written Guidance on Limits To Gay Investigations.** Four years into “Don’t Ask, Don’t Tell, Don’t Pursue,” most leaders have not received or read a copy of the current regulations and guidelines, and most do not know what the limits are to gay investigations.
- ★ **DoD Orders Recruiters To Stop Asking.** Secretary Cohen ordered replacement of a 1989 recruiting form that asked recruits if they were gay.
- ★ **DoD Orders End To Anti-Gay Harassment and Lesbian-Baiting.** Former Under Secretary of Defense Edwin Dorn issued a ground-breaking memorandum clarifying that commanders should investigate perpetrators of anti-gay harassment and lesbian-baiting, not their victims. No one in the field, however, is aware of this guidance.

RECOMMENDATIONS

- ★ **Issue Guidance on Limits To Gay Investigations.** DoD should issue guidance stating the limits to investigations under “Don’t Ask, Don’t Tell, Don’t Pursue” and the intent of the policy to stop prying into service members’ private lives.
- ★ **Distribute Memo On Anti-Gay Harassment and Lesbian-Baiting.** The Dorn memo on anti-gay harassment and lesbian-baiting has yet to reach the field. The services should move swiftly to get this guidance to everyone.
- ★ **Train All Service Members on Limits To Gay Investigations.** DoD has not trained most service members on the policy’s limits or the intent.
- ★ **Discipline Commanders Who Disobey Limits.** No one in the past two years has been disciplined for violating the limits to gay investigations. There must be disincentives to deter violations and incentives to do the right thing.
- ★ **Provide Recourse To Service Members To Stop Improper Investigations.** Local commanders do not know the rules. Superiors refuse to correct their mistakes. Thus, service members have nowhere to turn to stop illegal witch hunts or other violations.
- ★ **Require Commanders To State In Writing Reasons For Investigation.** DoD should instruct local commanders to articulate the reasons for starting an inquiry in writing to prevent investigations where the ends justify the means.
- ★ **Cease Use of Heavy-Handed Tactics in Gay Investigations.** DoD should train inquiry officers and criminal agents in proper investigative techniques that avoid heavy-handed tactics such as threats of imprisonment.
- ★ **Adopt Exclusionary Rule.** DoD should adopt an exclusionary rule so that evidence obtained illegally, as in a witch hunt, can be excluded at administrative discharge boards.
- ★ **Adopt Rule of Privacy for Psychotherapist/Patient Confidentiality.** DoD should adopt a rule of confidentiality for psychotherapist/patient conversations or adopt a rule that such conversations are private communications and protected under “Don’t Ask, Don’t Tell, Don’t Pursue.”
- ★ **Appoint Panel of Experts To Review Administrative Separation Process.** An expert panel including representation from outside the military should review the administrative separation process and make recommendations for improvement.

EXECUTIVE SUMMARY

Command violations of “Don’t Ask, Don’t Tell, Don’t Pursue” increased for the fourth year in a row. Command violations include instances where commands asked, pursued and harassed service members in direct violation of the limits to gay investigations under current policy. Servicemembers Legal Defense Network (SLDN) documented 563 command violations in 1997, up from 443 reported violations in 1996 (Exhibit 1). SLDN documented increased asking, increased pursuits and increased harassment in 1997. The Navy was the worst in “Don’t Ask, Don’t Tell, Don’t Pursue” compliance; the Air Force was a close second.

The reason underlying continued violations of “Don’t Ask, Don’t Tell, Don’t Pursue” is a lack of commitment from top military and civilian authorities. Military leaders have not communicated to the field the policy’s limits to gay investigations or its intent to end prying into service members’ private lives. The lack of commitment is reflected by: (1) The absence of clear and thorough guidance or training on investigative limits; (2) heavy-handed and increasingly intrusive investigative tactics against suspected gays, including coercion and fishing expeditions; (3) no recourse or redress for service members asked, pursued or harassed; and (4) a lack of accountability for those who violate current policy.

The result is a climate in many commands where “anything goes” in the pursuit of suspected gay personnel. Commanders who want to do the right thing must swim against the tide.

There are glimmers of hope. This past year marked the first time the Department of Defense has ordered replacement of old recruiting forms that asked prospective

recruits if they are gay, a problem noted in SLDN's *Third Annual Report*. In 1997, DoD also issued its first policy clarifying that commanders should investigate those who threaten or harass service members, not those who report anti-gay harassment or lesbian-baiting. Last year also marked the first time SLDN has documented more than one or two cases where commands complied with the mandates "Don't Ask," "Don't Pursue," and "Don't Harass."

As we move into the fifth year under "Don't Ask, Don't Tell, Don't Pursue," however, DoD and the services need to issue guidance stating the current limits to investigations and the intent of the policy not to pry into service members' private lives. DoD then needs to train all service members thoroughly on those limits and the policy's intent. The promises to stop asking, pursuits and harassment in 1993 were clear. General Colin Powell stated in 1993: "We will not witch hunt. We will not chase. We will not seek to learn orientation."¹ Senator Sam Nunn, former Chairman of the Senate Armed Services Committee, said, "I do not believe we should have sex squads prying into the private lives of our service members."² President William J. Clinton pledged that the policy would provide for "a decent regard for the legitimate privacy and associational rights of all service members."³ Then Senator, now Secretary of Defense, William Cohen, expressed a similar understanding of the policy when he asked then DoD General Counsel Jamie Gorelick whether the "small amount of privacy under the current policy was intended to prevent the military from prying into people's private lives." Gorelick

¹ *Policy Concerning Homosexuality in the Armed Forces: Hearings Before the Senate Comm. On Armed Services*, 103rd Cong., 2d Sess. (1993) at 709 (statement of General Colin Powell).

² Former Senator and Chairman of the Senate Armed Services Committee, Sam Nunn, *THE RECORD* A10 (May 31, 1993).

³ President William J. Clinton, *Text of Remarks Announcing the New Policy*, *THE WASHINGTON POST* A12 (July 20, 1993).

answered with a resounding “yes.”⁴

Last February, Secretary Cohen again reiterated his commitment to fair enforcement of “Don’t Ask, Don’t Tell, Don’t Pursue” when he stated on *ABC World News Tonight* that he would stop any “continued pursuits and prosecutions” under the policy.⁵ Shortly, thereafter, Secretary Cohen asked an internal review group to examine the implementation of “Don’t Ask, Don’t Tell, Don’t Pursue,” a process that is underway as this report goes to publication. SLDN looks forward to any substantive recommendations the review group may have to stop the continued asking, pursuit and harassment of service members.

This is the *Fourth Annual Report* on “Don’t Ask, Don’t Tell, Don’t Pursue” by SLDN. This report details command violations of current law documented by SLDN from February 26, 1997 to February 19, 1998. Located in Washington, D.C., SLDN is an independent legal aid and watchdog organization for those harmed by “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. Indeed, last May, in a *Washington Post* story, DoD conceded that it relies on SLDN’s annual reports to know what is happening in the field under its policy.⁶

⁴*Policy Concerning Homosexuality in the Armed Forces: Hearings Before the Senate Comm. On Armed Services*, 103rd Cong. 2d Sess. (1993) at 788 (statement of Jamie Gorelick).

⁵ *World News Tonight* (ABC news broadcast, Transcript # 97022604-J04, February 26, 1997).

⁶ Bradley Graham, *Military Reviews Allegations of Harassment Against Gays*, THE WASHINGTON POST A1 (May 14, 1997).

DON'T ASK

The "Don't Ask" regulations state that “commanders or appointed inquiry officials shall not ask, and members shall not be required, to reveal their sexual orientation.”⁷ Secretary of Defense William Cohen reaffirmed the rule last year, stating on *Larry King Live* that asking “is a clear violation of law.”⁸ SLDN documented 124 “Don’t Ask” violations in the past year. That is up 39% from 1996 when SLDN reported 89 “Don’t Ask” violations.

The Homosexual/Bisexual Questionnaire

A Naval inquiry officer flagrantly violated “Don’t Ask” this past year when he asked a sailor a series of questions from a form entitled “Homosexual/ Bisexual Questionnaire” (Exhibit 2). The questionnaire asked:

1. Do you engage in homosexual/bisexual activity?
If so, when was the last time?
If so, with whom?
If so, is he/she in the military?
2. Have you attempted to engage in homosexual/bisexual activity?
If so, when?
If so, with whom?
If so, is he/she in the military?
3. Do you have a propensity to engage in homosexual/bisexual acts?
If so, when?
If so, with whom?
If so, is he/she in the military?
4. Do you intend to engage in homosexual/bisexual acts?
If so, when?

⁷ DoDD 1332.30, Enclosure 8(D)(3) (1994) and DoDD. 1332.14, Enclosure 4(D)(3) (1994) [Hereinafter “Inquiry Guidelines”]; *See also* Comments by former DoD General Counsel Jamie Gorelick, *Policy Concerning Homosexuality in the Armed Forces: Hearings Before the Senate Comm. On Armed Services, 103rd Cong., 2d Sess. (1993)*, p. 789 (“...[W]e do not ask about orientation not only at accession but at any time.”)

⁸ *Larry King Live*, (CNN television broadcast, Transcript # 97012700V22, January 27, 1997).

If so, with whom?
If so, is he/she in the military?

5. Are you engaged in a homosexual/bisexual marriage?
If so, when did you?
If so, with whom?
If so, is he/she in the military?

Supplementing the “Homosexual/ Bisexual Questionnaire,” the inquiry officer then asked the sailor an additional twenty-nine questions (Exhibit 3), including:

1. Have you in the past engaged in homosexual behavior?
2. Are you having a homosexual relationship currently?
3. Is your partner in the military?
4. Are you monogamous?
5. Who is your current partner?
6. Have you ever had homosexual relations with [A]?
7. Have you had intercourse with anyone else since you’ve been in the Navy?
8. Were they in the military?
9. Do you remember their names?
10. Are you currently involved in a homosexual relationship with anyone in the Navy or military?
11. Are you having a fling with anyone?
12. Have you propositioned (sic) anyone to engage in a homosexual relationship with you who is in the military?
13. So no one in the military is involved with you?

Fifty questions! In the face of the clear mandates “Don’t Ask” and “Don’t Pursue,” a Navy inquiry officer asked one sailor fifty questions about his sexual orientation and private life.

We cannot think of any situation in which such a questionnaire could be justified under existing law. The rules are clear. An inquiry officer cannot ask about one’s sexual orientation or ask questions designed to elicit information about one’s sexual orientation.⁹ Even where commands have the credible evidence of homosexual conduct necessary to

⁹ Inquiry Guidelines, ¶ D(3) (“Commanders or appointed inquiry officials shall not ask, and members shall not be required to reveal, their sexual orientation.”)

initiate an inquiry, inquiry officers cannot expand the scope of their investigation beyond the specific allegation at issue.¹⁰ An inquiry officer cannot go on a fishing expedition to see what information he can net.¹¹

In this case, the command never specified in writing the credible information necessary to initiate an inquiry.¹² Instead, according to a “Voluntary Statement” filed by the sailor concerning the events leading to his interrogation, his Master at Arms started “asking some personal questions about [the sailor’s] sexual orientation (Exhibit 4). The sailor was distraught, because he did not think anyone would find out about him, and he did not want them to find out. In his statement, the sailor writes, “When I heard [that the Master at Arms was asking personal questions about my sexual orientation], I became very upset and even more scared [sic] the last thing I wanted was for this to become known about me.” The Navy, however, forced him out of the closet, costing him his career.

The Air Force Asks Civilians If They Are Gay

An Air Force Staff Sergeant with a stellar record found herself in a similar situation when an Air Force inquiry officer interrogated her roommates, one a military member and two civilians. Astoundingly, the inquiry officer questioned the roommates about their own sexual orientation as well as that of the Staff Sergeant. The inquiry officer asked the military roommate (Exhibit 5):

¹⁰ Inquiry Guidelines, ¶ A(3) (“Inquiries shall be limited to the factual circumstances directly relevant to the specific allegations.”).

¹¹ See “Don’t Pursue” section *infra*.

¹² Inquiry Guidelines, ¶ B(3) (“Credible information exists when the information, considering its source and the surrounding circumstances, supports a reasonable belief that a Service member has engaged in homosexual conduct. It requires a determination based on articulable facts, not just a belief or suspicion.”); see also Inquiry Guidelines ¶ D(4) (“At any given point of the inquiry, the commander or appointed inquiry

1. Did [A] ever tell you that she is gay?
2. Has [A] ever been to a gay bar?
3. How did you meet [A]?
4. Has [A] ever confided in you that she is a homosexual?
5. Are you a Homosexual?
6. Have you ever been to a gay establishment?
7. Were you aware that your roommates were lesbians?

The inquiry officer then questioned the Staff Sergeant's two civilian roommates.

The inquiry officer called one roommate at work, and reportedly asked (Exhibit 6):

1. How long have you known [A]?
2. Have you ever seen or heard [A] engage in homosexual activity?
3. Has [A] ever told you that she is gay?
4. Are you homosexual?

The inquiry officer then spoke with the next civilian roommate, placed her under oath, and reportedly asked (Exhibit 7):

1. Is [the military roommate] gay?
2. Have you ever seen [A] engage in homosexual activity?
3. How do you know [A]?
3. Has [A] ever stated that she is gay?

The current regulations unequivocally prohibit asking.¹³ That an Air Force inquiry officer would question civilians as well as a military member about their sexual orientation demonstrates an utter lack of propriety and complete disregard for the rules.

Additionally, the inquiry officer violated the regulations that prohibit expanding the scope of inquiries when he questioned the military roommate, who was not supposed to be under investigation, about herself and when he attempted to dredge up additional allegations against the Staff Sergeant. Inquiry officers cannot ask about any sexual or

official 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 relates to those specific separation grounds.”).

affectional acts engaged in by a service member absent a specific, credible allegation made about an act. The same is true for statements of sexual orientation. The regulations are clear that going to a gay bar is permitted¹⁴ and associating with gay people is allowed.¹⁵ The sort of wide-ranging fishing expedition that occurred in this case is strictly forbidden under current rules.

Asking Leads To Harassment

The most disturbing set of asking cases that SLDN has documented is when asking is linked to anti-gay harassment or becomes harassment itself. Two cases illustrate the point.

