

FOIA MARKER

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Folder Title:

Don't Ask, Don't Tell (2000) [3]

Staff Office-Individual:

Defense Policy-Beardsworth, Richard

Original OA/ID Number:

3154

Row:	Section:	Shelf:	Position:	Stack:
31	2	6	1	V

1.) What do you think of Britain's Department of Defense's new code of social conduct?

~~It appears that Britain is further along as a society in openly accepting gays and lesbians into the military. We should learn from their experience. As I understand it, the code sets standards for proper social interaction between the diverse mix of individuals serving in the military. These standards, much like we have in our own military, will help commanders maintain good order and discipline within their units.~~

2.) What do you think of the European Court of Human Rights ruling, (which led to Britain's change in policy) that the ban on gays in the military is a ban on human rights?

The European Court's opinion is setting out a standard of equality and human rights that is something we should study and learn from. It's consistent with what the President pressed for in 1992-93. A future Congress should consider where Europe is headed. Usually, the United States is at the forefront in the struggle for equality and human rights, but sometimes we lag behind.

3.) Is there a possibility that the US Supreme Court will overturn the DADT law as a ban on human rights similar to the European Court?

I'm not sure what the Supreme Court would do, but I don't think this is primarily a legal matter. It's a question of what makes sense for military readiness and what is fair to gays and lesbians who have served honorably in the military services for a long time.

~~4.) Britain now joins Norway, Finland, Israel, Germany, France, Canada, Australia, New Zealand, ...? etc.(NSC please fill in) In fact, the US and Turkey are the only NATO countries to ban homosexuals from serving. Most NATO countries now allow homosexuals to serve openly in their militaries. Will the effectiveness of joint NATO maneuvers be threatened because of the DOD's fear of diminished military unit cohesion with NATO forces who allow gays in the military?~~

~~I am confident that different policies on this issue will not hinder joint NATO maneuvers or any other NATO action. Our military commanders have adjusted to much tougher demands than this one.~~

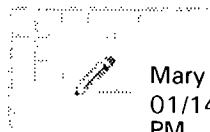
5.) What do you think of DOD's response to the trial at Ft. Campbell?

Both the President and the Secretary of Defense have said in the clearest terms that harassment of people based on sexual orientation -- or race and gender for that matter -- are strictly prohibited. The Inspector General of the Department of Defense is conducting an investigation of compliance with our Don't Ask/Don't Tell/Don't Harass policy, and the Army IG is conducting a separate one at Ft. Campbell. We are

determined to implement this policy in a fairer, more effective way and we are determined to prevent service members from being harassed.

6.) What do you think of Vice President Gore's statement on the role of the Joint Chiefs?

He's made clear that he would want the candid advice of Members of the Joint Chiefs, but that he would expect them to support the policy that the Commander in Chief decided. That is the traditional and appropriate relationship between the President and the Joint Chiefs and certainly the one that this President has followed.



Mary B. DeRosa
01/14/2000 12:31:12
PM

Record Type: Record

To: Edward W. Correia/WHO/EOP@EOP
cc: See the distribution list at the bottom of this message
Subject: Re: Don't Ask/Don't Tell 

I have a few comments on the guidance

#2 -- I would change the question slightly (I know it's only a guess at what the question might be, but don't want Podesta to be confused by it.) to read: "What do you think of the European Court of Human Rights ruling (which led to Britain's change in policy) that the ban on gays serving openly in the military violated the fundamental human right to privacy?"

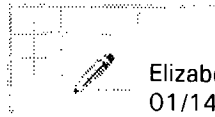
#4 -- Delete the second sentence of the response, so it now reads "I am confident that different policies on this issue will not hinder joint NATO maneuvers or any other NATO action."

#5 -- The question asks about the trial at Fort Campbell. I think the answer to a question about a the trial should start by making clear that he is not commenting on the verdict. I would recommend the answer read:

"I'm not going to comment about the verdict or sentence in any particular case. This case is in the military justice system, and the legal process is ongoing. As a general matter, both the President and the Secretary of Defense have said in the clearest terms that harassment of people based on sexual orientation -- or race and gender for that matter -- is strictly prohibited. The Department of Defense is taking a number of actions to review implementation of this policy. The Inspector General of the Department of Defense is conducting an investigation of compliance with our Don't Ask/Don't Tell/Don't Harass policy, and the Army IG is conducting a separate one at Fort Campbell. We are determined to prevent service members from being harassed."

Message Copied To:

elizabeth j. potter/who/eop@eop
johannes a. binnendijk/nsc/eop@eop
david b. peterman/nsc/eop@eop
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beth nolan/who/eop@eop
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karen tramontano/who/eop@eop



Elizabeth J. Potter
01/14/2000 10:12:10
AM

Record Type: Record

To: Edward W. Correia/WHO/EOP@EOP
cc: See the distribution list at the bottom of this message
Subject: Re: Don't Ask/Don't Tell 

We need to prepare additional Q/A on NATO member countries policy on Gay's in the Military. The recent announcement of Britain to allow gays to serve in the military puts the US in an unlikely alliance with Turkey as the only two NATO members that do not allow gays to serve in the military.

John Podesta will be on "Meet the Press" this weekend and we need guidance on the following:
We need something by 1:00 pm today.

NEW QUESTIONS

1.) What do you think of Britain's Department of Defense's new code of social conduct?

(This code lifts the ban on gays in the military and replaces it with a code of conduct that applies across the forces regardless of service, rank, gender or sexual orientation. It will complement existing policies such as zero tolerance towards harassment, discrimination and bullying.)

2.) What do you think of the European Court of Human Rights ruling, (which led to Britain's change in policy) that the ban on gays in the military is a ban on human rights?

The European Court's opinion is consistent with what the President pressed for in 1992-93....

Britain's policy is essentially what the President first proposed, Congress however, enacted into law the DADT policy, which includes mandatory discharges.

Our judicial and legislative process here in the US is very different, ultimately, DADT is a law which Congress will have to change.

3.) Is there a possibility that the US Supreme Court will overturn the DADT law as a ban on human rights similar to the European Court?

Although cases have been brought before the lower courts....EDDIE

4.) Britain now joins Norway, Finland, Israel, Germany, France, Canada, Australia, New Zealand, ...? etc.(NSC please fill in) In fact, the US and Turkey are the only NATO countries to ban homosexuals from serving.

Will joint NATO maneuvers be threatened because of the DOD's fear of military unit cohesion with NATO forces who allow gays in the military?

5.) What do you think of DOD's response to the trial at Ft. Campbell.?

We believe that harassment is a serious problem, DOD has announced....(I will incorporate some of the questions from earlier this week) Need tight synopsis of DOD response.

Message Copied To:

johannes a. binnendijk/nsc/eop@eop
david b. peterman/nsc/eop@eop
betsy pimentel/nsc/eop@eop
mary b. derosa/nsc/eop@eop
laura s. marcus/who/eop@eop
matt gobush/nsc/eop@eop
beth nolan/who/eop@eop
william marshall/who/eop@eop
karen tramontano/who/eop@eop

Peterman, David (Brian) (DEFENSE)

From: Binnendijk, Johannes A. (Hans) (DEFENSE)
Sent: Wednesday, January 12, 2000 9:14 PM
To: Peterman, David (Brian) (DEFENSE)
Subject: FW: More on don't ask don't tell [UNCLASSIFIED]

0279

Brian, could you put this in memo form for the President. Thanks. Hans

-----Original Message-----

From: Sutphen, Mona K. (NSA)
Sent: Wednesday, January 12, 2000 8:44 PM
To: Binnendijk, Johannes A. (Hans) (DEFENSE); @APNSA
Cc: @LEGAL - Legal Advisor; @LEGISLAT - Legislative Affairs; @EXECSEC - Executive Secretary; @DEFENSE - Defense Policy;
@RUDMAN; @PRESS - Public Affairs
Subject: RE: More on don't ask don't tell [UNCLASSIFIED]

hans -

sandy would like you to summarize this in a 1-page memo for potus. thx.

mona

cc: exec to track

-----Original Message-----

From: Binnendijk, Johannes A. (Hans) (DEFENSE)
Sent: Tuesday, January 11, 2000 11:17 AM
To: @APNSA
Cc: @LEGAL - Legal Advisor; @LEGISLAT - Legislative Affairs; @DEFENSE - Defense Policy; @RUDMAN; @PRESS - Public Affairs
Subject: More on don't ask don't tell [UNCLASSIFIED]

PLEASE PASS TO SANDY FROM HANS (@ Legal and @ Legislat concur)

As I mentioned at this morning's staff meeting, I spoke yesterday afternoon with Rudy DeLeon and his OSD colleagues (along with Matt Gobush, Mary DeRosa and Betsy Pimentel) to get an update on the Fort Campbell trial and related DOD actions on policy implementation. The results are as follows:

Fort Campbell Trial:

- The trial was held on Saturday, Jan 8th, for Specialist Fisher (roommate of Winchell). Trial was actually a sentencing hearing as a pre-trial agreement had been made as part of a previous plea-bargain to get Fisher's agreement to testify in the trial of Private Glover (previously convicted of murdering Private Winchell).
- As a result of his guilty plea, Fisher was convicted of obstruction of justice, making false official statements and providing alcohol to a minor. Sentence imposed by the court included 14 years imprisonment, but the pre-trial agreement capped the sentence at 12 1/2 years.
- As part of the sentencing hearing a psychologist testified that Fisher had a drinking problem, struggled with his own sexual identity, had been a cross-dresser since he was 14, had 3 abusive father figures and had a previous experience with a transvestite. These facts were picked up by several local papers, but not the national press. This is significant as it is a whole new twist on the incident and the individuals involved.
- Private Winchell's family knew about the pre-trial agreement several weeks ago and was not happy. They continued to express their discontent in the

press following the trial.

Follow-on actions at Fort Campbell:

- Last Saturday after the trial, Fort Campbell commander MG Clark requested that the Army IG conduct a review into the alleged violations of the DOD Homosexual Conduct Policy at Fort Campbell.
- Yesterday Louis Caldera announced that he will implement an Army IG investigation which will:
 - examine all alleged violations of the policy that came up during the trial to include the alleged environment of harassment that led up to Private Winchell's murder.
 - look at the overall command climate at Fort Campbell as it related to the application, enforcement and training associated with the DOD Homosexual Conduct Policy.
 - examine the overall implementation of the Don't Ask, Don't Tell policy throughout the rest of the Army.
- This is in addition to the DOD IG's climate assessments ordered by Bill Cohen.
- The IG's report and recommendations are due to Caldera by May 1st.

DOD Climate Assessments:

- DOD is on-track with their IG assessment of the environment at representative military installations.
- The assessment will be a random sampling of units from each service with surveys provided to a cross-section of individuals with no means of identification on the survey. The team will be in the field administering the survey beginning next week.
- The IG is on target to complete the effort by 13 March.

Service Implementation of August guidelines:

Rudy plans to meet with key representatives of each service this Friday for a final review of their plans to implement the "don't harass" training program. Bill Cohen may make a public statement at that time announcing the new plans.

Next steps:

We have established a de facto White House working group with Julian Potter (Domestic Policy Office), Eddie Correia (White House Counsel), Mary DeRosa, Matt Gobush, Mark Tavlarides, Brian, Betsy, and me to coordinate on this issue. We have kept in close touch with OVP. The next step (per our discussion at the staff meeting) is to ask Rudy to convene a small group to review additional non-legislative ways to improve the current policy. This idea is supported strongly by White House Counsel and Rudy. We would join with the White House Counsel's office to participate in Rudy's review group.

_____ OK to join a group convened by Rudy de Leon to review non-legislative improvements to existing policy.

_____ Lets discuss further

Peterman, David (Brian) (DEFENSE)

From: Sigler, Ralph H. (WHSR)
Sent: Monday, January 10, 2000 5:12 PM
To: @MILITARY
Subject: DIGNITY AND RESPECT FOR ALL [UNCLASSIFIED]

ActionAddres: ALARACT
Classification: UNCLASSIFIED
DateTime: 101800Z JAN 00
Distribution: SIT: NSC
Identifier: M4238561
InfoAddres: RUEADWD/HQDA WASHINGTON DC//DAP-HR-L//
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Line2: ZNR UUUUU ZYW ZOC T ALL US ARMY REPS AND ACTIVITIES
Line3: R 101800Z JAN 00
Line4: FM HQDA WASHINGTON DC//DAPE-HR-L//
Originator: HQDA WASHINGTON DC//DAPE-HR-L//
Precedence: ROUTINE
Profiles: CABLES
StationRoutingIndicator: RUEADWD
StationSerialNumber: 7977
TimeOfReceipt: 01/10/2000 16:12:06 ET

-----Message Text-----

UNCLAS ALARACT 008/00
SEC ARMY AND CSA SEND
TO ALARACT

SUBJECT: DIGNITY AND RESPECT FOR ALL

1. SERVICE IN OUR ARMY IS HONORABLE AND RESPECTED BY THE CITIZENS OF THIS COUNTRY. SOLDIERS WHO OFFER THEIR COMMITMENT AND THEIR LIVES IN THIS SERVICE SHOULD AND MUST BE TREATED WITH DIGNITY, HONOR AND RESPECT. RESPECT FOR OUR FELLOW SOLDIERS DEMANDS THAT WE SPEAK WITH RESPECT FOR ALL. ANY DEROGATORY WORDS ABOUT ANY GROUP, INCLUDING THOSE BASED UPON SEXUAL ORIENTATION, THAT ARE PREJUDICIAL TO GOOD ORDER AND DISCIPLINE, MAY SUBJECT THE SOLDIER TO ADVERSE ADMINISTRATIVE ACTIONS OR DISCIPLINARY MEASURES UNDER THE UCMJ. EVERY SOLDIER HAS THE RIGHT TO EXPECT TREATMENT CONSISTENT WITH OUR CORE VALUES, A SAFE AND SECURE ENVIRONMENT, AND THE SUPPORT OF THEIR CHAIN OF COMMAND. WHENEVER WE VIOLATE THE TRUST OF ANY SOLDIER, WE VIOLATE

PAGE 02 RUEADWD7977 UNCLAS
THE TRUST OF ALL SOLDIERS.

2. WE AFFIRM THAT TREATING SOLDIERS WITH DIGNITY AND RESPECT IS A BEDROCK VALUE FOR THE ARMY. WE DECLARE THAT THERE IS NO ROOM FOR HARASSMENT OR THREATS TO ANY SOLDIER IN OUR ARMY FOR ANY REASON. THEREFORE, AS THE SENIOR LEADERS OF THE ARMY, WE ARE DETERMINED TO CONTINUE TO IMPLEMENT THE "DONT ASK, DONT TELL" POLICY WITH EQUITY AND FAIRNESS TO ALL OF OUR SOLDIERS.

3. FINALLY, WE CONTINUE TO EXPECT THAT ALL SOLDIERS IN THE UNITED STATES ARMY WILL BE TREATED WITH DIGNITY AND RESPECT AT ALL TIMES, AND WILL BE AFFORDED A SAFE AND SECURE ENVIRONMENT IN WHICH TO LIVE AND WORK. HARASSMENT OF SOLDIERS FOR ANY REASON, TO INCLUDE PERCEIVED SEXUAL ORIENTATION, WILL NOT BE TOLERATED. WE EXPECT COMMANDERS AT EVERY LEVEL TO TAKE APPROPRIATE ACTION TO PREVENT HARASSMENT OF OR THREATS AGAINST ANY MEMBER OF OUR ARMY. ONCE AGAIN WE ARE DETERMINED TO CONTINUE TO IMPLEMENT THE "DONT ASK, DONT TELL" POLICY WITH FAIRNESS TO ALL BECAUSE THAT IS THE RIGHT THING TO DO FOR OUR SOLDIERS.

CALDERA AND SHINSEKI

Peterman, David (Brian) (DEFENSE)

From: Sigler, Ralph H. (WHSR)
Sent: Monday, January 10, 2000 5:12 PM
To: @MILITARY
Subject: DIGNITY AND RESPECT FOR ALL [UNCLASSIFIED]

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CALDERA AND SHINSEKI

Personnel and
Readiness

THE OFFICE OF THE UNDER SECRETARY OF DEFENSE

WASHINGTON, DC 20301-4000

*Betsy
per Hans*

Facsimile Cover Sheet

To:	HANS BINNENDIJK
Office:	
Phone:	
Fax:	202 456-9190
From:	Mr. Rudy de Leon
Office:	Under Secretary of Defense (Personnel & Readiness)
Phone:	703-695-5254/5255/7402/7407 DSN 225-5254/5255
Fax:	703-693-0171
Date:	
No. Pages with Cover:	
Comments:	



UNDER SECRETARY OF DEFENSE
4000 DEFENSE PENTAGON
WASHINGTON, D.C. 20301-4000

PERSONNEL AND
READINESS

DEC 18 1999

MEMORANDUM FOR ASSISTANT SECRETARY OF THE ARMY
(MANPOWER & RESERVE AFFAIRS)
ASSISTANT SECRETARY OF THE NAVY
(MANPOWER & RESERVE AFFAIRS)
ASSISTANT SECRETARY OF THE AIR FORCE
(MANPOWER, RESERVE AFFAIRS, INSTALLATIONS &
ENVIRONMENT)

SUBJECT: Implementation of Guidance Concerning Homosexual Conduct Policy

We agree with the approach that you have proposed for executing the Department of Defense guidance memorandum of August 12, 1999, entitled "Implementation of Recommendations Concerning Homosexual Conduct Policy." With respect to the other August 12 DoD guidance memorandum entitled "Guidelines for Investigating Threats Against or Harassment of Service Members Based on Alleged Homosexuality," it is important that all of the services fully implement as soon as possible the training required by that guidance. Accordingly, please submit to us no later than January 17, 2000, copies of all updated training materials concerning the homosexual conduct policy, including those materials that incorporate the training regarding threats or harassment.

We also think it is important that the leadership of each of the services issue a strong statement to the field that harassment of service members for any reason, to include alleged or perceived homosexuality, will not be tolerated and that commanders are expected to take prompt, appropriate action against individuals involved in such behavior. In your January 17 submission, please provide us with a copy of the statements that are issued on this subject.

Rudy de Leon
Under Secretary of Defense
(Personnel & Readiness)

Douglas Dworkin
Acting General Counsel

cc: General Counsels of the Military Departments



McKenna, Suzanne M., CIV, OSD/P&R**From:** Begines, Tom, COL, OASD/PA**Sent:** Monday, December 27, 1999 8:30 AM**To:** deLeon, Rudy, CIV, OSD/P&R; Maldon, Alphonso Jr., CIV, OSD/P&R; Rush, Frank, CIV, OSD/P&R; Leftwich, William, CIV, OSD/P&R; Tracey, Patricia A., VADM, OSD/P&R; Haughton, Claiborne, CIV, OSD/P&R; Koffsky, Paul, Mr, DoD OGC**Cc:** McKenna, Suzanne M., CIV, OSD/P&R; Ferguson, David W., COL, OSD/P&R; Pere, David, MAJ, OSD/P&R; Zacharzuk, Joe, CAPT, OSD/P&R; Taylor, Curtis, COL, OSD/P&R; Taylor, Karen, Lt Col, OSD/P&R; Jones, Terrance G., CDR, OSD/P&R; Begines, Tom, COL, OASD/PA; Reed, Robert, COL, DoD OGC; Wiegmann, Bradford, Mr, DoD OGC; Black, Paul L., Col, OSD/P&R**Subject:** FW: DoD News Briefing, Mr. Kenneth H. Bacon, ASD PA

Sir, Ma'am,

Please see below the transcript of the regular DoD news briefing Dec. 23 (the last briefing of this year). Mr. Bacon discussed two topics in the P & R realm: homosexual conduct policy (HCP) and allegations re. Camp Van Dorn, 1943. I have highlighted those remarks in **bold** below. Re. HCP, Mr. Bacon announced the Dec. 18 memo co-signed by Mr. de Leon and Mr. Dworkin. The media asked no questions re. HCP during the briefing but CNN, Fox News, Associated Press, and *Stars & Stripes* followed up with me after the briefing. There was one Q & A on Camp Van Dorn and no follow up.

