

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

EXECUTIVE SUMMARY

Living in forced isolation, in constant fear of investigation and inadvertent disclosure is harmful to gay service personnel. Each day I am witness to...anti-gay comments and attitudes. The Navy takes no action to stop this improper and outrageous behavior on the part of its best and brightest officers. My witness to this unfortunate anti-gay climate, and the direct harm that it causes me, forces me to disclose to you that I am gay. — Navy Officer

The Pentagon’s implementation of “Don’t Ask, Don’t Tell, Don’t Pursue” is a failure. Anti-gay harassment, asking and pursuits have surged to record levels since Congress enacted this law five years ago. Last year alone, reports of anti-gay harassment more than doubled. Reports of asking and pursuits increased 42%. These violations are due to lack of leadership. Military leaders have refused to send guidance to the field explaining the explicit investigative limits under “Don’t Ask, Don’t Tell, Don’t Pursue” and its intent to respect service members’ privacy. Military leaders have held no one accountable for asking, pursuits or harassment. As a result, many commanders and investigators do not know the intent or letter of “Don’t Ask, Don’t Tell, Don’t Pursue.” Others deliberately violate the policy, knowing their leaders do not take it seriously.

Service members have no way to protect themselves from harassment or to stop improper investigations. There is nowhere they can turn for help without fear of reprisal. Military leaders have wrongly required service members to keep their sexual orientation a total secret, forcing them to lie about who they are, even to their families, best friends and health care providers.

The result is that discharges under “Don’t Ask, Don’t Tell, Don’t Pursue” have soared. The Pentagon is firing three to four people every day for being lesbian, gay or bisexual—a total of 1,149 discharges last year alone (Exhibit 1). Gay discharges last year were the highest in a decade, and represent an 86% increase since “Don’t Ask, Don’t Tell, Don’t Pursue” was first implemented.¹ The pink slips the past five years have cost American taxpayers \$130 million (Exhibit 2).² Many more dedicated, competent service members have left at the end of their terms, fed up with constant fear, dissembling and harassment.

The news under “Don’t Ask, Don’t Tell, Don’t Pursue” is not all bad. Physical abuse by investigators has declined.³ Mass investigations have waned. Criminal prosecutions of lesbian, gay and bisexual service members have decreased as more are administratively discharged. While welcome, these steps forward reflect the low baseline used to measure success.

Not all officers and enlisted leaders engage in verbal gay-bashing or snoop on their service members. The current climate, however, supports those who do. Service members experience daily harassment. Comments such as the following are routine in many units: “You’d better not be queer because in the Navy we kill our fags;” “That dyke is going to fry;” “You’re a dead faggot;” “There’s nothing wrong with killing a few fags;” “That fag (Matthew Shepard) deserved to die;” and “There’s nothing to do in Sasebo unless you are a homo killer, “ a chilling reference to the murder of gay sailor Allen Schindler in 1992 by shipmates in Sasebo,

¹ These numbers are based on Department of Defense figures which do not include 14 Coast Guard discharges in 1998 or discharges in previous years. The Coast Guard is part of the Department of Transportation in peacetime, but joins the Navy during war.

² This does not include the costs of investigation, discharge or litigation.

³ See RANDY SHILTS, CONDUCT UNBECOMING, 231-232 (citing former Army Lieutenant Jay Hatheway’s testimony that he was forced to undergo “neurological testing” that included a psychiatrist’s puncturing his scalp with pins to attach sensors); 570 (citing Steve Ward’s testimony that he was placed into a broom closet without personal breaks until he confessed to being gay).

Japan. These are just a fraction of examples from the cases handled by Servicemembers Legal Defense Network (SLDN) in the past year.⁴

Leadership from the top down is required to change the incentives, and to support those leaders in the field who try to do the right thing. Military leaders should, as recommended by an April 1998 Department of Defense report on “Don’t Ask, Don’t Tell, Don’t Pursue,”⁵ issue the two-year-old guidance on anti-gay harassment that is pending at the Pentagon.⁶ Other recommendations in the April 1998 Pentagon report, while welcome, do not address other core issues: privacy, investigative limits, accountability and recourse. Military leaders should send guidance to the field about the policy’s intent to respect service members’ privacy and its explicit limits to investigations (Exhibit 3). Military leaders should hold those who ask, pursue and harass accountable, and provide recourse to service members who are improperly targeted. Were these steps taken, command violations of “Don’t Ask, Don’t Tell, Don’t Pursue” would fall.

SLDN’s Fifth Annual Report on “Don’t Ask, Don’t Tell, Don’t Pursue,” *Conduct Unbecoming*, reviews what the policy says, and recaps major developments in the past five years.⁷ The report then zeroes in on what happened in the past year, examining the military’s failure to implement the core parts of “Don’t Ask, Don’t Tell, Don’t Pursue” and how that has impacted military readiness. The report also recognizes instances where individual leaders have

⁴ Servicemembers Legal Defense Network is an independent legal aid and watchdog organization.

⁵ OFFICE OF THE UNDER SECRETARY OF DEFENSE (PERSONNEL AND READINESS, DEP’T OF DEFENSE, REPORT TO THE SECRETARY OF DEFENSE: REVIEW OF THE EFFECTIVENESS OF THE APPLICATION AND ENFORCEMENT OF THE DEPARTMENT’S POLICY ON HOMOSEXUAL CONDUCT IN THE MILITARY (Apr. 1998), hereinafter cited as DEP’T OF DEFENSE APRIL 1998 REPORT.

⁶ *Memorandum of Under Secretary of Defense Edwin Dorn, Guidelines for Investigating Threats Against Service Members Based on Alleged Homosexuality*, DEP’T OF DEFENSE (Mar. 24, 1997). This guidance instructs commanders to investigate those who threaten service members, not those who report anti-gay threats (Exhibit 4). The service chiefs failed to distribute the guidance. In April 1998, the Pentagon recommended that the instructions be expanded to include a prohibition on harassment, and finally be sent to the field. No guidance has been sent to the field yet. In the meantime, the Navy sent the original “Dorn memo” to the field via message traffic.

⁷ SLDN has assisted more than 1,600 service members in the past five years who have been harmed by “Don’t Ask, Don’t Tell, Don’t Pursue.”

taken appropriate action on behalf of their service members. The report concludes that, as military leaders struggle with critical retention and recruiting shortfalls,⁸ they can ill-afford to violate the letter and intent of the policy, or continue to let the valuable contributions of lesbian, gay and bisexual service members be frittered away by indifference or outright hostility.

⁸ Dana Priest, *Military Lags in Filling Ranks: Army Chief Wants Change in Education Requirements*, THE WASH. POST, Feb. 17, 1999 at A1 (citing Army Secretary Louis Caldera's statement asking the Department of Defense to change current recruitment policy to allow more than 10% of new recruits to be high school dropouts with equivalency diplomas in order to solve a shortage problem that will only get worse).

WHAT IS “DON’T ASK, DON’T TELL, DON’T PURSUE?”

When President Clinton assumed office and pledged to sign an Executive Order lifting the ban on military service by lesbian, gay and bisexual Americans, he stirred up a hornet’s nest in Congress and the military. Ultimately, Congress took matters into its own hands, and wrote into law the same grounds for discharge that had existed in policy since 1981.⁹ Today, as in past years, lesbian, gay and bisexual service members are fired from the military for stating their sexual orientation or being in a committed adult relationship with someone of the same gender.¹⁰ Heterosexual service members are not subject to the same restrictions.

In two respects, however, this law is significantly different. Congressional and military leaders acknowledged, for the first time, that lesbians, gay men and bisexuals serve our nation and do so honorably¹¹ and that sexual orientation is no longer a bar to military service.¹² Second, President Clinton, Congress and military leaders agreed to end intrusive questions about service members’ sexual orientation and to stop the military’s infamous investigations to ferret out suspected lesbian, gay and bisexual service members.¹³ They agreed to take steps to prevent

⁹ 10 U.S.C. § 654.

¹⁰ DEP’T OF DEFENSE DIRECTIVE NO. 1332.14, encl. 3 H.1.a. (1994); *Id.* NO. 1332.30, encl. 2 C. (Dec. 22, 1993), “Homosexual conduct includes homosexual acts, a statement by a member that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage.” DoD has broadly defined “homosexual act” to include hugging, kissing or hand-holding with someone of the same gender.

¹¹ *Policy Concerning Homosexuality in the Armed Forces: Hearings Before the Senate Comm. On the Armed Services*, S. Hrg. 103-845, 103rd Cong., at 707 (1993). “[H]omosexuals have privately served well in the past and are continuing to serve well today.” (Testimony of General Colin Powell).

¹² DEP’T OF DEFENSE DIRECTIVE NO. 1332.14, encl. 3 H.1.a.; *Id.* NO. 1332.30, encl. 2 C. “Sexual orientation is considered a personal and private matter, and homosexual orientation is not a bar to continued service unless manifested by homosexual conduct.”

¹³ *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). “We will not witch hunt. We will not chase. We will not seek to learn orientation.” These include the investigation of women onboard the *USS Norton Sound* in 1980, which resulted in the discharge of eight women sailors; investigations on the hospital ship *Sanctuary* and on the *USS Dixon*; the Army’s ouster of eight military police officers at West Point in 1986; the 1988 investigation of thirty women, including every African American woman, onboard the destroyer-tender *USS Yellowstone*, which resulted in the discharge of eight women; the 1988 investigation of five of the thirteen female crew members onboard the *USS Grapple*; and the 1986-1988 investigation at the Marine Corps Recruit Training Depot at Parris Island, South Carolina, where 246 women were questioned, at least twenty-seven women were discharged, and three were jailed. See SHILTS, *supra* note 3.

anti-gay harassment.¹⁴ They agreed to treat lesbian, gay and bisexual service members even-handedly in the criminal system, instead of criminally prosecuting them in circumstances where they would not prosecute heterosexual service members.¹⁵ They agreed to implement the law with due regard for the privacy and associations of service members.¹⁶ The law became known as “Don’t Ask, Don’t Tell, Don’t Pursue” to signify the new limits to investigations and the intent to respect service members’ privacy.

¹⁴ DEP’T OF DEFENSE DIRECTIVE NO. 1304.26. “The Armed Forces do not tolerate harassment or violence against any servicemember, for any reason.”

¹⁵ *Directives Implementing the New DoD Policy on Homosexual Conduct in the Armed Forces*, OVERVIEW, III. Criminal Investigations. “[T]he new directive provides that investigations into sexual misconduct will be conducted in an evenhanded manner.”

¹⁶ President Clinton pledged that the policy would provide for “a decent regard for the legitimate privacy and associational rights of all service members.” President William J. Clinton, *Text of Remarks Announcing the New Policy*, THE WASH. POST A12 (July 20, 1993). Then Senator, now Secretary of Defense, William Cohen understood that the “small amount of privacy under the current policy was intended to prevent the military from prying into people’s private lives.” *Policy Concerning Homosexuality in the Armed Forces: Hearings Before the Senate Comm. On Armed Services*, S. Hrg. 103-845, 103rd Cong., at 788 (1993).

LOOKING BACK ON FIVE YEARS OF ASKING, PURSUIT AND HARASSMENT

The Pentagon's record the past five years is one of nonfeasance. Military leaders have failed to distribute guidance against anti-gay harassment,¹⁷ on the policy's investigative limits¹⁸ and on its intent to protect service members' privacy.¹⁹ The result is that lesbian, gay and bisexual service members increasingly are asked, pursued and harassed.

SLDN clients from the past five years report daily, even hourly, verbal gay-bashing and threats. Just a few examples of derogatory comments reported in SLDN's cases include:

- Die Fag.
- Kill all fags.
- You're going to die.
- You can't hide, fag.
- You will be killed.
- We're going to kill you.
- We're going to get you.
- You sick fucking dyke!
- That dyke is going to fry.
- That fag (Matthew Shepard) deserved to die.
- We don't need queers around here.
- What are you going to do about it, fag?
- You're dead, you dick-sucking faggot.
- There's nothing wrong with beating up gays.
- If I find a gay guy on this ship, I would (sic) throw him overboard.
- There's nothing to do in Sasebo unless you are a homo killer.
- You'd better not be queer because in the Navy we kill our fags.
- If I ever saw two guys kissing, I'd beat them with a baseball bat.
- We can't wait to get out to sea so that we can throw you overboard.
- I hate homosexuals. If you find one...beat the shit out of him.
- If I ever find out for sure you're a fag, I'll kick your ass.
- There are three things I hate: liars, thieves and faggots.
- If I catch you around town, I'm going to kill you.
- There are accidents in divisions. Sometimes people die. When word gets out, you may be one of those.
- You're a dead faggot.
- Whip his faggot ass.
- Leave or Die Fag.

¹⁷ See *supra* note 6, at 3.

¹⁸ SLDN has asked DoD to distribute understandable guidance because commanders, investigators and attorneys who advise them do not know the rules.

¹⁹ See *supra* note 16, at 5.

These threats and comments provide insight into the overt anti-gay climate that exists in many military units. This climate serves as a backdrop for many of the cases SLDN has handled in the past five years. A few examples follow.

- ***Supervisor Threatens Marine Who Was Gay-Bashed with Criminal Investigation.*** When Marine Lance Corporal Kevin Smith was gay-bashed by civilians in San Angelo, Texas, his supervisor threatened him with an investigation into his private life rather than helping him bring his assailants to justice (Exhibit 5).
- ***Commander Fails to Help Airman Who Received Death Threat.*** Former Airman Sean Fucci woke up two days before Christmas to find the note, “Die Fag!” next to his bed. This was the second threat Fucci had received. When Fucci reported the threats, his commander responded with a written memorandum telling him there was nothing he could do to protect Fucci (Exhibit 6).
- ***Sailors Threatened with Death or Assault.*** Four sailors aboard the *USS Eisenhower* reported being assaulted or threatened with their lives because they were perceived as being gay. Their supervisors did nothing to protect them. When they came out and sought discharge due to the threats, their supervisors instead accused them of trying to avoid their military duties and launched an investigation into their private lives (Exhibit 7).
- ***Federal Judge Says Navy Launched “Search and ‘Outing’ Mission.”*** The Navy pursued Master Chief Petty Officer Timothy McVeigh based on an anonymous America Online profile containing the word “gay.” A federal judge ruled in McVeigh’s favor, stating, “Although Officer (sic) McVeigh did not publicly announce his sexual orientation, the Navy nonetheless impermissibly embarked on a search and ‘outing’ mission.”²⁰ Ultimately, the Navy dropped its appeal under pressure, and permitted McVeigh to retire at the rank he had earned. Navy leaders maintain they did nothing wrong in pursuing McVeigh.
- ***Air Force Cuts Deal with Felon to Get Names of Suspected Gay Men.*** Prosecutors at Hickam Air Force Base in Hawaii reduced the sentence of a convicted felon from life to twenty months on the condition that he accuse others of being in gay relationships. He named seventeen men in all services. The Navy jailed one sailor. The Air Force pursued and discharged all Air Force members fingered by

²⁰ *McVeigh v. Cohen*, 983 F. Supp. 215 (D.D.C. Jan. 26, 1998).

the felon, including Senior Airman Andre Taylor and Technical Sergeant Daryl Gandy. Investigators also questioned dozens of Gandy's coworkers in an effort to dig up additional allegations and to find other suspected gay service members.²¹

- ***The Okinawa Witch Hunt.*** Corporal Craig Haack and ten other marines were questioned at length about their sexual orientation during a witch hunt in Okinawa (Exhibit 8). A criminal investigator, Agent Jose Abrante, banged on Haack's door and loudly announced that he was under investigation for being gay so that the entire barracks could hear. Agent Abrante overturned Haack's bed, ransacked his belongings and seized his computer, computer disks and address book, looking for any indication of Haack's sexual orientation. As the result of outside pressure, the Marine Corps released Haack. The Marine Corps jailed another marine, however, for thirty days.
- ***Career Officer Court-Martialed After Witch Hunt.*** The Air Force criminally prosecuted Major Debra Meeks based on allegations that she was in a relationship with a civilian woman, just as the Major approached retirement. Air Force criminal investigators at Lackland Air Force Base solicited the allegations against her in the course of a witch hunt against Meeks and eleven other women named in the Report of Investigation (Exhibit 9). Meeks, who faced up to eight years in prison and forfeiture of her entire pension, was acquitted at trial in a widely publicized case.²²
- ***Airman of the Year Discharged Although Accuser Recants.*** The Air Force discharged former Airman Sonya Harden based solely on an allegation later recanted by her accuser. The accuser admitted she lied about Airman Harden being in a lesbian relationship in retaliation for a financial dispute between the two women (Exhibit 10). Airman Harden had presented ex-boyfriends to testify on her behalf at the discharge board, to no avail.
- ***Soldier Accused of Being a Lesbian After Reporting Attempted Rape.*** A young Private First Class, away from home for the first time, was attacked and nearly raped in her barracks hallway in Korea. When she reported the attack, the perpetrators retaliated by falsely accusing her of being involved in a lesbian relationship. The unit commander pressured her to accuse other women of being lesbians and when she refused sent her to a court-martial based on the false allegations.