AN Barry Waldrop faced repeated questions about his sexual orientation from other sailors on the *USS Eisenhower* this year. The questioning escalated to the point that AN Waldrop became concerned for his safety. “I was concerned that if people were talking about me, someone might take the next step and try to hurt me,” he wrote in a memorandum for record (Exhibit 8). AN Waldrop decided the only way to ensure his safety was to tell his supervisor he is gay and be discharged from the Navy. “Because so many people were asking me if I was gay, I decided that I did not want to remain trapped in this situation and have to continue denying who I am but still be afraid that someone might find out anyway” Waldrop wrote.

AN Waldrop slept in the common area so that he would never be alone, out of fear he would be attacked in his rack. He told his command he feared for his safety.

¹³ Inquiry Guidelines, ¶ D(3).

¹⁴ Inquiry Guidelines, ¶ E(4) (“Credible information does not exist ... when 4. The only information known is an associational activity such as going to a gay bar, possessing or reading homosexual publications, associating with known homosexuals, or marching in a gay rights rally in civilian clothes.”).

¹⁵ *Id.*

Less than two weeks later, AN Waldrop returned to his berthing area and found “You’re a dead faggot” scrawled in magic marker on his rack. Another sailor who witnessed AN Waldrop reading the note immediately asked, “Are you gay?” Displaying a keen sense of self-preservation, he said “no,” in an effort to “avoid exactly the kind of danger threatened on my rack.”

As discussed further in the “Don’t Harass” section, the command initially refused to discharge AN Waldrop because, without apparent basis, it did not believe him. The ship’s command placed AN Waldrop in an untenable and dangerous bind by not taking measures to protect his safety when he first reported harassment. The command on the *USS Eisenhower* created exactly the scenario that Seaman Allen Schindler faced in 1992 when he was murdered for being gay by fellow shipmates. Navy officials should learn from past mistakes so that history does not repeat itself.

In another case, a Lance Corporal in the Marine Corps reports that he faced constant harassment and constant questioning about his sexual orientation. Ultimately, the climate grew more and more hostile until he received a death threat. The Lance Corporal reports that other marines “would drop their pants,” taunt him, and ask him if he wanted to engage in fellatio. To our knowledge, the command took no action to stop the asking or the harassment, sending the message that such behavior is acceptable in the Marine Corps.

The circumstances faced by Waldrop and the Lance Corporal cannot be tolerated. Asking cannot become a form of harassment. Harassment cannot lead to asking. Today, the Pentagon fails on both equations.

Inadvertent Questioning

The last series of “Don’t Ask” cases highlighted in this report can best be described as inadvertent questioning. These are cases where well-meaning commanders and others ask questions that, on their face, are not designed to ask about sexual orientation, but the consequence is that they do elicit such information. The problem is that some commands are acting on the information inadvertently discovered and discharging service members rather than treating the information as “personal and private” and taking no action.

In one case, a commander ordered a sailor and his wife to attend counseling in an effort to repair their marriage and forestall divorce. The service member attempted to tell his commander that counseling would not be an effective and productive route. The commander insisted. Finally, the sailor closed the door to the commander’s office and told the commander that the counseling would not be productive because he and his wife had come to accept that he is gay and had determined that it was in both of their interests to seek a divorce. The commander then discharged the sailor for his statement.

Army recruit Robin Chatelle found herself facing a moral dilemma this year during basic training. Like any good drill instructor, Chatelle’s drill instructor tried to scare the daylights out of his fresh crop of eager recruits. The drill instructor told the recruits that they had to come forward with any and all “skeletons” in their past. The drill instructor warned the recruits that if they did not comply, and security clearance investigators later discovered those skeletons, the Army would harshly punish, even court-martial, recruits who had failed to disclose every detail of their past. Chatelle experienced her moment of truth. She told her drill instructor that she had confided in a

high school counselor about a private matter and asked whether she should disclose that confidence to him. The drill instructor insisted she had to tell him everything. She told him she discussed that she was struggling with her sexual identity. His response: “You shouldn’t have told me that.” Her commander then processed her for discharge.

SLDN notes one area where there has been some improvement this year: recruiting forms. This year Secretary Cohen instructed the services to replace old recruiting forms with a new form that does not question prospective recruits about their sexual orientation (Exhibit 9). In our report last year, SLDN reported that the old forms, from 1989, had not been replaced and that prospective recruits, especially in the Coast Guard, were being “asked” in violation of current policy.¹⁶

SLDN recently conducted a random survey of 26 Army, Navy, Air Force, Marine Corps and Coast Guard recruiting stations around the country to determine if Secretary Cohen’s instructions were being followed. Of those stations surveyed, SLDN found two, or 7.6 percent, that continue to use the 1989 forms, a Coast Guard recruiting station in Miami, Florida and a Marine Corps recruiting station in Sioux City, Iowa. SLDN is pleased to report that, in 1997, no prospective recruits reported being asked about their sexual orientation during the recruiting process. SLDN urges all services to ensure full compliance with Secretary Cohen’s instructions to immediately replace the old recruiting forms.

¹⁶ C. DIXON OSBURN ET AL., SERVICEMEMBERS LEGAL DEFENSE NETWORK, CONDUCT UNBECOMING: THE THIRD ANNUAL REPORT ON “DON’T ASK, DON’T TELL, DON’T PURSUE” (1997).

DON'T TELL

The “Don’t Tell” regulations are commonly viewed as a restriction on gay service members from publicly declaring their sexual orientation. Sexual orientation, however, is a “personal and private” matter according to the regulations. SLDN believes that lawmakers did not intend the military to pry into “personal and private communications,” such as those to parents, siblings, doctors, psycho-therapists and close personal friends. Indeed, the current regulations specifically permit gay military members to “tell”

- lawyers;¹⁷
- chaplains;¹⁸ and
- security clearance personnel.¹⁹

SLDN is happy to report that the number of “Don’t Tell” violations this year dropped significantly. In both the Army and Navy, the violations have dropped by approximately fifty percent, while Air Force violations have dropped approximately twenty percent. SLDN documented 22 “Don’t Tell” violations in the past year, down 29% from 31 in the previous year.

In another potentially good development, SLDN has been told that the Navy General Counsel’s office may have taken the position that service members may discuss their sexual orientation with mental health counselors, but if that is the case, the guidance has not reached the field.

Despite these developments, “Don’t Tell” violations continue to be a problem, especially given the intrusive nature of these violations. Psychotherapists and other

¹⁷ Military Rule of Evidence 502.

¹⁸ Military Rule of Evidence 503.

¹⁹ DOD Policy Guidelines on Homosexual Conduct in the Armed Forces, July 19, 1993. See also, Defense Investigative Service Manual “Manual for Personnel Security Investigations” DIS-20-1-M (Encl. 18), January 1993.

health providers continue to report to SLDN that they have been ordered to turn in gay service members who confide in them during private counseling sessions. Service members continue to report that their military psychotherapists have violated their trust, usually resulting in the service members' discharge.

Private Conversations With Psychotherapists

One case involves an Air Force cryptologist who was outed by his military psychologist. Though he was promised confidentiality, the airman learned that, instead, the psychologist had revealed their counseling sessions to his First Sergeant. In a memorandum for record dated September 17, 1997, the airman writes, "The [First Sergeant] told me that [the psychologist] had gone to her, told her that I was gay, and asked for advice on what to do about it (Exhibit 10)." The next week, according to the Air Force member, "a friend told me that he heard that I had mentioned to the psychologist...that I was gay." Concerned that the information had spread throughout his squadron, the airman saw no real option but to be honest with his commander. He was discharged as a result.

The psychologist's actions in this case are reprehensible, but under current policy, service members have no recourse. There is no rule of confidentiality. And while such conversations are supposed to be treated as "personal and private," they sometimes are not. As a result, gay service members find that there is absolutely no safe space to discuss their sexual orientation and related issues without risk of discharge.

SLDN is aware of at least three other cases where psychotherapists outed service members or where inquiry officers obtained service members' mental health records to look for information about their sexual orientation. One Air Force inquiry officer, in

concluding that a service member was gay, made special note of the fact that the mental health records indicated that the service member declined to discuss one “problem” (Exhibit 11). It is astounding that an inquiry officer could place any significance on the absence of information in a medical file.

Seeking Out Family and Friends

In other cases, SLDN remains concerned that inquiry officers and investigators are seeking out family members and close personal friends to solicit information that can be used against their loved ones. One Air Force inquiry officer required an officer to answer more than 150 questions about her sexual orientation and private life, including numerous questions seeking information on how to contact family members and friends. The officer was very clear in stating that her orientation was a personal and private matter about which she did not want the Air Force questioning her friends and family. The transcript of this interview shows, however, that the inquiry officer persisted in hounding her for this information (Exhibit 12).

61Q For instance, have you talked about this with family members?

61A. I’ve talked about it with a few and basically told them about my feelings.

62Q Would there be people I could contact?

62A. There – I guess I feel that this is a personal matter and that I would prefer that if you do need a statement, that that could be a written statement and I’m willing to provide that, but I guess I don’t feel that it’s necessary for you to actually talk to those people yourself and I would be happy to provide a written statement from a family member for you. But I guess I just don’t feel comfortable having you talk with them directly because it is a personal issue with me.

- 63Q. Okay. Are there people, other than family members, that you discussed this with?
- 63A. [Conversations with a few friends about what it means to be gay.]
- 65Q. Are there any of those people that you could give me their names and phone numbers that I could talk with?
- 65A. Again, I guess I'll answer that the same way as my family, I could also provide you with a letter from a friend just telling you, you know, what I've told her. But I would rather that you didn't speak with her personally.
- 66Q. Why is that? Why would you rather I not talk to these people personally?
- 66A. I guess it's just I feel this all has to do with me and my personal feelings and – I mean it's a sensitive issue and I guess I would just like to deal with this myself instead of getting a lot of other people involved. . . . I don't know, it's just a personal issue.
- 123Q. If I were to call one or both of your parents and just identify myself and explain what this is all about are they going to be just dumbfounded in having heard nothing about this or are they going to be....
- 123A. Basically, my father knows nothing about it. . . .

We wish we could say that this heavy-handed inquiry officer was the exception, not the rule. We cannot. Interviews like the one above have become standard practice, particularly in the Air Force, and increasingly in the Army. When inquiry officers are successful in locating family members and friends, they have been aggressive in pressuring these individuals to provide damaging information against service members.

Numerous family members and friends have contacted SLDN. All have viewed the military's tactics as highly offensive. In the above case, for example, the officer's relative and friend only reluctantly provided written statements confirming that the officer is a lesbian. The officer's aunt made it a point to state, "I do not want to discuss

anything about my niece's personal life, and I hope that you will direct any further questions to her" (Exhibit 13). In a similarly firm tone, the friend confirmed that the officer had recently begun to question her orientation, and concluded, "Other than this, I do not wish to make any further comment on such a private and personal matter" (Exhibit 14). Military leaders should end these intrusive tactics.

In some cases, inquiry officers have even delved into civilians' sexual orientation and private lives. The case of the Air Force Sergeant discussed in the "Don't Ask" section is just one example. She was forced out of the military based on information solicited by the Air Force inquiry officer from her three roommates. Two of the roommates were civilian; one was in the military. All were asked about their private lives. In the face of military authority, all believed that they were required to answer the questions put to them. The larger issue, however, is that the inquiry officer should not have pried into conversations between a military member and her close personal friends.

Similarly, an Air Force Office of Special Investigations (OSI) agent instructed a civilian friend of a service member who was under investigation to tell him everything, falsely maintaining that (1) he "already knew" that the service member was gay, and (2) the "Don't Ask, Don't Tell, Don't Pursue" policy prohibited the Air Force from prosecuting her friend for his sexual orientation. Thinking that she was not revealing any new information, the friend confirmed the OSI agent's suspicions. The service member's discharge is pending as a result.

Privacy Not Assured with Chaplains

One final issue deserves mention. SLDN continues to be concerned about the confidentiality of conversations between service members and their military chaplains,

which are covered by limited privilege under military law. A Navy officer reports this year that his military chaplain, upon being questioned by an inquiry officer, divulged the contents of conversations spanning more than two years in which the officer had sought spiritual counseling because he was struggling with a tension he felt between his sexual orientation and his faith.

In other cases, chaplains have advised gay service members to turn themselves in to their commands, without ensuring that service members are fully informed about the legal consequences and the possible risks to their safety of such a course of action. Some chaplains have given service members legal information that was just plain wrong. Service members who have relied on this erroneous information have experienced great harm.

SLDN finds it outrageous that an inquiry officer would question a chaplain about his discussions with a service member, and we are equally concerned that chaplains would divulge this information. Furthermore, we are concerned that some chaplains have attempted to provide legal counseling to service members rather than sending them to a defense attorney to obtain accurate legal advice.

While SLDN does not record a large number of cases where chaplains break confidentiality or give bad legal counseling, the fact that these cases occur at all forces SLDN to warn service members that it is risky to confide in military chaplains. This is a tragedy. Chaplains, and the ability of service members to safely confide in them, have always been thought to be essential to service members' well-being and in the best interests of the command. Under "Don't Ask, Don't Tell, Don't Pursue," however, nothing is sacred.

As reported above, “Don’t Tell” violations decreased by 29% in 1997. We think that the result is significant. There are two possible reasons why “Don’t Tell” violations decreased in 1997. One possibility is that, after three years of witnessing military policing of private conversations, gay service members have learned that, in practice, the “zone of privacy” means nothing and survival under “Don’t Tell” requires absolute secrecy.

The other possibility is that the services have reduced efforts to question doctors, psychotherapists, parents, siblings and close personal friends of service members under inquiry. SLDN notes, however, that neither DoD nor the services has published any guidance clarifying that these private conversations will be off-limits to inquiry officers. SLDN urges DoD and the services to issue guidance this year.