-----Original Message-----

From: dltranscripts_sender@DTIC.MIL [mailto:dltranscripts_sender@DTIC.MIL]**Sent:** Thursday, December 23, 1999 4:45 PM**To:** DODTRANSCRIPTS-L@DTIC.MIL**Subject:** DoD News Briefing, Mr. Kenneth H. Bacon, ASD PA

= N E W S B R I E F I N G

=

= OFFICE OF THE ASSISTANT SECRETARY OF DEFENSE

= (PUBLIC AFFAIRS)

= WASHINGTON, D.C. 20301

DoD News Briefing

Mr. Kenneth H. Bacon, ASD PA

Thursday, December 23, 1999 1:35 p.m. EST

MR. BACON: Good afternoon. **This is last regularly scheduled briefing of this year**, so I thought I'd use it to bring you up to date on a couple of issues.

First, Venezuela. The name of our operation to help the Venezuelans deal with the tragedy caused by the flooding is Fundamental Response, Operation Fundamental Response. And we are in the process of setting up a joint task force, which will be called Joint Task Force Fundamental Response, to manage our part of the emergency relief and rehabilitation efforts in Venezuela.

We currently have 107 people working as part of Operation Fundamental Response. That's up 13 from Tuesday. There are 10

helicopters -- that's up two from Tuesday -- and five C-130s -- that's up two from Tuesday -- and two other planes that, as I mentioned before, are contract planes that are working to supply goods. They're called Casa 212s fixed-wing aircraft.

So far, our planes have flown 449 sorties and transported more than 5,300 flood victims to safety or to medical facilities.

Today a C-5A Galaxy from the New York National Guard flew down two reverse osmosis water purification units. These actually were picked up in Puerto Rico, where they're run by the Puerto Rican National Guard and Army National Guard, and taken down to Venezuela. Each one of these units can purify 60,000 gallons of water a day. And they join a smaller unit that was there on Tuesday, that purifies 12,000 gallons of water a day.

We have two other large purification units in Puerto Rico ready to transport down to Venezuela to meet -- going to their primary needs right now, which is drinking water.

I am also informed by SOUTHCOM, and I haven't confirmed this any other way, but SOUTHCOM tells me that the local Pepsi bottler down there has stopped producing Pepsi and is using its facilities to purify water and distribute it free in

01/07/2000

jugs, plastic jugs. So this is another way that the demand for potable water is being met.

We will continue to survey the situation. General Wilhelm, as you know, was there on Monday. And he plans to go back, I believe next week, to look again at what's happening and our response to it. The Venezuelans have asked for of course, water, medicine and, as I said last week -- earlier this week, tragically, body bags.

They have also asked for some bridging equipment that could be used to help reconstruct roads, coastal roads, so that goods and services can get in along roads and people can get out along roads. So it would relieve some of the pressure on the airlift to repair the roads. And of course, we are looking at that, and we'll take appropriate action.

I should say that the Venezuelans do have in their military, an organization that's proven to be very capable at providing disaster relief and assistance and, we think also, will be capable of rebuilding some of these roads and bridges. But we will assist them in appropriate ways, as we get to the next stage of that operation.

The first stage, 30 days, we'll concentrate really on meeting emergency needs.

And the stage after that, we'll begin to look at rehabilitation.

So that's Venezuela. If you want, I can take questions on that now or just move on and finish the other announcements. What's the consensus here?

Q Go ahead and keep going.

MR. BACON: All right.

Second, I want to bring you up to date on the latest development on the "don't ask, don't tell" front. Secretary Cohen believes that the description of the law passed by Congress in 1993 should be expanded from "don't ask, don't tell" to "don't ask, don't tell, don't harass." And the actions that the department is taking are designed to stress the third part, "don't harass."

As you know, in August Undersecretary de Leon reissued and strengthened a 1997 statement that deals with harassment. In 1997 Undersecretary Dorn focused on a complaint that has long been made by human rights groups interested in protecting homosexuals in the service, and that deals with complaints that have been made about people being homosexual. And many people have complained that if they come to a commander and say they're being charged with being homosexual for whatever reason, that the commander has then used this as evidence that they're making a statement of their homosexuality.

The 1997 Dorn memo says this is wrong. You cannot take a complaint from a soldier about harassment to be evidence of homosexuality.

In fact, what the commander should do is investigate the harasser, the person who is harassing the soldier or making the complaint. And the -- in August Secretary de Leon -- Undersecretary de Leon reissued that with stronger language. And we can -- Tom Begines can give you the copies of these, if you don't have them already.

We have issued them many times, but if you don't have them, you can get other copies -- issued a stronger version of that in which he said that commanders have an obligation to make it clear that harassment is wrong and that the people who do harass are subject to action by the commander.

That memorandum asked all the services to incorporate in their training stronger language against harassment; in other words, to make it very clear in the training they provide troops, one, in basic training and then in refresher courses throughout their career, that harassment on the basis of sex is wrong, just as it's wrong on the basis of race or religion or whether a person is male or female. So the services are in -- have presented drafts of that. Undersecretary de Leon has reviewed those, has asked them to make some changes and to come in with final versions by January 17th.

In addition, in the course of -- in this memo, which you can also get from Tom Begines, was issued earlier this week -- Undersecretary de Leon and Douglas Dworkin, the acting general counsel said, "We also think it is important that the leadership of each of the services issue a strong statement to the field that harassment of service members for any reason, to include alleged or perceived homosexuality, will not be tolerated and that commanders are expected to take prompt, appropriate action against individuals involved in such behavior." It goes on to say, "In your January 17th submission, please provide us with a copy of the statements that are issued on this subject."

So once again, it's an effort to emphasize that the policy should be described as "don't ask, don't tell, don't harass," and to put some backbone in the "don't harass" part of the policy.

Third issue involves what many American soldiers, sailors, airmen and Marines have called for years the "gateway to Europe," the Rhein-Main airport in Frankfurt.

Today, American and German officials signed an historic agreement that will turn over Rhein-Main Air Base to the Federal Republic of Germany over the next six years. And in exchange for that, Germany will invest the equivalent of \$425 million into two other U.S. air bases in Germany, Ramstein and Spangdahlem, near Bitburg, to improve their facilities so they take over the traffic and the job that has been performed by Rhein-Main. So that will happen over the six-year period.

Rhein-Main, which of course is right next to the Frankfurt commercial airport, will become absorbed into the Frankfurt commercial airport, which I believe is one of the busiest airports in Europe and will become even busier as a commercial gateway.

So the U.S. gateway to Europe will shift from Rhein-Main to Ramstein over the next six years. Probably many of you have flown into Rhein-Main in the course of going to see our troops in Bosnia or Kosovo or elsewhere in Europe.



THE SECRETARY OF DEFENSE
1000 DEFENSE PENTAGON
WASHINGTON, DC 20301-1000

DEC 13 1999

MEMORANDUM FOR INSPECTOR GENERAL, DEPARTMENT OF DEFENSE

SUBJECT: Implementation of the Policy on Homosexual Conduct in the Military

This August, the Department of Defense, following an extensive review of the Department's implementation of the homosexual conduct policy, issued additional guidance intended to improve the application and enforcement of the policy. The Military Departments are preparing the issuance of their instructions to the field to implement this guidance.

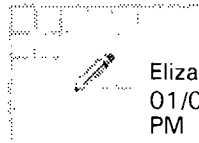
As I have previously indicated, I am determined that the policy on homosexual conduct in the military be clearly understood and fairly enforced. This is critically important, as the effectiveness of the Department's application and enforcement of the policy has a direct relationship to unit cohesion and readiness.

Therefore, I am today asking that you initiate an assessment of the environment at representative installations that you select within each Military Department with respect to the application of the homosexual conduct policy. This assessment will include a review of the extent to which the harassment of service members based on perceived or alleged homosexuality may occur. The extent to which disparaging speech or expression with respect to sexual orientation occurs or is tolerated should also be assessed as this can undermine good order and discipline. Please provide me with your assessment within 90 days.

William X GR



U18841-99



Elizabeth J. Potter
01/06/2000 05:17:39
PM

Record Type: Record

To: See the distribution list at the bottom of this message

cc:

Subject:

Reminder: The meeting with NSC, WH Counsel, OPL and COS and press to discuss the DADT policy has been changed to Friday, tomorrow at 5:00 pm room 117.

Q Mr. President, last night the Vice President in the debates said that he'll ask military commanders about their feelings on gays serving in the military before appointing people to the Joint Chiefs of Staff. Is this litmus test the way it should work?

THE PRESIDENT: Well, I think the real problem is -- let me go back to what happened, because, as you know, my view was -- and I will restate my view. The Uniform Code of Military Justice prohibits homosexual contacts. So my view was, if someone was willing to take the pledge to observe the Uniform Code of Military Justice, they shouldn't have to lie about being gay and being in the military. Then, let me remind you what happened. The Congress voted, by a veto-proof majority, against that position. So that's how we got to "don't ask, don't tell."

My focus has been on trying to make the policy work the way the military commanders said it would work back in 1993, which it has not been doing. No one disputes that. To Secretary Cohen's credit, back in August we announced some new guidelines, which have now been implemented, for training and for implementation, which I think will significantly improve the present situation over the next few months.

Now, the Vice President and Senator Bradley say they want to go back to the position that I advocated in '92 and '93. In order to do that, the Congress will have to change the law, I believe. I don't think that the military and the President have the authority to do it. Now, you could go back and look at the constitutional arguments and do some research, but I think a lot of this debate, I think a lot of people have actually forgotten that Congress put into the law the present policy.

And so what I'm going to do is spend the next year trying to make sure that we do what was intended and what I announced would be done, after extensive consultation with our commanders back in 1993. I believe that the next President, if he wants to change the policy, will have to get the Congress to change the law.

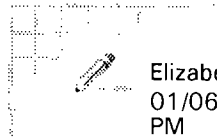
Q A quick follow-up on that. Wouldn't litmus tests like that have disqualified somebody like Colin Powell from serving as Joint Chiefs?

THE PRESIDENT: I think that I'm going to leave the appointment process to the next President. I'm not going to get involved in this election right now. I think that there have been, we know, going back all the way to the first world war, we have clear evidence that there have been gays in the military who have served with great distinction. I think it's quite interesting that most of the Vietnam veterans, combat veterans, in the United States Congress, including Senator Robb and Senator Kerry, just to mention two, have felt that -- both Senator Kerry and Kerrey, and Senator Robb -- have felt that the policy ought to be changed and supported my original position.

So I would like to find some way for people to be honest, to obey the law, and to serve with distinction in the military. So I think that is where our focus ought to be, and the next President will have to figure out how to do that. But I think there will have to be a change in the law.

Message Sent To:

Johannes A. Binnendijk/NSC/EOP@EOP
David B. Peterman/NSC/EOP@EOP
Laura S. Marcus/WHO/EOP@EOP
William Marshall/WHO/EOP@EOP
Edward W. Correia/WHO/EOP@EOP
Dag Vega/WHO/EOP@EOP



Elizabeth J. Potter
01/06/2000 01:52:17
PM

Record Type: Record

To: Jason H. Schechter/WHO/EOP@EOP
cc: See the distribution list at the bottom of this message
Subject: Re: Gore promises pro-gay litmus test for military's Joint Chiefs of Staff 

This answer has been approved by NSC, WH Counsel and the COS office.
Potter 1/6

Q. What do you think of the Vice President's statement last night on the "Don't Ask, Don't Tell" policy? He said..."I would insist, before appointing anyone to the Joint Chiefs of Staff--, that individual would support my policy," Mr. Gore said. "And yes, I'll make that a requirement."

A: Persons who serve as Members of the Joint Chiefs of Staff provide candid advice to the President but agree to support the President's policy, once it is determined. That is a long-standing and appropriate tradition followed by all Presidents.

Message Copied To:

Edward W. Correia/WHO/EOP@EOP
Laura S. Marcus/WHO/EOP@EOP
Johannes A. Binnendijk/NSC/EOP@EOP
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William Marshall/WHO/EOP@EOP
Alejandro G. Cabrera/OVP@OVP

NATIONAL SECURITY COUNCIL
WASHINGTON, D.C. 20504

8774
REDO

December 15, 1999

ACTION

MEMORANDUM FOR SAMUEL R. BERGER

FROM:

HANS BINNENDIJK *HB*

SUBJECT:

"Don't Ask, Don't Tell"

Per our conversation this afternoon, attached is the revised memo for the President on "Don't Ask, Don't Tell."

Concurrences by:

Jamie Baker, Miles Lackey
in draft *in previous versions*

RECOMMENDATION

That you sign the memorandum for the President at Tab I.

Approve _____ Disapprove _____

Attachment

Tab I Information Memorandum for the President

THE WHITE HOUSE
WASHINGTON

INFORMATION

MEMORANDUM FOR THE PRESIDENT

FROM: SAMUEL R. BERGER

SUBJECT: Problems with "Don't Ask, Don't Tell"

You asked for an assessment of the "don't ask, don't tell" policy for gays in the military. The assessment below concludes that: 1) there have been negative trends in policy implementation, 2) OSD is trying to improve the situation, overcoming resistance from the Services, and 3) there are steps available to improve the situation further, but they may reignite negative congressional reaction.

BACKGROUND

Several interrelated trends capture the nature of the current problem. The number of annual discharges for homosexual conduct has doubled since 1994, growing consistently from 617 in that year to 1149 last year. The vast majority of these discharges (82%) were triggered by a personal "statement" admitting to homosexuality. Fifty-eight percent of the discharges were within the member's first year of service.

Servicemembers' Legal Defense Network (SLDN) data (which may not be completely reliable) indicates that incidents of anti-gay harassment have doubled since 1997. Last year they documented 400 cases that included death threats and verbal abuse. The Fort Campbell murder, they argue, must be seen in the context of this broader environment of harassment. SLDN also believes that "commands use heavy-handed tactics to pursue gays" in violation of the "don't ask, don't pursue" elements of the policy. SLDN reports that incidents of "asking and pursuing" were up 42% between 1997 and 1998. They also conclude that while reports of threats to extract confessions are up, physical abuse by investigators has declined.

There appear to be several reasons for these negative trends. Under legislation passed in 1993, service members with a propensity or intention to engage in homosexual acts "create an

unacceptable risk" and must be separated from the Armed Forces. At the same time, the "don't ask, don't tell" policy stresses privacy rights. This has posed contradictions for those tasked with implementing the policy and for those trying to live with it. It is clear that the culture of the military leans in the direction of the law banning gays. While most service members receive some training on the policy, it appears inadequate. Therefore, the "don't ask, don't tell" policy may give homosexuals a false sense of security about joining a culture that may not meet expectations.

OSD EFFORTS TO IMPLEMENT THE POLICY

Bill Cohen and OSD appear to be making a good faith effort to implement the policy, but must overcome implementation problems in the Services. In March 1997, OSD issued a memorandum from Undersecretary Dorn, which made it clear that if a service member reports that he/she is being threatened because of a perception of being homosexual, that report shall not, by itself, cause the service member to be investigated for homosexuality. The report of such a threat should result in the prompt investigation of only the threat itself.

An April 1998 OSD review pointed out that the "don't ask, don't tell" policy posed an implementation challenge to the Services. The review found that although for the most part the policy has been properly applied, there is cause for concern about some aspects of policy implementation. It recommended several steps to enhance implementation.

On August 13, 1999, OSD issued new policy guidelines based on the 1998 review. The new guidelines strengthened and reissued the 1997 Dorn memorandum, and called for its wide distribution and for training on its content. In addition, the 1999 guidelines recommended that: 1) staff judge advocates consult with senior legal officers at higher headquarters before initiating investigations of an allegedly homosexual member, 2) prior authorization be sought at the Service Secretary level before initiating any investigation that might deprive a discharged member of financial benefits, and 3) Service Inspectors General (IG's) inspect the training of those charged with enforcing the policy. The Services are currently developing implementation plans for these August guidelines, so their impact has not yet been felt. OSD reports that the Army plan is acceptable but the other plans need to be revised.

OSD has also made a major effort at Lackland Air Force Base to reduce the number of recruits declaring themselves to be

homosexuals. By initiating a "cooling off" period, they have significantly reduced the number of discharges during basic training.

This week in an important step, Bill directed the DOD IG to assess the environment with respect to application of the "don't ask, don't tell" policy at representative installations within each of the military departments. The IG's assessment will address the extent to which service members are subject to harassment based on alleged homosexuality, and the extent to which disparaging speech or expression relating to sexual orientation is tolerated. Bill asked the IG to report back to him in 90 days; the report will serve as a useful basis for considering next steps.

CONGRESSIONAL CONSIDERATIONS

Efforts to strengthen the "don't ask, don't tell" policy could prove extremely controversial, particularly with the Services and opponents of the policy on the Hill. Too bold a step might reignite legislative proposals that could undermine our existing policy and spill over into other defense issues. In a December 15 *Washington Times* article, Senator John Warner is reported to have said, "The wise and fair course for future congressional action, particularly in view of the profound impact of these issues on military readiness, is not to take legislative action in the heated rhetoric of an election year."

POSSIBLE NEXT STEPS

Short of changing the "don't ask, don't tell" policy, there are several steps that might be taken to strengthen existing policy, including the following:

- Ensure prompt and complete Service implementation of the August 1999 guidelines.
- Conduct more vigorous anti-harassment training since current training appears inadequate.
- Take appropriate additional steps to hold commanders accountable for inappropriately "asking or pursuing" and for condoning an environment conducive to harassment.
- Pursue a broader definition of the service member communications for which confidentiality is protected.
- Ensure that there is appropriate recourse to accused service members to stop improper investigations by their commanders.
- A White House/OSD working group might be established to monitor implementation of the August guidelines, discuss implementing the above steps and consider other alternatives after release of the IG report.



Personnel and
Readiness

THE OFFICE OF THE UNDER SECRETARY OF DEFENSE

WASHINGTON, DC 20301-4000

Facsimile Cover Sheet

To:	Mr. Binnendijk
Office:	
Phone:	202-456-9191
Fax:	202-456-9190
From:	Rudy de Leon
Office:	Under Secretary of Defense (P&R)
Phone:	703-695-5254/5255/7402/7407
Fax:	703-693-0171
Date:	December 20, 1999
No. Pages with Cover:	

MEMORANDUM

TO: Mr. Hans Binnendijk
FROM: Suzanne McKennaSM, Special Assistant to USD (P&R)
DATE: December 21, 1999
RE: Homosexual Conduct Policy Implementation

There are several things of which you should be aware regarding the implementation of homosexual conduct policy and with respect to Fort Campbell.