²¹ Two years after the witch hunt, a Pentagon review weighed in against the use of pretrial agreements to obtain information about consensual sexual conduct. DEP'T OF DEFENSE APRIL 1998 REPORT at 13. No action has been taken to make amends to the former service members who were targeted in this witch hunt or to discipline the errant prosecutors.

²² *Jury Acquits Air Force Major Accused of Lesbian Affair*, N.Y. TIMES, Aug. 17, 1996 at L7.

When a military judge threw out the charges for lack of evidence, the commander tried instead to discharge her. The commander dropped the charges only after substantial outside intervention. This soldier remains anonymous because she serves on active duty.

- ***Psychiatrist Turns in Marine Who Asks About Homosexuality.*** A Navy psychiatrist turned in former Marine Corporal Kevin Blaesing for merely asking what it meant to be gay (Exhibit 11). The psychiatrist testified at his discharge board that Blaesing never, in fact, revealed his sexual orientation. Blaesing's commander, Lieutenant Colonel Martinson, nevertheless, pursued his discharge.²³ When Blaesing successfully sought, with outside help, to overturn his discharge, his commander retaliated by foreclosing his opportunity to reenlist.
- ***West Point Seizes Cadet's Diary.*** The Army pursued and disenrolled Cadet Nikki Galvan of West Point based on statements she made in her personal diary (Exhibit 12). Galvan's commander, Lieutenant Colonel Abraham Turner, seized her diary and three years' worth of email messages after Galvan filed a complaint against him for questioning her about her sexual orientation and private life. Galvan had started keeping her diary at the suggestion of West Point counselors, who felt it would help her deal with the grief of her mother's death.
- ***Women Threatened with Prison During Witch Hunt.*** Investigators onboard the *USS Simon Lake* directly questioned former Seaman Amy Barnes and other women about their sexual orientation. Investigators threatened them with prison if they did not "confess" or accuse others of being lesbians, according to sworn affidavits the women later submitted in federal court (Exhibit 13). The Navy forced Seaman Barnes into court when Navy officials, apprised of the illegal investigation, refused to intervene to stop it. The Navy ultimately settled this case, although Seaman Barnes lost her career.
- ***Navy Uses "Homosexual/Bisexual Questionnaire" to Ferret out Gay Sailors.*** The Navy discharged two sailors after asking them fifty questions about their sexual orientation and activities, in part from a document titled "The Homosexual/Bisexual Questionnaire." The questionnaire appears to be a standard form used on the sailors' ship to investigate suspected gay personnel (Exhibit 14).

²³ Lincoln Caplan, "Don't Ask, Don't Tell" – *Marine Style*, NEWSWEEK, June 13, 1994, at 28.

THE REASONS FOR COMMAND VIOLATIONS

Command violations of “Don’t Ask, Don’t Tell, Don’t Pursue,” like the ones described above, continued through the fifth year of this policy primarily because of a lack of leadership on the part of senior military leaders. Military leaders have not implemented the privacy protections promised under this policy or enforced its limits to investigations. Leaders have held no one accountable for violations and have provided no means of recourse for service members who are harassed or improperly investigated.

Military Leaders Ignore Privacy Protections

When “Don’t Ask, Don’t Tell, Don’t Pursue” was adopted, great emphasis was placed on respecting service members’ privacy. It was widely understood at the time that lesbian, gay and bisexual service members would be left alone.

Military leaders have failed, however, to implement the intent of this policy to respect service members’ privacy. In five years, not one instruction, memorandum, regulation or policy letter has been sent to the field informing personnel of the policy’s intent to respect service members’ privacy. When asked by a reporter about the promise to create a “zone of privacy” under this policy, then Secretary of the Air Force Sheila Widnall professed ignorance, responding, “Never heard of it.”²⁴ As new leaders have taken the helm, pledges made by their predecessors have been forgotten.

In place of privacy, military leaders have imposed a rule of total secrecy on lesbian, gay and bisexual service members. Military leaders are discharging service members who confide in their parents, best friends and psychologists. Psychologists have been instructed to turn in gay

²⁴ *ABC News*, Santa Barbara, November 1997.

service members who seek their help in private counseling sessions.²⁵ These private conversations are a far cry from the kind of public statements, such as those made on television or in front of a military formation, that lawmakers expressed concern about during the 1993 debate on gays in the military. That military leaders would even think of discharging service members who confide in their families or health care providers is an indication that the policy's intent to respect service members' privacy has been ignored.

Military Leaders Refuse to Send Investigative Limits to the Field

Military leaders have failed to distribute any guidance in the past five years explaining the limits to investigations in an understandable, accessible way. The result is that most leaders and service members in the field do not know the limits to investigations established by "Don't Ask, Don't Tell, Don't Pursue."

The "Don't Ask, Don't Tell, Don't Pursue" directives are an unwieldy 100 pages long, with important investigative limits scattered throughout. In the services, the relevant regulations are typically broken down into a number of manuals, not all of which are kept on hand by unit commanders. The directives and service regulations are written in "legalese," making them even more inaccessible. Most commanders, attorneys and inquiry officers have never read them, much less understood them.

In the absence of Pentagon leadership, SLDN distributed more than 1,000 copies of our own three-page memorandum on the limits to investigations in late 1998 and early 1999 (Exhibit 3). The memorandum sets forth the investigative limits, using exact quotes from the Department of Defense directives. SLDN sent the memorandum to every major command in each of the services and to every Navy ship, at a cost of a mere \$1,130. One SLDN client has already

²⁵ See the "Don't Tell" section of this report, *infra* at 34-35, for documented examples.

reported that his commander dropped an inquiry against him days after SLDN sent the commander a copy of the memorandum on investigative limits. SLDN believes, if the rules were distributed and properly enforced, many commanders and inquiry officers would try to comply with them and, as a result, command violations of “Don’t Ask, Don’t Tell, Don’t Pursue” would decline.

Service Members Have No Recourse to Stop Asking, Pursuits and Harassment

In every one of the case examples described above, service members tried to resolve the command violations against them within the military. In every case, their chain-of-command failed them. In every case, military leaders dug in their heels and attempted to justify the command violations, rather than stopping them. In five years, the Services officially have held no one accountable for asking, pursuing or harassing service members in violation of the law.

Inspector General (IG) complaints have proved no better. Invariably, service members receive only a cursory reply, rubber-stamping the command’s violations, arriving months and even years after they have already been discharged.²⁶ In a case where an Inspector General provided more than a cursory reply, the “Hawaii 17” witch hunt described above, the IG justified the prosecutors’ decision to significantly reduce the sentence of a convicted felon in exchange for the names of suspected gay men. The Pentagon’s April 1998 review of “Don’t Ask, Don’t Tell, Don’t Pursue” later repudiated this sort of agreement but the targeted service members had long since lost their careers.

²⁶ Airman Sonya Harden, mentioned above, is one example. She filed an IG complaint more than three years ago. Two years later, after she had been discharged, she finally received a reply. Without explaining the basis of his actions and without speaking to Harden or her attorney, the IG found the command did nothing wrong. The five sentence reply the IG sent former Air Force Major James Strader, who was wrongly pursued based on an anonymous accusation, is another example of the cursory treatment Inspectors General give these cases (Exhibit 15).

There is no way within the military for a service member to stop harassment or runaway investigations. Instead, service members have been forced to seek outside help from SLDN, our private cooperating attorneys and their Congressional Members, even in cases involving the most obvious of command violations. A few, like Master Chief Petty Officer Timothy McVeigh, have successfully gone into federal court as a last resort to make the Pentagon follow its own rules. Service members should not have to seek outside help, however, to have their leaders—the people charged with their welfare—enforce the military’s own rules against asking, pursuits and harassment. Unfortunately, they have no other option at present.

GAY DISCHARGES SOAR TO HIGHEST LEVEL IN A DECADE

Military leaders are now paying the price for the intolerable climate that has flourished on their watch. Discharges have increased 86% under “Don’t Ask, Don’t Tell, Don’t Pursue.” The Pentagon has fired 4,378²⁷ dedicated, hard-working Americans at a time when shortfalls in recruiting and retention have reached crisis proportions. Hundreds, if not thousands, more have left at the end of their service terms. Service members are fed up with constant asking, pursuits and harassment and the misguided requirement that they lie about who they are to their parents, best friends and doctors as a condition of military service.

Pentagon officials say that most discharges involve service members who “voluntarily” state their sexual orientation. Pentagon officials have been less than forthcoming, however, in telling the American public that they define *any* disclosure of sexual orientation as “voluntary.” As seen in the case examples above, “statements” include disclosures made to psychotherapists; in personal diaries; in response to direct questions about their sexual orientation; in anonymous online profiles; and those coerced out of service members due to fear, intimidation, assaults, death threats and threats of criminal prosecution. Service members outed by the military in the these circumstances certainly do not experience being forced out of the closet as “voluntary.”

Some military officials have also suggested that service members who disclose their sexual orientation are simply looking for an easy way out of the military, particularly where such disclosures are made to superiors.²⁸ Officials have offered no support for this assertion, which flies in the face of the harsh consequences imposed on service members who come out. These

²⁷ The Coast Guard, which is part of the Department of Transportation (DoT), has fired an additional 51 service members from 1995-1998; 1994 figures were not available. Total DoD and DoT discharges are 4,429.

²⁸ Steven Lee Myers, *Despite ‘Don’t Ask’ Policy, Gay Ousters Rose in ‘98*, NEW YORK TIMES, Jan. 23, 1999, at A13; Sig Christenson, *Military: Rising number of gays kicked out of the military*, SAN ANTONIO EXPRESS NEWS, Jan. 22, 1999, at 1.

include potential criminal prosecution,²⁹ reprimand,³⁰ recoupment,³¹ lower discharge characterizations,³² loss of educational,³³ unemployment³⁴ and pension benefits,³⁵ civilian employment discrimination,³⁶ and, of course, loss of employment and livelihood.

In reality, Pentagon officials do not know the facts behind these cases. The Pentagon's own April 1998 report on the implementation of "Don't Ask, Don't Tell, Don't Pursue" candidly admits "the reasons for this increase [in statements discharges] are not known and would be difficult to ascertain."³⁷ The Pentagon report included the first public mention of anomalous discharge figures at Lackland Air Force Base, the service's basic training center, which accounted for 65% of Air Force discharges last year. These figures far exceed those for basic training discharges in the other services.³⁸ To date, no one has spoken with trainees discharged in the past to learn their experiences, or conducted a comprehensive review to determine the

²⁹ See threats of criminal prosecution in "Don't Pursue" section, *infra* at 55-58.

³⁰ An Air Force commander issued an airman a "Letter of Reprimand" for coming out to friends on the base. Discharge authorities review a service member's overall record to determine characterization of discharge. Commanders may lower a discharge characterization based on a letter of reprimand in an airman's record (Exhibit 16).

³¹ Former West Point cadet Jincy Pace currently faces recoupment of \$80,000 in scholarship funds because she came out while serving on active duty, including Operation Uphold Democracy in Haiti. The Internal Revenue Service has seized her tax refunds and placed a bad mark on her credit rating, preventing her from obtaining a car loan or credit card.

³² Former Marine Lance Corporal David Raleigh's commander recommended an Other Than Honorable (OTH) discharge simply because Lance Corporal Raleigh admitted to being gay. Had he received an OTH, Raleigh could have faced substantial prejudice in civilian employment. SLDN intervened on his behalf and he received the Honorable discharge he deserved based on his record. Raleigh's case is not uncommon.

³³ An Army Specialist in Monterrey, California faced losing his GI Bill benefits, including \$1200 he paid into the program out of his own pocket, when his commander recommended a "General" discharge service characterization just for coming out. In order to qualify for GI Bill benefits, service members need an "Honorable" discharge. SLDN intervened to protect his benefits so that he could go on to college. All GI Bill benefits are lost unless service members serve the minimum time required, usually 2-3 years.

³⁴ Service members discharged under "Don't Ask, Don't Tell, Don't Pursue" may face difficulties in obtaining unemployment benefits in some states, regardless of the characterization of their discharge. Many jurisdictions will not give unemployment benefits to those separated for being lesbian, gay or bisexual.

³⁵ Both Major Debra Meeks, *supra* at 8, and Master Chief Petty Officer Timothy McVeigh, *supra* at 7, faced the prospect of losing their pension benefits if discharged.

³⁶ Former service members report civilian employment discrimination because their discharge paperwork (DD Form 214), which many employers require prior to hiring, contains the reason for discharge, usually stating "homosexual conduct" or "homosexual admission."

³⁷ DEP'T OF DEFENSE APRIL 1998 REPORT at 5.

³⁸ Richard Parker, *Confusion Reigns From "Don't Ask, Don't Tell,"* KNIGHT RIDDER, Jan. 26, 1999.

reasons for these discharges. Press accounts cite reasons ranging from harassment to the isolation experienced by lesbian, gay and bisexual recruits as reasons for these discharges.³⁹ SLDN keeps an open mind, having had few cases from Air Force basic training. Air Force recruits, unlike those in the other services, are being discharged only days after arriving at basic training, before they learn of SLDN's existence.

In cases handled by SLDN, anti-gay harassment is the primary reason why service members disclose their sexual orientation to their superiors. Lesbian, gay and bisexual service members are prepared to face the enemy and walk into the jaws of death in service to our nation. Lesbian, gay and bisexual service members are not, however, prepared to risk their lives and physical safety at the hands of bigots in the ranks. While SLDN believes that service members generally are becoming more tolerant of lesbians, gays and bisexuals,⁴⁰ SLDN has also documented a group of people in the military who feel free to express anti-gay sentiments and threaten their coworkers. The sad fact of today's military climate is that bigots are given free rein.

A second reason service members come out is that they face an ethical dilemma not of their own making. Military leaders have wrongly required service members to keep their orientation a total secret, even from their families. Military leaders are forcing service members to lie and dissemble, contrary to their own values and to the military's "Core Values" of honesty and integrity. This misguided approach also denies service members the guidance they often

³⁹ See *Id.*; Sig Christenson, *Recruits Deny Lackland Harassment*, SAN ANTONIO EXPRESS NEWS, Jan. 22, 1999.

⁴⁰ In a recent poll taken by Northwestern University Professor Charles Moskos, the architect of "Don't Ask, Don't Tell, Don't Pursue," the number of Army males who registered "strongly disagree" to the question of whether gays should be allowed to serve openly in the armed forces dropped to 36% from its 1993 level of 63%. See MILLER/MOSKOS NONRANDOM SURVEYS OF ARMY PERSONNEL, Professor Charles Moskos, Northwestern University, Sep. 1998.

need from their parents, close friends and health care professionals in dealing with their sexual orientation.

Service members tell SLDN they want to serve our country, but they see no recourse in the face of daily harassment and the untenable ethical dilemma military leaders have imposed upon them.

Military leaders have done little to stop anti-gay harassment and enforce the investigative limits under “Don’t Ask, Don’t Tell, Don’t Pursue.” Military leaders should take responsibility for the current hostile climate and for continued command violations, rather than scapegoating lesbian, gay and bisexual service members for increased discharges, which only serves to inflame further hostility against them.

DON'T ASK

“Don’t Ask” states that “commanders or appointed inquiry officials shall not ask, and members shall not be required to reveal their sexual orientation.”⁴¹ In 1997, Secretary of Defense William Cohen reaffirmed the rule, stating on “Larry King Live” that asking “is a clear violation of law.”⁴² The Pentagon reaffirmed that asking is wrong in its April 1998 report on the effectiveness of the implementation of “Don’t Ask, Don’t Tell, Don’t Pursue.”⁴³

SLDN documented 161 “Don’t Ask” violations in 1998. That is up 30% from 1997, when SLDN reported 124 “Don’t Ask” violations. The Navy led all the Services with 67 “Don’t Ask” violations; the Air Force had the second most violations with 45. “Don’t Ask” violations are up almost 335% over five years under this policy.

Violations of “Don’t Ask” continue to rise, as hostile supervisors, coworkers and investigators question service members about their sexual orientation. Service members’ silence in the face of hostile questioning, in an effort to comply with “Don’t Tell,” only fuels speculation about their sexual orientation, and invites anti-gay harassment in the current military environment.

This section addresses four common “Don’t Ask” scenarios: (1) questions asked by supervisors and coworkers as a means of harassment or intimidation; (2) questions from investigators; (3) questions from well-meaning friends; and (4) inadvertent questions. Regardless of who asks, service members risk losing everything if they answer truthfully or not at all.

