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DOD [Department of Defense] Policy on Gay Conduct

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DOD
Policy on Gay
Conduct

Servicemembers Legal Defense Network

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MEMORANDUM

TO: Judge Abner Mikva

FROM: Michelle M. Benecke, Esq.
C. Dixon Osburn, Esq.

DATE: May 31, 1995

RE: Implementation and Enforcement of DOD Policy on Homosexual Conduct

Though it has been nearly two years since President Clinton announced the new policy and one and one-half years since the new regulations were fully implemented, it is clear that neither the intent nor letter of the new policy has been enforced.

In the first year under the new policy, we carefully documented over 340 command violations. These were just the tip of the iceberg. The violations included ten death threats against servicemembers based on their perceived sexual orientation, fifteen actual or attempted witch hunts, and two memoranda from the highest levels of the Navy and Air Force that direct officers to take actions that violate the letter and intent of the new policy. Heterosexual servicemembers have found that false allegations of homosexuality have been enough to end their careers, and parents have found themselves the subjects of questioning as inquiry officers have attempted to pit them against their children.

Furthermore, we have noted that attorneys from the Department of Justice have misled the federal courts about the new policy and how it has been implemented in their effort to defend it.

The attached materials highlight the critical issues that have arisen during the first year of implementation, an overview of reasons underlying the problems that have arisen and a series of specific recommendations to correct misinterpretations, misunderstandings and misapplications of the new policy. The issues and recommendations identified are by no means exhaustive, and should be considered the beginning of a conversation, not the end.

The recommendations outlined do not require the Administration to reopen the debate on gays in the military in Congress, implement new Department of Defense regulations, or in any way mitigate its defense of the new policy in federal courts. The recommendations simply require that the Administration enforce the few promises it made under the new policy (to stop questions about sexual orientation, witch hunts and harassment) and be honest about what the policy means to the public and to federal courts.

Servicemembers Legal Defense Network

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MEMORANDUM

TO: Judge Abner Mikva
FROM: Michelle M. Bencke, C. Dixon Osburn
DATE: May 31, 1995
RE: Recommendations: Critical First Steps on Gays in the Military

Stop Death Threats/Harassment/Hate Crimes. Under the new policy, "harassment will not be tolerated against any servicemember for any reason." Gay servicemembers, however, cannot report death threats, harassment and hate crimes, and their underlying basis, without risk of investigation and discharge. Reports of death threats, hate crimes and harassment should not constitute "credible information" to start an investigation. Those who harass should be investigated, not the victims of harassment. DoD should also take steps to enforce its zero-tolerance policy against harassment, as it is doing with racial and sexual harassment.

Train All Military Members on the Intent and Letter of The New Policy. Many officers and enlisted members have received inadequate or no training on the new regulations. DoD should adopt formal training requirements on the intent and the letter of the regulations, including at all levels of military schooling. Training should emphasize (1) the requirement of "credible information" before an investigation can be started, (2) the requirement to limit inquiries to the scope of the instant allegation; (3) penalties for violations (i.e., asking, harassment, false accusations) and, (4) what servicemembers can and cannot do under the regulations. DoD should also issue a Letter of Instruction and hypotheticals clarifying the intent of the policy and correcting misperceptions regarding the regulations in the first year of implementation. These steps would be consistent with actions taken regarding other personnel policies.

Make An Example of Someone Who Violates The New Policy To Send The Proper Signal. To date, no military official has been disciplined for violating the policy despite ample evidence of violations. The lack of action tells commanders that they can violate the new policy with impunity and fosters a command climate resistant to its implementation. The officers and investigative agents who illegally started the Okinawa witch hunt, where over 50 violations were documented, and who subsequently misrepresented their actions to the Commandant of the Marine Corps and the DoD should be among the first disciplined.

Provide a Common Sense Response to Servicemembers Harmed by Command Violations. Currently, the services are discharging gay members who are found out when their command violates the new regulations. "Don't Ask, Don't Pursue" means nothing if servicemembers must pay the price for improper questions, witch hunts and harassment. These servicemembers should be afforded a common sense remedy, like other victims of command impropriety. Further, information obtained in the course of an improperly initiated and pursued investigation should be excluded. Reversal of the patently unconstitutional policy of depriving servicemembers under investigation of counsel prior to charges being brought, but after their Article 31 rights have been

given, would help to decrease the alarming frequency with which this problem occurs.

Stop Questions to Parents. A Department of Air Force memo dated November 3, 1994 directs inquiry officers to question parents about the sexual orientation and private lives of their children for purposes of discharge and this instruction has been carried out in several SLDN cases. No American who listened to the 1993 debate believed that military officials would have the authority to intrude into private family relationships and attempt to turn family members against one another. For this and other reasons, the Air Force memo should be rescinded. Commanders, investigative agents and lawyers should be instructed not to question parents about their children.

Allow Servicemembers to Talk to Doctors and Mental Health Providers Without Fear. The services are discharging gay military members based on private conversations with their doctors and psychologists, contrary to the intent of the policy to prohibit public, not private, statements. The DoD should make clear that conversations to health providers are not "credible information." This is exactly the way the new policy on homosexuals treats security clearance investigations and other military policies treat HIV status and self-referrals to drug and alcohol programs. Other private conversations respected by the policy on homosexuals include those between chaplains and penitents, attorneys and clients and husbands and wives.

Stop Court-Martialing Gay Servicemembers for Private, Adult, Consensual Activities. The regulations are clear that the preferred method of handling allegations of consensual homosexual acts is through the administrative discharge system and that any criminal investigation of homosexual acts must be dealt with in the same way as with heterosexual acts. As a practical matter, the services do not prosecute heterosexuals for private, adult consensual activities. Nevertheless, some commanders are singling out gay servicemembers for prosecution and gay servicemembers are in prison today as a result.

Instruct the Department of Justice Not To Mislead Federal Courts. The Department of Justice made several material omissions to the federal court in Thomasson v. Perry about the new military policy on homosexual conduct. In particular, the Department of Justice misled the court about the nature of the rebuttable presumption under the new regulations (suggesting that the rebuttable presumption applies to heterosexuals as well, which it does not), and that servicemembers retain their freedom of speech and freedom of association under the new policy (which, while true under the new regulations, has been directly contradicted by a Department of Navy memorandum issued in June 1994 and roundly ignored by military prosecutors). The result is that the federal court did not have a fair, accurate or honest understanding of specific aspects of the new policy. The Department of Justice's misleading statements should be rectified.