DOD INSPECTOR GENERAL ASSESSMENT OF EXTENT OF HARASSMENT:

On December 13, 1999, Secretary Cohen instructed the DoD Inspector General to conduct an assessment of the environment at military installations with respect to the application of the homosexual conduct policy. The Inspector General will assess the environment at a representative installation in each of the Military Services and the assessment will be completed within 90 days. The assessment will include a review of the extent to which the harassment of service members based on perceived or alleged homosexuality may occur. The assessment will also include a review of the extent to which disparaging speech or expression regarding sexual orientation occurs or is tolerated. A copy of the Secretary's instruction to the Inspector General is attached.

FORT CAMPBELL. In addition, at Fort Campbell, the Army will investigate any credible allegation of harassment and will hold accountable, as appropriate, those determined to have engaged in harassment. This investigation will occur once the court-martial cases have been completed.

HARASSMENT TRAINING. Mr. de Leon and Mr. Dworkin signed a memorandum, dated December 18, 1999, directing the Services to provide updated homosexual conduct policy training materials that incorporate training regarding threats or harassment. The updated training materials are due January 17, 2000.

In addition, the December 18, 1999 memorandum asks the Services' leadership to issue a strong statement to the field that harassment for any reason will not be tolerated and that commanders are expected to take prompt, appropriate action in instances of harassment.

2 Attachments

1. Secretary Cohen's Memorandum to the DoD Inspector General
2. 18 Dec 99 Memorandum, Subject: Implementation of Guidance Concerning Homosexual Conduct Policy

UP.



THE SECRETARY OF DEFENSE
1000 DEFENSE PENTAGON
WASHINGTON, DC 20301-1000

DEC 13 1999

MEMORANDUM FOR INSPECTOR GENERAL, DEPARTMENT OF DEFENSE

SUBJECT: Implementation of the Policy on Homosexual Conduct in the Military

This August, the Department of Defense, following an extensive review of the Department's implementation of the homosexual conduct policy, issued additional guidance intended to improve the application and enforcement of the policy. The Military Departments are preparing the issuance of their instructions to the field to implement this guidance.

As I have previously indicated, I am determined that the policy on homosexual conduct in the military be clearly understood and fairly enforced. This is critically important, as the effectiveness of the Department's application and enforcement of the policy has a direct relationship to unit cohesion and readiness.

Therefore, I am today asking that you initiate an assessment of the environment at representative installations that you select within each Military Department with respect to the application of the homosexual conduct policy. This assessment will include a review of the extent to which the harassment of service members based on perceived or alleged homosexuality may occur. The extent to which disparaging speech or expression with respect to sexual orientation occurs or is tolerated should also be assessed as this can undermine good order and discipline. Please provide me with your assessment within 90 days.

William X GR



U18841-99



UNDER SECRETARY OF DEFENSE
4000 DEFENSE PENTAGON
WASHINGTON, D.C. 20301-4000

PERSONNEL AND
READINESS

DEC 18 1999

MEMORANDUM FOR ASSISTANT SECRETARY OF THE ARMY
(MANPOWER & RESERVE AFFAIRS)
ASSISTANT SECRETARY OF THE NAVY
(MANPOWER & RESERVE AFFAIRS)
ASSISTANT SECRETARY OF THE AIR FORCE
(MANPOWER, RESERVE AFFAIRS, INSTALLATIONS &
ENVIRONMENT)

SUBJECT: Implementation of Guidance Concerning Homosexual Conduct Policy

We agree with the approach that you have proposed for executing the Department of Defense guidance memorandum of August 12, 1999, entitled "Implementation of Recommendations Concerning Homosexual Conduct Policy." With respect to the other August 12 DoD guidance memorandum entitled "Guidelines for Investigating Threats Against or Harassment of Service Members Based on Alleged Homosexuality," it is important that all of the services fully implement as soon as possible the training required by that guidance. Accordingly, please submit to us no later than January 17, 2000, copies of all updated training materials concerning the homosexual conduct policy, including those materials that incorporate the training regarding threats or harassment.

We also think it is important that the leadership of each of the services issue a strong statement to the field that harassment of service members for any reason, to include alleged or perceived homosexuality, will not be tolerated and that commanders are expected to take prompt, appropriate action against individuals involved in such behavior. In your January 17 submission, please provide us with a copy of the statements that are issued on this subject.

Rudy de Leon
Under Secretary of Defense
(Personnel & Readiness)

Douglas Dworkin
Acting General Counsel

cc: General Counsels of the Military Departments



DRAFT

Possible Steps to Improve Implementation of Don't Ask/Don't Tell

Prohibiting Harassment of Service Members. In August 1999, DOD released a memorandum to the services reiterating the Pentagon's policy prohibiting threats or harassment on the basis of alleged homosexuality. The services are to disseminate this guidance to all levels of command and incorporate it into training. Only the Navy has disseminated guidance. The other services should do so as soon as possible.

More Effective Enforcement of the "Don't Ask" Prohibition. One straightforward step that can be taken is for the services to issue guidance to commanding officers reiterating this policy and for commanding officers at each base to make clear the importance of this requirement.

Another effective way to communicate the importance of this policy is to ensure that persons who violate it are held accountable. The record in the Winchell case suggests that there may have been violations of the existing bar on commanding officers asking about sexual orientation. Ft. Campbell has announced that, at the conclusion of the court martial proceedings arising out of the Winchell murder, it will initiate an inquiry regarding compliance with all aspects of the policy, including the bar on these inquiries. Although an investigation of any person must be conducted free of any command influence by the White House, DOD, or military commanders, DOD can conduct additional inquiries where appropriate to more effectively enforce this aspect of the policy.

Pre-trial Agreements. Existing DOD policy is unclear as to when pre-trial agreements in court martial proceedings can be contingent on one service member providing information about the consensual sexual conduct of other service members. There have been discussions within DOD about clarifying the policy to make clear that such agreements should not be contingent on providing such information unless the conduct of the other service member constitutes conduct that warrants a criminal investigation.

Protecting the Confidentiality of Communications. The "Don't Tell" prohibition in the statute does not define prohibited statements. However, the intent of the policy was to protect the confidentiality of service members' sexual orientation but to bar openly gay men and women from remaining in the military. Consequently, there should be sufficient flexibility in the implementation of the policy to recognize a category of confidential statements regarding sexual orientation that do not violate the "Don't Tell" prohibition. For example, these would include confidential statements to counselors and chaplains, etc. DOD has considered expanding confidentiality protections and we can work with them to do so.

Rebutting the Presumption of Homosexual Conduct. The statute provides a service member is separated if he or she makes a statement that he or she is a homosexual and fails to demonstrate "that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts." Consequently, a service member should be given a reasonable opportunity to make this demonstration. For example, if there is no evidence that a service member has engaged in conduct, an affidavit regarding the intent not to engage in conduct in the future should be sufficient. The infrequency with which this rebuttal provision has been used suggests that DOD needs implement this aspect of the policy in a more flexible way.

DADT working



J. PAUL OETKEN
ASSOCIATE COUNSEL TO THE PRESIDENT

THE WHITE HOUSE

(202) 456-0297

CLINTON LIBRARY PHOTOCOPY

Questions and Answers

Tasking & Process

1. What specifically was your tasking?

- The Secretary directed us to review the DoD IG report and other pertinent materials and to propose a draft action plan on the measures necessary to address the problem of harassment based on perceived sexual orientation, and the other issues raised by the results of the IG's survey.
- Later, our charter was expanded to include a review of the Army IG's report of investigation into the 1999 murder of PFC Barry Winchell, a soldier at Fort Campbell. Our additional objective was to determine how our draft action plan might correct the problems identified in the Army IG report.

The second bullet indicates that the Army's report was completed some time ago, yet they claim the reason for delay in release of the report was that it was not completed. Why was the Army's report not released when it was completed as the Army previously stated it would?

2. What do you mean by other pertinent material? What else did you consider?

- The Secretary wanted to give us the flexibility to consider what we deemed necessary to address the issue of harassment raised in the IG report.
- In addition to the DoD and Army IG reports, we considered the Services' harassment policies and training programs, suggestions from the West Point faculty on ways to affect behaviors, and public comment.

3. The military's policy that homosexuality is incompatible with military service probably contributes to the harassment problem. Why didn't you just review the homosexual conduct policy itself?

- The policy is dictated by statute (10 U.S.C. § 654) and only Congress can change it
 - DoD and the Services are committed to ensuring the policy is understood and fairly implemented
- Our review was limited to addressing the issue of harassment

Is there any intent on the part of the Department to ask that the statute be revised?

4. Why did you solicit public comment? How many did you receive? Can we see it?

- We wanted to get a variety of perspectives on how to address the problem of harassment in the military
- We received 241 comments (116 gave suggestions on dealing with harassment; 125 addressed other matters, mostly expressing opinions on the law)
- You can ask OASD (PA) for it

5. Did you invite outside speakers? Why not invite gays rights groups?

- We invited faculty members from the United States Military Academy Behavioral

Questions and Answers

Science Department to speak to us on behavior change techniques in the military to reduce harassment

- We invited public comment, including from gay rights groups, to submit written comments on how to address the issues of harassment of service members based on perceived sexual orientation
 - We received comments from several gay rights groups

6. The Working Group members were senior civilian employees and military members. Why not include non-DoD members, especially gay rights experts, on the Working Group?

- OSD identified the composition of the working group

Dr. Rostker, why didn't OSD include non-DoD gay rights experts on the working group?

7. Wasn't this Working Group just a knee jerk reaction to the Winchell case?

- The Working Group was formed in response to the DoD IG survey
- It demonstrates DoD's commitment to eliminate harassment based upon perceived sexual orientation

Overarching Principle & DoD-wide Directive

8. How does the overarching principle differ from current policy?

- Emphasizes DoD policy's that there is no place for harassment, of any type, in the military
- Describes the type of behaviors that aren't acceptable
- Including inappropriate comments or gestures, which hadn't been specifically address in policy statements before (except the Navy's)
- Emphasizes that this is leadership issue, for not only commanders, but all leaders

9. Did you find anything wrong with current policies?

- We found nothing wrong with the policies; however, we determined they could benefit from consolidation in a single DoD directive.

When will the Directive be published? Who will be the proponent? How will the Services track compliance?

10. What is the difference between mistreatment and harassment?

- They are essentially the same
- Some of the Services use the term "mistreatment" to describe all forms of inappropriate treatment of individuals.
- The DoD IG report adopted the term "harassment" to describe inappropriate treatment

Questions and Answers

based on alleged or suspected homosexuality -- it is essentially a form of mistreatment.

11. What do you mean by harassment?

- Conduct directed towards an individual
- Harassment for any reason is unacceptable

This does not address inappropriate gay jokes, jodies or comments made in a public forum. If I were a gay person I would feel this type of behavior was targeted at me, even though it may have been done in ignorance. Aren't these all considered forms of harassment?

12. What do you mean by climate? Isn't your overarching principle an attempt to control attitudes and beliefs?

- Climate is the command environment in which harassment is either forbidden or tolerated
- We are trying to ensure service members treat each other with dignity and respect
- Not trying to control attitudes or beliefs, just behavior

13. The principle says inappropriate comments or gestures undermine the principle. What do you mean by inappropriate? Who determines what is an inappropriate comment or gesture?

- Inappropriate comments or gestures are behaviors that aren't necessarily directed toward a person and, therefore, are not harassing but nevertheless contribute to a climate of toleration of harassment.
 - For example, offensive jody calls, while not necessarily harassing, may be inappropriate
- Ultimately, supervisors or commanders must determine whether comments or gestures are inappropriate and take appropriate action.

What if an individual feels harassed by an offensive jody or comment, even if the supervisor or commander does not feel it was? There are provisions for a person, who feels sexually harassed to complain, why is this same provision not extended to homosexuals?

14. In practice how does this overarching principle work?

- The overarching principle is intended to set a uniform standard requiring all personnel to treat each other with dignity and respect
- The overarching principle also calls attention to the relationship between such treatment and good order and discipline
- Finally, it puts harassment based on alleged or suspected homosexuality into a larger context – one in which all harassment is prohibited – to make it clear that no harassment should be condoned

Questions and Answers

15. How do you intend to handle jokes?

- Commanders and supervisors should handle jokes as they do any other behavior – if they are inappropriate, they should be stopped or the persons making them punished

16. How can referring to gays by crass terms be considered anything but inappropriate?

- Using crass terms to refer to gays or any other groups or individuals is inappropriate
- Commanders and supervisors determine how to respond based on all the circumstances surrounding the inappropriate behavior

17. Do you really expect to be able to control harassment when your policy discriminates against gays?

- We expect all individuals, **including alleged or perceived homosexuals** (*what about bona fide homosexuals? Recommend we delete the phrase in bold*), to be treated with dignity and respect
- Mistreatment or harassment of any individual undermines good order and discipline and adversely impacts readiness
- Not trying to control thoughts, just behavior

18. Why are you recommending that DoD issue a single Department-wide directive on harassment? What's wrong with the current policies that DoD has issued?

- All of the policies and guidance are scattered around
- Consolidating policies and guidance into one directive, especially one available in the electronic library of DoD Directives, will make it easier for everyone to access the information

19. You've recommended that the directive make clear that commanders and leaders be held accountable for failing to enforce the directive. Have you specified the punishments?

- The policy is clear--mistreatment, harassment, and inappropriate comments and gestures are not appropriate--if a member engages in these activities, or condone or ignores them, they must be held accountable
- We haven't specified particular punishments because that is a function of command
- Command has a full range of options available from counseling to court-martial, depending upon the severity of the violation

In the past you have not tracked incidents of leaders who failed to enforce the policy, are you going to start tracking this?

Training

Questions and Answers

20. Don't the Services currently tailor training to the grade, experience, and responsibility level of their audiences?

- Currently, some of the training is tailored, but not all
 - For example, the Services have different training for commanders, attorneys, and investigators than the general population
- Based on public comments that we received, as well as the experience at Fort Campbell, we recognized the need to ensure training is tailored, based upon the audience
- Everyone needs to at least have a working knowledge of the policy
- Those responsible for implementing and applying the policy, such as commanders, investigators and attorneys, need to have a more thorough understand of the policy

21. Did you assess the effectiveness of the training the Services implemented earlier this year? Has that training been effective?

- Even though DoD had already approved the Services' training programs, we thoroughly reviewed the training as it pertained to mistreatment, harassment, and inappropriate comments or gestures
- We found that each Service's training programs exceeded that which was required by law and policy
- Because the training programs had only been recently implemented, and some Services were still in the process of providing the required training, we determined it would be more appropriate to evaluate the training at a later time
- Several draft action items require the Services to evaluate training programs

22. Is the frequency of training adequate?

- We reviewed all the Services training programs and found some trained more than others--some trained annually and some at specific points in a service member's career
- The Army IG report indicated that there was inadequate sustainment training at Fort Campbell
- Our action plan recommends that each Service review its training annually; however, we impose no minimum training frequency on the Services because their requirements vary so drastically.
- Our objective is to achieve effective, tailored training

Has each Service completed its baseline training?

23. The SLDN has reported that much of the current training is just "check the block" training which commanders and members don't take seriously. How does your plan ensure training will be taken more seriously and properly conducted?

- OSD and the Services are committed to the fair implementation of the homosexual conduct policy and to preventing mistreatment and harassment of service members
- Our action plan makes it clear that this is a leadership issue -- not only for commanders

Questions and Answers

but all leaders. Additionally, it requires Services to measure training effectiveness in the areas of knowledge, behavior and climate.

- To summarize, we've recommended far more rigor in the development and deployment of training programs: annual reviews, tailoring, measurement, and incorporation of the overarching principle

24. Why not have SLDN conduct or monitor training programs?

- Training is the responsibilities of each Service's leadership
- Our action plan ensures training programs and their effectiveness will be carefully evaluated by the Services

25. Why not require commanders to conduct training?

- Commanders are (1) responsible for training, (2) expected to make sure training is properly conducted, and (3) expected to lead by example
- Commanders are encouraged to conduct training, but not required to

You really haven't told me why commanders are REQUIRED to conduct the training. Should this be something that is chain taught -- do we find that chain teaching is the most effective? This is training that must be addressed at every level of supervision?

26. What does your plan do to ensure trainers are knowledgeable and prepared to train on the policy?

- The action plan requires the Services to annually review their training programs and to evaluate the effectiveness of the programs
- Up to now, no such evaluation has been required.
- As with other training, if its effectiveness falls short of expected standards, it will be necessary for the Services to determine where the problems lie and to take appropriate corrective action
- Ultimately, it is the responsibility of each Service's leadership to ensure training is effective and trainers are able to deliver that training

Reporting

27. What do you mean by avenues of reporting mistreatment, harassment and inappropriate comments or gestures?

- These are the many persons to whom someone may report mistreatment, harassment, and inappropriate comments or gestures
- Service members can go to commanders, supervisors and other superior ranking individuals, chaplains, inspectors generals, law enforcement personnel, area defense counsel, etc
- We want to make sure that everyone knows to whom they can report harassment

Questions and Answers

If a person inadvertently reveals his or her sexual orientation when reporting harassment, does the chain of command have the option of not initiating separation proceedings? If not, then how can the Air Force allow basic trainees to "think about" statements of homosexuality? It doesn't seem like there is a consistent policy.

28. Why is the chain of command so important in the reporting process?

- Chain of command is responsible for maintaining good order and discipline
- Best means to prevent problems and quickly resolve problems that may occur

29. Why are you encouraging that harassment be reported at the lowest level possible? Won't it have a chilling effect to require service members to report harassment to their first line supervisors?

- If first line supervisors can get involved and make on-the-spot corrections, we believe it will not only resolve the problem quickly, but help foster a climate at the **junior ranks**, (*recommend this be replaced with at every level of command*) in which mistreatment, harassment, and inappropriate comments and gestures are not tolerated
- Because some members may feel uncomfortable reporting harassment to their supervisors, we are recommending that the services be required to inform members of all the avenues to report to harassment

30. If harassment is to be taken seriously, why are you recommending that harassment be reported at the lowest level rather than to the commander?

- Mistreatment and harassment are command issues; commanders must be engaged in all issues involving good order and discipline in their units
- By encouraging reporting at the lowest level, we are not precluding command involvement; we are simply acknowledging that these types of problems are best handled by dealing with them quickly – speed dictates that they be handled by the first level of supervision that becomes aware of them

31. If someone makes a statement that he or she is homosexual, why not ask if they have been harassed?

- The action plan requires the Services to ensure inspection programs assess adherence to the overarching principle, and implementing directive
- The Services may use exit surveys to ask this question

Will these complaints be tracked and investigated? If it is determined that the servicemember revealed their sexual orientation as a result of this harassment, will they have any recourse?

32. What do you mean by confidential and non-confidential avenues?

- By law, conversations with certain individuals, specifically chaplains and attorneys, in certain circumstances (e.g., in priest-penitent or lawyer-client relationships) are privileged and may not be revealed to anyone

Questions and Answers

- These are confidential communications, all the rest are non-confidential

Why aren't medical personnel included in the confidential category? Obviously some medical conditions will be better addressed if the servicemember can be open and honest with their health care provider.

33. It seems to me that if someone reports harassment, evidence that the complainant was gay would naturally flow during an investigation into harassment? Doesn't a person reporting harassment risk being outed? What does your plan do to protect persons reporting harassment from being outed?

- First, current DoD policy states that reporting harassment does not constitute credible evidence necessary to begin a homosexual conduct investigation
- Our action plan acknowledges this policy and makes it clear to both persons who report harassment and persons to whom harassment is reported that information about sexual orientation is not needed in order for a harassment complaint to be taken seriously.

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If such information
If such information

What if the information is requested and the person answers truthfully? Will they still be subject to separation?