⁴¹ DEP’T OF DEFENSE DIRECTIVE NO. 1332.14, Encl. 4 D.3.; *Id.* NO. 1332.30, Encl. 8 D.3. *See also, Policy Concerning Homosexuality in the Armed Forces: Hearings Before the Senate Comm. On the Armed Services, S. Hrg. 103-845, 103rd Cong., at 789 (1993).* Comments by then DoD General Counsel Jamie Gorelick, “[W]e do not ask about orientation not only at accession but at any time.”

⁴² *Larry King Live*, (CNN television broadcast, Transcript # 97012700V22, January 27, 1997).

⁴³ DEP’T OF DEFENSE APRIL 1998 REPORT at 1.

Asking as Anti-Gay Harassment

The most disturbing trend documented by SLDN is the growing link between asking and anti-gay harassment. Hostile commanders, supervisors, colleagues and investigators hound service members with constant questions about their sexual orientation and conduct. Sometimes they question the individual directly. Many times, they question service members in front of their peers. Lesbians, gays and bisexuals experience the questioning not only as asking, but harassment, intimidation and hostility. In five years under “Don’t Ask, Don’t Tell, Don’t Pursue,” the Pentagon has officially held no one accountable for asking or harassing a service member in violation of the policy. As a result, more service members are disclosing their sexual orientation in response to the asking and harassment as the only means to protect themselves. This trend will likely continue in the absence of military leadership to stop command violations, ensure accountability and provide recourse for service members who are questioned or harassed.

Officer Asks Midshipman About His Sexual Orientation

Former Midshipman Robert Gaige reported last year that he had been asked on at least four separate occasions whether he is gay (Exhibit 17). In one incident, Marine Major Richard Stickel, Gaige’s Navy Reserve Officers Training Corps (NROTC) instructor at Cornell University, asked about the significance of a red ribbon worn by Gaige. When Midshipman Gaige responded that the red ribbon signified hope for a cure for AIDS, Major Stickel asked derisively, “What are you, some kind of fucking homo?”

Midshipman Gaige was considered a “gung-ho” NROTC student. Among other activities, he was the Operations Officer of “Semper Fi,” an organization for aspiring Marine Corps officers led by Major Stickel. Midshipman Gaige’s dedication, however, did little to ward

off Major Stickel's questions about his sexual orientation. According to other midshipmen, Major Stickel routinely asked them about the sexual orientation of Gaige and another NROTC student, Mark Navin.

On one occasion, Major Stickel reportedly asked about Gaige's and Navin's sexual orientation in front of the entire battalion, as all of the midshipmen sat together after completing a physical fitness test. With Gaige and Navin present, Major Stickel stated, "Sometimes its helpful to find a workout partner. Look at Gaige and Navin . . . They're always working out together. I don't know what else they do together, but we're not allowed to talk about it anyway." The midshipmen reportedly greeted Major Stickel's comments with prolonged, raucous laughter; many harassed Gaige and Navin for the remainder of the day. This was only one of numerous incidents, described further in the "Don't Harass" section of this report.

Midshipman Gaige's experience onboard Navy ships during summer training cruises indicate that asking is the norm in today's Navy, not the exception. On one cruise, shipmates asked Gaige about his sexual orientation because he refused to join them in visiting prostitutes at brothels when the ship was in port. Enlisted men who had been charged with making sure that Gaige had a "good time" began to question Gaige after he would not take the pool of money they had collected to buy a prostitute's services for him. When Gaige begged off, inventing a girlfriend at home as a reason not to visit prostitutes, one of the enlisted men allegedly said, "Don't tell me you play for the other team, kid?" The sailor reportedly continued, "I think we got a midshipman fag aboard, boys." After more questions about his sexual orientation, Midshipman Gaige finally went into a room with a prostitute. Unknown to the enlisted men however, he did not avail himself of the prostitute's services. Gaige felt that this was his only recourse to ward off further questions about his sexual orientation (Exhibit 18).

Midshipman Gaige remained silent in the face of questions about his sexual orientation in an attempt to comply with “Don’t Tell.” This only led to increased speculation about his sexual orientation and further anti-gay harassment. Ultimately, Midshipman Gaige concluded he had no way of stopping the questions and harassment. As a result, he came out as bisexual to his commander in the course of reporting the harassment he had experienced. Despite his strong desire to serve, he was separated from NROTC. To our knowledge, no action has been taken against Major Stickel or others who questioned and harassed Midshipman Gaige.

Officers and Enlisted Sailors Ask Midshipman If He Is Gay

Midshipman Mark Navin, mentioned above, reports that fellow midshipmen and supervisors questioned him on no less than six separate occasions about his sexual orientation. Major Stickel and other midshipmen in Cornell University’s NROTC program asked Navin about his sexual orientation before he even knew or accepted that he is bisexual. During a freshman year trip to Quantico Marine Corps Base, in Virginia, with the NROTC pistol team, Major Stickel and other midshipmen invented a running joke about a supposed relationship between Navin and Midshipman Gaige. Common questions included, “So Navin, what’s up with you and Gaige?” and “Yeah, are you two together?”. Other NROTC students called Navin “fag” and “homo” (Exhibit 19).

Sailors also questioned Midshipman Navin about his sexual orientation during his summer cruises onboard Navy ships. During a late night bridge watch onboard the *USS Boone*, for example, two sailors threatened Midshipman Navin, telling him, “You’d better not be queer because in the Navy we kill our fags.” During a second summer cruise on the *USS Rodriguez*,

both his midshipman running mate and a junior officer with whom he shared a stateroom asked him directly whether he were gay (Exhibit 20).

Midshipman Navin independently came to the conclusion that he had no recourse against questions about his sexual orientation or anti-gay harassment. Like Midshipman Gaige, Midshipman Navin came out in a letter to his commander recounting the questions he had faced in his young career. Despite his desire to serve, the Navy disenrolled him as well.

Sergeant Asks New Marine About Sexual Orientation

A Marine noncommissioned officer, Sergeant Dewey, reportedly questioned former Private First Class Gabrielle Butler about her sexual orientation last May, during her advanced Military Occupation Specialty training. Sergeant Dewey surprised Butler one day, asking her, “Do you plan on marrying a female?” Fearful that her sergeant had figured out that she is a lesbian, Butler made the mistake of going UA (unauthorized absence). Butler, who returned to training and took responsibility for going UA, explained her fear in a subsequent letter to her commander:

During the second week of May, I was approached, unprovoked, by Sgt. Dewey and asked, “Do you plan on marrying a female?” Since then, I’ve dreaded the possibility of an intrusive investigation, it getting back to my peers, or having punitive actions taken against me. The incident with Sgt. Dewey made me aware of the reality of serving as a closeted lesbian in the United States Marine Corps; I would live in constant fear of being “found out” no matter how discreet my private behavior. It was this realization that led to my becoming afraid and confused. My decision to go UA was driven by my fear . . . I truly fear for my safety if word of my sexual orientation becomes common knowledge (Exhibit 21).

Unfortunately, Butler’s fears were well-founded. Word spread rapidly through her unit that she is a lesbian. She has since been discharged.

Recruiter and Drill Instructor Question Marine

Lance Corporal David Raleigh was asked about his sexual orientation from the time he signed up to serve in the Marine Corps. Raleigh's recruiter, a Master Gunnery Sergeant, said to him, "Because of President Clinton's new policy, I can't ask you if you're a fag. So I'll just ask if you suck cock."

During boot camp at the Marine Corps Recruiting Depot in San Diego, Raleigh's Drill Instructor repeatedly told him in front of his squad that he was "timid, clumsy and weak." Raleigh responded to each charge with a vehement "No, sir." Finally, the Drill Sergeant asked, "You're a fag aren't you, Raleigh?" Raleigh was petrified. He remained silent out of fear that any type of response would ruin his young career.

Officers Ask Ensign About His Sexual Orientation

A Naval Academy graduate with prior experience as an enlisted sailor recently faced direct questions about his sexual orientation from classmates in a prestigious Navy program. Classmates reportedly asked the Ensign, "Would you sleep with a girl?" and questioned his friendships with other military officers. The Ensign reports that fellow officers engaged in verbal gay-bashing daily. The Ensign described his experience in a letter to his commander disclosing his sexual orientation and explaining why he came out:

Living in forced isolation, in constant fear of investigation and inadvertent disclosure is harmful to gay service personnel. Each day I am witness to unprofessional, anti-gay comments and attitudes. The Navy takes no action to stop this improper and outrageous behavior on the part of its best and brightest officers. My witness to this unfortunate anti-gay climate, and the direct harm that it causes me, forces me to disclose to you that I am gay. When classmates, who are supposed to be professionals upholding

the high values of the Naval officer corps frequently ask me questions designed to determine whether or not I am gay, I can only conclude that their intrusive questions are calculated to cause me harm. I evade their questions for fear of how they would react if they knew the truth. It is simply difficult to believe that in 1999 such antiquated un-American attitudes are flourishing in our nation's Navy (Exhibit 22).

The Ensign's letter speaks eloquently to the dilemma facing lesbian, gay and bisexual service members in today's military. While enforcing "Don't Tell" with a vengeance, senior uniformed leaders have demonstrated 100% tolerance for asking and anti-gay harassment. The entire burden is on gay service members to evade and dissemble when questioned about their sexual orientation.

Master Chief Asks Subordinate About His Sexual Orientation

A Navy Master Chief Petty Officer confronted a Petty Officer Second Class, about his sexual orientation. The Master Chief crudely asked the Petty Officer if he would like to see his penile implant because he thought the Petty Officer was "into that." Though the Petty Officer, a nine-year career sailor with a stellar record, warned him that he considered the comment to be sexual harassment, the Master Chief confronted him again the next day.

This time, seeking a reaction from the Petty Officer, the Master Chief pointed to the word "homosexual" contained in Navy regulations governing discharges and stated, "That's you." After turning a few more pages, the Master Chief went back to the same page, pointed again to the word "homosexual" and stated, "See, right there '[Petty Officer's name]'." In a third incident, this Master Chief and a coworker speculated about the Petty Officer's sexual orientation while standing right in front of him.

The Petty Officer's military experience provided him no more means to defend against questions about his sexual orientation than the young military members mentioned above. In a letter to his commander, in which the Petty Officer documented these incidents, he wrote, "I feel unable to defend myself from these attacks without raising even more suspicion" (Exhibit 23). As a result, he reluctantly came out to his commander, stating in part, "The only means I see to . . . avoid becoming a victim of harassment is by making this disclosure to you."

Fortunately for this Petty Officer, his commander took his report of harassment seriously and placed a letter of counseling in the Master Chief's personnel file describing his harassment and ordering him to cease and desist. The commander is retaining the Petty Officer in his position and has promised that he will not investigate his sexual orientation. SLDN applauds this commander for setting the right priorities in his unit, and for his common sense approach to resolving this situation. If "Don't Ask, Don't Tell, Don't Pursue" were properly enforced, the leadership this commander demonstrated by holding the Master Chief accountable for his harassment would be the rule, not the exception.

Service Members Are Asked Every Day About Their Sexual Orientation

Service members are asked about their sexual orientation every day by hostile supervisors and coworkers. This affects anyone who is perceived as gay, regardless of the service member's actual sexual orientation. Asking, when it is against the law and when answers can be punished with loss of livelihood, sows fear and distrust among coworkers. "Don't Ask" hurts unit cohesion. As Marine Lance Corporal David Raleigh told SLDN, in reference to coworkers who had harassed him, "If I were in combat with them, I would not trust them."

Asking has become a routine occurrence. The following are just a few additional examples that are typical of SLDN's cases:

- A young sailor reports being asked, "What's up, lesbian?" and told by coworkers that she must be gay because she never talks about a boyfriend when everyone else is talking about their husbands or wives (Exhibit 24).
- A military firefighter recently filed a sexual harassment complaint after enduring repeated questions and a physical assault based on a perception that he is gay. His supervisor and several coworkers have asked: "Are you gay?" "Are you coming out of the closet?" and "Yes, I'm asking; are you homosexual?" (Exhibit 25).
- A sailor in an aviation unit on an aircraft carrier reports being asked more than twenty times by shipmates about his sexual orientation. Recent questions include: "Are you gay?" "Are you a flaming faggot?" and "I heard that you are gay." Because of these hostile questions, the sailor fears for his safety while at sea.
- An Army Captain came out to his commander after being asked about his own sexual orientation and hearing degrading comments about soldiers thought to be gay, including frequent anti-gay jokes, at each of the three bases where he had been stationed in his career (Exhibit 26).
- An Army Corporal reports being asked, "Are you gay?" by a former roommate whom the Corporal subsequently learned had stolen his diary. Later, the former roommate asked the Corporal, in front of his coworkers, "Do you like women?"
- A sailor on the submarine *USS Houston* reports being asked numerous questions about his sexual orientation by coworkers, including: "What are you, a fag?" and "Well, we already know you're a fag, so what kind are you, an art fag or a regular fag?" (Exhibit 27).

Investigators Ask About Sexual Orientation

Navy Investigators Ask About Sexual Orientation

Agents from the Naval Criminal Investigative Services (NCIS) blatantly violated “Don’t Ask, Don’t Tell, Don’t Pursue” last year when they questioned a Navy Petty Officer and his coworkers. In this case, NCIS agents repeated a series of questions with several witnesses following the pattern below, as set forth in a letter from the Petty Officer’s attorney to his commander (Exhibit 28):

- The witness is questioned concerning whether or not he knows about the ‘lifestyle’ of [A];
- And what [A] ‘does for fun;’
- And where he goes socially (i.e. types of bars, social gathering places, etc.);
- And what he’s ‘like in public;’
- And whether he has been ‘buddy buddy’ with male friends and roommates.

According to the attorney, the sailor under investigation was questioned personally along these same lines, giving rise to the “Don’t Ask” violations in this case. The questions asked by the NCIS agents led witnesses and the sailor’s commander to conclude that the agents were engaged in a witch hunt for gay personnel, as described more fully in the “Don’t Pursue” section. Despite repeated requests, NCIS never informed the sailor of the allegations against him. When pressed by his command for the reason behind the investigation, the agents suggested that the sailor’s marriage was not valid and that his wife therefore fraudulently obtained medical benefits. The agents offered no support for this offensive theory. As noted by the sailor’s military attorney, the NCIS agents’ questions exceeded what is needed to investigate a medical fraud case.

An Air Force investigator violated “Don’t Ask” when he asked a Lieutenant the following wide-ranging questions about his sexual orientation, as set forth in the investigator’s Report of Inquiry (ROI) (Exhibit 29). The investigator asked the Lieutenant:

- when [was] the last time he had had a girlfriend and what her name was;
- what he thought of homosexuals;
- if he thought homosexuals belonged in the military;
- if he had ever had any kind of homosexual contact with anybody at anytime in his life; and
- if he had ever thought about it or otherwise had any desire to ever engage in homosexual acts.

The investigator also questioned a coworker about whether this Lieutenant “had ever mentioned anything about former girlfriends” or “his private life,” questions that are forbidden under “Don’t Pursue” (Exhibit 30).

In another Air Force case, investigators questioned a senior noncommissioned officer last year about his sexual orientation in the course of investigating a civilian employee of the Air Force whom the noncommissioned officer knew. The allegations against the civilian employee had nothing to do with homosexual conduct. That did not deter the investigators, who asked the noncommissioned officer: “Are you gay?” “Are you married?” “What kind of bars do you go to?” “What kind of restaurants do you go to?” and “What kind of magazines do you read?” In every way, these questions violate “Don’t Ask, Don’t Tell, Don’t Pursue.”

Friends Ask Service Members About Their Sexual Orientation

Increasingly, superiors and coworkers ask service members about their sexual orientation out of friendship or concern, not as a means of harassment. The problem is that the military discharges service members based on their responses. This misguided application of the policy makes service members vulnerable to any leak of information about their identity, requiring

service members to avoid friendships and to be wary of trusting anyone. It also hurts the military by making it more difficult for leaders to look after their subordinates and by creating distrust among coworkers.

In one good example illustrating how things should work under this policy, a marine reports that his First Sergeant agreed to help him after a Gunnery Sergeant questioned him four times about his sexual orientation. The First Sergeant stated: "I know about you. My brother is that way. If you have a problem, come to me and I'll try to help you. I know you're a good marine. I love my brother and I support you." This First Sergeant should be commended for taking the marine's complaint of "Don't Ask" violations seriously and for not turning him in to be discharged.

In a number of cases, coworkers have gone out of their way to affirm suspected gay service members. In one Navy case, for example, a sailor faced repeated questions about his sexual orientation. When another coworker asked him directly, "Are you gay?" he feared the worst. The coworker, however, hastened to add, "I know you're gay and I've never had a problem with it." The coworker did not start rumors or turn in the gay sailor and the sailor continues to serve on active duty.