SLDN is also pleased to report the first advance in the area of psychotherapist confidentiality. On May 6, 1997, the Joint Service Committee issued a recommendation to amend the Manual for Courts Martial to provide for a limited psychotherapist confidentiality for military retirees and military dependents.²⁰ The Department of Defense has yet to adopt this recommendation. SLDN also urges DoD and the services to consider adopting a rule of full confidentiality for psychotherapist/patient conversations, bringing them into compliance with the 1996 United States Supreme Court opinion, *Jaffee v. Redmond*.²¹

²⁰ 62 Fed. Reg. 24640 (1997).

²¹ 518 U.S. 1 (1996).

DON'T PURSUE

The “Don’t Pursue” regulations contain express limits on gay investigations.

These include, but are not limited to, the following:

- Only a service member’s commander may initiate an inquiry into homosexual conduct.²²
- Commanders may initiate inquiries only upon receipt of credible information of homosexual conduct.²³
- Credible information exists when information, considering its source and the surrounding circumstances, supports a reasonable belief that a service member has engaged in homosexual conduct.²⁴
- Credible information requires a determination based on articulable facts, not just belief or suspicion.²⁵
- Not all accusations of homosexual conduct constitute credible information as a basis for inquiry or discharge.²⁶
- Credible information does not exist when the source of the accusation is not credible or reliable.²⁷
- Credible information does not exist when the accusation concerns an associational activity, such as going to a gay bar, associating with known homosexuals, or marching in a gay rights rally in civilian clothes.²⁸

²² Inquiry Guidelines, ¶ A(1) (“Only the member’s commander is authorized to initiate fact-finding inquiries involving homosexual conduct.”).

²³ Inquiry Guidelines, ¶ A(1) (“A commander may initiate a fact-finding inquiry only when he or she has received credible information that there is a basis for discharge.”).

²⁴ Inquiry Guidelines, ¶ B(3) (“Credible information exists when information, considering its source and the surrounding circumstances, supports a reasonable belief that a service member has engaged in homosexual conduct.”)

²⁵ Inquiry Guidelines, ¶ B(3) (Credible information “requires a determination based on articulable facts, not just belief or suspicion.”)

²⁶ *Id.*

²⁷ Inquiry Guidelines, ¶ F(1) (Credible information requires an accusation by “a reliable person.”).

²⁸ Inquiry Guidelines, ¶ E(4) (“Credible information does not exist when the accusation concerns an associational activity, such as going to a gay bar....associating with known homosexuals, membership or participation in gay organizations or marching in a gay rights rally in civilian clothes.”).

- Credible information does not exist when the information concerns possessing or reading homosexual publications.²⁹
- Credible information does not exist when the information concerns listing by a service member of someone of the same gender as the person to be contacted in the case of an emergency, as an insurance beneficiary, or in a similar context.³⁰
- Credible information does not exist when the information concerns an allegation by another that a service member is homosexual.³¹
- Credible information does not exist when the inquiry would be based on rumor, suspicion, or capricious claims concerning a member's sexual orientation.³²
- Credible information does not exist when a service member reports being threatened because he or she is said or perceived to be a homosexual.³³
- Inquiries shall be limited to the factual circumstances directly relevant to the specific allegations.³⁴

²⁹ Inquiry Guidelines, ¶ E(4) (“Credible information does not exist when the information concerns...possessing or reading homosexual publications....”).

³⁰ DoD Policy Guidelines on Homosexual Conduct in the Armed Forces, July 19, 1993 (“The listing by a service member of someone of the same gender as the person to be contacted in the case of an emergency, as an insurance beneficiary, or in a similar context, does not provide a basis for separation or further investigation.”).

³¹ Inquiry Guidelines, ¶ E(2) (“Credible information does not exist when...the only information is the opinions of others that a member is homosexual....”).

³² Inquiry Guidelines, ¶ E(3) (“Credible information does not exist when the inquiry would be based on rumor, suspicion, or capricious claims concerning a member's sexual orientation.”).

³³ Memorandum of Under Secretary of Defense Edwin Dorn, *Guidelines for Investigating Threats Against Service Members Based on Alleged Homosexuality*, (March 24, 1997) (Credible information does not exist when “a service member reports being threatened because he or she is said or perceived to be a homosexual.”).

³⁴ Inquiry Guidelines, ¶ A(3) (“Inquiries shall be limited to the factual circumstances directly relevant to the specific allegations.”) *See also* DoD Instruction 5505.8, “Investigations of Sexual Misconduct by the Defense Criminal Investigative Organizations and Other DoD Law Enforcement Organizations,” December 21, 1993 [Hereinafter, “Guidelines for DCIOs”] (“Investigations shall be limited to the factual circumstances directly relevant to the specific allegations.”) *See also Policy Concerning Homosexuality in the Armed Forces: Hearings Before the Senate Comm. On Armed Services*, 103rd Cong., 2d Sess. (1993) p. 789 (comments by then DoD General Counsel Jamie Gorelick: “Once you establish the elements of the offense or basis for discharge, you go no further.”).

- Commanders shall exercise sound discretion regarding when credible information exists.³⁵
- Commanders shall examine the information and decide whether an inquiry is warranted or no action should be taken.³⁶
- Commanders will consider, in allocating scarce investigative resources,³⁷ that sexual orientation is a personal and private matter, and that under current policy, there is a decent regard to the legitimate privacy and associational rights of all service members.³⁸

What do these limits on gay investigations mean? In the words of General Powell, “no witch hunts.”³⁹ In the words of Senator Sam Nunn, “no sex squads.”⁴⁰ In the words of President Clinton, “a decent regard to the legitimate privacy and associational rights of all service members.”⁴¹ In the words of Secretary of Defense William Cohen, “no pursuits.”⁴²

The limits set forth under “Don’t Ask, Don’t Tell, Don’t Pursue” were intended to stop the far-ranging, punitive and heavy-handed investigations that characterized the military’s treatment of its gay members under prior policies. These limits have been roundly ignored. Investigative excesses have been routinely justified.

³⁵ Inquiry Guidelines, ¶ D(2) (“Commanders shall exercise sound discretion regarding when credible information exists.”).

³⁶ *Id.* (“They shall examine the information and decide whether an inquiry is warranted or no action should be taken.”).

³⁷ Guidelines for DCIOs, (“...as a matter of investigative priorities and resource limitations, Defense Criminal Investigative Organizations (DCIOs) and other DoD law enforcement organizations will normally refer allegations involving only adult private consensual sexual misconduct to the service member’s commander for appropriate disposition.”).

³⁸ DoDD 1304.26, Enclosure 2(8)(a) (1994), DoDD 1332.30, Enclosure 2-2(C) (1994), and DoDD 1332.14, Enclosure 4(H)(1) (1994) (“Sexual orientation is considered a personal and private matter.”).

³⁹ *Policy Concerning Homosexuality in the Armed Forces: Hearings Before the Senate Comm. On Armed Services*, 103rd Cong., 2d Sess. (1993) at 709 (statement of General Colin Powell).

⁴⁰ Former Senator and Chairman of the Senate Armed Services Committee, Sam Nunn, THE RECORD A10 (May 31, 1993).

⁴¹ President William J. Clinton, *Text of Remarks Announcing the New Policy*, THE WASHINGTON POST A12 (July 20, 1993).

McVeigh Case: The Navy “Goes Too Far”

A salient example of the continued pursuit of suspected gay service members is the recent, highly-publicized case of Senior Chief Petty Officer Timothy R. McVeigh (who, as noted by the press, is “no relation to the Oklahoma City bomber”). Senior Chief Petty Officer McVeigh is a seventeen-year career sailor with an impeccable record. At age 36, he had risen to become the senior enlisted man (Chief of Boat) aboard a nuclear submarine, the *USS Chicago*. The Navy attempted to discharge him, however, based on information the Navy surreptitiously obtained about McVeigh’s identity from the internet service provider America Online (AOL).

On January 29, 1998, Judge Stanley Sporkin, a Reagan appointee, granted a permanent injunction in Senior Chief Petty Officer McVeigh’s favor preventing the Navy from discharging him. Judge Sporkin ruled that the “Navy went too far”⁴³ and the Navy “violated the very essence of ‘Don’t Ask, Don’t Pursue’ by launching a search and destroy mission”⁴⁴ (Exhibit 15). Judge Sporkin also ruled that the Navy violated the Electronic Communications Privacy Act by failing to obtain the required warrant or court order before seeking this information from AOL.⁴⁵

On January 21, 1998, prior to Judge Sporkin’s decision, America Online issued a statement reporting the company’s finding, based on an internal investigation into the matter, that the Navy had “deliberately violated federal law” (Exhibit 16). AOL also admitted that its employee had made a mistake in releasing any information about Senior Chief Petty Officer McVeigh.

⁴² *World News Tonight* (ABC news broadcast, Transcript # 97022604-J04, February 26, 1997).

⁴³ *McVeigh v. Cohen*, (D.C.D.C.) Civ. Action No. 98-116, Memorandum Opinion Supporting Preliminary Injunction Order, Jan. 26, 1998, at 9.

⁴⁴ *Id.* at 7.

On the same day, Professor Charles Moskos, the architect of “Don’t Ask, Don’t Tell, Don’t Pursue,” submitted a declaration in federal court concluding that the Navy had violated the policy’s limits on investigations (Exhibit 17).

In a move that has become typical, Navy leaders persist in their denials of wrongdoing.⁴⁶ The Navy insists, for example, that it could investigate Senior Chief Petty Officer McVeigh based on a suspicion that the online profile was his. That conclusion flies in the face of the regulations, which state that “credible information does not exist when the inquiry would be based on rumor, suspicion, or capricious claims....”⁴⁷ The Navy prosecutor who acted as the inquiry officer in this case claimed at Senior Chief Petty Officer McVeigh’s administrative discharge board that “I was not on a witch hunt.... I was permitted to ask questions that may lead him to volunteer information regarding homosexual conduct.” (Exhibit 18) That, however, is the very definition of a witch hunt and is expressly forbidden under current regulations. Even where inquiries are legitimate, inquiry officers are not permitted to fish for information to see what they can dig up.⁴⁸

The Navy argued in federal court that, even if Judge Sporkin found wrongdoing on the part of Navy officials, Senior Chief Petty Officer McVeigh should still be discharged. The Navy argued that Senior Chief Petty Officer McVeigh had no recourse because “Don’t Ask, Don’t Tell, Don’t Pursue” creates “no substantive or procedural rights” for service members. Basically, the Navy’s position is that the end justifies the means in a gay investigation.

⁴⁵ *Id.* at 8.

⁴⁶ Treva Jones, *Navy Secretary Boosts Scouting*, THE NEWS OBSERVER (RALEIGH, N.C.) B3 (Jan. 31, 1998). (When asked about Judge Sporkin’s ruling in McVeigh’s favor, Secretary Dalton responded, “We are confident we did comply with the law and Department of Defense regulations.”)

We look forward to the day when government officials stop attempting to excuse and justify the actions of their agents and instead put their energy into training investigators to comply with the law in the first place. America Online admitted wrongdoing and has pledged to take steps to ensure that the mistake is not repeated. The Navy should do the same.

The Army Stops A Witch Hunt

SLDN cannot help but contrast the Navy's actions in the *McVeigh* case with those taken by the Army this year to stop a witch hunt that was in progress at an Army installation in the Southeast. The record in the case shows the lack of discipline typical for those investigating suspected gay service members. The record also provides a good example of what officials at higher headquarters should do when they learn of witch hunts by their commands.

In this case, Army investigators interrogated a soldier who was alleged to have been a male prostitute, stripper in a gay nightclub, porn star and drug dealer. Rather than charge him for all of his alleged crimes, however, Army investigators brokered a deal and turned him into an informant in order to identify gay soldiers.

According to the record in this case, Army investigators obtained photos of the informant at a gay bar and asked him to identify the patrons of the bar (Exhibit 19). The questions asked included the following:

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

⁴⁷ Inquiry Guidelines, ¶ E(3).

⁴⁸ Inquiry Guidelines, ¶ A(3).

3. I'm showing you photograph #3, can you identify this individual?
4. I'm showing you photograph #4, can you identify this individual?
5. I'm showing you photograph #5, can you identify this individual?
6. I'm showing you photograph #6, can you identify this individual?
7. I'm showing you photograph #7, can you identify this individual?

The investigators then asked questions about specific individuals the informant identified from the photos.

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

The Army's refreshing response when apprised of the witch hunt was to review the case, not automatically rush to justify the command's actions. SLDN applauds the Assistant Staff Judge Advocate who reviewed the case for stopping the witch hunt before it destroyed the lives and careers of possibly dozens of soldiers. In a letter to the command dated April 7, 1997 (Exhibit 20), the Assistant Staff Judge Advocate concludes the following:

- DoD Instruction 5505.8 not only prohibits this command from conducting investigations solely to determine a service member's sexual orientation, it limits investigations into adult private consensual sexual misconduct *to the factual circumstances directly relevant to the specific allegations.*

- Specialist [A]’s statements are rife with questions and areas of investigation which, although not illegal, suggest a goal of the investigation is identifying the sexual orientation of the soldiers among this group.
- Broad, cryptic questions such as ‘Do you understand why you are here?’ are easily interpreted as a veiled hint that the subsequent interview is about sexual orientation.
- Attempting to identify soldiers who associate with [B] and asking witnesses to identify soldiers in photographs is easily portrayed as a ‘witch-hunt’ based upon sexual orientation....
- Broad questions such as ‘Tell me everything you know about SGT X’ or ‘Tell me everything you know about Y’ are easily interpreted as improper questions about sexual orientation.

The Army did the right thing in this case and should be commended. The Army’s actions in this case sharply contrast with the Navy’s insistence that it behaved properly in the McVeigh case.

The Army’s good actions also stand in sharp contrast to the Air Force’s response last year to a witch hunt at Hickam Air Force Base in Honolulu, Hawaii. The witch hunt targeted seventeen servicemen, the “Hawaii 17,” in all branches of the military except the Coast Guard. Air Force officials entered into a pre-trial agreement with Airman Bryan Harris, an admitted felon, who was facing life in prison for the rape of another man and other charges (Exhibit 21). Similar to the Army case discussed above, Air Force prosecutors cut a deal. The Air Force agreed to reduce Harris’ sentence from life 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. Harris accused seventeen men. All of the accused Air Force members have been discharged. Airman Harris served only

eleven months of his sentence.