34. Given the reports of witch hunts and other failures by leadership to ensure the 'don't ask, don't tell' policy is fairly implemented, why didn't you recommend that independent investigators or persons outside the military, investigate reports of harassment?

- To effectively deal with harassment, commanders must handle it the same way they handle other misconduct – by setting standards, investigating deviations, and punishing violations
- Our action plan makes it clear that anyone, including commanders, who condone or ignore harassment are subject to appropriate action
 - We believe that this new standard establishes a clearer expectation that commanders will deal quickly and fairly with harassment if and when it arises

35. Why not create an independent reporting mechanism? Why not expand confidentiality?

- Our working group established two criteria to measure the likely effectiveness of any reporting system: the extent to which it stops harassment and the degree to which it protects the complainant and the person harassed (often, the same person).
 - We believed reporting harassment to the chain of command met both criteria as long as our earlier admonition against inquiring about sexual orientation is enforced
 - Independent reporting systems often do not get complaints to commanders quickly enough for them to take decisive action

Questions and Answers

- Confidential reporting systems often do not get complaints to commanders at all. Thus, while they serve as great opportunities for complainants to vent frustration, unless the complainant waives confidentiality, it is difficult to take action against harassers
- The bottom line is that since information regarding sexual orientation is not needed in order to act on harassment complaints, it is not necessary to ask about, reveal, or protect admissions of sexual orientation unless such admissions are provided in a confidential communication.

36. Why not just create an EEO-like system of reporting / measurement?

- EEO reporting processes are creatures of statute
- To effectively deal with harassment, commanders must handle it the same way they handle other misconduct – by setting standards, investigating deviations, and punishing violations

Many see this harassment as a form of discrimination. What specifically does the law say? Many civilian agencies have extended equal opportunity protection to homosexuals -- why can't the military?

37. Why not require members reporting harassment be given warnings about the consequences of disclosing their sexual orientation?

- We considered this option, especially since it appeared in a Sense of Congress footnote in the 1993 homosexual conduct policy legislation
- We rejected it because we felt it would have a chilling effect on complainants and, therefore, would reduce complaints
- Our action plan provides these warnings; however, they are not contemporaneous with the reporting of harassment.

38. Why not adopt a rule so that if someone illegally asks about sexual orientation, the answer can't be used in discharge proceedings?

- We also considered this option, but rejected it when we realized imposing such an "exclusionary rule" would violate the 1993 homosexual conduct law

39. The SLDN has said that having the chaplains and military defense counsel as the only avenues for privileged reporting is not enough. Did you consider establishing other avenues?

- Sufficient avenues exist
- Establishing privileges was beyond the purview of this group
- Privileged communications are created by executive order or law

Privileged communications can also be created by policy. Why not just make it a matter of policy?

40. Does your action plan require people to report harassment?

Questions and Answers

- The plan does not require people to report harassment
- Service members have a duty, however, to report criminal activity

41. Is it your personal feeling that the military needs to be more assertive in asking people whether they have been harassed?

- No, we don't routinely ask our personnel whether they've been the victims of any other offenses.
- We deal with misconduct by educating personnel on the behavior we expect, tell them the consequences of misbehavior, and then impose those consequences when they misbehave.
- Harassment is no different from any other form of misbehavior and it should not be treated differently

Enforcement

42. You've recommended that violators be held accountable for asking about sexual orientation. Have you specified the punishments?

- The policy is clear--mistreatment, harassment, and inappropriate comments and gestures are not appropriate--if a member engages in these activities, or condone or ignores them, they must be held accountable
- We haven't specified particular punishments because that is a function of command
- Command has a full range of options available from counseling to court-martial, depending upon the severity of the violation

43. Are commanders and leaders going to be given any ideas as to appropriate action when punishing someone?

- We recommended a draft action item directing Services to examine training programs to ensure service members are provided training on enforcement mechanisms available to them

44. What about the former commanding officer at Fort Campbell? How should he be held accountable under this plan?

- Although our working group did review the Army IG report on the incident at Fort Campbell and concluded that some of our action plan recommendations might address some of the problems identified in that report, we did not consider whether any Army personnel should be held accountable

Do we consider this a Service matter? If so, then we need to say that, if not then why didn't we consider it? Part of the charter was to determine how your action plan might correct problems identified and you've already stated that people that allow this to happen should be punished.

45. Has any commander or supervisor been reprimanded for condoning

Questions and Answers

harassment?

- I don't have enough information to answer that question
- Under the standards we propose, however, there will be a clear expectation that commanders and supervisors are accountable for ignoring or condoning harassment

46. Did you examine individual cases?

- We examined a few individual cases, primarily as anecdotal examples of larger issues raised in the DoD IG report or that arose in our discussion of harassment generally
- The nature of our charter focused our attention on the perceptions documented in the IG survey.

Measurement

47. When the formation of your group was announced, we were told one of the things you would be looking at was implementation and effectiveness of the training programs that the Services instituted at the beginning of the year. Did you evaluate the implementation and effectiveness of these programs?

- We did not review the content of each Service's training program – that had already been done by DoD prior to their deployment
- We focused our attention on the kinds of programs each Service deployed, their intended audiences, and frequency
- Although each Service appears to be training its personnel effectively, we recommended they implement feedback mechanisms designed to tell them whether their training efforts are, in fact, sufficient

48. To what extent does any Service measure harassment?

- All the Services maintain data on the number of harassment cases resulting in UCMJ punishment.
- Otherwise, most of the Services do not track or measure harassment
- Although we did not include a specific recommendation requiring such measurement, we did recommend that each Service implement programs designed to measure the effectiveness of their training programs.

The DoD IG report seemed to lump several forms of behavior together under the heading of harassment -- graffiti, jokes, comments and physical assault. Are there any plans to track these occurrences separately?

49. Did you determine how many instances of harassment occurred in the service? Why not?

- No, it wasn't necessary
- Our charter required us to address the perceptions documented in the DoD IG survey. Those numbers gave us a good idea where the specific problems of harassment lay.

Questions and Answers

50. What about the number of times that service members were outed when they reported harassment? What about the number of times the military punished persons for harassing other service members? If you didn't measure this, how were you able to determine the true extent of the problem?

- Our task was to determine from the DoD IG survey results where our personnel's concerns lay.
- Our action plan recommendations were designed to address those concerns
- We **were** (*are*) convinced that **had** (*delete*) we studied the real numbers of cases rather than the widespread perception of these problems, the small number of cases would have minimized rather than maximized our consideration of these issues.

51. Do you intend to require the Services track incidents of harassment and resulting accountability actions?

- No, however, in order for each Service to effectively comply with our recommendations regarding measurement, they will have to implement some kind of tracking mechanism

Will these figures be made available to the public?

General

52. This building has issued directives now every year for the last three years, now going into the fourth year, say that a certain kind of behavior is intolerable. What assurances can you give service members, or anyone else, that this action plan is going to make a difference?

- OSD, the Services, and commanders are committed to eliminating harassment and inappropriate comments and gestures
- The plan makes responsibilities clearer and establishes measurements to better assess the implementation of anti-harassment and homosexual conduct policies

53. Do you still believe that homosexuality is incompatible with military service?

- The law says **homosexuality** is incompatible with military service (We have consistently said that the issue is conduct, not sexual orientation. Homosexual conduct is inconsistent with military service.)

54. Do all the Services agree with this Plan?

- The Services were represented in the creation of this plan

Additional Questions

55. In a recent Washington Post article, Charles Moskos and Michelle Benecke assert that gays who are harassed are often reluctant to complain because the person receiving the complaint may discover their sexual orientation during the

Questions and Answers

course of the investigation. Why can't DoD adopt a policy that prevents such information from being used to discharge complainants?

- First, it is important to understand that complaints of harassment must be taken seriously and that information regarding sexual orientation may not be requested, and need not be revealed
- Second, simply lodging a harassment complaint is, in itself, not sufficient "credible evidence" to warrant initiating an investigation to determine if the complainant is gay.
- However, we are required by law to discharge any member who we discover through non-confidential means has engaged in homosexual conduct, defined as homosexual acts, marriage, or admission of homosexual orientation. To achieve what Moskos and Bennecke suggest would require modification of that law.

56. Who can initiate an investigation?

The following guidance was issued to Service secretaries in a August 12, 1999 memo from USD (P&R) Rudy de Leon:

-Recommend that, to promote consistent and fair application of the law and policy, installation level staff judge advocates consult with senior legal officers at higher headquarters prior to the initiation of an investigation into alleged homosexual conduct. This guidance should make clear that the responsibility to determine when credible information exists - i.e., to determine whether the information reported supports a reasonable belief that a service member has engaged in homosexual conduct, such that an investigation is appropriate - remains with commanders. Commanders are best equipped to assess the credibility of the information provided, taking into account, for example, whether the stress of basic training may affect the reliability of a statement.

-Ensure that initiation of any substantial investigation into whether a service member made a statement regarding his or her homosexuality for the purpose of seeking separation be approved at the Military Department secretarial level.

-Ensure that Service Inspectors General include as an item of specific interest in their inspections the training of those charged with application and enforcement of the policy on homosexual conduct - i.e., commanders, attorneys, and investigators.

"Don't Ask, Don't Tell" Policy
July 20, 2000

Background: On Thursday July 19, both the Washington Post and the New York Times reported on the Army Inspector General's report on the climate at FT Campbell. The investigation was initiated by the former Commander of the 101st Airborne Division, MG Robert T Clark after PFC Barry Winchell was slain, ostensibly because he was gay. While the report has yet to be officially released, the reported findings indicated that there was not a climate of harassment at FT Campbell, however, more and better training is needed.

Also due out this week is DOD's senior working group report. This working group was initiated by Secretary Cohen after a March DOD IG report entitled Military Environment with Respect to the Homosexual Conduct Policy.

Core Points:

- Any type of harassment within any of the Services is unacceptable. The Administration is committed to eliminating harassment and ensuring proper implementation of "Don't Ask, Don't Tell."
- Secretary Cohen directed all the Services to implement new training so that every service member, from most senior officer to new recruit, understands the "don't ask, don't tell" policy and that harassment of any kind will not be tolerated. This training was begun in February and its impact is just beginning to be felt. The Administration and Secretary Cohen will continue to ensure the training is tailored and effective.
- Senior leadership of all the Services recently made strong statements condemning harassment of service members perceived to be homosexual. These statements, coupled with the "don't ask, don't tell" policy training, will send a clear message to every service member that harassment will not be tolerated and that violators will be held accountable.
- The senior-level working group, appointed by Secretary Cohen, will report out later this week after analyzing the data from the DOD IG's assessment. The working group will propose further steps to improve implementation of the "don't ask, don't tell" policy.
- Specific questions concerning either the Army IG investigation or the senior level working group should be addressed to DOD.

Brian

Servicemembers Legal Defense Network

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MEMORANDUM

TO: ✓ Hans Binnendijk; Julian Potter
FROM: Michelle Benecke, Esq. *MB*
DATE: May 15, 2000
RE: DoD Working Group on Anti-Gay Harassment

Enclosed please find the materials SLDN submitted to the DoD Working Group that is reviewing anti-gay harassment in the military. The materials cover the need for leadership, accountability, recourse and better training that is supported by uniformed leaders. Below is a summary of major concerns.

Military leaders still are not doing the things they normally do when they attempt to convey to the force that an issue is important. These include holding violators accountable; addressing the issue at pre-command courses, General Officer conferences and during visits to the field; and ensuring that training is proper and taken seriously. Secretary Cohen should personally set the example and should hold his Service Chiefs accountable to do the same.

No one has been held accountable for the many command violations of this policy documented in SLDN's Sixth Annual Report. It has, for example, been more than one year since PFC Barry Winchell was first assaulted and harassed by fellow soldiers and his leaders. Still, no one has been held accountable.

I am concerned that Army leaders may be attempting to shield MG Robert Clark from accountability for the rampant anti-gay harassment he has permitted at Fort Campbell. Recently, the Army extended the deadline for an Army Inspector General (IG) report on MG Clark's command climate from May 1, 2000 to July 1, 2000. Today, MG Clark's change of command, projected for July, has evidently been set for June 9, 2000. This ensures MG Clark will leave Fort Campbell by the time the IG report is filed.

MG Clark would have been relieved of command had he allowed widespread harassment against any soldiers other than perceived gay soldiers. If the Army tries to promote MG Clark, instead of holding him accountable, the White House should block his promotion.

With regard to recourse, service members must be able to report harassment and crimes and must be permitted to seek medical treatment for resulting physical injuries and mental health consequences such as PTSD and depression. Currently, many Inspectors General, law enforcement officials, doctors and psychologists erroneously believe there is a duty to report service members under this policy. As a result, service members -- for example women who are raped by male service members -- cannot report harassment or crimes. Nor can they seek treatment without being outed to their commands and discharged.

This Administration should tell Inspectors General, law enforcement officials, psychologists, doctors and others not to out gay service members who seek their help. There is, in fact, no duty to turn in service members under this policy. Indeed, it is the outing of service members that triggers the policy's purported concern about unit cohesion. Service members' attempts to privately seek help in no way constitute "telling" as contemplated under this policy.

Even Professor Charlie Moskos, the author of "Don't Ask, Don't Tell, Don't Pursue, Don't Harass," and former Undersecretary of Defense Edwin Dorn, who wrote the Pentagon's first anti-gay harassment policy, agree with SLDN that service members must be able to speak with Inspectors General, law enforcement officials, doctors and psychologists without being outed to their commands and discharged. Their letters to the DoD Working Group are enclosed.

Servicemembers Legal Defense Network

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MEMORANDUM

To: Department of Defense Homosexual Conduct Policy Working Group
From: Servicemembers Legal Defense Network
Date: May 8, 2000
Subject: Recommendations Regarding "Don't Ask, Don't Tell, Don't Pursue, Don't Harass"

In response to your request for public comments on "how to solve the problem of homosexual harassment" and other problems confirmed by the recent Department of Defense Inspector General (DoD IG) survey, SLDN submits the following recommendations: 1) require committed leadership; 2) hold commanders who tolerate harassment, and individuals who engage in it, accountable; 3) ensure service members who are harassed, gay-bashed, raped or otherwise victimized can report these offenses to the appropriate authorities and obtain legal and medical assistance; and 4) institute procedural safeguards to ensure proper implementation of the policy.

I. Committed Leadership is Needed

Top leaders must be committed to stopping anti-gay harassment and properly implementing this policy before any real change will occur. Sadly, top leaders – especially uniformed leaders – have at best been indifferent when it comes to proper implementation of this policy.¹ Continued leadership failure in this regard will only result in continued problems, including harassment and attacks² against service members who are perceived to be gay, and will further fuel the public perception that military leaders are being insubordinate to civilian authority.

While SLDN appreciates recent steps that have been taken as a direct result of Private First Class Barry Winchell's murder, including the survey, this working group, service training on the policy and messages to the field from the Secretary and Chief of each service, we are concerned that these steps are widely perceived as a "check the box" exercise in the field. This is because top leaders are not taking the follow-up steps they normally take when showing they are concerned about an issue.

If military leaders were serious about properly implementing this policy, to include deterring anti-gay harassment, they would take the following steps, among others. First, they would set an example for their subordinates. They would not tolerate verbal gay-bashing from subordinates, and they would immediately correct anyone who did. Top officers,

¹ In each of the past six years, Servicemembers Legal Defense Network has found and reported that lack of leadership at the top is the primary reason for the high incidence of anti-gay harassment and other violations of "Don't Ask, Don't Tell, Don't Pursue, Don't Harass."

² SLDN explicitly called on military leaders to take steps to address anti-gay harassment and warned, "It is reasonably foreseeable that if the Department of Defense does not take corrective actions now, deaths of actual and perceived homosexual service members, like slain sailor Allen Schindler, will occur." C. Dixon Osburn and Michelle M. Benecke *Conduct Unbecoming Continues: The First Year Under "Don't Ask, Don't Tell, Don't Pursue"* (Servicemembers Legal Defense Network, Feb. 28, 1995). Military leaders failed to begin to take steps to address this serious problem until after Private First Class Barry Winchell was murdered in an anti-gay hate crime last summer.

including the Chief of each service, would personally conduct training on this policy and require their subordinate commanders to do the same, as MG B.B. Bell did at Fort Knox.³ In contrast, top officers at the Pentagon were merely handed or emailed the Army's training slides, with no leadership emphasis provided, thus fueling the perception that this training was not important.

Second, our top military leaders would speak publicly about the importance of these issues and place proper implementation of this policy on their service's agenda in a positive and proactive manner. For example, service Chiefs of Staff would include this topic in their addresses to pre-command courses, General Officer conferences and in public speaking engagements. Secretary of the Navy Richard Danzig recently missed an opportunity to send the right message at the U.S. Naval Academy. In response to a question about gays in the military, Secretary Danzig responded merely that the military should not be considered a testing ground for gay-rights issues.⁴ He could have stressed the Navy's actions to protect sailors and their importance to future officers, but he did not.

In addition, top leaders would discuss the importance of preventing harassment when visiting commanders and enlisted leaders in the field. They would ask commanders to brief them on the actions they are taking to prevent harassment and other policy violations. These are just a few examples.

Third, top leaders would want to know what is happening in the field. They would establish oversight and reporting mechanisms and other means by which to receive feedback about the incidence of harassment and other violations in the field. Military leaders would, for example, continue to survey service members about harassment and their knowledge of this policy. Top leaders would seek to assess which bases have high incidents of harassment and other policy violations, and they would be interested in developing efforts directed at improving the record of those bases. Conscientious leaders would want service members who are victimized by anti-gay harassment, gay-bashing and other offenses to be able to report the offenses against them, and to receive medical treatment, discussed below.

Fourth, top leaders would hold commanders who tolerate harassment, and individuals who participate in harassment, accountable, as discussed below.

Fifth, top leaders would want to have the best training possible on this subject. Training is discussed in a separate memorandum that is being submitted by SLDN.

³ Fort Knox Commanding General (MG) B. B. Bell set the proper tone, up front, for his subordinate leaders by issuing a memorandum stating "I will conduct mandatory [policy] training for all [Fort Knox] Colonel-level commanders and primary installation directors." The General further directed that "unit commanders personally conduct the Homosexual Conduct Policy training in their units...." He also clearly identified resources for Fort Knox leaders to utilize in training preparation (i.e., SJA, EO Advisors, etc.). Finally, MG Bell unambiguously stated that anti-gay "Slurs, demeaning jokes, harassment, and maltreatment violate the trust placed in us by the American people and by those whom we lead." Soldiers and leaders at Fort Knox report MG Bell's example made them take this seriously.

⁴ *Navy Boss: Don't Test Gay Issues*, Associated Press, Apr. 18, 2000.

These are just a few of many actions top leaders would take immediately if they were serious about properly implementing this policy. If taken, they will make a difference.

II. ACCOUNTABILITY

The DoD IG survey results revealed that eighty-five percent of service members believed anti-gay speech was tolerated and seventy-three percent of senior personnel who witnessed anti-gay harassment did nothing to immediately stop it. Lack of accountability was also demonstrated when more than twice as many respondents said service members got away with anti-gay harassment than did not get away with it and four times as many respondents said they did not know if personnel got away with harassment.

The survey confirms what SLDN has reported for six years: people can ask, pursue and harass suspected gay service members with impunity.