Other service members have not been so fortunate. The story of one airman is representative of many cases SLDN has handled. When a friend privately questioned this airman about his sexual orientation, he responded truthfully that he is gay. The friend made the naïve mistake of mentioning this conversation to three other friends, one of whom informed a superior. The command started an investigation, and questioned the friend. According to the Report of Investigation, the investigating officer "observed [the friend] to be honest, although somewhat uncomfortable. He briefly expressed concern about 'burning' a fellow [coworker]" (Exhibit 31).

The Air Force discharged the gay airman in this case based solely on the friend's statements to the investigating officer, made as a direct result of the investigator's prompting.

Inadvertent Questioning

The final group of "Don't Ask" cases highlighted in this report is best described as inadvertent questioning. These are cases where commanders and others ask questions that, on their face, are not designed to ask about sexual orientation, but, in fact, do. The problem is that some commanders are acting on the information inadvertently discovered and discharging service members, rather than treating the information as "personal and private"⁴⁴ and taking no action.

In a recent case, investigators from an Inspector General (IG) office questioned a sailor whose top-notch record includes being selected as "Sailor of the Quarter" on numerous occasions. The sailor says that the investigators never explained who, what or why they were investigating. Investigators questioned the sailor at length on several occasions. During the last interrogation, investigators insisted they "knew the truth" and told the sailor that her statements to them "conflict with the truth." When the sailor asked why the investigators were questioning her, they replied, "To let you tell the truth." After hours of questioning, the sailor finally blurted out, "How much more humiliation can I take? You know I'm gay." The sailor thought they wanted to elicit her sexual orientation; they did not. She now faces a possible discharge for her "statement" under "Don't Ask, Don't Tell, Don't Pursue."

An observer unfamiliar with life as a gay service member might be tempted to view this response as somewhat paranoid. Under "Don't Ask, Don't Tell, Don't Pursue," however, service members live every day in fear of events that cause little concern for their straight colleagues.

The policy requires lesbian, gay and bisexual service members to dissemble at every turn, even in the most mundane daily conversations. For gay service members, facing questions such as “What church do you go to?” “What basketball team do you play on?” “What did you do this weekend?” and “Do you have a boyfriend/girlfriend back home?” is like standing on the edge of a mine field. Heterosexual colleagues do not intend to elicit information about a coworker’s sexual orientation with these common questions, which they experience as innocuous. Lesbian, gay and bisexual service members who answer these questions truthfully, however, could reveal their sexual orientation. Avoiding or providing vague answers could also raise suspicions. One slip up could end their careers.

The military’s long history of witch hunts to ferret out lesbians, gays and bisexuals in the ranks reinforces service members’ anxiety, distrust and suspicion. They work in constant fear that every time their First Sergeant or Commander unexpectedly calls them into their office, it may signal that they have been discovered and their career is over.

In trying to stamp out any hint of homosexuality, military leaders have ironically created a situation where lesbian, gay and bisexual service members must be profoundly self-conscious about their sexual orientation at every turn. Not only must they learn to mask any sign that might betray their sexual orientation, they are also required to affirmatively project an image of someone they are not—a heterosexual. Under these circumstances, it is no wonder that the woman sailor in the above example concluded that the Navy investigators, in stating they wanted the “full truth,” had unmasked her true identity.

⁴⁴ See *supra* note 16, at 5.

Conclusion

The current military climate sends a direct message to commanders and service members that it is permissible to ask questions about a person's sexual orientation. Without a means to punish those who violate the rules, asking will continue unchecked and incidents of asking will increase. Furthermore, until the real intent of the policy is enforced, those friends, family members and health care providers who ask out of concern or support for service members will be placed in an untenable position where investigators could elicit information that hurts the ones they care about. This climate only fosters fear in service members—whether they are gay, straight or bisexual—and it perpetuates a lack of trust and unity among our troops. Service members should be protected from illegal and intrusive questions about their sexual orientation and should have adequate recourse to stop asking without fear of reprisal.

DON'T TELL

“Don’t Tell” requires lesbian, gay and bisexual service members to keep their sexual orientation a “personal and private” matter. “Don’t Tell,” however, does not prohibit all disclosures of sexual orientation. Service members may disclose their sexual orientation to defense attorneys,⁴⁵ chaplains,⁴⁶ security clearance personnel,⁴⁷ and, in limited circumstances, doctors who are treating patients for HIV.⁴⁸ The policy protects service members’ freedom of association with friends and extracurricular organizations.⁴⁹ The policy’s intent is to afford service members some private, safe space in which they can have private conversations without fear of investigation or discharge. As former Secretary of Defense Les Aspin explained to Senator Bingaman during the 1993 Senate hearings on the policy, “If I came to the commander and said that you told me that you are gay, if that was the only thing going, my expectation would be the commander would not do anything.”⁵⁰

SLDN documented 23 “Don’t Tell” violations this year. These are incidents in which commands investigated or discharged service members based on private conversations that were intended to be off-limits under “Don’t Ask, Don’t Tell, Don’t Pursue.” The Air Force, which traditionally has the worst “Don’t Tell” record, led the other services again this year with 11 violations. The 1998 figures are consistent with those in past years. For the purposes of this report, SLDN counts only command violations of “Don’t Tell” rather than instances where

⁴⁵ MILITARY R. EVID. 502.

⁴⁶ MILITARY R. EVID. 503.

⁴⁷ DEP’T OF DEFENSE DIRECTIVE 5200.2-R 10-100. *See also*, DEFENSE INVESTIGATIVE SERVICE MANUAL, DIS-20-1-M, encl. 18, Jan. 1993.

⁴⁸ DEP’T OF DEFENSE DIRECTIVE NO. 6485.1, encl. 3.2 (Mar. 19, 1991). “Information obtained from a Service member during, or as a result of, an epidemiological assessment interview may not be used against the Service member (in adverse criminal or administrative actions).”

⁴⁹ DEP’T OF DEFENSE DIRECTIVE NO. 1332.14, encl. 4 E.4.; *Id.* NO. 1332.30, encl. 8 E.4.. “[Credible information does not exist when] the only information known is an associational activity such as going to a gay bar, possessing or reading homosexual publications, associating with known homosexuals”

lesbian, gay and bisexual service members face possible discharge for “statements” of sexual orientation.

There is no safe space for service members as “Don’t Ask, Don’t Tell, Don’t Pursue” is being implemented. Contrary to the intent of the policy, service members cannot seek guidance from their psychotherapists, chaplains, family or closest friends for fear of being outed and losing their livelihoods. This contrasts sharply with the military’s treatment of heterosexual service members, who are encouraged to seek guidance from these sources in recognition that they are important pressure valves for service members dealing with the stresses of military life.

Psychotherapists and Doctors Ordered to Turn in Gays

Health care providers have been ordered to turn in lesbian, gay and bisexual service members who seek their help, in violation of “Don’t Tell.” SLDN has identified this problem in past reports. Last year, Department of Defense officials disputed SLDN’s findings based on representations made to them by the Services and stated that health care providers were not required to turn in their patients.⁵¹ Evidence obtained by SLDN shows, however, that the Pentagon’s assertions are incorrect.

The Navy’s *General Medical Officer Manual*, obtained by SLDN this year, for example, specifically instructs health care providers to turn in lesbian, gay and bisexual service members.⁵² Updated in May 1996, the *Manual* is given to doctors who have completed their internship, prior to beginning their residency. The *Manual* dispenses advice on everything from angina to phobias. One chapter focuses specifically on homosexuality, urging medical officers to turn in gay service members. The *Manual* states:

⁵⁰ *Policy Concerning Homosexuality in the Armed Forces: Hearings Before the Senate Comm. On Armed Services*, S. Hrg. 103-845, 103rd Cong. at 721 (Testimony of then Secretary of Defense Les Aspin).

Homosexuals should not be referred to psychiatry. This is not a medical matter, but a legal matter. The referral should be made to the command legal officer or judge advocate general. . . . [T]hose who seek out the GMO to disclose homosexual conduct or the idea that they are being over-stimulated by members of the same sex are asking to be discharged. One way of looking at homosexuals in the military is to distinguish between those who adapt to the military environment and those who do not. The adapters are invisible and do not seek to disclose their homosexuality. The nonadapters realize they made a mistake in joining the military, and they need to get out. When a nonadapter goes to the physician, the physician will be most helpful by facilitating the legal process. . . .⁵³

The *Manual*'s lack of medical bearing is striking. It does not discuss lesbian, gay and bisexual health concerns. It does not recognize that disclosure of one's sexual orientation may be a necessary part of the patient's health care. It does not recognize that sexual orientation is not a bar to service under "Don't Ask, Don't Tell, Don't Pursue."⁵⁴ Instead, the text suggests that doctors should deny health care to lesbian, gay and bisexual service members if they reveal their sexual orientation. That is bad medicine. Instructing health care officials to turn in lesbian, gay and bisexual service members is also bad policy, against even the Pentagon's position on the subject.

Pentagon officials removed the section on "homosexuality" from the online version of the *General Medical Officer Manual* in February 1999, after SLDN brought the *Manual* to their attention. The fact that the guidance existed in the first place, however, underscores SLDN's concern that military leaders do not know, or have chosen to ignore, the intent of "Don't Ask, Don't Tell, Don't Pursue" to respect service members' privacy.

In the Air Force, a psychiatrist tells SLDN that she has been specifically directed by her

⁵¹ DEP'T OF DEFENSE APRIL 1998 REPORT at 10.

⁵² DEP'T OF THE NAVY, NAVMED P-5134, GENERAL MEDICAL OFFICER (GMO) MANUAL (May 1996).

⁵³ *Id.*

⁵⁴ *See supra* note 12, at 5.

superior not to provide mental health counseling on issues of sexual orientation and conduct. She also reports that her fellow doctors frequently use anti-gay epithets and engage in verbal gay-bashing at work. Yet another Air Force psychiatrist reports that it is not uncommon for commanders to search medical notes to snoop on their airmen and ferret out lesbian, gay and bisexual service members. According to the health care providers, these problems prevent them from adequately treating their patients.

Military health care providers have, in fact, turned in lesbian, gay and bisexual service members. A Navy psychologist turned in Marine Corporal Kevin Blaesing merely for asking questions about homosexuality, as described in the introduction. Last year, an Air Force psychologist outed Staff Sergeant Victor Peralta, a Russian language cryptologist, to his First Sergeant and to his unit. Both Blaesing and Peralta ultimately lost their careers. These are just two of many examples.

There is a clear need for Pentagon officials to inform health care providers that they are not required to turn in lesbian, gay and bisexual service members who seek their help.⁵⁵ Pentagon officials should further clarify that disclosures of sexual orientation or conduct in the course of medical treatment are not a basis for investigation or discharge under “Don’t Ask, Don’t Tell, Don’t Pursue.” The Pentagon’s current proposal to adopt a limited psychotherapist privilege does not address the problem of health care providers turning in their gay patients, as it is limited to criminal proceedings.⁵⁶ Under “Don’t Ask, Don’t Tell, Don’t Pursue,” most gay cases are now handled in the administrative system. Military readiness depends on service

⁵⁵ DEP’T OF DEFENSE APRIL 1998 REPORT at 10.

⁵⁶ There is no psychotherapist privilege in the military. The Pentagon has recommended adoption of a limited psychotherapist privilege in light of the United States Supreme Court’s holding in *Jaffee v. Redmond*, 116 S. Ct. 1923 (1996).

members receiving adequate health care, which is impossible if they are not able to speak with health care providers without fear of reprisal.

Military Chaplains Improperly Give Legal Advice

Some military chaplains are telling lesbian, gay and bisexual service members who seek their guidance to turn themselves in. Other chaplains encourage friends to become turncoats and report lesbian, gay and bisexual service members to their commanders.⁵⁷

An Air Force chaplain, for example, threatened to out an Air Force officer stationed in Florida. The officer had confided in a friend, another officer in the unit, that she is a lesbian and involved in a relationship. Afterward, when the friend sought guidance from the unit's chaplain, he encouraged her to turn in the officer. The chaplain convened a meeting with the friend and the officer in which he gave the officer an ultimatum: turn herself in by the end of the week or the friend would out the officer to her commander. The chaplain reportedly threatened to testify against the officer at an administrative separation hearing if she did not turn herself in and leave the military. The chaplain reportedly told the lesbian officer she should not be surprised about what was happening to her based upon the "choices" she made in life. When, by the end of the week, the officer had not outed herself, the "friend" followed through with the ultimatum and turned her in. An investigation against the officer ensued.

At the time of this incident, doctors had diagnosed the lesbian officer with a serious degenerative disease. As a result, she was eligible for a medical separation including benefits for her care. Had the Air Force discharged her under "Don't Ask, Don't Tell, Don't Pursue," she would have lost all eligibility for medical benefits. Fortunately, her commander was sympathetic and, despite pressure from his superiors, he permitted the medical separation to go forward,

instead of discharging her under “Don’t Ask, Don’t Tell, Don’t Pursue.” The chaplain’s actions, however, and the resulting investigation caused significant emotional stress, negatively affecting the service member’s health at a critical time.

In another case, described in more detail in the “Don’t Pursue” section, the Air Force fired a Senior Airman at Offutt Air Force Base with three-and-a-half years of service after a friend, on the advice of a military chaplain, turned him in for confiding in him that he is gay. The Senior Airman had thought he could trust his friend who had talked about his lesbian sister, stating that he loved her. He was wrong. The friend was a turncoat. The command started an inquiry ultimately leading to the service member’s discharge.

While SLDN does not record a large number of cases where chaplains participate in outing lesbian, gay and bisexual service members, the fact that these cases occur at all is troubling. The Pentagon should ensure that chaplains know sexual orientation is no longer a bar to military service and is a personal and private matter. Chaplains should not pressure service members to out themselves or encourage others to rat on their friends.

Military Officials Seek out Family and Friends

SLDN remains concerned that inquiry officers and investigators are seeking out family members and close friends to solicit information that can be used against their loved ones, contrary to “Don’t Ask, Don’t Tell, Don’t Pursue.”

In a case described more fully in the “Don’t Pursue” section, a Navy prosecutor threatened a service member’s mother and sister-in-law with subpoenas if they did not provide her with incriminating information about the service member (Exhibit 32). An administrative

⁵⁷ See *infra* at 49.

separation board retained the service member despite the evidence against the service member garnered by the prosecutor's misconduct.

In the Air Force, top lawyers have actually instructed inquiry officers, in writing, to seek out service members' parents, brothers and sisters, close friends and even high school guidance counselors for questioning (Exhibit 33). The following excerpt from an Air Force Report of Inquiry conducted in a pending case is typical (Exhibit 34):

- Have you told any of your family members that you are homosexual? When? How can I contact them?
- Who are some of your closest friends? How can I contact them?
- Do you belong to any homosexual organizations? Which? When did you become a member? Can I verify by talking to other members who know? Whom?

The inquiry officer asked this Air Force officer twenty-three questions about his sexual orientation, private life, associates, close friends and family members. Interviews like this one have become standard practice. When inquiry officers are successful in locating family members and friends, they have pressured them to provide damaging information against service members.

The Air Force has attempted to justify its intrusive tactics by claiming that inquiry officers use them 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 further service obligations. First, "Don't Ask, Don't Tell, Don't Pursue" does not authorize expanded inquiries in recoupment cases. Second, the Air Force has expanded such intrusive tactics to cases not involving recoupment of monetary benefits. In the above case, for example, the Air Force officer had not received any funding that would cause him to incur a further service obligation. While these violations are not limited to the Air Force, the Air Force has been the worst violator of "Don't Tell" every year for the past five years.

Conclusion

Service members have no safe space or privacy, contrary to the intent of “Don’t Tell.” Psychotherapists have been ordered to turn in lesbian, gay and bisexual service members. Some chaplains are forcing service members to out themselves, and encouraging their friends to become turncoats. Investigators are pursuing close friends and family members in an effort to dig up allegations against suspected gay service members. To clean up the “Don’t Tell” violations, military leaders need to make it clear that private conversations—to family, health care providers and best friends—should not be used as a basis for inquiry or discharge.

DON'T PURSUE

“Don’t Pursue” is intended to get commanders and investigators to back off and to respect service members’ privacy. More than a dozen specific investigative limits comprise “Don’t Pursue” (Exhibit 3). These limits establish a minimum threshold to start an inquiry and restrict the scope of an inquiry even if properly initiated. The investigative limits would help, if followed, but they have not been. Commanders and investigators continue to snoop, pry, search and dig in violation of “Don’t Ask, Don’t Tell, Don’t Pursue.”