The Air Force continues to justify its actions in this case despite the overwhelming record of command improprieties. The Air Force Inspector General (IG) concluded that, although prosecutors pressured Airman Harris to name names, the Hickam investigation was not a witch hunt. The IG also verified that inquiry officers asked the following questions about one of the men accused by Airman Harris, yet has concluded that they did not constitute questions about sexual orientation (Exhibit 22):

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?

The Department of Defense Inspector General and the Department of Defense General Counsel's office have declined to reopen the Air Force Inspector General's investigation in 1997.

McVeigh Is Not Alone: Services Take Witch Hunts Online

The McVeigh case is only one of several SLDN has documented in which military officials have taken witch hunt tactics online in the past year. Coast Guard Petty

Officer Tim Bauer reports that investigators told him they had monitored his online activities for six months before moving to discharge him. His Notification of Administrative Separation, dated September 8, 1997, states that the only reason for discharge is that from July 2, 1997 to August 28, 1997, Petty Officer Bauer “used a government computer to access an internet ‘chat room’ for gay men” (Exhibit 23). Other military members in Bauer’s workplace, however, are reported to routinely access the internet from government computers for personal use. The unit’s unofficial policy reportedly permits this as long as it does not interfere with work requirements. The command, however, took adverse action against Bauer solely because the internet activity indicated interest in gay issues, notwithstanding “Don’t Ask, Don’t Tell, Don’t Pursue” guidelines that expressly protect associational activities.⁴⁹

SLDN does not take the position that there should be no computer use policies. Rather, where such policies exist, they should be applied in an even-handed manner, not selectively enforced as a ruse to skirt the limits to investigations under “Don’t Ask, Don’t Tell, Don’t Pursue.”

An Air Force inquiry involving online privacy ultimately led one service member to leave the Air Force rather than face continued prying into his private life and discharge proceedings. The record in the case is instructive in showing just how far the services are going to pursue suspected gay personnel.

According to the Report of Investigation, this case started based “on an anonymous phone call” about an Air Force member, alleging that he used government computers to access the internet and that his internet home page contained “homosexual images” (Exhibit 24). The commander investigated the allegation of misuse of

⁴⁹ Inquiry Guidelines, ¶ E(4).

government property and disciplined the member. The commander, however, also initiated an inquiry into the service member's sexual orientation based on this same anonymous tip.

At this juncture, the rules and regulations are clear that commanders cannot initiate an inquiry under "Don't Ask, Don't Tell, Don't Pursue" based on anonymous tips.⁵⁰ According to the Report of Investigation, however, the command initiated an inquiry "to explore the issue of [A's] homosexuality." The inquiry officer was tasked to conduct a "review of all aspects of the computer Internet web site home page allegedly produced and maintained by [A], and available e-mail documents associated with that web site and pertinent to this inquiry...."

Accordingly, the inquiry officer extracted 565 pages of computer code, web pages and electronic mail detailing the history of internet use by the servicemember. The inquiry officer's efforts were so wide-ranging that he also pulled the service member's medical and mental health records.

In addition, the inquiry officer interviewed twenty-three coworkers, friends, supervisors and others, attempting to solicit information about the service member's sexual orientation and private life. He asked twenty-one of the interviewees the following overly-broad questions:

1. Have you seen a web site home page relating to [A]?
2. Have you observed any on or off duty actions by [A] relating to the nature of this investigation?
3. Do you have any additional comments relating to the nature of this investigation?

⁵⁰ Inquiry Guidelines, ¶ B(3); E(3) (By definition, credible information requires a source whose credibility can be assessed. An anonymous phone call cannot be assessed and deemed credible in the same way that "rumor, suspicion, or capricious claims" are not deemed credible.).

4. Can you suggest any individuals that would have information relating to the nature of this investigation?

Occasionally, the inquiry officer would elicit some irrelevant speculation from the interviewees. One witness noted that she knew that the “beneficiary that [A] named for his...Life Insurance was a male Captain that he described as a friend” (Exhibit 25).

Current rules specifically state that the listing of a same gender beneficiary is not credible information.⁵¹ Another interviewee responded, “The only comment that I could relate was that [A’s] roommate appeared somewhat effeminate” (Exhibit 26). Such comments are, at best, stereotypical, after-the-fact speculation. “Don’t Ask, Don’t Tell, Don’t Pursue” specifically protects associational rights⁵² and states that speculation⁵³ about a service member and his or her friends is not credible information.

One of the twenty-three witnesses, however, finally provided one of the two items that the command eventually used to recommend discharge. That interviewee said, “During the conversation that I had with [A] that evening he confided in me that he was ‘gay.’” A statement of sexual orientation can be a basis for discharge under “Don’t Ask, Don’t Tell, Don’t Pursue,” but this purported statement was made in a private context.⁵⁴ Furthermore, the statement made by this witness was not the original allegation against

⁵¹ DoD Policy Guidelines on Homosexual Conduct in the Armed Forces, July 19, 1993 (“The listing by a service member of someone of the same gender as the person to be contacted in the case of an emergency, as an insurance beneficiary, or in a similar context, does not provide a basis for separation or further investigation.”).

⁵² Inquiry Guidelines, ¶ E(4).

⁵³ Inquiry Guidelines, ¶ E(1-3) (“Credible information does not exist ... when: 1. The individual is suspected of engaging in homosexual conduct, but there is no credible information ... to support that suspicion; or 2. The only information is the opinions of others that a member is homosexual; or 3. The inquiry would be based on rumor, suspicion, or capricious claims concerning a member’s sexual orientation ...”).

⁵⁴ Inquiry Guidelines, ¶ C(2) (“A basis for discharge exists if: ... The member has said that he or she is a homosexual or bisexual, or made some other statement that indicates a propensity or intent to engage in homosexual acts ...”).

the service member, and “Don’t Ask, Don’t Tell, Don’t Pursue” prohibits inquiry officers from fishing for additional grounds for discharge.⁵⁵

The only other piece of information that this service member’s command found and used to recommend discharge was one e-mail message recovered using several on-line search engines. In the electronic message, the service member allegedly admits that he is gay (Exhibit 27). In the notice of administrative separation, the service member’s commander writes:

You did on or about September 16, 1996, make a homosexual statement, in that you sent an e-mail from your government owned computer to ‘John’ in which you stated, ‘I really don’t consider my sexual orientation an aberration; although, I suppose some people definitely do. As you know, the reality is that there are quite a few lesbian and gay folks in the USAF and other branches. We’re just trying to live our lives as best we can given the current circumstances. I see...my web-page as a means to express my sexuality, as well as other interests in a somewhat low exposure environment,’ or words to that effect.

This e-mail was not the original allegation against the servicemember. It was uncovered only in the course of a fishing expedition. Time and time again, SLDN has documented cases where properly limited inquiries and investigations under “Don’t Ask, Don’t Tell, Don’t Pursue” would not have resulted in adverse action against a suspected service member. Inquiry officers who are given free reign to conduct fishing expeditions, however, may well turn up something if they dig long enough. How many of the same commanders and inquiry officers could withstand government agents searching every nook and cranny of their lives to dredge up confidences shared with friends, or any other information against them, however slight?

⁵⁵ Inquiry Guidelines, ¶ A(3).

The Navy, Coast Guard and Air Force are not the only services that have pursued suspected gay personnel online. SLDN has handled such cases in every service this year, raising serious concerns about online privacy and service members' associational rights. In issuing his opinion in *McVeigh v. Perry*, Judge Sporkin warns that, "In these days of 'big brother,' where through technology and otherwise the privacy interests of individuals from all walks of life are being marginalized, it is imperative that statutes explicitly protecting these rights be strictly observed." We believe most Americans view their online activities as private. It is clear that the Air Force member discussed above did. Even if online communications somehow do not inhere a reasonable expectation of privacy, they certainly are of the same caliber of associational activities purportedly protected under "Don't Ask, Don't Tell, Don't Pursue," such as going to a gay bar, marching in a gay rights parade or reading gay magazines such as *OUT Magazine*, a cultural magazine for the gay community, and *The Advocate*, a news magazine.⁵⁶

The "Prove You're Gay" Fishing Expedition

Another growing and disturbing trend among all services is the "prove you're gay" phenomenon. In the "prove you're gay" cases, inquiry officers conduct wide-ranging fishing expeditions in violation of "Don't Ask, Don't Tell, Don't Pursue" in an effort to dig up additional information about a service member who has already made a statement that he or she is gay. The trend started in the Air Force in 1994⁵⁷ and is spreading now to the other services. These "prove you're gay" fishing expeditions are placing service members lives and liberty at risk.

⁵⁶ Inquiry Guidelines, ¶ E(4).

⁵⁷ C. DIXON OSBURN ET. AL., SERVICEMEMBERS LEGAL DEFENSE NETWORK, CONDUCT UNBECOMING: THE THIRD ANNUAL REPORT ON "DON'T ASK, DON'T TELL, DON'T PURSUE" (1997).

In the “Don’t Ask” section, for example, we described the serious consequences of the “prove you’re gay” approach in the case of AN Barry Waldrop. AN Waldrop is the sailor who came out to his command in response to anti-gay harassment and who subsequently received a death threat. Rather than discharge him expeditiously, AN Waldrop’s command specifically told him he must “prove” that he is gay in order to be discharged. The command then launched an inquiry to determine whether AN Waldrop had engaged in gay acts.

By conducting a fishing expedition into AN Waldrop’s private life, rather than investigating those who had threatened him, the command exposed AN Waldrop to further danger and sent a terrible message to the crew: harassment will be tolerated and gay service members who report it will be punished.

The “prove you’re gay” fishing expedition also threatened AN Waldrop with additional adverse consequences, including imprisonment. The command, for example, threatened AN Waldrop with criminal charges if he did not admit to prior gay relationships, under the theory that he was lying about his sexual orientation and therefore making a false official statement. Under the Uniform Code of Military Justice (UCMJ), however, AN Waldrop could have been criminally charged and imprisoned for five years per charge if he had confirmed engaging in sodomy, which includes oral sex, or indecent acts, which includes almost anything in the context of a gay relationship, including hand-holding. How could AN Waldrop in good faith comply with his command’s demand to provide information about gay relationships knowing that any such information, if it indeed existed, could have landed him in jail? The “prove you’re gay” investigative tactic places service members in an untenable, lose-lose situation and

demonstrates a complete lack of good faith on the part of commanders and inquiry officers in following the limits to investigations under “Don’t Ask, Don’t Tell, Don’t Pursue.”

In another case, a highly-trained Navy officer was ordered to stay on duty and proceed to his next assignment by the Bureau of Navy Personnel (BUPERS) although he had made a statement of his sexual orientation in response to anti-gay comments in his unit and because of ethical concerns. In a letter to the officer, a BUPERS official explained his decision, stating, "Nothing in your statements indicates you engage in homosexual acts, or that you will engage in homosexual acts." BUPERS even went so far as to accuse the officer of lying about his orientation, a conclusion that is flat out wrong (Exhibit 28).

If the Navy has adopted the position that statements of homosexual or bisexual orientation are no longer grounds for discharge, that would be a major development that SLDN would welcome. SLDN asks Navy officials to confirm whether this is, indeed, their position. If it is not, this situation raises serious concerns about whether the intent of BUPERS is simply to punish service members who “come out” in the face of harassment, the threat of being “outed,” or due to ethical concerns by setting them up for even harsher punishment than discharge.

In numerous Air Force cases, SLDN has documented that investigators have asked or have attempted to ask the following standard questions with the purpose of forcing service members to “prove they are gay” (Exhibit 29):

1. What was your intent in making the statement?
2. What was your purpose for stating that you are a homosexual?
3. Do your parents and siblings know?

4. How can they be contacted?
5. How did you discover that you are a homosexual?
6. When did you discover that you are a homosexual?
7. Where do you live and do you have any roommates?
8. How do you know you have a homosexual orientation?
9. When did you realize this?
10. Who (sic) have you told?
11. When did you tell them?
12. Why did you tell them?
13. Have you been dating anyone?
14. Opposite or same sex?
15. How frequently have you dated?
16. How recently?
17. How can these persons be contacted?
18. Do you belong to any homosexual organizations?
19. Who are your close friends?
20. How can they be contacted?
21. Are there any other witnesses or documents that could verify that you are a homosexual?
22. Is there any further information, statements or evidence concerning this matter?

The Air Force has been quite forceful in attempting to justify its actions, claiming that “prove you’re gay” tactics are used only in a limited number of cases involving service members who come out and who have received educational funding, special pay or bonuses in exchange for a further service obligation. The Air Force asserts that this punitive approach is necessary to prevent fraud by heterosexual service members or gay “slackards” who might claim to be gay in order to avoid part of their service obligation. The service has provided no facts to support its assertion.

The Air Force position does not stand up to scrutiny. First, the Air Force has bad facts. In the past four years, SLDN has assisted 1,300 men and women harmed by “Don’t Ask, Don’t Tell, Don’t Pursue” and not once have we received any evidence to support the Air Force’s contention that the service is plagued by heterosexual frauds or

gay slackards. We agree with *The Washington Post's* editorial on May 15, 1997: "We would like to see the evidence on that one."⁵⁸

Second, the Air Force is using these memoranda in numerous cases, such as that of former Senior Airman Wendy Wilkins, where service members have not received any educational assistance or enlistment bonuses.

Third, the Air Force memoranda are based on completely inaccurate assumptions about what it means to be gay. Air Force officials do not acknowledge the sacrifice and risk to service members' safety involved in coming out. Nor do they comprehend the ethical dilemma created by the present regime, which requires service members to lie, even to their parents, as a condition of military service. This result is diametrically opposed to the professed Core Values of the Air Force. The ethical dilemma imposed on service members by this policy has only intensified in a year during which all of the services have placed renewed emphasis on Core Values, an otherwise laudable effort.

In a letter to Secretary Cohen dated September 25, 1997, S. Michael Yongue states that the reason he had to be honest about his sexual orientation had everything to do with the list of Air Force Core Values which he recited in his letter (Exhibit 30):

- **Courage.** "...a person of integrity, for example, is capable of acting on conviction."
- **Honesty.** "Honesty is the hallmark of the military professional because in the military, our word must be our bond. The bottom line is we don't lie, and we can't justify any deviation."
- **Responsibility.** "No person of integrity is irresponsible; a person of true integrity acknowledges his or her duties and acts accordingly."