These results not only demonstrate a serious lack of leadership, but also raise concerns that some service members will continue to engage in these activities because they believe they will not be held accountable for their actions. If service members are not held accountable, training or policy statements will not be a deterrent. Further, if military leaders do not start holding members accountable for violations of this policy, including abusing their fellow service members, military leaders will lose any remaining shred of credibility they have with the public regarding assertions that they are taking steps to implement this policy properly.

In order for the policy to be effective, service members at all levels, including commanders, must know that: 1) there are specific consequences for violations, from on the spot corrections to letters of counseling to nonjudicial punishment to courts-martial, depending on the offense; and 2) they will be held accountable if they engage in anti-gay behavior or allow anti-gay behavior or policy violations to occur.

With regard to leaders, the rewards system should not work for those who do not properly enforce the policy, including those who permit anti-gay harassment in their commands. Leaders' abilities on these issues should be taken into account on evaluations, in the selection process and in assignment decisions, and this should be made clear to all leaders. The Services will not be perceived as taking this policy seriously until there are real consequences for leaders who allow their subordinates to be abused, and who fail to enforce the policy in other ways.

SLDN's recent annual report named numerous individuals who violated the policy by asking, pursuing or harassing service members perceived to be gay. To our knowledge, not one of these individuals, with the possible exception of Marine Lieutenant Colonel Thomas Melton, has been held accountable for his or her actions.⁵

⁵ Lieutenant Colonel Melton was reportedly removed from his position at Twenty-Nine Palms for mocking the murder of PFC Barry Winchell and referring to gay service members as "queers" "backside rangers" and other derogatory terms in an email forwarding the Chief of Naval Operation's October 1999 message against anti-gay harassment, including the use of epithets, to his subordinates – immediately conveying that they did not have to

Other prominent cases mentioned in SLDN's report included a witch hunt conducted by Air Force noncommissioned officers at the Defense Language Institute in Monterey, California, which the Air Force moved expeditiously to address,⁶ and continued anti-gay harassment under the command of MG Robert Clark, 101st Airborne Division (Air Assault), at Fort Campbell. Anti-gay harassment and threats continue to this day at Fort Campbell, notwithstanding the murder of PFC Barry Winchell and despite the fact that SLDN and Members of Congress have brought documented cases to the attention of Fort Campbell, Army, and Department of Defense officials.

SLDN appreciates that the Secretary of the Army sent an Inspector General review team to assess the command climate at Fort Campbell in February 2000. We are concerned, however, that the review team failed to file its report by the May 1st deadline and has been given a two-month extension to coincide with MG Clark's projected change of command, suggesting that the Army will not hold MG Clark accountable for violations and continued harassment at the post.

While recounting all the facts is beyond the scope of this memorandum, it is fair to say that MG Clark would have been relieved of command by now if PFC Winchell and other soldiers reporting harassment were anyone other than perceived gay people. We also remain concerned that one year has passed since Winchell's leaders began to harass him, among numerous other violations of this policy, and still no one has been held accountable.

III. ENSURE SERVICE MEMBERS CAN REPORT ANTI-GAY HARASSMENT AND CRIMES

The DoD IG survey found that while 78 percent of service members said they felt free to report harassment, only 16 percent of the respondents who witnessed or experienced harassment stated they actually reported it. While the percentage of respondents who said they felt free to report harassment increased with pay grade, those most likely to be harassed – junior enlisted personnel – were the least likely to feel free to report anti-gay harassment.

SLDN has documented significant reasons why service members do not feel free to report harassment or assaults against them. First, service members fear – with good reason – that reporting harassment will increase, not decrease, the threat to their safety in the current command climate where leaders tolerate harassment and no one is held accountable, as discussed above.

Second, service members fear being outed to their units, investigated and discharged under "Don't Ask, Don't Tell, Don't Pursue, Don't Harass." Service members' fears are well-founded. Some Inspectors General and health care providers have told SLDN they believe that "Don't Ask, Don't Tell, Don't Pursue, Don't Harass" requires them to turn in gay service members who inadvertently reveal their sexual orientation or who are discovered to be gay in the course of seeking help.

take the CNO's message seriously. The Marine Corps has not confirmed any action was taken against Lieutenant Colonel Melton, or revealed whether steps in addition to removing him from his position were taken.
⁶ To date, SLDN has not received information about the Air Force investigation's findings or if the Air Force has held anyone accountable.

This is an erroneous, and cruelly ironic, interpretation of “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass,” which was intended to respect service members’ privacy and make them less susceptible to harassment and investigative abuses. As a result, SLDN recommends that DoD and Service officials inform health care providers, Inspectors General, law enforcement personnel and others who typically help service members dealing with harassment and assaults not to turn in gay, lesbian and bisexual people who seek their help, but to assist them. This position is supported by those directly responsible for creating and implementing “Don’t Ask, Don’t Tell, Don’t Pursue,” by Inspector General regulations and by military precedent in related areas. Military leaders cannot expect to have any credibility regarding ending anti-gay harassment until they clarify this issue and allow service members to safely report harassment.

Outing is Not Mandated and Must Be Prohibited

In a recent letter to Secretary Cohen, Professor Charles Moskos, the author of “Don’t Ask, Don’t Tell, Don’t Pursue,” expressed concern that health care providers, Inspectors General, law enforcement personnel and others wrongly believe they must turn in gay service members who seek their help, and urged the Secretary to clarify there is no such requirement. Professor Moskos stated that, “[m]ilitary members who reveal their sexual orientation ... in the course of reporting anti-gay harassment and threats are not ‘telling’ in a manner contemplated under the policy. It is appropriate for officials to assist these members, not turn them in.”⁷

Former Under Secretary of Defense Edwin Dorn, who developed the Defense Department’s 1997 anti-harassment guidance, shares this view. In a recent letter to Undersecretary DiBattiste, Mr. Dorn stated the belief that physicians, EEO personnel, Inspectors General and law enforcement personnel are “obliged to turn in service members who reveal their sexual orientation when they report anti-gay harassment, or who are discovered to be gay during an investigation into the reported harassment... is not what I anticipated or intended when I was involved in the development of DoD’s 1997 anti-harassment guidance.” Mr. Dorn made it clear that, “... soldiers who experience or witness anti-gay harassment [should] not jeopardize their own careers if they report the wrongdoing.”⁸

In its April 1998 report on the implementation of this policy, the Department of Defense conceded that there was no requirement for health care providers to turn in gay, lesbian and bisexual military members who seek their help.⁹ Nevertheless, despite numerous

⁷ Charles Moskos April 12, 2000 letter to Department of Defense Secretary William S. Cohen. Encl. 1.

⁸ Edwin Dorn May 1, 2000 letter to Under Secretary of the Air Force Carol DiBattiste. Encl. 2. See also Lawrence Korb May 8, 2000 letter to Under Secretary of the Air Force Carol DiBattiste. Encl. 3.

⁹ OFFICE OF THE UNDER SECRETARY OF DEFENSE (PERSONNEL AND READINESS), *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, at 10.

requests by SLDN,¹⁰ the Department has failed to take any action to clarify this to health care providers.

With regard to Inspectors General, regulations emphasize the need to protect the privacy of service members who make reports to the IG and to minimize the risk of reprisal against them. For example, Army regulations state, “persons who ask the IG for help, make a complaint ... often have an expectation of confidentiality. This expectation encompasses safeguarding their identity and the nature of their contact with the IG, and protection against reprisal.... The intent behind this emphasis on confidentiality is to protect individual privacy, maintain confidence in the IG system, and minimize the risk of reprisal.”¹¹ The Air Force’s Inspector General regulation also highlights privacy concerns and on its face precludes investigating service members who seek help. It states, “...IG records such as the complaint, report, witness testimony, etc., may not be used as the basis of a subsequent investigative effort outside IG channels.”¹²

Similarly, Title 10 USC §1034(b) entitled Protected Communications; prohibition of retaliatory actions states, “[n]o person may take (or threaten to take) an unfavorable personnel action ... as a reprisal against a member of the armed forces for making or preparing ... a communication in which a member of the armed services complains of, or discloses information that the member reasonably believes constitutes evidence of ... [a] violation of law or regulation including” a prohibition against sexual harassment or unlawful discrimination to an Inspector General.

These laws and regulations apply to all service members regardless of their sexual orientation.

Law Enforcement Personnel Should Not Report Victim's Sexual Orientation

The area of law enforcement deserves special mention. SLDN has assisted service members who have been assaulted, including women who have been raped by male service members, because of their perceived sexual orientation. In these cases, service members overwhelmingly opted not to report the crimes against them because they could not face the possible added trauma of being outed and investigated under “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass” in addition to the trauma of the attack. In this way, the misguided belief that law enforcement personnel should turn in gay members serves to shield felons from accountability.

Military leaders should have an interest in fully prosecuting rapists and gay bashers, not coddling them. In order to prosecute crimes and argue for appropriate sentences, investigators and prosecutors need to be fully informed of the circumstances of a crime, even if the facts reveal the sexual orientation of the victim of crime. This is especially true now

¹⁰ The issue was raised by SLDN after we were contacted by health care providers in all services who were in a quandary over instructions they had been given to turn in gay members. In the past year, SLDN found erroneous instructions on a Navy web site telling health care providers to turn in their patients.

¹¹ Army Regulation 20-1, 1-11, March 15, 1994.

¹² Air Force Instruction 90-301, August 12, 1999.

that President Clinton has signed an Executive Order amending the MCM to allow for enhanced sentencing for hate crimes based on sexual orientation, a development initiated by the Pentagon's Joint Service Committee.

Trained authorities should be the ones who parse which facts are indeed relevant to investigation and prosecution of the crime. It is unrealistic to expect service members who have no knowledge of the elements of a particular crime and who are experiencing the shock of having been attacked to hide their sexual orientation or to engage in semantic games with investigators. A thorough investigation of the crime can only occur if all facts are available to the agency with investigative responsibility.

It is cruel and inhumane to deny gay, lesbian and bisexual victims of crime access to standard reporting channels and assistance provided to similarly situated heterosexuals. Furthermore, potential attackers may be encouraged by the misguided idea that victims are inhibited from reporting such crimes due to fear for their careers.

DoD and the Services should follow the example set in the area of security clearances, where the military made clear at the outset of this policy that "information about homosexual orientation or conduct obtained during a security clearance investigation will not be used by the Military departments in separation proceedings."¹³ The sexual orientation of a crime victim should similarly not be included in a final investigative report to a command. In both circumstances, the military has an interest in service members providing full and complete information to investigators and other authorities.

Safe Resources Must be Truly Accessible

The Services must provide safe spaces for gay, lesbian and bisexual members to report anti-gay misconduct and they must have full access to the personnel commonly responsible for ensuring the well being of military personnel. These resources, in turn, must perform their protective, investigative or enforcement functions in an evenhanded manner, without regard to the sexual orientation of the victim. Service members must not be responsible for figuring out who they can speak to safely. It is incumbent upon the Services to ensure that all service members know where to turn for assistance.

While the Army training slides tell soldiers they can safely, and fully, report anti-gay threats and harassment to defense attorneys and Chaplains, these two resources are far from sufficient. Military defense attorneys are often physically inaccessible to service members, and military defense attorneys are often instructed that they can assist gay service members only if charges have been brought or discharge proceedings initiated against the member. Similarly, turning to Chaplains also has limitations. Chaplains may not be physically accessible to service members, few Chaplains are adequately educated regarding the law, and some Chaplains decline to assist service members because of religious ideology.

¹³ Overview: Directives Implementing the New DoD Policy on Homosexual Conduct in the Armed Forces, December 21, 1993.

IV. PROCEDURAL MECHANISMS TO ENSURE PROPER IMPLEMENTATION

Training, accountability and safe avenues for reporting harassment will not address some of the procedural implementation problems with the policy. As long as these issues remain, service members will face improper investigations and discharge under the policy. These procedural issues include:

Provide Recourse to Service Members to Stop Improper Investigations.

In six years, the Pentagon has failed to provide service members with recourse to stop improper investigations, taking an ends justifies the means approach. While recent guidelines requiring Service Secretary approval for “substantial investigations” and greater legal guidance from higher headquarters may help, they still deprive members of the opportunity to show why an inquiry should not go forward in the first place. Members should be able to obtain a military defense attorney before an inquiry is initiated, and have an opportunity to show that no credible evidence exists.

Cease Use of Intrusive Questioning in Gay Investigations.

Military leaders in all services should train inquiry officers and criminal agents in proper investigative tactics, to include instructing personnel not to question parents, siblings and other confidants, such as close friends about a service member’s sexual orientation or private life. The Air Force should rescind its written instructions to the contrary.

Adopt Exclusionary Rule.

The Pentagon should adopt an exclusionary rule so that evidence obtained illegally, as in a witch hunt, can be excluded at administrative discharge boards.

V. CONCLUSION

Until military leaders take the necessary steps to prove that anti-gay harassment and proper implementation of the policy are priority items, others will fail to follow the policy. This leadership must come from the top and leaders must realize their failure to convey the policy’s importance or proper implementation may negatively affect their careers. All service members must know the penalties for not following the policy and if they engage in anti-gay activities or violate the policy they will be held accountable. Lastly, the Services must provide safe, accessible resources where service members can report anti-gay harassment. If these steps are not taken, it is unlikely that anti-gay harassment or violations of the policy will decrease.

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April 12, 2000

The Honorable William S. Cohen
Secretary of Defense
Washington DC 20301-1000

Dear Secretary Cohen:

I write concerning reports that doctors, psychologists and inspectors general believe they are required to turn in gay military members under "Don't Ask, Don't Tell," the policy I authored in 1993. Pentagon spokesperson Rear Admiral Craig Quigley has recently indicated that you may be considering steps to correct these misguided beliefs. I strongly encourage you to do so.

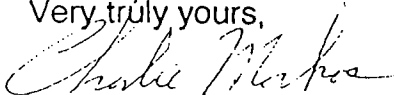
In my opinion, military members who reveal their sexual orientation during private medical treatment sessions or in the course of reporting harassment and threats are not "telling" in a manner contemplated under the policy. It is appropriate for officials to assist these service members, not turn them in. Indeed, it is the "outing" of service members to their units that triggers concerns about unit cohesion.

This sort of heavy-handed "enforcement" will inadvertently undermine the "Don't Ask, Don't Tell" policy by eroding service members trust that their leaders will not "pursue" if they do not "tell" by publicly declaring their sexual orientation. It will also erode the public's confidence in the military's commitment to properly implement "Don't Ask, Don't Tell" if service members cannot safely seek medical treatment or report harassment.

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 concern 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."

It is my opinion that, to preserve the "Don't Ask, Don't Tell" policy, the Department should make it clear that conversations with health care providers, inspectors general and law enforcement personnel are not the kind of statements that should result in investigation or discharge under this policy.

Very truly yours,



Charles Moskowitz
Professor



JUDD A. AND MARJORIE WEINBERG COLLEGE OF ARTS AND SCIENCES

6 Wingreen Loop
Austin, TX 78738
May 1, 2000

*File
refuse*

The Honorable Carol DiBattiste
Under Secretary of The Air Force
1670 Air Force Pentagon
Washington, DC 20330

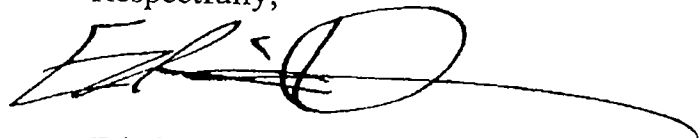
Dear Madam Secretary:

I understand that you are chairing an inter-service working group that Defense Secretary Cohen formed to recommend ways to reduce anti-gay harassment. I suggest that your working group review the military's policies and practices regarding privacy and confidentiality.

Recent reports have indicated that physicians, EEO personnel, inspectors general and law enforcement personnel believe they are obliged to turn in service members who reveal their sexual orientation when they report anti-gay harassment, or who are discovered to be gay during an investigation into the reported harassment. If these practices occur, then they have the effect of punishing the victim. This is not what I anticipated or intended when I was involved in the development of DoD's 1997 anti-harassment guidance.

Please consider clarifying DoD guidance to ensure that soldiers who experience or witness anti-gay harassment will not jeopardize their own careers if they report the wrong-doing.

Respectfully,



Edwin Dorn

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Lawrence J. Korb

Vice President

Maurice R. Greenberg Chair

Director of Studies

May 8, 2000

The Honorable Carol A. DiBattiste
Undersecretary of the Air Force
SAF/US 1670 Air Force Pentagon
Washington DC 20330-1670

Dear Secretary DiBattiste:

Five years ago I co-wrote an Op-ed for the *New York Times* which focused on the application of the "Don't Ask, Don't Tell, Don't Pursue" policy. I wrote that piece because as a former defense department official and retired military officer I was disheartened with military leaders' blatant disregard for the intent of the policy to grant a measure of privacy and safety to service members who are gay or perceived to be gay. Five years have passed and I remain concerned about the same issues. I write this letter to you in the hopes that this working group may be able to recommend changes so that the policy is implemented in a manner keeping with its original intent.

My primary concerns are the on-going harassment of service members by their supervisors and peers, and the lack of safe places for service members to turn within the military if they are facing harassment, medical or mental health problems or seeking spiritual guidance. Linked to these concerns are the lack of strong leadership and accountability.

Physical and verbal abuse of service members must stop. Only through strong leadership, training and accountability will harassment end. Leadership must be by example. From the Secretary of Defense on down through the chain of command, supervisors must make it clear that harassment of any kind will not be tolerated. In addition, service members must know that those who harass, or the commands allowing such harassment, will be punished accordingly. This punishment must be applied clearly and decisively.

Service members must be allowed to report harassment and seek advice from military officials, such as medical and mental health personnel, Inspectors General, Equal Opportunity Officers, law enforcement officials, and Chaplains, without fearing that they will be harassed, put out of the service, or face other retribution. Currently, the only safe place within the military that a service member can turn to request advice or assistance is to a military defense attorney. Regardless of the availability of military defense attorneys, which is a separate concern, they

The Honorable Carol A. DiBattiste

-2-

May 8, 2000

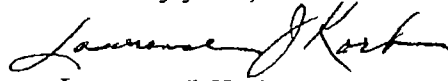
should not be the only outlet for service members to report harassment without fear. Military officials must be allowed to help service members without the misguided notion that they are required to report a service member's sexual orientation if it should be revealed to them.

The military has had six years to implement this policy, and adjust to any problems brought to light during implementation. I am disappointed that many of the problems I saw in the first year of the policy's implementation still exist today. As I stated in my Op-ed "Don't Ask' means don't ask. 'Don't Pursue' means don't pursue. 'Don't Harass' means don't harass. It shouldn't be that difficult."

The intent and letter of this law can be accomplished, but it will take strong clear guidance by this working group and each individual branch command. Such steps must be taken quickly. They are long overdue.

Thank you for giving me, and others who are concerned, an opportunity to comment on the implementation of the "Don't Ask, Don't Tell, Don't Pursue, Don't Harass" policy.

Sincerely yours,



Lawrence J. Korb

cc: The Honorable William S. Cohen, Secretary of Defense
Col. Steven J. Lepper

Servicemembers Legal Defense Network

★ ★ ★ ★ ★

MEMORANDUM

To: Defense Department Working Group
From: Servicemembers Legal Defense Network (SLDN)
Date: May 8, 2000
Subject: Training on Anti-Gay Misconduct

Fifty-seven percent of respondents to the Department of Defense Inspector General (DoD IG) Survey said they were not trained on the "Don't Ask, Don't Tell, Don't Pursue, Don't Harass" policy. Of the fifty-four percent of respondents who believed they understood the policy to a large or very large extent, only twenty-six percent were able to answer all three basic questions about the policy correctly. These responses confirm SLDN's findings on training for the last six years.