SLDN documented 350 “Don’t Pursue” violations in 1998 compared to 235 in 1997. Reports of “Don’t Pursue” violations in the Army and Marine Corps more than doubled from last year to 101 and 45 violations respectively. Air Force violations increased 29% from 90 to 116 violations while Navy violations increased 20% from 71 to 85 violations.

The most common “Don’t Pursue” violations are (1) starting inquiries without credible information, and (2) witch hunts, where inquiries are expanded beyond the original allegation to seek out additional allegations against the service member or others who are suspected of being lesbian, gay or bisexual. In some cases, commanders and investigators are expanding inquiries to seek out possible criminal charges against service members.⁵⁸

In a development highlighted last year, military leaders are still attempting to force known lesbian, gay and bisexual service members to “prove” they are gay by providing information that could lead to criminal prosecution.⁵⁹ What is new this year is military leaders have refused to discharge some lesbian, gay and bisexual service members who come out and decline to provide any information that could cause them further legal harm. Of great concern,

⁵⁸ This is contrary to the stated preference in “Don’t Ask, Don’t Tell, Don’t Pursue” of handling gay cases in the administrative system.

⁵⁹ Unlike recoupment cases, where this tactic originated, these service members have not received educational funding, bonuses or special pay and do not owe any resulting service obligation to the military.

as described in the “Don’t Harass” section, military leaders have taken no steps to stop the anti-gay harassment that forced these service members to come out in the first place, nor have they given assurances that these service members will not be kicked out later, as they approach retirement.

Inquiries That Should Have Never Been Started

Army Pursues Women Despite False Accusation

At an Army training base in the Southeast last summer, a commander launched a wide-ranging inquiry threatening the budding careers of several women soldiers. This case illustrates common violations of “Don’t Pursue” and service members’ legal rights.

First, this commander rushed to judgment by launching an inquiry, rather than evaluating whether there was credible information to start one.⁶⁰ This commander started an inquiry after one soldier claimed she saw two women lying together on a bunk in the barracks, partly beneath a blanket. There was an eye-witness who directly contradicted her. Furthermore, the credibility of the accuser was in serious doubt.⁶¹ It appears the accuser had a history of making spurious gay accusations against her colleagues, according to a sworn statement by the eyewitness:

- Q. Could it have been possible for PVT [A] and PVT [B] to be under the covers together when PVT [C] walked in?
- A. Absolutely not. Besides the fact that I was sitting on the bed at the time that PVT [C] walked in....
- Q. Did there appear to be any suspicious behavior between PVT [A] and PVT [B] that evening?
- A. Absolutely not.

⁶⁰ DEP’T OF DEFENSE DIRECTIVE NO. 1332.14, encl. 4 A.1.; *Id.* NO. 1332.30, encl. 8 A.1. “A commander may initiate a fact-finding inquiry only when he or she has received *credible information* (emphasis added) that there is a basis for discharge.”

⁶¹ DEP’T OF DEFENSE DIRECTIVE 1332.14, encl. 4 F.1.; *Id.* 1332.30, encl. 8 F.1. “Credible information exists, for example, when a *reliable person* (emphasis added) states that he or she observed or heard a Service member engaging in homosexual acts, or saying that he or she is a homosexual or bisexual or is married to a member of the same sex.”

- Q. Do you have any opinion as to PVT [C's] reputation for truthfulness?
- A. Any reputation she might have would be that of an untruthful person.... PVT [C] would constantly refer to others as 'homos' or 'lesbians' and would constantly accuse others of being 'gay.'
- Q If you were told that PVT [C] alleged that PVT [A] and PVT [B] were engaged in sexual activity on 21 March 1998, what would be your response?
- A. PVT [C] is lying once again. I was there and I know that nothing was going on (Exhibit 35).

The bottom line is that the accused soldiers had done nothing. Yet, the command forced one of them to go to a discharge board to fight for her career because her commander improperly started an inquiry based on a false accusation. The other soldier waived her board, and the Army discharged her for alleged homosexual conduct, even though she denied the two women were lesbians and she testified at Private [A's] discharge board that the two women did not have a physical or sexual relationship.

Second, even if the inquiry had been proper, the company commander did not limit his inquiry to the allegation at hand. Instead, he expanded the inquiry and used it as a platform to pursue other women. As noted by the military attorney for Private [A] in a letter to the President of her discharge board: "the company commander" strayed into asking questions about the sexual activity between different individuals in his company. Such activity constitutes the exact type of 'witch hunt' that is specifically forbidden by the 'Don't Ask, Don't Tell, Don't Pursue' policy" (Exhibit 36).

Third, the commander actively prevented Private [A] from obtaining adequate legal counsel to defend against the false allegations. The Army defense attorney described the commander's efforts to interfere with this soldier's legal rights in his letter to the President of the discharge board, stating, "Private [A] has suffered from continual harassment from her chain of

command in not allowing her time to talk to me.... Neither my client nor I have been given an opportunity to meet face to face to prepare for this matter.... I have been unable to interview any of the witnesses in this case.”

After attempts to resolve these problems with Private [A’s] commander and the military prosecutor proved unsuccessful, the Army defense attorney appealed to the base Commanding General, writing, “Such intentional obstruction of the Attorney-Client relationship is in direct violation of Private [A’s] constitutional right to counsel, as well as a potential ethical problem for the attorneys who are facilitating said obstruction” (Exhibit 37). The soldier’s father, an Army officer, eventually was forced to seek help from his United States Senator before the Commanding General heeded the pleas of this soldier’s attorney and permitted the soldier to meet with her attorney unfettered.

This soldier was “fortunate.” Ultimately, the discharge board decided to retain her, given the false accusation. The commander, however, should never have subjected this soldier to an inquiry. The commander should never have harassed her because she attempted to exercise her legal rights. The commander should have never discharged the other soldier who was falsely accused. The commander should not have investigated the other women in the unit. There is no indication that the Army has held accountable the commander for his actions.

This soldier is anonymous because she remains on active duty. Although she is heterosexual, she fears that the false allegations could lead to suspicion and harassment if coworkers at her new unit learn of them.

*Navy Prosecutor Interrogates Family,
Circuit City Employees to Find Out If Sailor Is Gay*

In preparing for an administrative separation board last year, a Navy prosecutor launched her own inquiry into a sailor's pre-service life to dig up additional information that could be used to bolster a weak case against him for alleged gay acts. "Don't Ask, Don't Tell, Don't Pursue," however, does not authorize prosecutors to start inquiries. Under the policy, only a service member's commander may initiate an inquiry. Furthermore, even where inquiries are properly started, inquiry officers must limit the scope of their inquiry to the original allegations, contrary to the prosecutor's actions in this case.

In a letter to the Commanding Officer of the ship dated September 3, 1998, the military defense attorney describes the prosecutor's misconduct (Exhibit 38):

[The prosecutor] went so far as to question members of the respondent's pre-service place of employment. This is particularly noteworthy in light of the fact that respondent enlisted in the United States Navy nearly *four years* prior to the initiation of this investigation. In addition, and perhaps even more egregious, [she] contacted members of the respondent's family, threatening to subpoena such family members if they refused to provide information.

That a Navy prosecutor would badger a sailor's family and employees from his pre-service place of employment to provide information against him demonstrates an utter lack of propriety and complete disregard for the limits to investigation. This case shows just how far some officers will go to pursue suspected gay personnel. Fortunately, she did not succeed in her crusade, and the sailor serves today.

Air Force Colonel Pursues Anonymous Allegation

The Air Force pursued Captain Ron Falcon last year based on an anonymous email

message, contrary to “Don’t Ask, Don’t Tell, Don’t Pursue.”⁶² Anonymous allegations are not sufficient to begin an inquiry, because a commander cannot assess the credibility of the accuser.

A person known only by the screen name “jammer” accused Captain Falcon of being gay in an email to his chain of command. The Record of Investigation in this case states “An email was sent to Major Goven...by a person using the alias ‘jammer.’ Jammer identifies himself as a Captain in the Army National Guard. Jammer’s email alleges homosexual conduct and manipulation by a medical officer.... Lt Col Clement...requested via email that jammer provide additional details” (Exhibit 39).

Lieutenant Colonel Clement’s own email of August 28, 1998 confirmed that he pursued anonymous allegations. He wrote (Exhibit 40):

Hello, I direct physician assignments for the Air Force.... I am interested in what you had to say but it is difficult to *pursue* (emphasis added) your leads without knowing who you are talking about. Any additional details you wish to share will be taken into consideration. Thanks for contacting our assignments division. I look forward to hearing from you soon.

“Jammer” fulfilled Lieutenant Colonel Clement’s request and turned over Captain Falcon’s name.

Captain Falcon’s discharge is pending based on “jammer’s” accusations as well as an independent statement made by Falcon to his commander admitting that he is indeed gay. Falcon’s statement was made independently of Lieutenant Colonel Clement’s actions in the case. An administrative separation board recommended Falcon’s separation, despite his arguments to the Board that he wants to serve.

⁶² DEP’T OF DEFENSE DIRECTIVE NO. 1332.14, encl. 4 E.2-3.; *Id.* NO. 1332.30, encl. 8 E.2-3. “Credible information does not exist, for example, when: . . . the only information is the opinions of others that a member is homosexual or the inquiry would be based on *rumor, suspicion, or capricious claims* (emphasis added) concerning a member’s sexual orientation.”

Sergeant Snoops Through Soldier's Personal Belongings

The Army discharged Specialist Christopher Albritton because First Sergeant Joseph Shinskie snooped through his personal belongings, in violation of “Don’t Pursue” and discovered private photographs inside Albritton’s day planner. Although the photographs did not depict any sexual acts, they led First Sergeant Shinskie to believe that Albritton is gay.

As First Sergeant Shinskie stated for the official record:

While in the room I noticed a day planner, black in color sitting on a night table.... I flipped open the planner and noticed several pictures.... Unsure as to the legality of the viewing of these photographs, I...advised the commander, CPT Dewitt, of my findings. After coordination with the SJA, CPT Bowers, the commander initiated an inquiry into...Albritton *and* the unidentified male in the photographs (emphasis added) (Exhibit 41).

Sergeants may inspect their subordinates’ rooms to ensure their health, welfare and safety, which is the type of inspection First Sergeant Shinskie said he was conducting in this case. First Sergeant Shinskie’s actions, however, went beyond this type of inspection. In health, welfare and safety inspections, sergeants are usually concerned about items directly connected to mission accomplishment, building maintenance, and individual well-being. These include ensuring soldiers have all of their uniforms and gear in proper condition and that their rooms are clean. In this case, First Sergeant Shinskie had already concluded that Specialist Albritton’s room was “adequate and presented no safety hazards” prior to opening Albritton’s day planner. Curious about Albritton’s private life, however, he went further. At this point, First Sergeant Shinskie stepped over the line from an inspection to effectively starting his own inquiry into Albritton’s private life.

More disturbing is the reaction of First Sergeant Shinskie’s commander, Captain

Christopher Dewitt. When he learned of First Sergeant Shinskie's snooping, he started an official inquiry based upon the ill-gotten pictures. Captain Dewitt's action turns the credible information standard on its head. Commanders must have credible information before beginning an inquiry. Commanders may not skirt this rule by allowing their noncommissioned officers to snoop on suspected gay service members, and then using whatever they dredge up as the basis for an official inquiry.

Captain Dewitt sought to identify the other man in the photograph, according to First Sergeant Shinskie's official statement. This apparently occurred with the blessing of legal advisors in the Staff Judge Advocate's office. Even if an inquiry could be justified in this case, both Captain Dewitt and the Staff Judge Advocate overstepped their bounds by trying to identify this man, who turned out to be a civilian.

SLDN has handled many cases like that of Specialist Albritton. We have also handled, however, a dozen cases over the past five years where commanders responded appropriately, by not initiating inquiries based on personal letters, photos, videos, diaries and journals. Service members in these cases are reluctant to be public, even to applaud their commanders, for fear that senior leaders might dredge up these old incidents as grounds for discharge.

Commander with No Authority over Marine Starts Inquiry Based on Stolen Journal

A commander investigated another enlisted marine after her former roommate stole a private poetry journal and accused her of being a "dyke" in retaliation for the marine's testimony against her in a nonjudicial proceeding for adultery. The marine, who was in a different unit, had reluctantly testified on the order of her commander. At the hearing, the former roommate alleged the marine was a lesbian in an attempt to discredit her. The former roommate was told that her commander was "not going to address that issue" at the hearing, but she was not

dissuaded from raising it later.

After the hearing, the former roommate turned over the journal and letters tucked inside of it to her commander and accused the marine of being a lesbian. At the time, she remarked to a friend, “That dyke is going to fry,” in reference to the marine.

The former roommate’s commander responded by initiating an inquiry against the marine. Under “Don’t Ask, Don’t Tell, Don’t Pursue,” however, only a service members’ own commander may initiate an inquiry.⁶³

The inquiry was also improper because the accusation was not credible. “Don’t Ask, Don’t Tell, Don’t Pursue” requires commanders to assess if accusers are reliable and to take into account the surrounding circumstances in determining whether to initiate an inquiry.⁶⁴ The policy charges commanders to take into account that sexual orientation is a personal and private matter. These rules were intended to prevent people with retaliatory motives from being able to use official military channels to perform their dirty work.⁶⁵

In this case, the accuser’s undisputed motive was retaliation. Further, it is hard to imagine a more personal and private context than a person’s journal. An appropriate response for the former roommate’s commander would have been to return the journal to the marine without reading it. The former roommate should have been held accountable for making a retaliatory accusation and for stealing the journal.

This marine now faces possible discharge under “Don’t Ask, Don’t Tell, Don’t Pursue,” based solely on her poetry journal and the letters. By starting an inquiry that he was not

⁶³ DEP’T OF DEFENSE DIRECTIVE NO. 1332.14, encl. 4 A.1.; *Id.* NO. 1332.30, encl. 8 A.1. “Only the member’s commander is authorized to initiate fact-finding inquiries involving homosexual conduct.”

⁶⁴ DEP’T OF DEFENSE DIRECTIVE NO. 1332.14, encl. 4 B.3.; *Id.* NO. 1332.30, encl. 8 B.3. “Credible information exists when the information, considering its source and the surrounding circumstances, supports a reasonable belief that the Service member has engaged in homosexual conduct. It requires a determination based on articulable facts, not just a belief or suspicion.”

⁶⁵ *See supra* note 50, at 32.

permitted to start under this policy, the roommate's commander signaled just how far some leaders will go to pursue suspected gay service members. His actions give a green light to anyone with an ax to grind by encouraging retaliatory accusations.

Witch Hunts

Air Force Uses AOL "Buddy List" to Launch Witch Hunt

The Air Force kicked out a twenty-two year old Senior Airman at Offutt Air Force Base with three-and-a-half years of service as the result of a wide-ranging inquiry. The inquiry started after a friend, on the advice of a military chaplain, turned him in for confiding his sexual orientation in a private conversation. During this conversation, the friend had talked about his lesbian sister, stating that he loved her. This led the Senior Airman to believe he could safely confide in his friend. He was wrong. The friend was a turncoat.

After this conversation, the friend told a military chaplain about the Senior Airman's sexual orientation. According to the Report of Investigation (ROI), the friend:

felt his religious convictions could not allow him to support [the Senior Airman's] lifestyle. [The friend] felt by remaining silent it would send a message to [the Senior Airman] that he supported the life choice. [The friend] stated he gave the chaplain permission to divulge the information to whomever could [remove the Senior Airman from the workplace] (Exhibit 42).

The chaplain reported the Senior Airman to his commander. The commander sought advice from his superior, who summoned the base security police. In a fit of overkill, the commander appointed a criminal investigator from the security police to investigate whether the airman had said he is gay. Typically, in coming out cases, the commander assigns an officer from the base to conduct an administrative inquiry as an additional duty.

Under “Don’t Ask, Don’t Tell, Don’t Pursue,” the commander should never have initiated an inquiry. The policy was not designed to police private statements to friends.⁶⁶ The senior airman did not shout out his sexual orientation in the mess hall. He did not run to *The Omaha World Herald* to proclaim that he is gay. He confided in a friend whom he thought he could trust because the friend had a lesbian sister.

The investigator also expanded the inquiry’s scope in violation of the investigative limits. Even if the commander had credible information to start the inquiry, the only appropriate inquiry in this case was whether the Senior Airman confided in his friend. The investigator established this fact almost immediately in his interviews with the friend and Senior Airman. At that point, he should have closed the inquiry and submitted his findings to the commander.

Instead, the investigator sought out additional allegations against the Senior Airman. He questioned another friend about private conversations with the Senior Airman, which were not in issue. Under questioning, this friend revealed that the Senior Airman had confided in him and another coworker at a time when “he was under a lot of pressure and stress to keep it a secret and felt he could tell them, hoping he wouldn’t lose their friendship” (Exhibit 42). This friend stated that, in fact, this information “never changed their friendship.”