⁵⁸ *The Washington Post*, "A Good Time to Review Gay Policy," May 15, 1997, A22.

- **Self-Respect.** “To have integrity also is to respect oneself as a professional and a human being...”
- **Mutual Respect.** “Genuine respect involves viewing another person as an individual of fundamental worth.”

Contrary to the Air Force’s own Core Values, its instructions to inquiry officers to treat service members who come out as heterosexual frauds or gay “slackards” has produced a climate where honesty is harshly punished and mutual respect is discarded. “Anything goes” is the rule in gay cases. The hypocrisy is clear to heterosexual and homosexual service members alike, undermining the service’s best intentions to inculcate strong values into our military members.

In addition to the ethical concerns which motivate some service members, many others 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 31).

“Don’t Ask, Don’t Tell, Don’t Pursue” is clearly not a zero discharge policy. Those who make public declarations of a homosexual or bisexual orientation will be discharged and the services will lose the valuable contributions of these members. Military leaders insisted on this policy in 1993, and they won. In light of this, it is rather disingenuous for Air Force leaders to complain now that they are not happy with all the results of their policy, namely that they are losing highly-skilled personnel such as doctors, pilots, physicists, and senior enlisted members.

As the Air Force has adopted more and more punitive measures to target the tiny subset of skilled members who have received government funding, the tail has come to wag the dog. The intrusive tactics required by the Air Force memoranda, offensive enough under any circumstances, have “bled over” to become the norm in all gay cases, even spreading to the other services. The effect is to unnecessarily “ratchet up” the pain threshold of gay cases as well as the cost, which often exceeds the amount of funding received by the service member. Ever more intrusive tactics and prolonged discharge proceedings are being used in simple cases where statements of sexual orientation should, under current policy, result in expeditious discharges. Investigations are launched and discharges initiated even in cases where no inquiry or discharge should be at issue because the service member has not violated the policy.

This approach is pouring fuel onto the flames of an already explosive situation in cases where service members come out as their only real recourse to protect their safety, such as those involving death threats and other harassment. This serves no purpose but to further jeopardize service members’ safety. The practice of asking overly-broad, intrusive questions is not limited to coming out cases, but is indicative of the witch hunt mindset that continues to exist in the services.

Good Command Actions

The news is not all bad. SLDN has documented some isolated cases where commands did not pursue suspected gay service members, correctly complying with the letter and intent of “Don’t Ask, Don’t Tell, Don’t Pursue.” These cases, like the Army’s response to the witch hunt described earlier, should serve as a compass to point the way to a “Don’t Ask, Don’t Tell, Don’t Pursue” policy that is properly implemented.

In the Air Force, a command launched an inquiry against a ten-year service member based on false allegations that he was gay. The command eventually closed the inquiry, however, after the inquiry officer determined that there was no credible information of homosexual conduct. “All of the circumstances taken together suggest that the allegations... are not credible,” concluded the inquiry officer in the Report of Inquiry. He continued, “The individual who alleges them has a motive to lie that would render him difficult to believe in a discharge board.” Further, after hearing from witnesses who stated that the service member ‘fit the stereotype’ of a homosexual, the inquiry officer correctly concluded, “It is specifically noted that homosexual mannerisms, such as those cited by the witnesses, are not homosexual statements” (Exhibit 32).

SLDN lauds the result of this inquiry. However, we note that the inquiry should not have been initiated. Credible information is required before launching an inquiry; commands may not investigate to try to find credible information. The danger in allowing inquiries to proceed is that inquiry officers who are less conscientious or informed than the inquiry officer in this case often fish for information that is not at issue, as in the online cases described earlier.

Another example of a good command action involves a career member of the military who faced a discharge board based on a letter to his partner that had been inadvertently discovered by a co-worker. The discharge board recommended retention, stating that “the release of the letter was entirely inadvertent. It was intended as a private communication for one person only.” SLDN agrees with the board’s conclusion that private, inadvertently discovered information was not intended to be policed under “Don’t Ask, Don’t Tell, Don’t Pursue.”

A Ft. Sill, Oklahoma, commander refused to initiate an inquiry when a soldier turned in a gay-related video belonging to a barracks roommate. While the Army commander “chewed out” the soldier for having the video, he also stated that the soldier’s private life was private, which is exactly what “Don’t Ask, Don’t Tell, Don’t Pursue” provides. The commander’s actions also reflected a correct understanding that neither gay-related videos nor inadvertent discoveries are credible information.

In a similar situation at Charleston Air Force Base, an airman discovered a gay adult magazine left behind by a Senior Airman when he moved out of his on-base housing. The airman’s commander properly declined to initiate an inquiry given the current rules protecting associational rights, including the possession of gay-related publications.

One final case involves a Navy Petty Officer who was suspected of being gay. The suspicions started when a civilian nurse who treated him for injuries from an automobile accident at a hospital emergency room searched his belongings and discovered items that led her to believe he might be gay. The nurse told her husband, who was a Navy officer, about what she had found and the husband relayed the information to the Petty Officer’s commander. The commander correctly determined that the service member had not made any public statements of his sexual orientation and that suspicions about his sexual orientation were an insufficient basis for an inquiry.

The most significant improvement in “Don’t Pursue” compliance is that SLDN did not document a single instance in 1997 where commands court-martialed service members on allegations of consensual gay sexual conduct. Air Force Major Debra Meeks made headlines two years ago when she fought allegations that she had been in a

consensual lesbian relationship and was acquitted at court-martial.⁵⁹ The Air Force had specifically held Major Meeks beyond her twenty-year retirement date in order to criminally prosecute and potentially imprison her for eight years based on the allegations.⁶⁰ SLDN remains concerned, however, that investigators and inquiry officers continue to threaten service members with criminal charges, often forcing them to accept discharge characterizations that are lower than their records merit.

In the previous three years, SLDN documented a dozen cases where commanders had attempted to criminally prosecute gay service members for consensual sexual conduct.⁶¹ Each year, SLDN noted that the current regulations instruct commanders to pursue administrative rather than criminal remedies in such cases,⁶² and to ensure even-handed enforcement in the criminal system regardless of sexual orientation.⁶³ We also noted that we knew of no case in those years where heterosexual service members were criminally prosecuted for consensual sexual conduct in similar circumstances.

SLDN commends the apparent ceasefire on criminal prosecutions of gay people. DoD and the services should take the next step and ensure that no commander, investigator or inquiry officer uses the threat of criminal charges in cases arising under “Don’t Ask, Don’t Tell, Don’t Pursue.”

The bottom line: despite some bright spots, “Don’t Pursue” enforcement continues to not meet standards. “Don’t Pursue” violations surged from 191 in 1996 to 235 in 1997, a 23% increase. The Air Force and Navy continue to lead the pack in

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Inquiry Guidelines, ¶ D(1) (“Informal fact-finding inquiries and administrative separation procedures are the preferred method of addressing homosexual conduct. This does not prevent disciplinary action or trial by courts-martial when appropriate.”).

⁶³ Guidelines for DCIOs, ¶ (D)(3).

documented “Don’t Pursue” violations. 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 service members in an attempt to dig up information that can subsequently be used to justify discharges or court-martials. Higher commands typically respond by justifying, not stopping, violations. Some commands, however, are beginning to do the right thing. Criminal prosecutions of service members for consensual gay conduct have waned this year. A few commands have correctly refused to initiate inquiries based on private communications or inadvertent discoveries. DoD and the services should examine the real-life scenarios where commanders did the right thing and use them to train other commanders on the fact that the current policy contains limits on investigations.

DON'T HARASS

The “Don’t Harass” regulations state clearly that “the Armed Forces do not tolerate harassment or violence against any servicemember for any reason.”⁶⁴ In a major development in 1997, the Department of Defense issued guidance clarifying that commanders should respond to anti-gay harassment and lesbian-baiting by investigating the harassment itself, not service members who report it (the “Dorn memo”) (Exhibit 33).⁶⁵ The memorandum states:

- This guidance is issued because of information we have received that some service members have been threatened with being homosexual after they rebuffed sexual advances....
- The fact that a service member reports being threatened because he or she is said or is perceived to be a homosexual shall not by itself constitute credible information justifying the initiation of an investigation of the threatened service member.
- The report of a threat should result in the prompt investigation of the threat itself.
- Investigators should not solicit allegations concerning the sexual orientation or homosexual conduct of the threatened person.
- Service members should be able to report crimes free from fear of harm, reprisal or inappropriate or inadequate governmental response.
- Please ensure that commanders take appropriate actions in such instances, with due consideration being given to the safety of persons who report threats, and see that commanders hold fully accountable persons found to have made threats or engaged in threatening conduct.

⁶⁴ “Applicant Briefing Item on Separation Policy” issued with DoDD 1304.26.

⁶⁵ Memorandum of Under Secretary of Defense Edwin Dorn, *Guidelines for Investigating Threats Against Service Members Based on Alleged Homosexuality*, (March 24, 1997)

The services, however, have failed to distribute the Dorn memo to the field. No commander, attorney, inquiry officer, investigator or other service member asked by SLDN in the course of assisting service members last year had ever heard of the Dorn memo, much less read it.

One result of the lack of guidance on anti-gay harassment and lesbian-baiting in the field is that “Don’t Harass” violations surged in 1997. SLDN documented 182 “Don’t Harass” violations in 1997, up 38% from the 132 “Don’t Harass” violations reported last year. The Navy led the services with 66 “Don’t Harass” violations, though this serious problem cuts across every service.

Anti-Gay Threats Aboard the USS Eisenhower

In one of the most harrowing sets of cases this year, SLDN received reports of anti-gay threats, including death threats, against four sailors onboard the *USS Eisenhower* within a two-month period. One of the sailors targeted was AN Barry Waldrop.

As described in the “Don’t Ask” section of this report, AN Waldrop had faced repeated questions about his sexual orientation that gave rise to concerns for his safety. In the middle of September, 1997 he returned to his berthing area one day to find the warning “You’re a dead faggot” scrawled in magic marker on his rack. A sailor in the next rack, who had seen the threat, asked AN Waldrop point blank if it were true that he is gay (Exhibit 8).

AN Waldrop reported the threat to his chain-of-command. Previously, he had informed his superior officer of the harassment he was experiencing and his concern for his safety. To SLDN’s knowledge, the chain-of-command did nothing to investigate the threat or to protect Waldrop. Only after Waldrop sought help from SLDN and, at our

urging, a military defense attorney, did the ship's security office even send personnel to photograph the threat. In a memorandum for record dated January 21, 1998, AN Waldrop writes, "This was two weeks later, and the magic marker was still there."

AN Waldrop was the second of four sailors on the *USS Eisenhower* who were targeted within a three-month period. In August, the first sailor received the written threat, "Leave or Die Fag," tacked to his rack.

In September 1997, a third sailor was knocked unconscious by an unknown assailant who called him "faggot" in an off-base assault. The assault occurred just days after his car tires had been slashed while the car was parked on base. The threats followed endless haranguing by fellow sailors that went undisciplined by the command. This sailor, for example, reports that groups numbering up to ten sailors yelled "faggot" at him, in full view and hearing of noncommissioned officers when he was on the ship's deck. These incidents occurred no less than twice a week, according to the sailor.

A fourth sailor found "Leave Fag" written in blood-like ketchup on his rack in October 1997. This sailor reports that twice he was awakened at night when someone had opened the curtains on his rack.

These three sailors also reported the threats and harassment they received to the ship's security personnel, among others. To SLDN's knowledge, the security personnel made no serious effort to investigate the threats. In fact, security personnel told the sailor who found "Leave Fag" written in ketchup that it was not a threat.

At one point after SLDN learned of the threats on the *USS Eisenhower*, the ship's senior officers appeared to take the threats against the fourth sailor seriously, agreeing to remove the sailor from the ship before it got underway. Seven days later, however, the

command reneged on this understanding and helicoptered the sailor out to the ship at sea, with no notice. When he reached the ship, the sailor was reportedly placed on restriction, questioned about his sexual orientation and pressured to drop his report of the threats. The legal office then accused him of vandalizing his own rack.

Like AN Waldrop, the other threatened sailors independently came to the conclusion that the only way to protect their safety was to “come out” to the military and be discharged. The first sailor to be threatened was discharged expeditiously. The other sailors were not.

At the behest of the ship’s legal office, the command refused to expeditiously discharge the remaining three sailors, and by all appearances, it refused to take the death threats seriously. Instead, the command required the sailors to “prove” that they are gay by demanding evidence they had engaged in homosexual acts. This information was unnecessary for discharge and could have subjected the sailors to criminal charges. The sailors were also told that, if they did not “prove” that they were gay, they would be criminally charged for making false official statements, placing them in an untenable Catch-22.

The command’s decision to investigate the threatened sailors’ private lives served only to fuel the ship’s rumor mill and increase the sailors’ vulnerability. AN Waldrop, who had already taken to sleeping in the common area because of fear for his safety, became afraid to sleep at all after learning of a new round of threats to “whip his faggot ass” (Exhibit 8). At this point, nearly two months after he reported the first threat, Waldrop’s worried parents made a written appeal to the ship’s Captain to protect their son’s safety and revealed their private family conversations about his sexual orientation

in an effort to satisfy the command that he is indeed gay and clear the way for his discharge.

In a nutshell, when an apparent pattern of targeting perceived gay men emerged on the *USS Eisenhower*, the ship's command did little to attempt to track down the perpetrators and instead investigated the private lives of the threatened sailors and questioned their veracity.