In August 1999, Secretary of Defense William S. Cohen ordered each Service to conduct "Don't Ask, Don't Tell, Don't Pursue, Don't Harass" policy training.¹ Although all of the services have produced written training materials at this point, the progress on actual training of service members varies. The Army should have completed its training of all troops and the Air Force should have partially completed its training. SLDN would like information on the training timelines for the other Services and would like information about the progress of all the Services.

After a review of the Department of Defense Inspector General's (DoD IG) survey results, each Service's written training materials, and conversations with soldiers who received the Army training, it is clear there are lessons to be learned and content problems that need to be addressed.

To address some of the issues, SLDN offers the following training recommendations for all Services: 1) leaders must demonstrate a strong command presence during the training; 2) training materials must be clear, accurate and more complete; 3) trainers must be given the tools to effectively brief others; 4) training should be targeted to particular audiences; 5) varied teaching techniques should be used; and 6) feedback and monitoring is essential.

Strong Leadership Presence Required

Overwhelmingly, service members report to SLDN that briefings where commanders are present or participate are taken more seriously than briefings lacking command presence.² For example, an airman at the Defense Language Institute reports that students took a briefing on the policy seriously because the senior commander provided strong comments about the prohibitions on harassment and accountability prior to the training presentation by a military attorney.

¹ Under Secretary of Defense Rudy de Leon, *Memorandum to Secretaries of the Military, Subject: Guidelines for Investigating Threats Against or Harassment of Service Members Based on Alleged Homosexuality*, Aug. 12, 1999.

² See Encl. 1. SLDN April 14, 2000 Memorandum to LTC Brinkley Wehner, Office of the Army Inspector General, "Don't Ask, Don't Tell, Don't Pursue, Don't Harass" Training Analysis.

Training Recommendations to the DoD Working Group

Page 2

The best example SLDN found of strong leadership comes from Fort Knox. Commanding General (MG) B. B. Bell set the proper tone, up front, for his subordinate leaders by issuing a memorandum³ stating “I will conduct mandatory [policy] training for all [Fort Knox] Colonel-level commanders and primary installation directors.” The General further directed that “unit commanders personally conduct the Homosexual Conduct Policy training in their units” He also clearly identified resources for Fort Knox leaders to utilize in training preparation (i.e., SJA, EO Advisors, etc.). Finally, MG Bell unambiguously stated that anti-gay “Slurs, demeaning jokes, harassment, and maltreatment violate the trust placed in us by the American people and by those whom we lead.”

Major General Bell’s actions – not just words – communicated the seriousness and purpose of the training, unlike other Army posts where SLDN identified a “check the block” type training attitude among many commanders. Examples of this include: leaders merely asking if service members knew the policy and then requesting service members to sign a document acknowledging receipt of training; unit leaders making anti-gay comments prior to the training; leaders failing to stop anti-gay comments made prior, during and immediately after training sessions; leaders not present for the training; and a briefing with no training aids or command input.⁴

Lastly, service members need to know the purpose and importance of the briefing for it be effective. A JAG attorney who gave the training was able to convey its importance and captured the soldiers’ interest by personalizing it with a summary of Private First Class Barry Winchell’s murder.

Clear, Accurate and Complete Training Materials Needed

Only twenty-six percent of the DoD IG survey respondents who stated they understood the policy to a large or very large extent were able to answer all three basic survey questions about the policy correctly. This highlights the fact that service members really don’t understand the policy despite their beliefs that they do. To ensure service members truly understand and retain information, it is critical that briefing materials are accurate, clear and adequately explain key “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass” concepts.

Provide Accurate Information

The Services and commands must take steps to ensure the materials being presented to service members are the approved Service materials and contain accurate information. For example, SLDN determined that multiple versions of training materials, including slides with inaccurate information, have been on the Army website. As a result of numerous conversations and memoranda on this issue – between SLDN, the Army and DoD – the website now contains only one version of Army slides, but still has a link to DoD training slides containing inaccurate

³ Addendum to Encl. 1.

⁴ Encl. 1 at 2.

Training Recommendations to the DoD Working Group

Page 3

information.⁵ Some soldiers report their training used Army slides that have been removed from the Army website.

The Marine Corps and Air Force slides also contain incorrect or confusing information. The following are just a few of the inaccurate or misleading statements contained in the training materials:

- Air Force – A Q&A slide at the end of the Air Force presentation incorrectly states “A member may be asked about his/her sexual orientation.” A service member can only be asked about the conduct at issue, not their sexual orientation. Another slide’s accompanying narrative states “The focus of such an inquiry [to determine if the statement was made for the purpose of seeking separation] is not so much the service member’s sexual orientation, but rather the motivation behind the statement.” There is no statutory authority to investigate the motives of service members who make truthful statements that they are gay.
- Marine Corps – A slide states the “purpose of the policy” is to “end discrimination on the basis of sexual orientation in [the military].” This slide is directly contradicted by other slides. The Marine Corps presentation does not clearly explain when commanders must seek advice from the staff judge advocate and some slides skip over SJA consultation completely in flow charts illustrating inquiry procedures. Another slide entitled “Accessions,” is confusing because it first states applicants will not be asked their sexual orientation, but later says the applicant can be rejected “when applicant cannot rebut the presumption,” without any further explanation of the phrase.

Provide Clear Examples

Clear examples representing policy concepts should be provided during training for better understanding of the policy. For example, none of the Services’ training slides designed to address limits on investigations adequately explain how an inquiry, once properly initiated, is limited.⁶ The concept of limits on inquiries would be more clear if materials included specific examples of impermissibly expanded inquiries.⁷ The following is a partial list of recommended examples:

- in coming-out cases, questions related to past or present sexual conduct including asking soldiers the names of people who can verify they are gay or any other attempts to have the soldier prove they are gay should not be asked;
- commands may not try to go beyond the instant allegation to dig up any other information relating to the service member’s sexual orientation or conduct; and

⁵ *Id.* at 3. Despite DoD assurances that the inaccurate materials would be removed from the website, the DoD briefing materials remain.

⁶ Encl. 1 at 3.

⁷ *Id.*

Training Recommendations to the DoD Working Group

Page 4

- if a commander is conducting a permissible, approved inquiry, the inquiry cannot expand into the sexual orientation or conduct of other service members.

Without such examples, even some trainers cannot understand or articulate policy concepts.⁸

Provide More Complete Information

Training materials must contain information identifying where service members may safely turn for assistance to report anti-gay harassment. The Army slides, for example, state a soldier can talk confidentially with a legal assistance attorney or a chaplain. In the "Trust" briefing narrative, the Navy states that service members may go to Equal Employment officials for same sex harassment. While this is a positive step, the materials are still somewhat confusing. The other Services do not identify where service members can go to safely seek assistance.⁹

Service members must know the penalties for engaging in anti-gay harassment or violating the "Don't Ask, Don't Tell, Don't Pursue, Don't Harass" policy. Only the Navy and Marine Corps attempt to address the issue. The Army and Air Force materials do not state that personnel engaging in anti-gay harassment will be held accountable. The Army materials simply state that anti-gay harassment will not be tolerated and that commanders will take appropriate action to prevent harassment and protect the safety of soldiers who report threats or harassment. The Air Force slide says harassment is an unacceptable response to homosexual conduct. It does not unequivocally state that it is unacceptable. All of the services must provide clear information regarding the consequences of engaging in or permitting anti-gay behavior in the policy's training materials.¹⁰

In order for the training materials to be effective, the materials should not contain information undermining the training's purpose. The initial version of the Army briefing materials that are still being used by many units, contains a slide declaring "the presence of [gays] ... creates an unacceptable risk to ... morale..." Service members report the slides send the message "we don't want gay people," despite the fact that the policy states that sexual orientation is not a bar to service.¹¹

Train the Trainers

Trainers, who should be commanders or attorneys with active command involvement in the training, must fully comprehend the material and be able to answer questions regarding the policy. Some Army trainers report they were merely handed a copy of the Department of the

⁸ *Id.* at 4-5

⁹ See SLDN May 8, 2000 Memorandum to Department of Defense Homosexual Conduct Policy Working Group, *Recommendations Regarding "Don't Ask, Don't Tell, Don't Pursue, Don't Harass."*

¹⁰ *Id.*

¹¹ Encl. 1 at 4. Several soldiers told SLDN they found the slide stating gays are an unacceptable risk offensive and the training as a whole enhanced their awareness of the policy's unfairness. These factors forced them to reexamine their career goals and led some to inform their commands they are gay.

Training Recommendations to the DoD Working Group

Page 5

Army slides prior to presentations with no other material regarding the training session or the policy. Teachers must learn before they can effectively teach.¹²

Comprehensive Materials Must be Provided

Trainers should be given educational materials to supplement their understanding of the issues. These materials should explain the policy in detail, including all concepts in the training materials so trainers can effectively educate others on the policy. Without these types of educational materials, some trainers have expressed to SLDN they lack confidence in their ability to instruct others on the policy.

Provide Hypothetical Questions and Answers

Trainers should be given hypothetical questions and answers in preparation for service member questions related to the training. This is essential because in response to participant questions, trainers have provided incorrect information that was not contained in the training material. For example, in some instances, trainers incorrectly state that soldiers are “required” to report the names of gay personnel. There is no such requirement in the law.¹³

Tailor Training to the Audience

While everyone must be trained on the policy and the prohibitions on anti-gay misconduct, personnel who commonly apply the policy because of their jobs need additional substantive policy training. These groups include commanders, senior noncommissioned officers, attorneys, inspectors general, and equal employment opportunity representatives.

Some Services have produced differing training materials depending on the targeted audience. For example, the Air Force has three different sets of training slides including one for general audiences and another for Commanders, JAGs and law enforcement personnel.¹⁴ These types of distinct training are helpful to ensure personnel have the necessary information to implement the policy properly.

The Services should also include materials on the policy in leadership courses for all levels of military personnel. This should, for example, include everything from War College classes, pre-command courses, Command and General Staff Colleges, basic and advanced officer training programs, warrant officer courses to schooling for senior noncommissioned officers. Leaders will be less likely to put sufficient emphasis on the policy or prevent anti-gay misconduct in the field if their leadership courses and their instructors do not stress its importance.

¹² *Id.* at 4-5.

¹³ *Id.* at 5

¹⁴ All versions of the Air Force slides provide consistent information, while the Marine Corps presentations for different personnel appear to be prepared by different personnel and contain conflicting information.

Use Varied Training Methodologies

In order to maximize the service members' comprehension of training materials, the training should incorporate varied training methodologies. Service members, like all people, absorb information in different manners and are more likely to learn from materials that appeal to their particular learning style. Currently, the Services are mostly conveying information through slide presentations. While this may be an effective way of conveying the information to some service members, it would be beneficial to incorporate other training models.

Use Methods Proven in Other Military Training

Additional training methods should include giving examples to demonstrate concepts in the training materials, applying the training materials to hypothetical situations and role-playing.¹⁵ Other types of military training use similar varied methodologies. For example, a review of the DEOMI website shows that their courses include interactive seminars, video presentations followed by discussions, case studies and scenario solving.

Feedback and Monitoring Necessary to Ensuring Success

Training participants should be given an opportunity to provide feedback. In addition, a committee of military experts on harassment and training issues should provide rigorous oversight of training materials, trainer education and training sessions.

Assess Effectiveness and Identify "Best Practices"

Service member feedback will give the Services insight into the effectiveness of training materials and trainers, and assist the Services in adapting training programs where weaknesses are indicated. The military routinely performs "after action reviews" of training events. Monitoring should help prevent some of the problems highlighted above, including the dissemination of confusing or inaccurate material. Additionally, the oversight should assist in identifying "best practices" relative to discouraging anti-gay harassment and encouraging proper implementation of the policy, which could then be replicated throughout the Services.

Because of the sensitive nature of this topic, an anonymous form will elicit more honest feedback. The collected comments, good and bad, should be forwarded to the monitoring group for evaluation. It is important to perform this type of evaluation while the training is new and there are opportunities to improve it. Constantly improving instruction increases the likelihood that training participants will understand the material and be able to effectively apply it. Also, briefers, knowing they will be evaluated, are less likely to make derogatory comments about gays, disparage the training itself, or otherwise derail the training. If evaluated, briefers may take the task more seriously, which will have a profound impact on how the message is given and received.

The Services are also likely to benefit from having "Don't Ask, Don't Tell, Don't Pursue, Don't Harass" policy training monitored by SLDN, including a review of the training materials

¹⁵ Encl. 1 at 2.

and attending selected briefings. SLDN could provide insight on the effectiveness of training materials and presentations, and recommend changes to improve training. This review could be similar to that performed with Lackland Air Force Base officials, who proactively addressed the procedures for handling gay discharges last year. Their efforts resulted in improvements in the policy's implementation at the base. SLDN provided some follow-on recommendations for the Air Force's consideration.

Monitoring by military or other organizations – which will hopefully be a periodic endeavor – should focus on bases or ships where survey respondents report the highest levels of anti-gay harassment and locations where the highest percentage of service members were not able to answer questions on the policy. Other military installations with the highest and lowest incidents of anti-gay harassment should be analyzed and compared to try to determine why the disparities exist.

Conclusion

The key to eradicating anti-gay death threats, assaults, harassment, threats of violence and other violations of “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass” is consistently strong leadership and sound training. Our armed forces have proven time and again their ability to tackle great challenges. This task requires taking the necessary steps to teach people the rules and show them that proper policy implementation is a top military priority.

MEMORANDUM

To: LTC Brinkley Wehner, Office of the Army Inspector General
From: Stacey L. Sobel, Esq., Legal Director
Date: April 14, 2000
Re: "Don't Ask, Don't Tell, Don't Pursue, Don't Harass" Training Analysis

The Servicemembers Legal Defense Network (SLDN) has spoken with many soldiers (officer and enlisted) regarding their experiences with the Department of the Army's "Don't Ask, Don't Tell, Don't Pursue, Don't Harass" policy training. Based upon these extensive conversations and a review of the training materials, SLDN offers the following analysis to assist the Army Inspector General's (IG) training review.

The bottom line with the Army's policy training, as with all military missions, is leadership. The best example of strong leadership SLDN found comes from Fort Knox. Commanding General (MG) B. B. Bell issued a memorandum (Encl. 1) stating "I will conduct mandatory [policy] training for all [Fort Knox] Colonel-level commanders and primary installation directors . . .," thereby setting the proper tone, up front, for his subordinate leaders. The General further directed that "unit commanders personally conduct the Homosexual Conduct Policy training in their units . . ." He went on to clearly identify resources for Fort Knox leaders to utilize in training preparation (i.e., SJA, EO Advisors, etc.). Finally, MG Bell unambiguously states that anti-gay "Slurs, demeaning jokes, harassment, and maltreatment violate the trust placed in us by the American people and by those whom we lead."

Major General Bell's leadership sets an example for other commands to emulate. His actions – not just words – communicate the seriousness and purpose of the training, thereby distinguishing Fort Knox from some other Army posts where SLDN identified a "check the block" type training attitude amongst commanders.

Generally, SLDN's review identified four major concerns: (1) commanding officers are not consistently providing necessary command emphasis in training sessions; (2) the training materials are confusing; (3) trainers improperly state that soldiers are "required" to turn in gays; and (4) the training fails to tell commanders to hold harassers accountable.

Strong Leadership Required

Overwhelmingly, service members report to SLDN that briefings where commanders are present or participate are taken more seriously than briefings lacking command presence. In some briefings, however, service members report that soldiers made anti-gay remarks before, during and after the training and sometimes in the presence of officers and senior enlisted soldiers, who took no corrective actions. In a number of trainings, leadership was lacking. Examples include:

- A Sergeant in Wuerzburg, Germany, told SLDN that the Sergeant did not receive any training. This Sergeant was merely asked whether she knew the policy, and then required to sign a document acknowledging receipt of the training.
- Other soldiers near Wuerzburg report that their unit training NCO conducted the briefing with no command presence. Reportedly, on the day of the training, the unit executive officer and a platoon leader stated words to the affect that the training was "bullshit," they oppose "special rights" for gays and that gays do not belong in the Army. The officers made these anti-gay comments in the presence of many soldiers. These soldiers further report the policy training was riddled with offensive anti-gay comments by soldiers in the audience. One soldier made threatening comments towards gays generally and, as a result, two gay junior enlisted soldiers have expressed fear for their safety.
- A Fort Campbell soldier reports a battalion staff member referred to the training as "the fag briefing." The NCO conducting the training directed soldiers to report known gays to the commander. The commander interjected with speculation that there are no gays in his unit because "you can tell."
- A Hunter Army Airfield Sergeant reports that the First Sergeant presented the briefing. The commander was present at the briefing, but said nothing. No other officers attended the briefing. Although several soldiers in the audience made anti-gay remarks during the First Sergeant's presentation, the commander did not correct the soldiers' misbehavior.
- A reserve Lieutenant giving the briefing in New York stated that upon the completion of his presentation, the senior enlisted member in the audience rose and told everyone an anti-gay joke. No officer stepped forward to correct the NCO's improper behavior.
- A Fort Carson Captain reports to SLDN that the briefing was presented by the Consideration for Others NCO, with no training aids and no input from the commander. The NCO closed the briefing by stating "what matters is that you and your buddy can shoot straight from the foxhole, regardless of whether or not he has extra sugar running through his veins."

There have been other reports of effective briefings. For example, a Fort Bliss Captain reports his battalion commander addressed the unit before and after the briefing, conducted by a JAG officer. The Captain reports that the battalion commander stressed the importance of the briefing and that the Army is committed to treating all soldiers with dignity and respect. According to the Captain, the briefer called upon members of the audience to answer simple questions associated with each briefing slide in an attempt to ensure that all participants best understood the material. This commander's approach to the training should be the norm, instead of the exception.

Training Materials Confusing

Even when commanders are present, there are often difficulties because the training materials are not clear and there are multiple versions of the training available. In January 2000, SLDN identified three variations of training materials on the ODCSPER website: one set of DoD briefing slides with improper guidance and two different versions of Army briefing slides. The earlier version of the Army training materials was removed from the website. However, despite assurances that the inaccurate DoD materials would be removed from the website, the DoD briefing materials remain. This is of particular concern because the DoD training slides fail to discuss harassment, inadequately discuss credible information and overemphasize the criminal system.¹

The Army briefing's focus on harassment, however, is encouraging. The briefing's particular references to the impropriety of anti-gay language, both in daily conversation and unit activities such as jody calls, sends the right message to soldiers.

Army Briefing Slides Inadequately Explain Limits on Investigations

The Army training slide designed to address limits on investigations, entitled "What are the Limits on Inquiries into Homosexual Conduct?", fails to explain how an inquiry, once properly initiated, is limited. The policy states that "inquiries shall be limited to the factual circumstances directly relevant to the specific allegation."² The majority of gay cases should involve "little or no investigation."³ According to the DoD Office of the General Counsel, once a commander determines that a statement, act, or marriage occurred, she must stop the inquiry.⁴ The commander may not look for additional bases for separation.

The training materials should include specific examples of impermissibly expanded inquiries such as:

- In coming-out cases, the inquiry should not include questions related to past sexual history or present sexual conduct. This includes asking soldiers the names of people who can verify they are gay or any other attempts to have the soldier prove that they are gay. Inquiries, which should be conducted rarely, should be limited to the credibility and reliability of the service member.