The investigator also violated the investigative limits by asking this friend wide-ranging questions about the Senior Airman’s off-duty activities, which were unrelated to the allegation in this case. According to the ROI, the investigator asked the following improper questions (Exhibit 43):

- Q. While attending [an off base dance club] with [the Senior Airman and friends], did you notice [the Senior Airman] dancing with any other male companions?
- A. No, I did not.

⁶⁶ *Id.*

- Q. Did you notice same-sex (male/male or female/female) relations occurring, i.e. their kissing, hugging or dancing together as a couple?
- A. No, I did not.
- Q. Has [the Senior Airman] or [a civilian woman] ever confided in [the Senior Airman's] (sic) sexual relationship with another man?
- A. To me, they have not
- Q. Has [the Senior Airman] ever identified any USAF flyers stationed at [another base] which (sic) he has dated as a homosexual male?
- A. No he has not.

The investigator should never have questioned this friend, let alone questioned him about the Senior Airman's private life. Under no circumstances should he have questioned this friend about the sexual orientation of another military member.

The investigator did not stop there. He obtained a warrant to search the Senior Airman's computer and seized a number of email messages. In an irony lost on the inquiry officer, the messages he seized included a widely distributed call for help from Master Chief Petty Officer Timothy R. McVeigh, sent when the Navy illegally pursued him based on an anonymous America Online profile (Exhibit 44).

Finally, the inquiry officer expanded the inquiry even further to pursue other suspected gay military members. According to the ROI, the inquiry officer downloaded the Senior Airman's America Online "Buddy List" containing twenty-one email screen names, and questioned him about the identities of those listed. The ROI contains a list of the screen names, with notations by each name indicating the listed person's suspected sexual orientation. Notations also indicate whether the holder of each screen name is thought to be a civilian or a military member. It is unclear whether the inquiry officer actually pursued all of the names he dug up, but the record has all the indicia of a classic witch hunt.

Based on the emails and “Buddy List,” the inquiry officer recommended that the Senior Airman be charged for “misuse of government computer systems,” a potential criminal offense. Given the context of this case, this can fairly be called “piling on,” another example of overkill in pursuing this young service member. By this point, the investigator had more than enough to support a discharge under “Don’t Ask, Don’t Tell, Don’t Pursue,” but instead he kept expanding the inquiry in an attempt to turn it into a criminal case.

The command violations in this case are numerous. That a commander and an investigator would go to such great lengths, and expend so many scarce investigative resources, to pursue a young service member because he confided his sexual orientation in a friend reveals seriously misguided priorities.

This case and others like it rebut recent Pentagon claims that gay service members disclose their sexual orientation because they want a so-called “easy way” out of the military. The harsh consequences and high risks of coming out to anyone in the military, including the risk that an investigator will stop at nothing to turn the situation into a criminal case, should cause even the most skeptical reader to disregard this blanket assertion.

Although the Air Force has discharged the service member, he remains anonymous out of concern for the military members listed on his America Online “Buddy List.”

NCIS Starts Witch Hunt

Agents from the Navy Criminal Investigative Service (NCIS) have started an investigation into a sailor’s sexual orientation on the offensive theory that he and his wife are not validly married. Despite numerous requests, the investigators have never told the sailor why they started the investigation or the specific allegations against him.

As described in the “Don’t Ask” section, NCIS agents improperly asked this sailor questions about his sexual orientation and associations. NCIS agents also questioned other people about this sailor’s sexual orientation and associations in violation of “Don’t Pursue.” Finally, the record shows that NCIS is trying to identify acquaintances of this sailor on the suspicion that they might be gay. Coworkers questioned by NCIS about this sailor saw this investigation for what it is: a witch hunt.

A letter from this sailor’s military defense attorney to the commanding officer states the case better than any other document (Exhibit 28):

[A] was asked inexplicably about whether he knew a fireman from Tulare who NCIS has reported going to and from his apartment. His former apartment manager was approached and asked whether he had seen men coming and going from his apartment.... Additionally, NCIS questioned [a retired sailor]. After the interview, [the retired sailor] pointed out to [A] that NCIS was asking ‘lifestyle’ questions about [A]...and that...NCIS repeated the lifestyle questions several times.... [Yet another sailor] was questioned by NCIS. He stated to me that based on the questions asked of him (including the questions above), it was clear that NCIS was on some kind of ‘witch hunt’ for homosexuals.

This sailor’s career remains in jeopardy. In the meantime, he has no recourse to stop this clearly improper investigation.

Platoon Sergeant Tells Marines to Turn in Gays

An active duty marine corporal reports that his platoon sergeant stood in front of a unit formation and said, “Rumors are going around that one of the Marines in our platoon is gay. If anyone has any information, they should come forward or if anyone is questioning their sexual orientation, they should come forward” (Exhibit 45).

“Don’t Ask, Don’t Tell, Don’t Pursue” forbids soliciting gay accusations against service members or instructing lesbian, gay and bisexual service members to out themselves.

Sailor Threatened Unless She Accuses Friend of Being Gay

An active duty sailor reports that her supervisor asked her about the sexual orientation of another sailor who was a friend. In a Memorandum for Record dated January 15, 1999, the sailor states that her supervisor asked (Exhibit 46):

- “Has [Z] ever told you that he is gay?”
- “Are you sure that he has never told you while you were attached to the command or since you have detached?”
- “[He] didn’t tell you he was gay New Years Eve night?”

When the sailor replied “No” to her supervisor’s questions, the supervisor threatened her, stating, “[Sailor], I can see that you’re lieing (sic) in your face. If you are caught lieing (sic) you can be in a lot of trouble.” When the sailor reaffirmed her answers, the supervisor attempted to intimidate her, suggesting that the sailor would have to testify at a court-martial.

A further exchange between the sailor and her supervisor reveals the supervisor’s cynical view of the limits to investigation under “Don’t Ask, Don’t Tell, Don’t Pursue.” When the sailor asked her supervisor, “Why don’t you ask him instead of me?” The supervisor replied, “‘Don’t Ask, Don’t Tell Navy,’ remember?” While the Navy supervisor correctly noted that she could not ask the sailor directly about his sexual orientation, the supervisor deliberately attempted to skirt the limits to investigation by pressuring the sailor’s friend to accuse him. This is not allowed under “Don’t Pursue.”

The supervisor further violated “Don’t Pursue” by launching her own fishing expedition to see what she could dig up against this sailor. The supervisor had not been appointed by her

commander to conduct an inquiry, as required.⁶⁷ The supervisor's commander had not made a determination that credible information existed to conduct an inquiry. In fact, there is no evidence that any allegation was lodged against the sailor at all. Instead, the supervisor attempted to dig one up, contrary to "Don't Ask, Don't Tell, Don't Pursue."

Gay or not, the sailor in question is lucky that his friend did not cave in to her supervisor's pressure. As shown in the examples above, even false accusations are enough to potentially ruin a service member's career. This sailor, and the friend who wrote the Memorandum for Record on his behalf, remain anonymous in this report for fear of retaliation by the supervisor.

Army Tries to Criminally Prosecute Soldier Who Comes Out

An Army Specialist almost found himself in prison after coming out to his commander in Korea. Specialist [F]'s case is another example of how dangerous it is for lesbians, gays and bisexuals to come out under "Don't Ask, Don't Tell, Don't Pursue."

Specialist [F] told his company commander, Captain Martha Granger, that he is gay in April 1998. He had become deeply depressed while coping with stress and serving in a hostile anti-gay environment.⁶⁸ Eventually, he decided that his mental and physical health required him to inform his commander that he is gay.

Captain Granger asked Specialist [F] a series of intrusive questions about his private life, in violation of the "Don't Pursue" mandate not to expand the scope of an inquiry. Captain

⁶⁷ DEP'T OF DEFENSE DIRECTIVE NO. 1332.14, encl. 4. A.2.; *Id.* NO. 1332.30, encl. 8 A.2. "A fact finding inquiry may be conducted by the commander personally or by a person he or she appoints."

⁶⁸ Military service in South Korea is particularly demanding of service members. North Korea and South Korea remain in a technical state of war, separated by a heavily defended Demilitarized Zone (DMZ). The Defense Department generally limits the length of assignments to one year and does not allow service members to bring their families with them because of the hazardous nature of the duty. Cultural differences between South Korea and the

Granger asked Specialist [F]

- When was the last time you had sex?
- With whom did you have sex?
- How many times per week did you have sex?

Specialist [F] answered the questions believing his commander was acting in his best interest, even though the questions subjected him to potential criminal charges.

Captain Granger declined to take further action against Specialist [F], which could be construed as a generous application of “Don’t Ask, Don’t Tell, Don’t Pursue” in this case. But Specialist [F] was severely depressed about being in the closet, among other things. Specialist [F]’s depression deepened until one day, in July 1998, he attempted suicide by ingesting a large quantity of motrin.

Rather than help Specialist [F], the commander made matters worse. Captain Granger required Specialist [F] to have his boyfriend write a letter detailing the nature of their intimate relationship. She also asked additional questions about his private life, which he answered. The result was not an administrative separation, but a criminal investigation.

The Army Criminal Investigation Command (CID) took the case. CID investigated Specialist [F] for sodomy and fraudulent marriage (he was married to a female soldier). CID asked his wife questions about the intimate details of their relationship, subjecting both him and his wife to UCMJ liability.

The CID investigation found that Specialist [F] and his wife had not defrauded the government. Specialist [F] faced continued investigation and possible criminal charges of consensual sodomy based on the questions his commander asked him. The sodomy investigation

United States are stark. Young soldiers and airmen assigned to South Korea often have great difficulty adjusting to these stresses.

was dropped only after SLDN wrote to the Commanding General of the Second Infantry Division last September.

The Army has provided two responses to inquiries regarding how it handled Specialist [F]'s situation. An October 1998 letter to SLDN from the Commanding General's Staff Judge Advocate (SJA) makes no mention of the fraud charges and tries to duck the fact that CID initiated a criminal investigation. The letter purports that CID intervened because "the unit requested that the local [CID office] assist in validating Specialist [F]'s claimed orientation." The SJA further maintained that CID's efforts were a "good-faith attempt to assist the unit's fact-finding inquiry" concerning homosexual conduct (Exhibit 47). Even if this were true, it would be contrary to "Don't Ask, Don't Tell, Don't Pursue," which prohibits CID from investigating service members' sexual orientation.⁶⁹

After further SLDN inquiries, the Army admitted, in a January 29, 1999 letter to Senator Feinstein (D-CA) that CID initiated a criminal investigation subsequent to Specialist [F]'s statement that he is gay. The Army admits CID expanded the scope of the investigation to encompass whether "he defrauded the government of housing and subsistence allowances by entering into a 'sham' marriage" (Exhibit 48). It may come as a surprise to Army officials that lesbians, gay men and bisexuals enter into valid, legally recognized marriages with members of the opposite gender for a variety of reasons, including love, companionship and mutual support. In many other cases, service members discover they are lesbian, gay or bisexual only after they are married. In this case, CID floated the false and offensive theory that lesbian, gay and bisexual people are presumptive frauds in order to bootstrap a mere coming out case into the criminal system.

⁶⁹ DEP'T OF DEFENSE DIRECTIVE NO. 5505.8 D.1. "No DCIO or other DoD law enforcement organization shall conduct an investigation solely to determine a Service member's sexual orientation."

The tactics in this case are not unique to the Army. SLDN has handled cases like this in all services. The cases suggest that the services are attempting to criminally punish service members who are, or are perceived to be, lesbian, gay or bisexual.

Soldier Feared Criminal Prosecution After Coming Out

Private Melanie Gonzalez feared that she, too, would face criminal prosecution after she came out. She had told her commander, Captain Paul Pierson, during reenlistment counseling that she did not want to reenlist because “being a lesbian in the U.S. Army is one of the most difficult obstacles I have ever had to overcome.” Later that day or the next day, according to Private Gonzalez, Captain Pierson questioned her about this statement. Under “Don’t Ask, Don’t Tell, Don’t Pursue,” it was appropriate to question Private Gonzalez only about her statement. Captain Pierson, however, questioned Private Gonzalez about her sexual activities and about other military members, contravening the clear rules against witch hunts. According to Captain Pierson’s Memorandum for Record dated November 13, 1998, he asked the following questions (Exhibit 49):

- Have you ever engaged in homosexual activities?
- Did those activities take place while in the military or did they occur previously?
- Where did these activities take place?
- Were you on leave or present for duty when these acts took place?
- With whom did they occur, civilian or soldier?
- Did you intend to engage in homosexual activity?

Answering these questions could have subjected Private Gonzalez to criminal charges. In fact, Captain Pierson showed her a charge sheet listing “sodomy” and “indecent acts,” criminal charges under the Uniform Code of Military Justice. Although Captain Pierson told her that

“...it was generally not the Army’s policy to court-martial soldiers for being homosexual,” she became concerned that she might be the exception, based on the charge sheet.

Private Gonzalez invoked her right to speak with an attorney, but Captain Pierson questioned her nonetheless. When a service member invokes her right to an attorney in cases like this one, questioning is supposed to cease.

Ultimately, the Army honorably discharged Private Gonzalez. However, her case, like Specialist [F]’s case above, shows how soldiers who are unfamiliar with the legal pitfalls of “Don’t Ask, Don’t Tell, Don’t Pursue” can potentially face criminal charges for answering questions about their private lives.

Navy Tells Officer to Prove He Is Gay

Navy Lieutenant (j.g.) Edward Galloway came out last year because of anti-gay harassment onboard the *USS Vandergrift*, as described more fully in the “Don’t Harass” section. When Lieutenant Galloway came out, the ship’s Executive Officer asked him the following questions about his private life and associations in a misguided effort to “confirm” that he is gay (Exhibit 50):

- Have you told anyone else about your sexual orientation? Who?
- Are you dating anyone?
- How can these persons be contacted?
- Did you belong to any homosexual student organizations at school?
- Have you told your family members? Who? How can they be contacted?
- Who are your close friends and how can they be contacted?

Lieutenant Galloway was caught between a rock in a hard place. He could tell the Executive Officer what he wanted to hear at risk of triggering a witch hunt or a court-martial,⁷⁰

⁷⁰ Under the Uniform Code of Military Justice (UCMJ), commanders may criminally charge service members who engage in a wide variety of consensual acts with someone of the same gender, including handholding, kissing, and

or he could refuse to answer the intrusive questions and risk his safety aboard the *USS Vandergrift*.

Lieutenant Galloway refused to answer these intrusive questions, whereupon Commander Kusumoto refused to discharge him. In a memorandum to Lieutenant Galloway dated October 8, 1998, Commander Kusumoto writes, "In the absence of information confirming LTJG Galloway's homosexuality and given his strong performance onboard *Vandergrift*, perhaps he would be better served to complete his 18 month tour..." Commander Kusumoto, however, failed to take any steps to stop the harassment and ensure Lieutenant Galloway's safety.

SLDN is aware of eight cases this year in the Army, Air Force and Navy where the services refused to discharge service members who disclosed their sexual orientation because the service members declined to answer questions about their private lives and associations. Ultimately, the Navy recommended Lieutenant Galloway's discharge only after outside intervention in his case. Others continue to serve.

Conclusion

In the past five years, commanders have pursued service members based on any information, however obtained, in direct violation of the investigative limits under "Don't Ask, Don't Tell, Don't Pursue." Commanders have pursued information that is defined as not credible, including anonymous allegations, false charges, rumor and innuendo. Commanders and inquiry officers have expanded inquiries to look for incriminating information when their initial leads run dry or prove untrue so that they can justify their inquiries. Commanders and inquiry officers pursue other service members uncovered in their investigations. The bottom line

sex. Heterosexuals may also be prosecuted for consensual oral or anal sex. Under "Don't Ask, Don't Tell, Don't Pursue," service members are supposed to be treated in an even-handed manner in the criminal system. However, gay service members continue to be prosecuted in circumstances where heterosexuals are not.

is that commanders still work hard to put service members on to the radar screen contrary to the policy's letter and intent.

There are three reasons why "Don't Pursue" violations continue to increase: lack of guidance, accountability and recourse. First, the Pentagon and service chiefs have refused to distribute guidance on the policy's investigative limits or the policy's intent to respect privacy. Second, the Pentagon officially has not held anyone accountable for asking, pursuits or harassment in five years under the policy, signaling that the Pentagon and Services will tolerate abuses. Third, service members have no recourse to stop unwarranted inquiries at any stage of the process.