The command's actions violated the clear mandates of "Don't Ask, Don't Tell, Don't Pursue" and the Dorn memo. "Don't Ask, Don't Tell, Don't Pursue" prohibits commands from asking service members to provide information about their sexual activities in cases involving statements of sexual orientation. This is a fishing expedition.⁶⁶ A statement of sexual orientation alone is a sufficient basis for discharge.⁶⁷

The Dorn memo is also very clear. The Dorn memo states that "The report of a threat should result in the prompt investigation of the threat itself."⁶⁸ This did not occur on the *USS Eisenhower*. The Dorn memo states that "Investigators should not solicit allegations concerning the sexual orientation or homosexual conduct of the threatened person."⁶⁹ Yet, in the *Eisenhower* cases, the command asked the sailors to prove that that are gay by providing details of their sexual lives, if any. And the Dorn memo states that "Service members should be able to report crimes free from fear of harm, reprisal or inappropriate or inadequate governmental response."⁷⁰ The *Eisenhower's* response was not only inappropriate and inadequate, it potentially jeopardized the sailors' lives.

⁶⁶ Inquiry Guidelines, ¶ A(3).

⁶⁷ Inquiry Guidelines, ¶ C(2).

⁶⁸ Memorandum of Under Secretary of Defense Edwin Dorn, *Guidelines for Investigating Threats Against Service Members Based on Alleged Homosexuality*, (March 24, 1997)

⁶⁹ *Id.*

⁷⁰ *Id.*

Ultimately, all of the *Eisenhower* sailors who received anti-gay threats were discharged after intervention by the sailor's families, top Navy officials and members of Congress. It is an unfortunate result that these sailors had to choose between their careers and their safety, but that is the predicament in which "Don't Ask, Don't Tell, Don't Pursue" and their command's misguided actions placed them. SLDN notes with gratitude the response of top Navy officials when alerted to this situation. SLDN, however, urges the Navy to hold accountable those responsible for both the threats and command violations in this matter.

Gay Bashing Against A Marine

Former Marine Lance Corporal Kevin Smith can also testify to the double-edged sword of anti-gay harassment when commands do not know the rules or do not take appropriate steps to ensure the safety of their troops. On September 26, 1997, Smith was assaulted by two men outside of a gay bar in San Angelo, Texas. His injuries were severe enough to prompt witnesses to call an ambulance. Smith made the difficult decision not to press assault charges against his assailant, because, as he detailed in a subsequent letter to his commander, dated October 9, 1997, "I did not want the military to learn about the attack. I feared that the circumstances surrounding the attack would be used as an excuse to initiate an investigation into my sexual orientation" (Exhibit 34).

Even though he did not press charges, Smith's platoon sergeant somehow learned of the assault and questioned him about it three days later. The platoon sergeant's response confirmed Lance Corporal Smith's fears. As stated by Lance Corporal Smith in a letter to his commander, "[The Platoon Sergeant]...asked me if I knew what kind of a bar I was at (sic)." "He also questioned me as to if there was anything that I wanted to tell

him and whether or not I wanted to get out of the military,” Smith reports. The platoon sergeant warned Smith that a Naval Criminal Investigative Service (NCIS) investigation into the assault would be “very thorough.”

Because of the command’s misguided focus on his suspected sexual orientation rather than the assault, Lance Corporal Smith reluctantly decided that his only real option, like the sailors onboard the *USS Eisenhower*, was to come out and be discharged from the military. In the letter to his commander, Lance Corporal Smith explains, “I enjoy my service in the Marines and am distressed at the position in which the DoD’s antigay policy has placed me. However, the price of serving my country is too high if the military puts more of a premium on investigating my private life than in assisting me with bringing those who assaulted me to justice” (Exhibit 34). Lance Corporal Smith has filed an IG complaint about this incident. The IG has released no results of the review to date.

Investigators Threaten Soldier With Death

In the Army, a noncommissioned officer (NCO) reports that he received a death threat at the hands of agents for the Criminal Investigation Command (CID). The threat occurred in the Army witch hunt mentioned in the “Don’t Pursue” section. The NCO who was threatened reports that he was questioned about gay allegations in his workplace. When he said that he did not want to discuss the allegations and invoked his right to consult with an attorney, the agents reportedly handcuffed him in front of his subordinates, telling him he was “not cooperating,” and hauled him down to their headquarters. Once there, one of the agents reportedly threatened him, stating, “There are accidents in divisions. Sometimes people die. When word gets out, you may be one

of those.” The NCO did not officially report the threats. In his view, such a report would only invite further investigation on trumped up charges. Although the NCO was cleared on the false allegations, he reports lasting consequences of the CID agents’ outrageous behavior. These include lingering suspicions that he is gay and diminished standing in the eyes of his command, despite his stellar professional record.

Additional Incidents Of Anti-Gay Harassment

Other incidents of anti-gay harassment recorded by SLDN in 1997 include, but are not limited to, the following:

- A soldier reports that he received the following message on his answering machine: “I better not find you up on the second floor, you faggot. If I do, I’m going to kick your ass. I’ll kick your f---ing teeth out of the back of your head.” While the command did not investigate the soldier’s sexual orientation when he reported the threat -- a good development -- neither did the command or military police take steps actually to investigate the source of the threat. The threatened soldier lived in fear until the suspect was transferred at the end of his tour several months later.
- Shortly after an airman was questioned by his supervisor and coworkers about his sexual orientation, questions which he evaded, a coworker said to him, “If I ever saw two guys kissing, I’d beat them with a baseball bat.” The airman is very much afraid of coming forward with these facts for fear of his safety and his career.
- A marine reports that his car was vandalized after he was placed under investigation for allegedly dancing with two men in a crowded mixed-gender bar. The car was keyed in several places, holes were punched in the trunk and someone had kicked dents in it. An acquaintance of this marine reportedly received two phone calls saying, “Die fag” and “If I catch you around town, I’m going to kill you.”

Hostile Command Climate Tolerated

Many service members who contact SLDN report enduring hostile climates characterized by endless anti-gay epithets, comments and jokes. “Queer,” “Faggot” and “Dyke” are standard fare. Some of the many examples recorded in 1997 include the following:

- At the Marine Corps Recruiting Training Depot in San Diego, it is reported that drill instructors call recruits “butt f---ing c---suckers” and reprimand recruits who underperform by stating, in the case of marching, “show us how queers march.”
- In the Army, a physician reports hearing a supervisor say, “If I had a gay son, I’d kill him.”
- In Italy, a marine first sergeant reportedly greets new unit members with, “There are three things I hate: liars, thieves and faggots.”

There is no room in today’s military for comments such as these. Especially given the risk that service members face in reporting these incidents to their commands, it is incumbent on leaders to fulfill their responsibilities in setting the command climate. To date, that has not happened.

Hostile command climates erode unit cohesion. Morale dips whenever unit members, gay and straight, perceive that the command is not fair or evenhanded. Commands that condone, or at least tolerate, harassment risk the very real perception that they do not follow the rules and do not respect the work of members in the unit. Commands that permit anti-gay harassment send the terrible signal that anti-gay violence is okay and that those who harass need not fear consequences.

Lesbian-Baiting As A Weapon of Sexual Harassment

In addition to anti-gay harassment, violations of “Don’t Harass” also include lesbian-baiting, a form of sexual harassment. Women – straight, gay, and bisexual – often are accused of being lesbians when they rebuff sexual advances by men or report sexual abuse. Women who are top performers in nontraditional fields are also subject to lesbian accusations, rumors and speculation designed to undermine their professional standing. Too often, commanders respond by investigating military women under the guise of enforcing “Don’t Ask, Don’t Tell, Don’t Pursue,” rather than disciplining the individuals who start such rumors or who perpetrate sexual abuse. As a result, many women do not report sexual assault or harassment because they realistically fear that they will be accused as lesbians, investigated and even discharged. Others backtrack from the assertive leadership styles that have made them competent military leaders – and vulnerable targets for lesbian accusations.

The good news in 1997 is that this form of sexual harassment finally began to receive the high-level attention it deserves. The previously mentioned Dorn memo marks the first time in history that DoD has acknowledged that lesbian-baiting exists and has taken steps to address it, though DoD advisory bodies have addressed the issue previously.⁷¹

In May 1997, the Senate Armed Services Committee also addressed this form of harassment for the first time, in Senate Report 105-29 supporting the DoD Authorization Bill (Exhibit 35):

⁷¹ Defense Advisory Committee on Women in the Services (DACOWITS) 1989 Spring Conference, Recommendation #12 (1989) (“The DACOWITS recommends DoD expand existing leadership training to include dealing with unfounded accusations of homosexuality against Service members.”).

The committee is concerned by an increasing number of reports that service members who refuse to participate in improper sexual activities or who report improper sexual activities by others are being labeled as being homosexual as a form of retaliation. Such labeling is especially insidious in its secondary effects which frequently include additional harassment, humiliation, ostracism, and, in extreme cases, improper investigation for homosexuality.

The committee report “urges the Department of Defense and leaders at all levels” to “ensure that no individual experience [sic] the need to submit to unwanted sexual advances or harassment for any reason” and to permit individuals to report inappropriate activities without fear of retaliation.⁷² The report further states the committee’s concern that “the right to investigate individual conduct is not used as a threat or abused in any manner.”⁷³

Though lesbian-baiting is prevalent in all of the services, the Army is the only service that has explicitly addressed the issue. The *Senior Review Panel Report on Sexual Harassment*, released in September 1997, notes that “[f]emale soldiers who refuse the sexual advances of male soldiers may be accused of being lesbians and subjected to investigation for homosexual conduct...”⁷⁴ (Exhibit 36). Further, the report continues, “Women accused of lesbianism believe that the mere allegation harms their careers and reputations irreparably.”⁷⁵ Given the serious risks involved in reporting lesbian-baiting, it is significant that soldiers raised this issue on their own initiative in focus groups, as well as other venues, during the Panel’s visits to Army bases. The Panel itself did not specifically survey or question soldiers about lesbian-baiting.

⁷² Senate Report #105-29 (1997) at 281.

⁷³ *Id.*

⁷⁴ THE SECRETARY OF THE ARMY’S SENIOR REVIEW PANEL REPORT ON SEXUAL HARASSMENT, VOLUME 1 (July 1997) at 66.

⁷⁵ *Id.*

SLDN commends the Army for its courage in conducting this review and appreciates the Panel's acknowledgment of soldiers' concerns regarding lesbian-baiting, placing the Army a step ahead of the other services. SLDN is concerned, however, that the process for implementing the Panel's recommendations appears to have stalled.

An independent Inspector General survey of the Army's 91st Division (Training) conducted in 1992 and obtained this year by SLDN foreshadowed the results of the Army Senior Review Panel (Exhibit 37). According to this Inspector General, "[T]he prohibition against homosexuals in the Army results in a subtle 'billy club' for anyone to use against single women in the Army. When they turn down a 'date' with another soldier, it is often whispered unjustifiably, that she is 'lesbian.'"⁷⁶

Despite these official landmarks, lesbian-baiting kept turning up in high profile cases in 1997. When retired Sergeant Major Brenda Hoster accused the Army's top enlisted man, Sergeant Major of the Army Gene McKinney, of sexual misconduct, anonymous allegations that Hoster is a lesbian surfaced almost immediately in the *Los Angeles Times* and other publications.⁷⁷ Shortly thereafter, McKinney's attorney began openly to accuse Hoster of being a lesbian and to question her friendships with female Army colleagues.

Perhaps the most ironic case of lesbian-baiting involved Air Force Lieutenant Kelly Flinn. Under investigation for adultery with a man, among other charges, Lieutenant Flinn was questioned out-of-the-blue by Air Force investigators about whether

⁷⁶ SURVEY RESULTS, DEP'T OF THE ARMY 91ST DIVISION (TRAINING), *Sexual Harassment and Sexual Discrimination* (October 20, 1992) at 6.

⁷⁷ Casper Zeuthen, *Accuser's Story Dispute in Army Sex Case*, THE LOS ANGELES TIMES A10 (July 30, 1997).

she was involved in a lesbian relationship.⁷⁸ In response to a reporter's question about the interrogation, Flinn remarked on the lesbian-baiting dynamic at work: "The fact that I wasn't dating openly sparked rumors that I was homosexual You can't win."⁷⁹ Though invited to do so by SLDN, the Air Force has not disputed this published account of Flinn's interrogation (Exhibit 38). To SLDN's knowledge, no one has been held accountable for the blatant violation of "Don't Ask, Don't Tell, Don't Pursue" that occurred in this incident.

That investigators would, during a heterosexual adultery investigation, question Lieutenant Flinn about her sexual orientation and the nature of her friendships with other military women underscores the prevalence of long-held stereotypes that fuel lesbian-baiting. Retired Air Force Colonel Barbara Wilson characterized the perception of military women on a recent CNN television special: "When women first went in service, the adage was that only queers or prostitutes went in service And I think that has just carried down from generation to generation."⁸⁰ Colonel Wilson continued, "But it's not just lesbians that are baited, it's women, generally speaking [who do not give in to sexual overtures]."⁸¹

SLDN's cases in 1997 reflected the continued problem of lesbian-baiting in the ranks. Former Army Sergeant Victoria Casper reports that she was forced out of the Army due to lesbian-baiting. In a complaint filed with the Department of Defense Inspector General, Sergeant Casper states that a male coworker constantly made degrading remarks about her, including Casper is "a f---ing lesbian," Casper is "a f---ing

⁷⁸ Tamara Jones, *The Pilot's Cloudy Future*, THE WASHINGTON POST D1 (April 29, 1997).

⁷⁹ Elaine Sciolino, *From a Love Affair to a Court-Martial*, NEW YORK TIMES, Section 1, page 1, Column 5, National Desk (May 11, 1997).

⁸⁰ *Sexual Bias in the Military* (CNN Impact broadcast, Transcript # 98020100V55 February 1, 1998).

woman.” Sergeant Casper reports that the coworker routinely accused her of being a “carpet muncher,” “faggot,” “queer” and “dyke” in front of witnesses, and of advancing professionally by giving sexual favors.

Sergeant Casper filed a sexual harassment complaint against the coworker with the base Equal Opportunity office. Shortly thereafter, allegations were lodged against Sergeant Casper by a close personal friend of the coworker, accusing Sergeant Casper of engaging in a homosexual marriage. Sergeant Casper vigorously denied the allegations. The allegations, constant harassment and lack of an appropriate command response took their toll. Ultimately, she came to the difficult conclusion that fighting the allegations would jeopardize the honorable discharge she had been offered and she decided to leave the military. The Department of Defense Inspector General has yet to conclude a review of this matter.