¹ The DoD training slides encourage commanders to seek assistance from Service criminal investigative agencies and local law enforcement whenever commanders discover possible gay conduct. The better emphasis would be to remind commanders of the policy's limitation on criminal investigations where the conduct involves adult, private, consensual behavior.

² Dep't of Defense Directive (DoDD) No. 1332.14, Encl. 4; 1332.30, Encl. 8, *Inquiry Guidelines*.

³ 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*, Office of the Under Secretary of Defense (Personnel and Readiness), April 1998, at 11; "The decision whether to initiate an investigation when a service member acknowledges his or her homosexuality and does not contest separation has generally rested with the individual commander. We concluded that, in most of these cases, little or no investigation should be conducted."

⁴ *Id.* at 789. Comments by then DoD General Counsel Jamie Gorelick: "Once you establish the elements of the offense or basis for discharge, you go no further."

- If a commander receives credible information that the service member is gay, the inquiry, if any, must be limited to the facts given to the commander. The commander may not try to dig up any other information relating to the service member's sexual orientation or conduct.
- If a commander is conducting a permissible, approved inquiry, the inquiry cannot expand into the sexual orientation or conduct of other soldiers.

The Army training materials also fail to highlight the fact that the policy states that sexual orientation is a personal and private matter and there should be a decent regard to the legitimate privacy and associational rights of all service members.⁵

Reference to Unacceptable Morale Risk Undermines Training's Purpose

When SLDN identified multiple versions of the Army briefing materials initially posted on the Army website, the initial version of the Army briefing contained a slide declaring "the presence of [gays] ... creates an unacceptable risk to ... morale...." A Major in the Washington, D.C., area reports that his unit training began with a slide stating that "homosexuality is incompatible with military service." Service members report these slides sent the message "we don't want gay people," despite the fact that the policy states that sexual orientation is not a bar to service. Although the inappropriate slide version of the materials was removed from the website, some units' briefings nonetheless improperly used these slides.

Since receiving, or in some cases presenting, the Army policy training, several soldiers have contacted SLDN expressing a desire to inform their units that they are gay. Some of these soldiers state that their enhanced awareness of the policy's unfairness, in treating gays differently from heterosexuals, forced them to reexamine their military career goals. Others stated that the unprofessional presentation of the training led them to reconsider their decision to serve.

Training Materials Fail to Adequately Explain Concepts

A reserve Lieutenant in New York presenting his unit's training reported to SLDN that, after studying the briefing slides and reading articles in the *Army Times* and *Soldier Magazine*, even he – as the unit's trainer – was not able to fully comprehend the role of "credible information" and "substantial investigations" in the policy.

In another illustration of the confusion caused by the training materials, a JAG officer in Germany told SLDN "the Army has done a disservice by using the slides they distributed. They need something that will reach the soldiers. My commanders barely understood" This JAG

⁵ President William J. Clinton, *Text of Remarks Announcing the New Policy*, Wash. Post, July 20, 1993, at A12; President Clinton pledged that the policy would provide for "a decent regard for the legitimate privacy and associational rights of all service members." 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*, (Senate Hearings) 103rd Cong., 2nd Sess. At 788.

officer attempted to personalize the training by beginning with a summary of the PFC Barry Winchell murder and found this approach highly effective in capturing soldiers' interest.

In addition to containing confusing definitions of credible information and limits to inquiries, the briefing materials fail to emphasize DoD's position that in gay statements cases little to no investigation is needed.

Trainers Mislead Soldiers with "Requirement" to Turn In Gays

The point of these briefings is to stop anti-gay harassment and outline investigative limits. Some trainers have deviated from their training materials and are providing information that is misleading and not on the slides. In some instances, trainers incorrectly state that soldiers are "required" to report the names of gay personnel to commanding officers. According to a videotape copy of a briefing at Fort McNair, Major Duncan Baugh stated that Inspectors General, Equal Opportunity representatives and Army health care providers are "required" to report soldiers who state that they are gay. Further, according to the *Washington Post*,⁶ during a recent Fort Meade briefing Captain Kevin Reszka told his soldiers they must report gays if they learn of another soldier's sexual orientation.

There is no statutory requirement to report gays to commanding officers. A "requirement" that the IG or EO report soldiers they learn are gay while assisting in an anti-gay harassment complaint will have a chilling affect on gays being able to trust these officials with their safety. Gay soldiers are not going to feel safe reporting harassment when the consequence may be getting fired from their jobs.

Training Fails to Address Accountability

The Army training materials do not state that personnel engaging in anti-gay harassment will be held accountable. The materials state that anti-gay harassment will not be tolerated and that commanders will take appropriate action to prevent harassment and protect the safety of soldiers who report threats or harassment.

Prevention and protection are important elements of the policy. Only command leadership, however, can ensure the policy's success. Such leadership must necessarily entail an accountability element. Soldiers engaging in anti-gay harassment and threats must be held accountable. Leaders who do not prevent or protect against harassment must also be held accountable. The Army must provide all soldiers with a clear understanding of the consequences of engaging in or permitting anti-gay behavior, and this should be included in the policy's training materials.

⁶ Steve Vogel, *Some GIs Puzzled By Rules on Gays*, Washington Post, Mar. 26, 2000.

Conclusion

Training briefings are no substitute for leadership. Army leaders, from the flag level to junior NCOs, must be actively involved in all aspects of the policy's implementation and adherence. The Army's initiation of the policy training program is a good first step. Greater emphasis, however, must be placed on leadership, training, privacy and accountability.

(1 Enclosure)



DEPARTMENT OF THE ARMY
HEADQUARTERS, U.S. ARMY ARMOR CENTER AND
FORT KNOX
FORT KNOX, KENTUCKY 40121-5000

REPLY TO
ATTENTION OF:

ATZK-CG

1 February 2000

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Homosexual Conduct Policy Unit Training Program

1. On 10 January 2000, the Secretary of the Army and the Chief of Staff mandated that all soldiers receive refresher training on the Department of Defense Homosexual Conduct Policy within the next 90 days. I am fully committed to that goal, as well as to ensuring that the policy is understood by all and properly implemented.
2. Instilling the proper command climate is a command responsibility. I direct that unit commanders personally conduct the Homosexual Conduct Policy training in their units NLT 15 March 2000. Unit commanders are encouraged to take advantage of the installation staff expertise and resources available, but I want unit commanders to be the primary instructors on this policy so that soldiers understand our commitment to both the policy and to a professional working environment.
3. The Office of the Staff Judge Advocate (OSJA) has assembled a training package based on training materials provided by the Office of the Deputy Chief of Staff for Personnel. The SJA will forward the package to each of you via electronic mail. The package includes PowerPoint slides and copies of relevant policy memoranda, recent DoD and HQDA messages, and applicable regulations. This training package is also available on the Fort Knox OSJA Internet home page (<http://knox-www.army.mil/sja>).
4. Training should be scheduled immediately. Report the dates of all scheduled training through the chain of command to the Fort Knox SJA NLT 11 February 2000. The SJA may be reached at 624-1255/2022. Once all assigned soldiers have received the training, report training completion through command channels to the SJA.

ATZK-CG

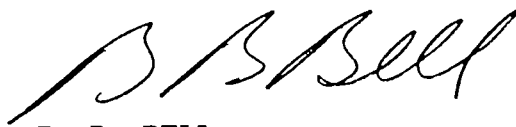
SUBJECT: Homosexual Conduct Policy Unit Training Program

5. I will conduct mandatory training for all USAARMC Colonel-level commanders and primary installation directors at 1100-1200, 7 February 2000 in the Headquarters conference room.

6. A full array of technical assistance and expertise is available to unit commanders. Judge advocates and DA civilian attorneys are the subject matter experts for this policy, and unit commanders may contact OSJA with questions or concerns. Commanders may also contact their unit chaplain, EO Advisor, or Office of the Inspector General for assistance. Soldiers having personal questions that they want addressed outside their chain of command may contact their unit chaplain or Legal Assistance at 624-2771.

7. Our Army leadership expects us to take a "personal look in the mirror" to ensure that our personal and official actions reflect our Army values, and that the standard of treating all our citizens with dignity and respect permeates our respective commands. I ask that you conduct that assessment carefully. Slurs, demeaning jokes, harassment, and maltreatment violate the trust placed in us by the American people and by those whom we lead. As in all that we do at Fort Knox, I expect unit commanders to set the standard, train to that standard, and then maintain the standard.

8. The point of contact for this memorandum is the SJA, COL Don Dubia (dubiad@ftknox-emh19.army.mil) or the Deputy SJA, LTC Rob Lloyd (lloyd@ftknox-emh19.army.mil) at 624-1255/2022.



B. B. BELL
Major General, USA
Commanding

DISTRIBUTION:

B

"Don't Ask, Don't Tell:
July 21, 2000

Background: Secretary Cohen announced today that he was implementing all of the recommendations that came out of his Senior Level Working Group. Cohen had chartered the group to review the March 2000 IG report entitled Military Environment with Respect to the Homosexual Conduct Policy.

The pentagon also released today the findings of the Army IG report on the climate at FT Campbell.

Core Points:

- Any type of harassment within any of the Services is unacceptable. The Administration is committed to eliminating harassment and ensuring the proper implementation of the "Don't Ask, Don't Tell" policy.
- The decision to accept the Working Group's recommendations represents a significant step forward in ensuring a military environment free of harassment. These recommendations build on Secretary Cohen's earlier directives on training and the importance of leadership, and will continue to improve the implementation of the "Don't Ask, Don't Tell" policy.
- Any questions concerning the FT Campbell IG report or specifics of the Senior Level Working Group Report should be referred to the Pentagon..

Q: "President Clinton has labeled DADT 'out of whack.' What does he think about the 'progress' you imply the Pentagon is making?"

- Secretary Cohen took a bold step when he ordered an assessment of his organization last year. He took that step because he knew improvements were needed in the implementation of the "don't ask, don't tell" policy. When the assessment was completed in March, we were troubled by the results. Secretary Cohen then directed a senior level working group to examine the report and to draft an action plan. It is this action plan that Secretary Cohen is implementing today. We are clearly pleased with these initiatives.

“Don’t Ask, Don’t Tell” Policy
March 27, 2000

Background: On Friday, March 24, the Pentagon released the results of the Department of Defense Inspector General's assessment of the military environment with respect to the homosexual conduct policy. This assessment, which surveyed over 71,500 service members, found that offensive comments about homosexuals were commonplace and a majority believed they were tolerated to some extent. About 5 percent of respondents had witnessed or experienced harassment of perceived homosexuals in the form of vandalism, physical assault, and limitation or denial of training or career opportunities. About half of the respondents believed the “don’t ask, don’t tell” policy was moderately or very effective at preventing or reducing harassment, while the other half felt the policy was only slightly effective or not effective.

Q: You have said the “don’t ask, don’t tell” policy is “out of whack”. Are you disappointed that, six years later, there is more evidence the policy is not working and that the military doesn’t appear to support the policy?

- First, let me praise Secretary Cohen for taking the bold step of ordering this assessment of his organization. He took that step because he knew improvements were needed in the implementation of the “don’t ask, don’t tell” policy and wanted data to help him decide where to focus his attention. We are troubled by the results of the assessment and deeply concerned that harassment continues to be directed against military members that are perceived to be homosexuals.
- While waiting for the assessment to be completed, Secretary Cohen directed all the Services to implement new training so that every service member, from most senior officer to new recruit, understands the “don’t ask, don’t tell” policy and that harassment of any kind will not be tolerated. This training was begun in February and its impact is not reflected in the findings of the assessment.
- Senior leadership of all the Services recently made strong statements condemning harassment of service members perceived to be homosexual. These statements, coupled with the “don’t ask, don’t tell” policy training, will send a clear message to every service member that harassment will not be tolerated and that violators will be held accountable.
- With the results of the DOD Inspector General’s assessment, the senior-level working group appointed by Secretary Cohen will be able to analyze the data and propose further steps to improve implementation of the “don’t ask, don’t tell” policy.

Q: Do you agree with the Vice President’s interest in changing the policy if he’s elected? Do you think it’s possible to get Congress to change the law?

- I have said that I do not believe that gays serving in the military should have to lie about their sexual preference as long as their behavior complies with the Uniform Code of Military Justice.
- The Congress voted, by a veto-proof majority, against that position.

- I believe that the “Don’t Ask, Don’t Tell” policy is the best course of action possible under existing law. I hope the next President will be able to work with Congress to find some way for all people to be honest, to obey the law, and to serve with distinction in the military.

**Release of DOD Inspector General Report on “don’t ask, don’t tell” Climate
March 24, 2000**

Background: Today DOD will release the results of the DOD Inspector General’s report on the military environment with respect to the homosexual conduct policy. At the direction of Secretary Cohen, the DOD IG surveyed over 70,000 service members worldwide to evaluate the climate at representative military installations in each Service to gauge the extent of harassment of service members based on perceived or alleged homosexuality. The results are mixed but indicate that problems exist with regard to implementing “don’t ask, don’t tell”.

Q: What is the White House reaction to DOD’s investigation of the “don’t ask, don’t tell” climate?

- We applaud Secretary Cohen’s efforts to improve implementation of the “don’t ask, don’t tell” policy and for ordering this fair and impartial assessment.
- We are troubled by the results of the assessment and deeply concerned that harassment continues to be directed against military members that are perceived to be homosexuals.

Q: What can be done to eliminate harassment of service members perceived to be homosexuals?

- We knew there were problems with implementation of the “don’t ask, don’t tell” policy but we weren’t aware of the extent of the problems. That is why Secretary Cohen ordered this climate assessment.
- But rather than wait for the results of this assessment, Secretary Cohen earlier this year directed the Services to begin aggressive anti-harassment training programs to help improve the work climate. These training programs were started in February and the results of this survey do not reflect the impact of these new programs.
- The surveys also do not reflect the impact of strong anti-harassment statements issued by the Services’ senior leadership in January.
- But the results of the survey underscore the need to further strengthen the current policy. The working group appointed by Secretary Cohen will identify additional ways we can reduce harassment and improve implementation of the “don’t ask, don’t tell” policy.
- I refer you to DOD for specific data from the DOD IG’s report.

Fuerth's Comments on Gays in the Military
March 23, 2000

Background: At a meeting with defense writers on March 22, Leon Fuerth, VP Gore's national security advisor, stated that Mr. Gore would work to overturn the ban on homosexuals serving openly in the military, if elected President. He said that Mr. Gore recognizes how complicated this issue is for the military but he wants to make it possible for homosexuals to serve in the military without fear of their sexual preference becoming public, thus ending their military service.

Q: Does the Vice President's position on gays in the military, as characterized by Mr. Fuerth, differ from the President's?

- No. The President has said that he does not believe that gays serving in the military should have to lie about their sexual preference as long as their behavior complies with the Uniform Code of Military Justice.
- The Congress voted, by a veto-proof majority, against that position.
- We believe that the "Don't Ask, Don't Tell" policy is the best course of action possible under existing law. We are working hard to improve the implementation of that policy.
- On January 6 of this year, the President said, "I would like to find some way for people to be honest, to obey the law, and to serve with distinction in the military. So I think that is where our focus ought to be, and the next President will have to figure out how to do that."

Q: Has the President been briefed on the results of the Department of Defense Inspector General's climate assessment?

- No, not yet. We understand that Secretary Cohen has just been briefed on the results and we expect to hear something soon.

Comparison of Policy Recommendations and DOD Directives

1997 DOD Guidelines "Dorn memo"	1988 DOD Recommendations	1999 SLDN Recommendations	August 1999 DOD Policy Directives
	The "Dorn memo" should be reissued and widely distributed to the field.	Distribute the "Dorn memo" on anti-gay harassment and lesbian-baiting. The Services should move swiftly to get this guidance to everyone and conduct comprehensive training to prevent anti-gay harassment.	The "Dorn memo" was reissued. Directive requires that info be disseminated to all levels of command and is made part of the training program for law enforcement personnel, commanders, supervisors and entry level training.
Report of harassment is not cause to investigate person being harassed. Prompt investigation should be initiated into the harassment. Investigator should not solicit info on the sexual orientation of the harassed member.	DOD should issue guidance clarifying that consultation with higher HQ legal offices is recommended before initiating investigations into alleged homosexual conduct.	Military leaders should issue guidance on the policy's investigative limits and its intent to respect service members privacy; a major reason for violations is lack of knowledge of the rules.	Requires installation level staff judge advocates consult with senior legal officers at higher HQ prior to the initiation of an investigation into alleged homosexual conduct.
	The Service Inspectors General should make training of those charged with implementing the homosexual conduct policy a specific item of interest for inspection.	Train all service members on the limits to gay investigations.	Requires Service Inspectors General include as an item of interest the training of those charged with application and enforcement of the policy on homosexual conduct- i.e. commanders, attorneys and investigators.

Comparison of Policy Recommendations and DOD Directives

1997 DOD Guidelines "Dorn memo"	1988 DOD Recommendations	1999 SLDN Recommendations	August 1999 DOD Policy Directives
Directs commanders to hold accountable those that make threats or engage in threatening conduct.	When reissuing the "Dorn memo", make clear that harassment based on alleged or presumed sexual orientation is unacceptable and those that engage in such harassment will be held accountable.	Hold accountable those who ask, pursue or harass.	Statement by SECDEF at release, "I've made it clear there is no room for harassment or threats in the military." Actions will show if those breaking policy will be held accountable.
		Provide recourse to service members to stop improper investigations.	
		Require commanders to state in writing reasons for an investigation.	
	Found only one case where a doctor may have reported to a commander that one of his patients was a homosexual w/out the patient's permission.	Adopt rule of privacy for conversations with health care providers.	MCM changed by E.O. to establish a limited patient/client relationship w/ mental health care providers under limited circumstances in punitive cases.
	Issue guidance that pretrial agreements should generally not be used to obtain information on consensual sexual conduct.	Cease use of heavy-handed tactics in gay investigations.	
		Adopt an exclusionary rule so that evidence obtained illegally, as in a witch hunt, can be excluded at administrative discharge boards.	

Comparison of Policy Recommendations and DOD Directives

1997 DOD Guidelines "Dorn memo"	1988 DOD Recommendations	1999 SLDN Recommendations	August 1999 DOD Policy Directives
		Appoint a panel of experts to review the administrative separation process.	
	Issue guidance that commanders must obtain prior authorization from their Service Secretary for investigations in "coming out" cases if the investigation will involve anything other than asking questions of the service member or individuals whom the member names for purpose of corroboration.		Initiation of any substantial investigation into whether a service member made a statement regarding his or her homosexuality for the purpose of seeking separation be approved at the MilDep secretarial level.

Review of DOD's Implementation of "don't ask, don't tell" policy

Introduction

Since 1982, the Department of Defense (DOD) had maintained a policy requiring separation of any service member deemed to be "homosexual". In 1991, in his campaign for the Presidency, Bill Clinton made this prohibition an issue, and in late 1992, President-elect Clinton said that he intended to "lift the ban" on homosexuals in the military. In the President's first week in office, however, the Joint Chiefs strongly protested such a change. The Senate majority leader also informed the President there were seventy votes against this change of policy. In a compromise between the President, the Joint Chiefs, and the Senate, the "don't ask, don't tell" policy was born. This new policy was implemented by DOD directive. Later in 1993, Congress enacted a statute that was considerably less protective of homosexual service members than the Pentagon policy.