SLDN urges military leaders to immediately issue guidance regarding the policy's investigative limits and its intent to respect service member's privacy. Military leaders should conduct comprehensive training for all service members. They should hold accountable those who ask, pursue and harass in violation of "Don't Ask, Don't Tell, Don't Pursue." And they should provide some means of recourse for service members who are improperly targeted.

In addition, Commanders should state in writing, at the outset of an inquiry, the credible information on which the inquiry is based. The Pentagon should permit military defense attorneys to represent service members as soon an inquiry commences, rather than instructing them to wait until after the command has completed an inquiry, filed the discharge paperwork or preferred criminal charges.

Further, Pentagon and service officials should review the administrative discharge process to ensure that fundamental rights of due process are upheld. At the very least, the Pentagon should adopt an exclusionary rule, allowing service members to exclude evidence that is the fruit of unlawful inquiries from administrative separation proceedings.

Finally, SLDN would welcome guidance from the Department of Defense or the services regarding the recent trend permitting known lesbian, gay and bisexual personnel to serve, and what steps they will take to ensure service members' safety and the viability of their careers in these cases.

DON'T HARASS

“Don’t Harass” clearly states, “The Armed Forces do not tolerate harassment or violence against any service member for any reason.”⁷¹ The services, however, have failed to uphold this standard. Last year’s reports of anti-gay harassment soared 120% to a record 400 violations, compared with 182 violations the previous year. Violations increased in every service. The Navy led the services with 158 “Don’t Harass” violations, a 140% increase from last year’s figure of 66 violations. The Army was second with 122 violations, an increase of 198% over the previous year.

Reports of harassment, from death threats to verbal gay-bashing, came from nearly every major base and port. Service members report being harassed by officers and enlisted personnel. Men commit most of the harassment, although harassment by women is not unknown. The harassment often begins in basic training and continues throughout a service member’s career.

Service members tell SLDN they endure daily anti-gay epithets and threats such as: “Shut your faggot mouth”; “We’re going to kill you”; “Carpet muncher”; “I have a right to beat your ass”; “There’s that faggot”; “Dyke”; “Queer”; “Die, faggot”; “They deserve to die”; “I hate your kind”; “Shut up, you faggot”; and “That dyke is going to fry.” These statements are just a fraction of the epithets and threats reported to SLDN in the past year.

Lesbian, gay and bisexual service members have no recourse to stop harassment. Service members cannot report it without inviting further harassment and possibly triggering an investigation of their sexual orientation. For many, the only recourse is to come out and face possible discharge.

⁷¹ DEP’T OF DEFENSE DIRECTIVE NO. 1304.26, *Applicant Briefing Item on Separation Policy*.

In 1997, the Pentagon issued a memorandum instructing commanders to investigate anti-gay threats and lesbian-baiting, not service members who report it.⁷² In 1998, however, the Pentagon conceded that the Services had not distributed the Dorn Memo. Upon SLDN's urging, Pentagon officials recommended that the memo be clarified to expressly include harassment and distributed fully.⁷³ This has not yet occurred.

This guidance would help, if distributed. Ultimately, however, leaders at every level need to make a visible commitment to stopping anti-gay harassment in the field. Failing that, harassment will continue to flourish, forcing lesbian, gay and bisexual service members to come out to their commands in even higher numbers.

The following examples are representative of SLDN's cases in the past year.

“You’re Dead...You Faggot”

An Ensign faced constant anti-gay harassment, including death threats, while aboard the *USS Platte*. He reports that his Chief called him “a fucking faggot” and a Senior Chief said, “Oh, that’s right, you’re one of those light-footed sailors from Annapolis. There is (sic) a lot of your type down there isn’t there?” Leaders from Chief Petty Officers to Lieutenant Commanders reportedly made repeated derogatory remarks, including, “All this table (in EOS) needs is some stirrups. So, if anyone wants to they can come by and fuck me like a fag” and “[I am not good at] bouncing balls off [my] chin” (Exhibit 51). The Ensign reports sailors threatened his life repeatedly. Someone reportedly yelled: “You’re dead, you dick-sucking faggot.” On another occasion, a sailor told him “You’d better watch yourself out there . . . tonight. It’s mighty slippery. Wouldn’t want to slip and go over the side.” (Exhibit 51, 52).

⁷² See *supra* note 6, at 3.

⁷³ DEP’T OF DEFENSE APRIL 1998 REPORT at 8.

The Ensign came out to his commander and resigned because he feared for his safety. The Ensign's commanding officer initially refused to accept his resignation, reportedly telling him he could "live with the harassment." After he filed a sexual harassment complaint, however, she reluctantly granted the resignation. The commanding officer reportedly stated she would issue an order that anti-gay harassment was inappropriate. There is no indication, however, that she ever issued the order or held the harassers accountable.

"There's Nothing Wrong with Killing a Few Fags"

Former Specialist Carol Melnick faced constant lesbian-baiting and anti-gay harassment from the moment she entered the Army in 1996 until she ultimately came out as a lesbian because of the harassment and was discharged in 1998 (Exhibit 53).

In the first week of basic training, a noncommissioned officer harassed Melnick after seeing her place her hand on another female trainee's shoulder. The Sergeant called the two women over and lectured them in front of the entire platoon stating, "We don't do that in the Army," and threatened that Melnick would be "in a lot of trouble" if he saw her "do anything like that again." Assuming she is a lesbian, he added, "People like her" "disgusted him" and "they shouldn't be allowed in the Army. They don't belong here."

This is a classic lesbian-baiting scenario where common friendship between two women was perceived as something sexual when it was not.⁷⁴ Through the lens of "Don't Ask, Don't Tell, Don't Pursue," however, ordinary actions have extraordinary consequences. A pat on the back, a hug, or a hand on a shoulder can result in women being labeled as lesbians, and lead to

⁷⁴ See Michelle Benecke & Kirsten Dodge, *Military Women in Nontraditional Job Fields: Casualties of the Armed Forces' War on Homosexuals*, 13 HARV. WOMEN'S L.J. 215 (1990).

inquiry, discharge or criminal charges. Melnick was labeled a lesbian from day one and never escaped being asked, hounded or harassed.

Later in basic training, a platoon guide harassed Melnick. The platoon guide reportedly wagged her finger in Melnick's face and began yelling throughout the barracks that Melnick and another female soldier were lesbians. Melnick and the other soldier reported the platoon guide's actions to Sergeant First Class Montgomery, the head Drill Sergeant, who merely smiled and then refused to take appropriate action, according to Melnick.

Melnick's first assignment was at Bravo Company, 9th Psychological Operations Battalion at Fort Bragg, North Carolina. While there, Melnick says she faced pervasive anti-gay harassment. Once, while riding in a truck with several noncommissioned officers and, ironically, an Equal Opportunity representative, a senior member of her unit reportedly told a sexually explicit lesbian joke. Throughout the joke, this individual, Sergeant Parker, reportedly turned to Melnick several times and said, "Now, don't take this personally," implying to all present that Melnick was a lesbian. According to Melnick, all of the noncommissioned officers laughed and looked at her to check her reaction. Sergeant Parker and other noncommissioned officers reportedly made daily jokes and speculated about Melnick's sexual orientation in front of other soldiers.

Melnick also reports that students in her Fort Bragg language class made daily anti-gay jokes and mimicked gays with limp-wristed stereotypes. One student reportedly said "There's nothing wrong with killing a few fags." Several noncommissioned officers also repeatedly pretended to mispronounce a Vietnamese word that sounded like the word "gay." A classmate told Melnick that jokes were made about her sexual orientation when she was not present. The instructor ignored the jokes and never stopped them.

Melnick reports that “lewd comments and jokes about gays were prevalent and appeared to be as much a part of the Army culture as the uniform.” She reports the harassment she experienced made her hesitate to go to public places such as the dining hall, gym or clubs on post. The harassment caused Melnick to become depressed, but she did not seek counseling, fearing it would lead to an investigation. Due to these circumstances, after two years of service, Melnick felt that coming out was her only option to stop the harassment and protect her mental and physical health. After two years of service marred by constant harassment, Melnick wanted to work and live in a healthy, safe and professional environment. The Army could not give this to her, so she came out to ensure her welfare.

“You’d Better Not Be Queer Because in the Navy We Kill Our Fags”

Two midshipmen in Cornell University’s Navy NROTC program also reported physical threats and other anti-gay harassment last year.⁷⁵

Midshipman Mark Navin reports he was repeatedly questioned about his sexual orientation during a summer training cruise onboard a Navy ship. An enlisted crewman reportedly threatened his life during a late-night watch, warning Navin, “You’d better not be queer because in the Navy we kill our fags” (Exhibits 19).

During NROTC activities, Navin was also repeatedly asked and harassed about his perceived sexual orientation (Exhibit 20). As a result of this pervasive harassment, Navin came out to his NROTC command. Navin was disenrolled from the program for disclosing his sexual orientation when reporting the harassment.

After Navin came out, Midshipman Rob Gaige received direct physical threats and comments because he was a friend of Navin’s. Other midshipmen made comments such as, “I’ll

beat the fuck out of you and your boyfriend,” erroneously implying that Gaige and Navin were boyfriends. Major Richard Stickel, Gaige’s instructor, also reportedly made derogatory comments about both Gaige and Navin in front of other midshipmen. Additionally, Gunnery Sergeant Armstrong, a senior enlisted leader, stated during a Naval Science class, “The Major heard your answering machine yesterday, and he says you sound like one big, fat cock-smoker. You better change that faggoty answering machine message.”

Gaige also reports being harassed and asked if he were gay during his summer cruise in Panama City, Panama and in his NROTC unit (Exhibits 17-18). As a result of these experiences, Gaige came out to his commander, citing harassment and fear for his safety as the reasons for his disclosure.

“I Can’t Ask You If You’re a Fag. But I Can Ask You If You Suck Cock.”

Lance Corporal David Raleigh experienced anti-gay harassment from the day he signed up. Raleigh’s recruiter reportedly told him, “Because of President Clinton’s new policy, I can’t ask you if you’re a fag. But I can ask you, do you suck cock?” (Exhibit 54).

Raleigh was also harassed during basic training at the Marine Corps Recruit Training Depot in San Diego, where his Drill Instructor reportedly made repeated comments regarding his perceived sexual orientation in front of other recruits. These comments included “I know what you guys do under water,” referring to Raleigh’s water polo skills, and “You’re a fag, aren’t you Raleigh?” Raleigh reports this questioning continued until his graduation. He gutted it out, hoping the situation would improve at his next assignment.

It did not. Rumors about his sexual orientation spread throughout his unit at Fort Leonard Wood, Missouri, where he attended advanced training. Raleigh reports his roommate

⁷⁵ See *supra* at 18-20 .

called him a “faggot” and said he was “not a normal guy” because he didn’t lock himself in the bathroom with pornography. Raleigh was reportedly teased, taunted and shunned because of the rumors. As a result, he felt he could not respond to the harassment without bringing even more unwanted scrutiny on himself. By the end of his training, all sixty members of his class perceived him to be gay.

Raleigh persevered and reported to Weapons Company, 2d Battalion, 23d Marines, 4th Marine Division, his reserve unit in Port Hueneme, California. Unfortunately, he faced more anti-gay comments at this unit as well. At weapons drill, for example, he heard fellow marines make repeated derogatory remarks about gay people.

Raleigh was particularly disturbed because some of these homophobic comments were reportedly made by Marine police officers stating that “faggots are wrong” and expressing reservations about upholding the rights of gay people. These individuals, who were also members of the Los Angeles and Santa Barbara Police Departments, allegedly described graphic homosexual sex. In addition, Raleigh reports the chaplain’s assistant told Raleigh that God condemned gays.

Raleigh felt he had little choice but to come out to his commander and be discharged rather than face constant anti-gay harassment without recourse. Lance Corporal Raleigh stated about his leaders and coworkers, “If I were in combat with them, I would not trust them.”

“That Fag (Matthew Shepard) Deserved to Die”

A Marine Corporal is currently considering whether to come out in response to the extreme anti-gay harassment he has faced since day one (Exhibit 45). The Corporal reports that one of the most disturbing moments occurred when his advanced training class made derogatory comments about Matthew Shepard, the young man in Wyoming who was murdered last fall

because he was gay. One student reportedly stated, “That fag deserved to die.” No one disagreed with the comment. Worse, the marine reports that his instructors and fellow students then made numerous anti-gay comments related to Shepard’s death and funeral.

During advanced training, the corporal reports hearing constant, anti-gay jokes and epithets. The marine reports his class discussed the perceived sexual orientation of other service members stating, “Just wait till [X] gets here—he’s a real flamer,” and “Have you seen the new guy who is always watching Xena in the lounge,” suggesting that he might also be gay. The Corporal feared that the class speculated about his sexual orientation when he was not around.

The marine also reports that other recruits repeatedly asked about his sexual orientation in basic training. He deflected the questions as best he could, but feared what others might do if they figured out he is gay. His fear was based on other recruits’ constant anti-gay remarks and the fact that Drill Instructors did not attempt to stop them.

At Marine Combat Training at Camp Pendleton, California, another marine reportedly commented that this service member “acts gay.” This caused him great concern when a Staff Sergeant, addressing the platoon, said there was scuttlebutt that a platoon member is gay. The Staff Sergeant then stated, “If anyone has information, they should come forward or if anyone is questioning their orientation they should come forward.”

The Corporal has since moved to a new base. He hopes his new unit will salvage his faith in the Marine Corps and that he will not be forced to come out as his only recourse against harassment.

“I Guess The Sexuality of Everyone in This Office Is Not in Question”

Staff Sergeant Ron Schumann, an Army recruiter, came out after more than thirteen years of dedicated service because he could no longer ignore the anti-gay harassment or stress from living under “Don’t Ask, Don’t Tell, Don’t Pursue.” Schumann reports he endured anti-gay and “faggot” comments by his coworkers. Although he suffered the comments in silence, in an effort to comply with “Don’t Tell,” speculation about his sexual orientation surfaced nonetheless.

One day, in front of a potential recruit’s family, Sergeant First Class Michael Miller told him, “We have not ever seen your girlfriend, you’re gay and you are probably going to hang out at the Gay 90’s,” a local gay bar (Exhibit 55). After Schumann reported Miller’s actions, the command promoted Miller without reprimanding him.

Schumann also reports he was often pressured to engage in sexist charades to divert suspicions about his own sexual orientation. Many afternoons, for example, his coworkers gathered at the office windows and made sexually explicit, derogatory comments about women running on a track across the street. On one such occasion, Schumann’s Company Commander, Captain Davis, said, “I guess the sexuality of everyone in this office is not in question.” Schumann felt that if he did not participate in these activities, he would be labeled as gay and investigated.

As a recruiter, Schumann was one of the Army’s best, selected for this prestigious position because of his stellar performance in the field. He gave up a highly successful career and his retirement pension because he could no longer tolerate the pervasive anti-gay environment in which he served. The Army lost a highly skilled leader as a result.

“There’s Nothing To Do in Sasebo Unless You Are a Homo Killer”

Lieutenant Edward Galloway gave the Navy many opportunities to prove that it would not tolerate the anti-gay harassment he faced, and it failed him. While onboard the *USS Vandegrift*, Galloway witnessed both officers and enlisted personnel engaging in constant and pervasive anti-gay harassment. Petty Officer First Class McGee reportedly said in Galloway's presence, "There better be no flamers in my Navy." Petty Officer First Class Considine allegedly said, "There's nothing to do in Sasebo [Japan] unless you are a homo killer," a chilling reference to the 1992 murder in Sasebo of Seaman Allen Schindler, who was brutally beaten to death by two of his shipmates (Exhibit 56). And an officer reportedly stated, "Galloway needs directions to find his way out of the closet," in front of Galloway's Commander, Neal Kusumoto, and all of the officers in Galloway's section. No one, however, reprimanded this officer for his inappropriate conduct. Instead, everyone reportedly laughed at Galloway.

As a direct result of these anti-gay remarks, Lieutenant Galloway came out to his commander, hoping for support similar to that from his former *USS Bunker Hill* commander, who had promised to protect him. Commander Kusumoto, however, did not stop the harassment, placing Galloway in a precarious situation. Commander Kusumoto's inaction is particularly troubling, given that he admitted in a letter to Galloway, "I acknowledge that many Navy personnel and many VANDEGRIFT crewmembers hold antipathy towards homosexuals." Commander Kusumoto opined, however, "I disagree that you are in any current danger. I encourage you to be cautious in what you say and do." (Exhibit 57).

Commander Kusumoto finally assigned Galloway to shore duty only after outside assistance by SLDN. He now faces discharge. Commander Kusumoto had stated he did not want to lose Galloway because he was an excellent officer. Ironically, he lost Galloway precisely because he took no steps to stop the anti-gay harassment Galloway faced.