In a Marine Corps case, a female marine reports that her husband accused her as a lesbian after she filed for divorce proceedings. The female marine has a stellar record, while her husband has a record of disciplinary problems, including sexual harassment, and a history of domestic violence. Despite the husband’s clear motives for retaliation, the female marine’s command initially asked her if she were gay and threatened her with unspecified criminal charges. While this situation ultimately dissipated when the wife moved to a new command, she fears that her ex-husband will soon try again to derail her career through false allegations. SLDN is not aware of any action taken against the husband by his command.

In one last example of lesbian-baiting, a senior officer writes that, even after twenty years of stellar service, she is still baited as a lesbian (Exhibit 39). She recounts

⁸¹ *Id.*

that twenty years ago “I was propositioned daily and when I questioned their behavior and refused to ‘play’ the game I was called names, labeled as a ‘dyke.’ Obviously there was something wrong with me if I did not want to be with them!” She has endured repeated investigations, threats, rumors and false allegations during her career.

Recently, her commander received a series of anonymous allegations that she is a lesbian. She is in a good command that recognizes that anonymous allegations are not a sufficient basis to start an inquiry and that good leaders may have accusations of one sort or another thrown at them by detractors. She remains worried that one day a commander will take the allegations and run with them, though they are unfounded. She has witnessed countless episodes herself when women’s careers have been derailed by false allegations of lesbianism.

A Freedom of Information Act (FOIA) request submitted in the early 1990s produced a redacted file with documents alleging that she is a lesbian. After reading the file, she knew that those who had made prior allegations against her were men whom she had outperformed in her career. In a letter dated January 28, 1998, she writes, “The people I had passed by with early promotions and plum assignments continue to name call me today!”

As we have in past years, SLDN urges DoD and the services to address lesbian-baiting as an integral part of their sexual harassment programs. The military’s best efforts will not halt sexual harassment as long as perpetrators can use gay accusations as a trump card to silence their victims, derail sexual abuse investigations and punish women who excel in the military. Sexual extortion and smear campaigns impose an

unnecessary burden on women in the military and are an unjust return for their dedicated service to our nation.

Good Command Actions To Stop Harassment

SLDN documented some cases where commanders took appropriate steps to protect service members from anti-gay harassment or lesbian-baiting. The high-ranking woman officer mentioned above reports that her current command is supportive in her efforts to combat ongoing lesbian-baiting threats. The woman whose ex-husband has retaliated against her by accusing her as a lesbian reports that her new command is supportive and aware of his retaliatory motives. In another case, an Air Force commander appropriately dropped an inquiry started when a soldier reported anti-gay harassment after SLDN alerted him to the standards set forth in the Dorn memo. A sailor reports that his command took immediate steps to stop anti-gay slurs and graffiti directed at him when the command was alerted to the situation. SLDN is happy to report that all of these service members continue to serve.

SLDN also commends the Marine Corps for holding accountable five marines who detonated a stolen military tear gas canister in Remington's, a local gay bar in Washington, D.C. More than a dozen Remington's customers suffered severe burning of the eyes and throat after breathing the fumes released by the tear gas grenade.⁸² A Marine Corps investigation revealed that five marines had deliberately planned the July 1997 attack against the gay bar and carried it out. The Marines included Lance Corporals Carl Richard Bennett, Jr., Sean Falsey, Richard Todd Nance and Ryan Barrett. The Marine Corps court-martialed all five accused of the attack. All five have been

convicted. Four have been sentenced to confinement from four weeks to four months, reduced in rank and fined. Three of those four will receive bad conduct discharges. One will be allowed to serve out his term of enlistment. One marine awaits sentencing, and has not been identified.⁸³

SLDN is also happy to report that on May 6, 1997, the Joint Service Committee issued a recommendation to amend the Manual for Courts Martial to provide for sentence enhancement in cases of hate crimes involving sexual orientation, among other factors.⁸⁴ The Department of Defense has not acted on the recommendation to date.

SLDN urges the Department of Defense and the services to fully distribute the Dorn memo on anti-gay harassment and lesbian-baiting to the field. SLDN also urges DoD and the services to take affirmative measures to prevent anti-gay harassment and lesbian-baiting in the first place. Mission effectiveness depends on cohesion, not the sort of division created by threats, harassment, extortion and hostile command climates.

⁸² Jennifer Ordonez, *Police Criticized for Response To Tear Gas Attack at D.C. Bar*, THE WASHINGTON POST A16 (July 17, 1997).

⁸³ Lou Chibbarro, Jr., *Marines Demoted, Sent to Brig*, THE WASHINGTON BLADE (February 13, 1998).

⁸⁴ 62 Fed. Reg. 24640 (1997).

ANALYSIS

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

Why do commands continue to ask, pursue and harass in direct violation of “Don’t Ask, Don’t Tell, Don’t Pursue?” The reason is simple: a lack of commitment from top military and civilian authorities to ensure that the limits on gay investigations are followed. Military leaders have forgotten the intent of the policy to “provide a decent regard for the legitimate privacy and associational rights of all service members”⁸⁵ and to “prevent the military from prying into people’s private lives.”⁸⁶ Just one example of this problem involves former Air Force Secretary Sheila Widnall who, in response to a reporter’s questions, could not explain what the “zone of privacy” was for service members under “Don’t Ask, Don’t Tell, Don’t Pursue.” Secretary Widnall’s response: “Never heard of it.”⁸⁷

Three areas illustrate leaders’ current lack of commitment in following the rules and guidelines under “Don’t Ask, Don’t Tell, Don’t Pursue.” One, military leaders have done little to communicate the intent and letter of the policy or to train all service members to ensure that the limits on gay investigations are followed in the field.

Two, investigators and inquiry officers have run rough-shod over service members’ legal rights, using heavy-handed investigative tactics to coerce and intimidate suspected gay members.

Three, no effective recourse currently exists for service members to challenge command violations of “Don’t Ask, Don’t Tell, Don’t Pursue,” and there is no

⁸⁵ President William J. Clinton, *Text of Remarks Announcing the New Policy*, THE WASHINGTON POST A12 (July 20, 1993).

⁸⁶ *World News Tonight*, (ABC news broadcast, Transcript number 97022604-J04, Feb. 26, 1997).

accountability. Commands do not know what the rules are. Administrative discharge boards too often rubber stamp command actions. And Inspectors General have proven consistently ineffective in addressing allegations of command violations in any meaningful way.

There are no incentives to do the right thing, and there are no disincentives not to do the wrong thing. The result is a climate where “anything goes” in the pursuit of suspected gay people. Commanders who want to do the right thing have little support.

The Absence of Guidance and Training

The Department of Defense and the services have provided no real guidance to the field on the intent of “Don’t Ask, Don’t Tell, Don’t Pursue” to afford a zone of privacy for service members and to limit gay investigations.

SLDN, for example, continues to be required to send copies of the “Don’t Ask, Don’t Tell, Don’t Pursue” policy and service regulations to a significant number of military attorneys and service members, including leaders in the chain-of-command. These are basic documents, without which it is impossible to correctly handle gay cases, and yet they are not available in many units in the field. This is a problem in all the services.

The regulations and guidelines under “Don’t Ask, Don’t Tell, Don’t Pursue” also remain unwieldy. The DoD implementing regulations are one hundred pages long and are written in legalese. The express limits to gay investigations are scattered throughout the regulations such that even many of the most experienced military attorneys do not know that limits on investigations exist. Four years into the current policy, the

⁸⁷ *Don’t Ask, Don’t Tell*, (ABC news broadcast, November 1997).

Department of Defense has, with one exception, not issued any concise guidance on the limits to gay investigations and the intent to stop prying.

The one exception is the Dorn memorandum, which states that reports of anti-gay harassment and lesbian-baiting are not to be used as a basis for investigating those who report the harassment. A full eleven months after it was issued, however, the memo has not been distributed to the field. Of the hundreds of commanders, service members and attorneys SLDN has had contact with this year, not one had even heard of the Dorn memorandum. Service members who suffered harassment this year did not benefit from this guidance. Commanders who were concerned about anti-gay harassment and lesbian-baiting did not know they had the backing of the Pentagon to take appropriate steps. The result is that, in a year when we hoped to see a dramatic decrease in harassment, we saw harassment surge.

When guidance is provided, it often focuses attention on how to “get” gay people instead of how to limit investigations. Three memoranda in particular, as discussed in last year’s report, are fueling inappropriate fishing expeditions against suspected gay personnel.

The first is a Navy memorandum issued in June 1994 by the Navy’s appellate litigation group. The memorandum suggests that gay associational activities, such as belonging to a gay men’s chorus, are “inconsistent with good military character” (Exhibit 40). This contradicts “Don’t Ask, Don’t Tell, Don’t Pursue,” which explicitly permits service members to attend gay pride parades, gay bars and engage in other associational activities.⁸⁸

The second memorandum, from the Air Force, instructs inquiry officers to

conduct wide-ranging fishing expeditions against service members who state they are gay. The November 3, 1994 memorandum (Exhibit 41) and its November 17, 1995 (Exhibit 42) successor are very specific, encouraging inquiry officers to interrogate “parents and siblings,” “school counselors” and “roommates and close friends,” among others.⁸⁹ The memoranda provide officers with a laundry list of twenty-five questions to fish for information about service members’ private lives that can be used to press criminal charges and other harsh punishment against them.⁹⁰ The guidance contradicts explicit prohibitions in “Don’t Ask, Don’t Tell, Don’t Pursue” against expanding the scope of inquiries beyond the instant factual allegations in a case.⁹¹ The Air Force is using “statements” cases to bootstrap inquiries into service members’ 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 of November 3, 1996 also unequivocally states that “if...other military members are discovered during the proper course of the investigation...appropriate action may be taken.”⁹² No proper investigation under “Don’t Ask, Don’t Tell, Don’t Pursue” would ever turn up other people: that is a witch hunt.

As explained in the “Don’t Pursue” section, the Air Force has defended its memoranda as necessary to protect against “fraud” in cases where service members who have received funded education may state that they are gay to avoid a service obligation. There is, however, no evidence that backs up the Air Force’s claims. Furthermore, the

⁸⁸ Inquiry Guidelines, ¶ E(4).

⁸⁹ Memorandum for all Staff Judge Advocates, *Commander Inquiries on members stating they are homosexual*, Harlan G. Wilder, Chief, General Law Division, Office of the Staff Judge Advocate, Department of the Air Force, November 17, 1995.

⁹⁰ *Id.*

⁹¹ Inquiry Guidelines, ¶ A(3).

⁹² Air Force memorandum, note 89.

Air Force's argument does not explain why the Air Force is using the fishing expedition tactics described in its memoranda in many cases that do not involve funded education or bonuses. Thus, the Air Force has justified over-the-top, "prove you're gay" investigations to purportedly snag the hypothetical heterosexual frauds or slackers who want to avoid military service.

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 43) 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 service members. This development marks an unprecedented governmental infringement on the privacy of civilians, not only the service members who confide in them, turning even parents into potential witnesses against their children.

SLDN has asked that the Department of Defense, Air Force and Navy rescind these memoranda or issue new guidance to supercede these policies in each of the past two years, but, to date, they have not.

The lack of training or incorrect training mirrors the lack of guidance and wrong guidance covering the limits to investigations under "Don't Ask, Don't Tell, Don't Pursue."

Last year, SLDN highlighted a Navy training slide presented to commanders in the Atlantic Fleet that encourages commands to seek out suspected lesbian, gay and bisexual service members (Exhibit 44). 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 service members.”⁹³ To our knowledge, there has been no change in Navy training.

Also, last year, SLDN reported that some Equal Opportunity officers and NCO’s had specifically requested guidance and training from the Defense Equal Opportunity Management Institute (DEOMI), but DoD reportedly ordered DEOMI not to teach any courses on “Don’t Ask, Don’t Tell, Don’t Pursue.” To our knowledge, the situation has not changed.

Heavy-Handed Investigative Tactics

The second reason that service members continue to face witch hunts and other violations of “Don’t Ask, Don’t Tell, Don’t Pursue” is that commanders and investigators have free rein to run rough-shod over service members’ legal rights. On one level, this is a systemic problem about which concern has been expressed by many entities, both civilian and military, besides SLDN. On the other hand, the use of heavy-handed tactics in gay cases is a more specific concern that is directly related to the punitive guidance that has been issued to the field and the lack of adequate training on “Don’t Ask, Don’t Tell, Don’t Pursue,” discussed above.

“Don’t Ask, Don’t Tell, Don’t Pursue” explicitly requires commanders and others to inform service members of the policy and to read service members their legal rights prior to any questioning.⁹⁴ SLDN, however, documented twenty-one separate incidents in 1997 where inquiry officers and investigators failed to inform service members of their legal rights to remain silent and consult with an attorney under Article 31 of the Uniform Code of Military Justice. In an additional seven cases, inquiry officers or investigators failed to end their questioning, in violation of military law, once a servicemember had invoked his or her rights.

In thirty-four cases documented by SLDN this year, inquiry officers and investigators threatened adverse action against service members if they failed to “cooperate” by admitting that they are gay, confessing to gay conduct or accusing others as gay. Threats used in this context included threats of criminal charges, confinement, forced polygraphs, non-judicial punishment, retaliatory personnel actions, outing service members to family and friends and unwarranted Other Than Honorable discharge characterizations. Such threats are precisely the kind of activities that this policy was supposed to stop. That they continue underscores the “business as usual” climate that exists in the field.

Finally, in eight cases, inquiry officers and investigators conducted illegal searches and seizures in violation of military law and the Fourth Amendment to the United States Constitution.

Some examples illustrate the problem. In one case described in the “Don’t Pursue” section, a senior enlisted Air Force member came under investigation based on

⁹³ President William J. Clinton, *Text of Remarks Announcing the New Policy*, THE WASHINGTON POST A12 (July 20, 1993).

false allegations that he had made a statement of gay orientation and made advances to a male coworker. The inquiry was conducted by a prosecutor who, of all people, failed to read the servicemember his rights and who refused to halt the questioning after the Air Force member, on his own initiative, invoked his right to remain silent and consult with a defense attorney.