Sergeant Gay-Bashed by Soldiers and Then Investigated

Soldiers verbally and physically gay-bashed an Army Sergeant recently while on duty in his unit's barracks. While making his rounds, he discovered two enlisted men drinking heavily. The Sergeant reported this to the Staff Duty Officer who instructed him to monitor the soldiers but take no further action.

Upon a return inspection, the soldiers, who had become even more intoxicated and rambunctious, began questioning the Sergeant about the sexual orientation of others in the unit. Suddenly, one of the soldiers pulled a gun on the Sergeant and called him a "fag." The soldiers hit the Sergeant in the head 10-12 times. Someone called the Criminal Investigative Division (CID) which administered breathalyzer exams to the two soldiers and the Sergeant. The soldiers falsely claimed that the Sergeant had been drinking as well; he had a 0.00 blood alcohol level.

When the Sergeant returned from vacation a few weeks later, he discovered he was under criminal investigation. CID reportedly began an investigation after the two soldiers accused the Sergeant of being gay.

The Sergeant should never have been investigated. According to the Dorn memo, reports of physical harassment should result in the investigation of the harassment, not those who report it. "Don't Ask, Don't Tell, Don't Pursue" is also quite clear that commanders cannot initiate inquiries without credible information.⁷⁶ Unfounded allegations by drunken soldiers with a motive to retaliate do not meet the credible information standard that is required to initiate an inquiry or investigation.

⁷⁶ See *supra* note 59, at 41.

Although the Sergeant repeatedly requested an attorney to assist him, his command denied him counsel for almost a month. Meanwhile, he faces the possible loss of his career because no one followed the rules.

Soldier Assaulted but Still Serves

A bisexual soldier came out to his commander after being assaulted outside of a gay bar and threatened by military personnel on other occasions. The soldier, stationed at Fort Bragg, North Carolina, was speaking with a civilian near a gay bar when two marines reportedly “pushed [him] into a ditch” The service member, a former soldier of the year, did not report the incident initially because he feared becoming the subject of a gay investigation.

Two months later, another service member called the soldier a “faggot.” This service member also warned him that “Korea is not like Bragg,” implying that perceived gay soldiers are in danger in Korea. The soldier, who had orders for duty in Korea, came out to his commander because he feared danger to his safety and possible witch hunts. The service member’s commander understood his concerns and did not discharge him based on the disclosure of his sexual orientation. The commander instead encouraged him to go to his next duty assignment and reassess the situation. The soldier went on to serve in Korea.

Are You “Going to Marry a Woman?”

A Marine Private First Class, Gabrielle Butler, reports that Sergeant Dewey at Fort Leonard Wood, Missouri asked her if “she was going to marry a woman” during her advanced training in vehicle maintenance as reported in the “Don’t Ask” section. Butler, citing Sergeant Dewey’s question and her resulting fear of being investigated, came out to her commander.

Rather than take steps to stop the asking and harassment, Butler's Commanding Officer, Major R.C. Smith, reportedly told her that society wouldn't accept her and "[she] had to accept the consequences of [her] preference." According to Butler, Major Smith also told her, "There has to be a penalty (Other Than Honorable discharge) because then everyone will think they can just write a letter saying they are a homosexual and they'll get out. I'm not saying you're doing that PFC Butler, but there has to be a penalty." When Butler asked if she was being punished for being gay, Smith said, "Yes." (Exhibit 58). With SLDN's assistance, Butler eventually received an Honorable discharge.

"Kill All Fags"

Petty Officer Charles Buchanan reports sailors on the *USS Ponce* repeatedly hurled slurs about "faggots" and "queers" last year. Sailors reportedly said, "Kill all fags," and "I hope they all die of AIDS!" (Exhibit 59). Out of fear for his safety, Buchanan came out to his commander. Fortunately, his commander took Buchanan's concerns seriously. Buchanan's Executive Officer reportedly told him that he "was sorry to see an A-1 sailor go" and that he understood Buchanan's concerns. After discussing the situation, the Executive Officer decided it would be best to place Buchanan off the ship. It is unfortunate, however, that Buchanan could not safely serve.

Soldier Harassed Because He Didn't "Act Straight"

Thomas Theret, an Army Specialist stationed at Fort Bragg, says that he was harassed and accused of being gay on a number of occasions because he did not participate in enough "heterosexual" activities to satisfy his peers. Theret states his sexuality was called into question because he did not go to strip clubs or have a girlfriend. On another occasion, a soldier

reportedly asked Theret if he is gay and then harassed him further, asking him to prove that he is not gay (Exhibit 60). Theret refused to answer the soldier in order to comply with “Don’t Tell.” Specialist Theret never disclosed his sexual orientation, but other soldiers harassed him because he did not “act” the way they thought a straight man should act.

Theret reportedly heard soldiers make anti-gay remarks such as, “Homosexuals are less than fully human,” and statements that they desired to physically hurt gay people. Fearing it was just a matter of time until he became a victim of physical harassment or his command heard the rumors and began an investigation, Theret came out to his commander and was discharged.

Additional Incidents of Anti-Gay Harassment

Other incidents of anti-gay harassment recorded by SLDN in 1998 include, but are by no means limited to, the following:

- In Japan, Airman Ken Heeb feared for his safety when a sailor reportedly yelled down a barracks hallway, “That guy’s a fag”; “He’s as gay as two dogs fucking”; “I don’t like friends of that faggot coming over to my room”; and “Did you know that guy’s a fag?” The sailor then reportedly threatened, “How hard would I have to punch someone to knock them out with the first blow?”
- Joshua Jones, a former Army Private First Class stationed at Fort Hood, Texas, feared for his safety when a dead fish head was nailed to his barracks door, which in his unit signified that the recipient would be beaten up. A note on the door stated, “For you, faggot.”
- An Airman First Class stationed at Edwards Air Force Base, California, reports being told “I’m going to kick your faggoty ass” and “Shut up, you faggot.” When the service member reported the harassment to his First Sergeant, the First Sergeant urged him to come out to avoid the harassment, instead of trying to stop it.
- A sailor on the *USS Truman* faced daily harassment from other service members because of his perceived sexual orientation. A vandal painted a swastika and wrote the word “Faggot” on the sailor’s car in white shoe polish. Harassment from other sailors included “We can’t

- wait to get out to sea so that we can throw you overboard.” One service member, who constantly called the service member a “faggot,” sprayed pressurized air in the service member’s eyes and wrapped a rope around the sailor’s neck. Others called him “faggot” and “queer bait.”
- A sailor at Great Lakes Naval Base, Illinois, reports that he was threatened with court-martial if he did not confess to being gay. The sailor asked for legal counsel and was denied. He was told it would be easier on him if he just “cooperated.” The Sailor reports that other service members threatened him, stating, “You need to be careful”; “There’s still hazing in Navy showers”; and “We’re going to kill you.”
 - A Navy officer hears anti-gay comments constantly, even from enlisted sailors. One reportedly said, “If I find a gay guy on this ship, I w[ill] throw him overboard.” The officer found “fag” written on his qualification book. His Executive Officer reportedly told him, “Homosexuality is all about self-gratification. It’s not genetic.... It’s in their minds.”
 - A Private First Class at Fort Meade, Maryland, says other soldiers harassed him stating, “I don’t want to be friends with that cock sucker”, and “I wonder how much [he] can take up the ass.” Another soldier allegedly wrote “The cum that flows from my mouth” on a notepad attached to his barracks room door.
 - While at sea, a Petty Officer Second Class feared being attacked because of threats such as “Die faggot” and “There goes that queer.” He also heard anti-gay comments, including “They deserve to die”, and “Good. No more queers.”
 - A bisexual Petty Officer First Class reports that an unknown sailor placed four anonymous notes in the ship’s suggestion box falsely claiming that he was having sex with another male sailor. Other sailors reportedly told him, “Get his faggot ass out of my space”, and “I hate your kind.” He also found a picture of a dildo with the description “ass stuffer” hung in his berthing area.
 - Shipmates warned Duane Pauley, a Petty Officer on the *USS Carl Vinson* “about a faggot that was tied, bound and thrown overboard.” The sailors told Pauley that the command registered the rumored disappearance as an accident.
 - An Army doctor reports that fellow doctors make disparaging remarks about lesbians, gay men and bisexuals. In one example, another doctor told his students that an HIV patient was “a faggot and they’re not going to learn from this.”

Women Face Lesbian-Baiting

In addition to anti-gay harassment, violations of “Don’t Harass” 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. In other cases, women are harassed because they depart from gender stereotypes in other ways. 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 “Don’t Ask, Don’t Tell, Don’t Pursue” rather than disciplining the individuals who start rumors or perpetrate sexual harassment. As a result, many women do not report sexual assault or harassment because they realistically fear being accused as lesbians, investigated and discharged. Others backtrack from the assertive leadership styles that make them competent leaders—and vulnerable targets for lesbian accusations. Sometimes women fear associating together in groups, because they may raise misperceptions that they are lesbians.

The April 1998 Department of Defense Report states, “it is critical that military women feel free to report sexual harassment or threats without fear of reprisal or inappropriate governmental response....We recommend that the Department reissue guidance to make clear that when sexual harassment is reported, the focus of the investigation must be on the harassment or threat.”⁷⁷ While Congress,⁷⁸ an Army Review Panel⁷⁹ and others⁸⁰ have recognized this problem, the Pentagon has not, to date, distributed guidance to the field on this issue.

⁷⁷ DEP’T OF DEFENSE APRIL 1998 REPORT at 8.

⁷⁸ S. Rep. NO. 105-29 at 281 (1997) Senate Armed Services Committee concerned by increasing numbers of reports that service members refusing to participate in sexual activities or who report others are being labeled as being homosexual in retaliation.

The following are just a few examples of lesbian-baiting from SLDN's cases in the last year.

Party Leads to Lesbian-Baiting and Witch Hunt

The Coast Guard initiated an investigation against a group of women solely because they socialized together at a party (Exhibit 61). The Report of Investigation reports that one woman claimed that the group of women kept to themselves at the party. She says she assumed that they were lesbians based on "comments" they made, though she never specified what those comments were. The command should have never initiated an inquiry because the policy specifically states the rumor and speculation do not constitute credible information. The Coast Guardsman, however, endured a three-month long investigation. Ultimately, the command dropped the inquiry and she continues to serve. The lesbian-baiting she suffered, however, is not uncommon.

Divorced Woman Lesbian-Baited

Another soldier with more than 19 years of service faces constant lesbian-baiting because she has not dated men since her divorce. The woman, who divorced her husband due to documented physical abuse, reports that a junior enlisted soldier asked her, "How come it's been more than two years since you've slept with a man?" Another crudely said to her, "Male and female ends of tools are supposed to go together." Another reportedly embarrassed this soldier in front of a female friend by saying, "What do y'all do in your free time? Masturbate?" In yet

⁷⁹ THE SECRETARY OF THE ARMY'S SENIOR REVIEW PANEL REPORT ON SEXUAL HARASSMENT, VOLUME 1 (July 1997) at 66 (female soldiers refusing male soldiers' sexual advances may be accused as lesbians or investigated for homosexual conduct).

⁸⁰ SURVEY RESULTS, DEP'T OF THE ARMY 91ST DIVISION (TRAINING), Sexual Harassment and Sexual Discrimination (October 20, 1992) at 6.

another incident, a soldier asked, “Have you eaten fish today?” Some coworkers also commented on her physical appearance, calling her “butch, butch, butch.”

This soldier’s goal is to remain in the Army and transfer to another unit that is free of harassment. Her story of lesbian-baiting, however, shows the pressure women face to affirmatively project a very narrow image of what it means to be a heterosexual woman.

Stereotypes Lead to Lesbian-Baiting

A junior enlisted Navy woman reports she is lesbian-baited with constant comments and epithets about her sexual orientation. Other sailors have said that she must be a lesbian because she has short hair and “never talk[s] about a boyfriend when everyone else is talking about their husbands and wives” (Exhibit 24). These comments place the woman in a precarious position. If she remains silent, as required by “Don’t Tell,” she sets herself up for continued harassment. Denying the accusations would be a lie and would violate the Navy’s “core values,” as well as her personal values.

This sailor also reports being called a “dyke-looking bitch,” “butch bitch,” and “lesbian,” and was told, “What do you know about panties? You wear boxers.” When she disclosed her anti-gay experiences during sexual harassment training, the senior woman leading the discussion reportedly inquired if she was harassed because she “would not sleep with the men.” The sailor said, “Yes.” Even though the senior woman and the service member’s superiors know about the harassment, they have never attempted to stop it.

Conclusion

Lesbian, gay and bisexual service members must endure constant anti-gay threats and epithets as a condition of military service. While not all service members harass their

colleagues, bigots have free rein in today's military. These military bigots undermine the good order, discipline and morale of our forces, and adversely affect military readiness. This hurts the military as well as service members, who as competent, dedicated men and women are forced out in increasing numbers or leave at the end of their obligation due to harassment.

The Pentagon has promised to issue new guidance on anti-gay harassment and lesbian-baiting. While SLDN supports the Pentagon's recommendation, support from uniformed military leaders will be key to its effectiveness. Senior leaders must make it clear to commanders in the field that anti-gay harassment in the military will not be tolerated. Military leaders must distribute any new Pentagon guidance, conduct comprehensive training and provide service members facing harassment and violence with adequate recourse.

CONCLUSION TO FIFTH ANNUAL REPORT

The Pentagon is at a critical juncture in implementing “Don’t Ask, Don’t Tell, Don’t Pursue.” In the face of dramatically increasing discharges, military leaders can either address the harassment and forced secrecy that are pushing so many dedicated lesbians, gay men and bisexuals out of the armed forces, or they can continue with business as usual.

The first order of business should be to implement recommendations against anti-gay harassment that have been sitting on the shelf for more than two years. At the same time, military leaders should finally, after five years of ignorance and confusion in the field, send guidance informing everyone, from privates to general officers, of this policy’s investigative limits, and its intent to respect service members’ privacy. This guidance should include a specific prohibition on discharging service members based on private conversations they have with their families, closest friends and health care providers.

After informing their personnel of the limits to investigations, military leaders should hold their subordinates accountable for following them. When mistakes happen, or where commanders knowingly disregard the rules, leaders should also provide recourse or some means of practical accommodation for improperly targeted service members.

Looking further into the future, SLDN is heartened by increasing public support for the service of known gay men, lesbians and bisexuals. The latest Gallup poll in 1998 showed 77% support for gays in the military,⁸¹ and a separate Who’s Who poll registered 75% support.⁸² A majority of Americans have supported gays in the military since 1977, more than two decades ago (Exhibit 62). A poll of soldiers conducted by Professor Charles Moskos, the architect of

⁸¹ CNN-USA TODAY GALLUP POLL, Conducted June 5-7, 1998. Survey responses to question of “If a draft were to become necessary, should gay men be included, or not?” Yes: 77%, No: 21%, No Opinion: 2%.

⁸² WHO’S WHO AMONG AMERICAN HIGH SCHOOL STUDENTS, Press Release: *Nearly Half of Teens Admit Prejudice Against Homosexuals*, Nov. 12, 1998. “Despite their feelings, 75 percent of teens believe homosexuals should be allowed to join the military”

“Don’t Ask, Don’t Tell, Don’t Pursue,” indicated a dramatic decrease in strong opposition to gays in the military from 63% in 1993 to 36% in 1998.⁸³ These poll results stand in marked contrast to the current state of the policy which results in the deliberate firing of people for being lesbian, gay or bisexual.

While neither Congress nor the federal courts seem prepared to overturn “Don’t Ask, Don’t Tell, Don’t Pursue” at this time (Exhibit 63), the Pentagon’s failure to address rampant anti-gay harassment, respect service members’ privacy rights and enforce the policy’s investigative limits will hasten that day.⁸⁴

⁸³ MILLER/MOSKOS NONRANDOM SURVEYS OF ARMY PERSONNEL, Professor Charles Moskos, Northwestern University, Sep. 1998. Survey responses based on question of “How do you feel about the proposal that gays and lesbians should be allowed to enter and remain in the military?”

⁸⁴ See *McVeigh v. Cohen*, DECLARATION BY PROFESSOR CHARLES MOSKOS, Civ. No. 1:98CV00116 (D.D.C. 1997) at 3-4. “In my opinion, this sort of heavy-handed ‘enforcement’ by the Navy will inadvertently undermine the ‘Don’t Ask, Don’t Tell’ policy by eroding confidence among servicemen that the Navy will not ‘ask’ if they do not ‘tell.’ It is these kinds of actions by the military, rather than lobbying by homosexual-rights advocates, that pose the greatest threat to the efficacy of the policy in balancing the military’s concerns about readiness, unit cohesion and morale with what President Clinton called ‘a decent regard to the legitimate privacy and associational rights of all service members.’”