The prosecutor took the Air Force member into an empty courtroom, directed him to the witness box and made him raise his right hand to be “sworn in.” The Air Force member was told he had no choice but to respond to the allegations against him. The prosecutor began his questioning by stating, “[The purpose of] my inquiry is to develop evidence prejudicial to you.” He then insisted again that the Air Force member could not refuse to answer his questions, while proceeding to pose questions that were potentially incriminating.

A later legal review of the officer’s actions substantiated many of these investigative abuses, but excused them as inconsequential, basically harmless errors, because the command ultimately concluded that the accuser was not credible and dropped the investigation (Exhibit 45). This gets the standard backward, however. Credible information is required *before* commanders may initiate investigations. Commanders may not fish for information in an effort to justify, *post hoc*, the inquiries they launch. This prosecutor was never held accountable, sending the message that leaders will wink at blatantly illegal actions in gay cases.

Another Navy enlisted man was physically assaulted on base because of suspicions that he might be gay. In questioning him, base police interrogated the service member about his sexual orientation, rather than the assault. The service member was

⁹⁴ Inquiry Guidelines, ¶ D(3).

not read his rights until after he had already been duped into confirming the suspicions regarding his sexual orientation.

During almost three hours of questioning, investigators threatened to make him take a polygraph, falsely told him that he would not lose his right to an attorney if he signed a rights waiver form, and threatened to visit local gay bars with his photograph to obtain confirmation that he had patronized those establishments.

Separately, and prior to the interrogation of this sailor, the investigators also questioned one of his friends. During this interview, investigators falsely told the friend that the service member had already confessed to being gay, in an attempt to pressure her to make a written statement confirming his orientation.

A last example involves the sailor who was asked fifty questions about his private life in the “Homosexual/Bisexual Questionnaire” and supplemental questions as discussed in the “Don’t Ask” section. The sailor was not read his rights before being questioned. He and another sailor questioned were, between the two of them, threatened with criminal prosecution for sodomy, indecent acts, and making false official statements, non-judicial punishment and unwarranted Other Than Honorable (OTH) discharges. Even more disturbing, they were told to stop reporting the anti-gay harassment they were experiencing. According to one of the sailors, a senior military attorney on their ship threatened them as follows (Exhibit 4):

You are going to Mast, it’s just that the Captain doesn’t have time for you and your problems right now; you are not a priority. You are not at risk. I don’t believe you’re scared, so stop telling people that you are. Now, if you want to stay in the Navy, tell the truth now that you lied and I’ll charge you with false official statements or keep on lying and stick with your original statement and I’ll see you

get an OTH.⁹⁵ Did [the paralegal] and [the chaplain] tell you that you would be discharged without mast if you turned yourself in? Well, that's the way we have always done it but this is different, you work in security, and we have to start to punish you people so you won't come forward whenever you want an honorable discharge.

The attorney's reported statement demonstrates the punitive trend that has emerged under "Don't Ask, Don't Tell, Don't Pursue." Service members who report anti-gay harassment are viewed as the problem and the response is to threaten and punish them into silence. Once a servicemember is suspected of being gay, his or her legal rights and the already weak guarantees of due process in the military are trampled. Numerous other examples have been mentioned throughout this report.

The Department of Defense has been criticized in the past for not reining in the heavy-handed tactics of inquiry officers and military investigators. In a 1995 report, a blue-ribbon panel reviewing the investigative capabilities of the Department of Defense criticized reported incidents of criminal investigators failing to advise subjects of the crimes of which they were suspected, as required by military law, and coercing confessions through abusive interview techniques.⁹⁶ The panel also noted reports of subjects' rights being violated in command directed inquiries, including the failure of inquiry officers to inform subjects of the reason for investigation or of their rights, and improper seizure or collection of evidence.⁹⁷

In its report, the Advisory Board on DoD Investigative Capability stated, "Actual protection of an individual's rights during an investigation hinges on the conduct of the

⁹⁵ DoDD 1332.30, Enclosure 7, Character of Discharge, ¶ B(1) (Under current regulations, a statement of gay orientation cannot be a *per se* basis for lowering a servicemember's discharge characterization.).

⁹⁶ REPORT OF THE ADVISORY BOARD ON THE INVESTIGATIVE CAPABILITY OF THE DEPARTMENT OF DEFENSE, Charles F.C. Ruff, Chairman at 34.

⁹⁷ *Id.* at 93.

agent pursuing the investigation and the suppression of any evidence, real or testimonial, gained in violation of those rights.”⁹⁸ To further the goal of responsibility by those conducting investigations, the panel recommended increased training and guidance, particularly in command directed inquiries.⁹⁹ The panel also recommended that the military increase accountability for investigative abuses committed by inquiry officers, suggesting accountability within the evaluation and promotion process as well as consideration of an exclusionary rule that would prohibit improperly obtained information from being used in administrative proceedings.¹⁰⁰

The recommendations of the Advisory Board on DoD Investigative Capability mirror recommendations made by SLDN in our previous annual reports. The continuing lack of guidance, training and proper investigative tactics significantly contribute to the investigative abuses described above and should be addressed by the military leadership.

Lack of Recourse and Accountability

The last significant reason why commands continue to ask, pursue and harass in direct violation of “Don’t Ask, Don’t Tell, Don’t Pursue” is that there are no incentives not to. In the past two years, SLDN is not aware of a single commander who has been disciplined for violating the limits to gay investigations. Too often, as in the case of the Air Force member described above who was taken into the jury room, placed under oath, not read his rights and denied an attorney, those reviewing the matter conclude that the command actions constitute “harmless error.” In the case of Senior Chief Petty Officer Timothy R. McVeigh, the Navy asserts that, even if investigators violated the limits to

⁹⁸ *Id.* at 42.

⁹⁹ *Id.* at 59, 62, 102.

¹⁰⁰ *Id.* at 103.

investigations under “Don’t Ask, Don’t Tell, Don’t Pursue,” Senior Chief McVeigh had no basis to challenge those violations.

So where can a service member turn when he or she is the subject of an improper inquiry or investigation under “Don’t Ask, Don’t Tell, Don’t Pursue?” Commands do not know what the rules are. There are no procedural means that enable military defense attorneys to challenge and stop fishing expeditions. Service members cannot exclude evidence obtained during the course of improper inquiries at administrative discharge boards because there is no exclusionary rule. Rumor, innuendo and speculation are permissible evidence. The lack of evidentiary safeguards results in administrative discharge boards that often rubber stamp command actions. The chain-of-command has failed time and time again to exert leadership and correct command mistakes. Thus, the administrative system serves to encourage command violations of “Don’t Ask, Don’t Tell, Don’t Pursue,” not curb them.

Previously, the General Counsel’s office of the Department of Defense instructed SLDN to direct service members who are being discharged as a result of command violations of “Don’t Ask, Don’t Tell, Don’t Pursue” to their Inspector General. We have done so. In our experience, however, Inspectors General consistently fail to offer effective redress, or take so long to review the matter that the delay effectively derails a service member’s career.

In three cases reported last year, for example, neither the service nor Department of Defense Inspectors General have reviewed the complaints in a meaningful way. One case was that of Senior Airman Sonya Harden. Harden was discharged despite there being no evidence of homosexual conduct before the discharge board.

While Senior Airman Harden was stationed at Eglin Air Force Base in Florida, a former roommate accused her of being a lesbian. The woman later retracted the accusation and testified at the discharge board that the accusation was false. At the board, Senior Airman Harden presented evidence that her accuser had previously threatened to accuse her of being a lesbian if she did not pay the accuser money. Senior Airman Harden produced witnesses that testified about her heterosexual relationships. The original false allegation, however, was enough to end Senior Airman Harden's career.

Senior Airman Harden had been MSS Airman of the Quarter, MSS Airman of the Year in 1992, Personnel Specialist of the Year in 1993 and Hurlbert Field Airman of the Quarter in 1995.

Senior Airman Harden filed a complaint with the Air Force Inspector General prior to her discharge (Exhibit 46). The Inspector General refused to review the case while discharge proceedings were pending against Senior Airman Harden. On Senior Airman Harden's behalf, SLDN then filed a complaint with the Department of Defense (DoD) Inspector General's (IG) office subsequent to her discharge. In April 1997, the DoD IG refused to review the matter, erroneously interpreting the purpose of the complaint. On April 30, 1997, SLDN requested that the DoD IG reconsider this decision, pointing out that the purpose of the complaint was to seek review of the command's improper actions, a request that is within the IG's authority. On June 3, 1997, the DoD IG agreed to task the Air Force Inspector General to review the case. On December 23, 1997, the Air Force Inspector General concluded that the inquiry against Senior Airman Harden "was fair and impartial and consistent with policy." The Air Force Inspector

General never contacted Senior Airman Harden nor SLDN during the review. Nor did the Air Force Inspector General address any of the specific allegations by Senior Airman Harden that her command failed to follow the limits on investigations under “Don’t Ask, Don’t Tell, Don’t Pursue.”

The Inspector General has also failed, to date, to address the complaint filed by former Airman Jennifer Dorsey (Exhibit 47). Airman Dorsey reported that she had been attacked in the latrine by two women coworkers who repeatedly hit her in the stomach while telling her, “You sick f---king dyke!” This attack occurred after Airman Dorsey had already brought prior incidents of harassment to the attention of her First Sergeant. When apprised of the harassment incidents, Airman Dorsey’s commander, according to her complaint, failed to discipline the women who attacked her and instead threatened Airman Dorsey with a gay investigation (Exhibit 48 and Exhibit 49).

The Department of Defense Inspector General agreed to review Airman Dorsey’s complaint on April 24, 1997. On November 21, 1997, the DoD IG responded to a status inquiry that they had tasked the Air Force Inspector General to review the matter and did not know any results yet. SLDN has inquired into Airman Dorsey’s complaint six times since June 1997. To date, however, no representative from the Air Force Inspector General’s office has contacted Airman Dorsey, her military attorney or SLDN.

SS3 Kelli Sprague’s complaint has also not been resolved. SS3 Sprague reported that her commander directly questioned her about her sexual orientation, threatening her with criminal prosecution for making a false official statement if she did not answer his questions and do so truthfully (Exhibit 50). Under great pressure, she admitted to being a lesbian. Based solely on this coerced admission, she was discharged. Six months after

filing the complaint with the Department of Defense Inspector General, no representative has contacted SS3 Sprague or SLDN.

In a case highlighted two years ago, the Navy Inspector General has only recently completed a review of allegations by Seaman Amy Barnes, substantiating many of her claims. Barnes reported that she was one of up to fifty women targeted in a witch hunt onboard the *USS Simon Lake*. Two shipmates filed affidavits in federal court in this case, stating that they had been threatened with prison unless they accused Seaman Barnes of being a lesbian or confessed to being lesbians themselves (Exhibit 51 and Exhibit 52).

The Inspector General report in this case concludes that Navy officials failed to read Seaman Barnes her Article 31 rights to remain silent and consult with an attorney and improperly expanded the scope of the investigation beyond the original allegations against Seaman Barnes. SLDN welcomes these conclusions. However, the Inspector General excused the violations as “not intentional” and the Navy has declined to hold any of those who committed violations of the rules accountable. Whether or not intentional, the effect of the violations is the same: Seaman Barnes lost her Navy career. Even more disturbing, the Navy does not appear to be taking steps to prevent future “unintentional” violations that will have the same result for other sailors.

As shown above, there is currently no effective way for service members to address violations when they occur. Even if the overworked Inspectors General offices had the resources they need to fully address the many complaints they receive, it would not cure the deficiencies pointed out in this report. The bottom line is that the kind of basic violation documented by SLDN should not be occurring in the first place at this point, nearly five years into “Don’t Ask, Don’t Tell, Don’t Pursue.” This responsibility

rests squarely on the chain-of-command. The energy spent by military leaders to justify command abuses when they occur would be better spent training their subordinates to follow the limits on investigations.

The vigor with which commands have pursued suspected gay personnel stands in stark contrast to the lackadaisical attitude of top uniformed leaders regarding training, accountability and other issues necessary to stop violations. The lack of interest at the top of the chain-of-command regarding the limits on gay investigations signals to local commands that the hunt is still on.

CONCLUSION

It is time for military leaders to obey the law. Command violations of “Don’t Ask, Don’t Tell, Don’t Pursue” surged for the fourth year in a row. Commanders asked. Commanders pursued. Commanders harassed. These violations must stop. They cannot and should not be justified by uniformed leaders or senior officials of any service.

The path is clear. The Department of Defense and the services need to issue written guidance to all service members about the limits on investigations under “Don’t Ask, Don’t Tell, Don’t Pursue.” Leaders must train everyone so that the intent of the policy, as articulated by General Colin Powell, Senator Sam Nunn, Secretary of Defense William Cohen and the Commander-in-Chief, President William J. Clinton, is perfectly clear: Stop prying.

Last year, in response to SLDN’s *Third Annual Report* on “Don’t Ask, Don’t Tell, Don’t Pursue,” Secretary Cohen ordered a review of the implementation of the current policy. He promised an end to the “pursuits and prosecutions.” We look forward to the results of DoD’s review and hope that the Pentagon will begin to address the problems shown in the implementation of “Don’t Ask, Don’t Tell, Don’t Pursue” over the past four years.

It should be a wake-up call to military leaders that Professor Charles Moskos, the architect of “Don’t Ask, Don’t Tell, Don’t Pursue,” has criticized the heavy-handed enforcement of current regulations. In the words of Professor Moskos: “heavy-handed ‘enforcement’ will inadvertently undermine the ‘Don’t Ask, Don’t Tell’ policy by eroding confidence among servicemen that the [military] will not ‘ask’ if they do not ‘tell.’ It is these kinds of actions by the military...that pose the greatest threat to the

efficacy of the policy...” (Exhibit 17). While we do not agree with Professor Moskos about the efficacy of the policy, we do agree that the military must obey its own rules. Continued command violations of the basic limits on investigations under “Don’t Ask, Don’t Tell, Don’t Pursue” will not only erode confidence within the military, it will erode the confidence of the American people. Americans cannot view military officials as acting in good faith in light of reports that commanders are interrogating parents and psychologists and conducting intrusive fishing expeditions in their endless pursuit of suspected gays in the ranks.