The Law

In 1993, Congress enacted 10 USC 37, Sec. 654, "Policy Concerning Homosexuality in the Armed Forces." Congress found "the presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability." The law directs that a member be separated from the armed forces if: the member has engaged in, attempted to engage in, or solicited to engage in a homosexual act or acts; the member has stated that he or she is a homosexual or bisexual; or, the member has married or attempted to marry a person known to be of the same biological sex. As defined in the law, a homosexual is "a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts, and includes the terms 'gay' and 'lesbian'."

This statute and the DOD directives governing homosexuals in the military were challenged on constitutional grounds. In April 1996, the Fourth Circuit Court of Appeals upheld the constitutionality of both the law and the directives. In October 1996, the Supreme Court denied a request for review of the Circuit Court's decision. In January 1999, the Supreme Court again upheld the constitutionality of the law and the implementing directives.

DOD Implementation of the StatuteUniformed Code of Military Justice (UCMJ)

These are the facts of what is punishable under the UCMJ. Many misconceptions exist among military members with many thinking that homosexuality itself is punishable under the UCMJ. Four articles of the UCMJ could apply to homosexuals, depending on the situation. These articles are:

Sect. 878. Art. 78 Accessory After the Fact

Any person subject to this chapter who, knowing that an offense punishable by this chapter has been committed, receives, comforts, or assists the offender in order to hinder or prevent his apprehension, trial, or punishment shall be punished as a court-martial may direct.

Sect. 907, Art. 107, False Statements

Any person subject to this chapter who, with intent to deceive, signs any false record, return, regulation, order, or other official document, knowing it to be false, or makes any other false official statement knowing it to be false, shall be punished as a court-martial may direct.

Section 925, Art. 125, Sodomy

- (a) Any person subject to this chapter who engages in unnatural carnal copulation with another person of the same or opposite sex or with an animal is guilty of sodomy. Penetration, however slight, is sufficient to complete the offense.
- (b) Any person found guilty of sodomy shall be punished as a court-martial may direct.

Fraternization.

The recent Executive Order change to the Manual for Military Courts Martial

DOD Directives

The DOD Directive covering homosexuality is 1332.14 with the specifics included in Enclosure 3, Attachment 1. The key points contained in the directive are:

- Homosexual conduct is grounds for separation from the military.
- 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.

- A member's sexual orientation is considered a personal and private matter, and is not a bar to continued service unless manifested by homosexual conduct.
- A member shall be separated if: 1) the member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts; or 2) The member has made a statement that he or she is a homosexual or bisexual, or words to that effect, unless there is a further approved finding that the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.
- The member bears the burden for rebuttal throughout the proceeding and for proving that retention is warranted.

Further guidance is included in Enclosure 3, Attachment 4 outlining the guidelines for fact-finding inquiries into homosexual conduct. These guidelines include:

- Only the member's commander can initiate fact-finding inquiries involving homosexual conduct and only when he or she has received credible evidence that there is basis for discharge.
- The inquiry may be conducted by the commander, or any person he or she appoints.
- Inquiries shall be limited to the factual circumstances directly relevant to the specific allegations.
- If there is credible evidence of criminal misconduct, the procedures in the UCMJ should be followed.

Procedural guidance on inquiries continues with the following:

- Informal fact-finding inquiries and administrative separation procedures are the preferred method of addressing homosexual conduct.
- Commanders shall exercise sound discretion regarding whether credible information exists.
- Commanders or appointed inquiry officials shall not ask, and members shall not be required to reveal, whether a member is a heterosexual, a homosexual or a bisexual. However, upon receipt of credible information of homosexual conduct commanders or appointed inquiry officials may ask members if they are engaged in such conduct.

Policy Statements

DOD issued a policy memorandum in 1997 stipulating guidelines for the investigation of threats against service members on the basis of alleged homosexuality. In August of 1999 this guidance was reissued based on a recommendation from the DOD working

group tasked with evaluating DOD's implementation of the homosexual policy. The policy statements:

- Reiterate the policy regarding the investigation of threats against or harassment of service members on the basis of alleged homosexuality.
- Provide that service members should be able to report crimes and harassment free from fear of harm, reprisal or inappropriate or inadequate governmental response.
- Require commanders to take appropriate action to hold those responsible for the threats or harassment accountable.
- Allow for the fact that a service member reports being threatened or harassed because he or she is said or is perceived to be a homosexual shall not in itself constitute credible information justifying the initiation of an investigation of the threatened or harassed service member.

An additional policy was promulgated in August 1999 that took action on several of the recommendations from the DOD review of the policy implementation discussed below. The guidance issued:

- Requires installation level staff judge advocates consult with senior legal officers at higher headquarters prior to the initiation of an investigation into alleged homosexual conduct.
- Requires any initiation of a substantial investigation into whether a service member made a statement regarding his or her homosexuality for the purpose of seeking separation be approved at the Military Department secretarial level.
- Requires the Service Inspectors General to include as an item of interest in inspections the training of those charged with application and enforcement of the policy.

Statistics and Trends

The large majority of discharges are based on statement of service members who identify themselves as homosexual. The increase in discharge numbers since 1994 is attributable to the increase in statement cases. Most discharged under the policy are junior personnel with very little time in the military. Since extensive inquiries are not made in these cases, the reasons behind the increases are not known.

DISCHARGE FOR HOMOSEXUAL CONDUCT

<u>FISCAL YEAR</u>	<u>TOTAL DISCAHRGED</u>
1980	1754
1981	1817
1982	1998
1983	1815
1984	1822
1985	1660
1986	1643
1987	1380
1988	1101
1989	996
1990	941
1991	949
1992	730
1993	682
1994	617
1995	757
1996	858
1997	997

BASIS FOR HOMOSEXUAL CONDUCT SEPARATIONS BY GENDERFISCAL YEAR 1997

<u>STATEMENT</u>			<u>ACT/MARRIAGE</u>		
<u>MALE</u>	<u>FEMALE</u>	<u>TOTAL</u>	<u>MALE</u>	<u>FEMALE</u>	<u>TOTAL</u>
626	194	820 (82%)	147	30	177 (18%)

SEPARATIONS BY YEARS OF SERVICE (YOS)FISCAL YEAR 1997

<u>LESS THAN 1YOS</u>	<u>LESS THAN 4 YOS</u>	<u>MORE THAN 4 YOS</u>	<u>TOTAL</u>
576 (58%)	240 (24%)	181 (18%)	997

Policy Reviews

In April of 1997, the Secretary of Defense tasked a review of how well the Department's policies on homosexual conduct are being applied and enforced. This review was completed in April

of 1998. The DOD review examined data on discharges, the application and enforcement of the homosexual conduct policy and provided recommendation where the department could take action to address concerns with the implementation of the policy.

Findings of the report regarding the number of discharges for homosexual conduct conclude that the numbers have indeed risen and the rise is cause for concern even though it continues to be a small percentage of the force. The large majority of the discharges for homosexual conduct are based on statements by service members. Most of the personnel discharged are very junior personnel and this accounts for most of the increase. The majority of discharges for homosexual conduct are uncontested and processed administratively.

In looking at the application and enforcement of the policy only isolated cases were identified in which inquiries were made without the requisite facts or in scope beyond what was necessary. DOD concluded that concerns regarding widespread "witch hunts" and other abuses in the course of investigations are unfounded. Although DOD concluded that the department's policy on homosexual conduct is generally being implemented properly, areas were identified where the policy could be clarified or the implementation enhanced.

DOD concluded that the policy implementation to strike a balance between the prohibition of homosexual conduct in the military and the privacy rights of individuals has posed a challenge to the military. On the whole, the policy has been appropriately applied and enforced. However, specific steps were identified to enhance the implementation of the policy:

- The Department should issue guidance specifying that consultation with higher headquarters legal officials is recommended before initiating investigations into alleged homosexual conduct;
- The Department should issue guidance on the use of pre-trial agreements, or "plea-bargains," to obtain evidence of consensual homosexual conduct;
- Prior authorization should be established at the Service Secretary level prior to initiation of a substantial investigation in "coming out" cases, including where recoupment of financial benefits is at issue;
- The Department should reissue and expand the directive guidance issued by former Under Secretary Dorn concerning threats against service members based on their alleged homosexuality and include specific language to make clear that harassment of service members based on their alleged sexual

orientation is unacceptable and that violators will be held accountable.

- The Department should issue guidance directing that Service Inspectors General make training of those charged with implementing the homosexual conduct policy a specific item of interest for inspection.

Criticism of DOD's implementation

The Servicemembers Legal Defense Network (SLDN) is self-described as the "sole national legal aid and watchdog organization that assists service members hurt by the "don't ask, don't tell, don't pursue" policy. In their March 1999 annual report, they offer the following statistics and observations:

- 400 incidents of harassment were reported to them, up 120% from the 182 reported in 1997. Gays fear reporting harassment within military channels because they might have their sexual orientation discovered.
- 511 incidents were reported where service members were asked and pursued for being or perceived as being lesbian, gay or bisexual - up from 359 violations in 1997.
- Discharges have increased 86% over the past five years. The Pentagon discharged 1,149 service members in 1998, compared to 997 last year. This is the highest number since 1987. The Air Force discharged 415, surpassing the Navy at 345. Army discharges jumped by more than 100, to 312 discharges. The Marine Corps discharged 77.
- Women comprised 27% of gay discharges, although women represent only 14% of the active force. The Army had the worst record, with 36% of its gay discharges being women.
- Incidents of asking and pursuits reported in 1998 were up 42% from 1997 reports.
- Physical abuse by investigators has declined.
- Criminal prosecutions for homosexuality have decreased.
- There were 161 "don't ask" violations in 1998, up 30% from 1997.
- 350 "don't pursue" violations were reported in 1998 - up from 235 in 1997.
- There were 8 cases in 1998 where Services refused to discharge members declaring their homosexual orientation.
- 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.

SLDN concludes that the "Pentagon implementation of the "don't ask, don't tell, don't pursue" policy is a failure" and offers the following comments and recommendations:

- The Pentagon should promulgate clear, easy to understand guidance on investigative limits, intended to protect service member's privacy.
- The Pentagon should distribute the "Dorn memo" which directs commanders to investigate those who harass, not those who report harassment. More service members report they are 'coming out' as their only recourse against unchecked anti-gay harassment.
- All service members should be trained on the limits to gay investigations.
- Hold accountable those who ask, pursue or harass. In five years, military leaders have not officially disciplined anyone for asking, pursuing or harassing. There must be disincentives to deter violations and incentives to do the right thing. SLDN observes that not all service members harass, but bigots have free rein.
- Provide recourse to service members to stop improper investigations. Service members currently have nowhere to turn to stop illegal witch hunts and other violations.
- Require commanders to state in writing the reasons for an investigation. This will help prevent investigations where the ends justify the means.
- Adopt rules of privacy for conversations with health care providers.
- Adopt an exclusionary rule that will prevent evidence obtained illegally in witch hunts from being presented to administrative discharge boards.
- Appoint a panel of experts to review the administrative separation process.

There is a fairly large body of published reports providing commentary on DOD's implementation of the "don't ask, don't tell" policy. One commentator observed that the "don't ask" part of the policy is not supported by the 1993 law and could therefore end with this Administration. This could leave service members that join under the current policy in jeopardy of being exposed and separated from the military. Citing the policy that "any evidence of conduct that manifests a propensity to engage in homosexual conduct" can trigger an investigation,

one reporter commented that this extreme flexibility permits commanders to launch on witch hunts with little evidence.

Some have noted that DOD is having difficulty implementing the "don't ask, don't tell" policy because of the realities of military culture. Central to military service are the virtues of honesty and respect. The "don't ask, don't tell" policy requires certain members to withhold the truth about their sexual orientation. In addition, there is a fundamental conflict between the law which states that homosexual conduct is a detriment to unit moral and unit cohesion, and the policy which states that military leaders cannot ask service members about this conduct. And finally, some observers have linked the experience of integrating blacks and women into the military with the goal of fully integrating gays into the military. One analyst argues this is an inappropriate use of the race and gender metaphors. Race and gender are ascribed at birth while homosexual conduct is a behavior, generally considered deviant in our society, which is an achieved behavior. There is no precedent for the current effort to integrate homosexuals into the military.

Analysis and Conclusions

To be developed.

Proposed Discussion Topics for DOD's "don't ask, don't tell" Policy Meeting

The following discussion topics are recommended for the upcoming "don't ask, don't tell" (DADT) policy oversight meeting:

- 1) Secretary Cohen recently approved the Services' anti-harassment training plans. We'd like to discuss the plans and determine how they can be monitored to ensure they are being faithfully executed.
- 2) Senior leadership from all the Services made statements in support of the DADT policy. Recommend we review these statements to ensure they are robust and supported at the highest levels.
- 3) We'd like to discuss ways that individual service members might be rewarded in evaluations for their contributions to a positive unit climate and how might those that condone or participate in harassment be held accountable?
- 4) The results of the IG climate investigations are due to the Secretary in mid-March. We should develop a plan now as to how the results of the investigation will be handled. Segments of the public will be looking for speedy release of results and DOD's response.
- 5) Can we pursue a broader definition of the service member's communications for which confidentiality is protected? The Army's training indicates that communications with Chaplains and legal assistance attorneys is generally privileged. Do the other Services agree with this view and if so, can that information be added to their training plans?
- 6) Can additional limitations be placed on pre-trial agreements that trade reduced punishment for incriminating information on alleged homosexuals?
- 7) Can it be made easier for service members to rebut the presumption of homosexual conduct?
- 8) Is DOD's definition of "homosexual statement" more restrictive than the law's definition? If so, can it be changed, particularly in the case of a statement about "homosexual orientation"?
- 9) Can a service member use the provisions of Article 138, UCMJ to stop an improper investigation?

“Don’t Ask, Don’t Tell”

June 30, 2000

Background: July 5, 2000 marks the first anniversary of the death of PFC Winchell at Fort Campbell, KY. Many believe this was a hate crime against a soldier perceived to be homosexual. The killer and his accomplice have been tried by court-martial and found guilty. Both are now serving prison sentences.

Q: What has been done to prevent future acts such as this in our military?

- We want to ensure that everyone who chooses to serve our nation in uniform, can do so in an environment that respects the contributions that can be made by every service member and one that is free from harassment, hate crimes and the detrimental impact harassment can have on a unit’s cohesion.
- The Services, at the direction of Secretary Cohen, have implemented aggressive new training programs that focus on preventing harassment of those perceived as being homosexual.
- We are pleased that senior leaders of the Services continue to make strong statements highlighting that there is no place in the military for harassment of fellow service members.
- A recent DOD survey of military personnel found that we still have a way to go in eliminating harassment of those perceived to be homosexual. Secretary Cohen has formed a panel of senior DOD civilian and military leaders to learn from the results of the survey and to recommend further actions that can help to stop harassment. Their report is due by the end of July.
- We believe that in our nation of equal freedom and justice under the law, we simply must do all we can do to protect the rights of all service-members and that all service members should be able to serve with the same level of honor, dignity and respect accorded to our military.

Q: Do you think the “Don’t Ask, Don’t Tell” policy is working?

- The President has said that he does not believe that gays serving in the military should have to lie about their sexual preference as long as their behavior complies with the Uniform Code of Military Justice.
- The Congress voted, by a veto-proof majority, against that position.
- We believe that the “Don’t Ask, Don’t Tell” policy is the best course of action possible under existing law. We hope the next President will be able to work with Congress to find some way for all people to be honest, to obey the law, and to serve with distinction in the military.

Review of DOD's Implementation of the "don't ask, don't tell" Homosexuals in the Military Policy

D. Brian Peterman

This paper provides information on DOD's implementation of the "don't ask, don't tell" homosexuals in the military policy and offers recommendations on ways implementation can be improved. Information for this review came from DOD published reports, interviews with Rudy de Leon (Undersecretary of Defense for Personnel and Readiness), discussions with Richard Sacarides and Edward Correia of the White House staff, and information from the Servicemembers Legal Defense Network (SLDN), a private watchdog group. The topic is very complex and this paper is not intended to be a thorough legal brief. It is intended to briefly inform and offer suggestions.

Background

From 1982 to 1993, the Department of Defense (DOD) maintained a policy requiring separation of any service member deemed to be "homosexual". In 1991, in his campaign for the Presidency, Bill Clinton made this prohibition an issue, and in late 1992, President-elect Clinton said that he intended to "lift the ban" on homosexuals in the military. In the President's first week in office, however, the Joint Chiefs strongly protested such a change. The Senate majority leader also informed the President there were seventy votes against his proposed change of policy. In a compromise between the President, the Joint Chiefs, and the Senate, the "don't ask, don't tell" policy was born. This new policy was implemented by DOD directive in early 1993. Later that year, Congress enacted a statute that was less protective of homosexual service members than the Pentagon policy. Current DOD policy implements this statute.

Current Law and DOD Policy

In 1993, Congress enacted 10 USC 37, Sec. 654, "Policy Concerning Homosexuality in the Armed Forces." Congress found "the presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability." The law directs that a member be separated from the armed forces if: the member has engaged in, attempted to engage in, or solicited to engage in a homosexual act or acts; the member has stated that he or she is a

homosexual or bisexual; or, the member has married or attempted to marry a person known to be of the same biological sex. As defined in the law, a homosexual is "a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts, and includes the terms 'gay' and 'lesbian'." The constitutionality of this law has been consistently upheld by the Supreme Court on appeal.

It is DOD policy that a service member's sexual orientation is considered a personal and private matter, and is not a bar to continued service unless manifested by homosexual conduct. Homosexual conduct, which includes making a statement that one is homosexual or bisexual (i.e. "don't tell"), is grounds for separation from the service. If it is found that a service member has engaged in homosexual conduct, the burden for rebuttal rests with the member for proving that retention is warranted.

DOD goes beyond the requirements of the statute to implement the "don't ask" portion of the policy. Individual service members are prevented from asking another service member about their sexual orientation; only a member's commander can initiate a fact-finding inquiry involving homosexual conduct and only when there is credible evidence that there is basis for discharge. Additional restrictions are placed on the types of questions that can be asked during the inquiry.

In 1997 and again in August 1999, DOD issued strong policy to prevent harassment or threats against service members on the basis of alleged homosexuality. The SLDN reported that many service members were reluctant to report harassment because they feared having their own sexual orientation investigated. This policy statement, known as the "Dorn memo", states that commanders should investigate those accused of harassing and not the reporter. In addition, it requires that commanders hold those found responsible for harassment accountable for their acts.

Additional guidance issued in August 1999 requires that commanders obtain their Service Secretary's approval before launching a substantial investigation into whether a person made a statement that they were homosexual. It also requires staff judge advocates to consult with senior legal officers at higher headquarters prior to initiating an investigation into alleged homosexual conduct. Both of these provisions were put in place to help prevent "witch hunts". A provision was also added to require Service Inspectors General to determine in their

inspections that training of personnel charged with application and enforcement of the policy was accomplished.

Statistic and Trends

All statistics indicate the "don't ask, don't tell" policy is not working as originally intended.

DOD completed its own review of the policy implementation in April 1998. This review did not find widespread "witch hunts" or abuses in the course of investigations. They did state that, "to strike a balance between the prohibition of homosexual conduct in the military and the privacy rights of individuals has posed a challenge to the military." Their report made several recommendations to improve policy implementation, many of which were implemented in the August 1999 DOD policy memoranda.

SLDN's fifth annual report released in March 1999 indicates 400 incidents of harassment were reported to them in 1998, up 120% from the year before. 511 incidents were reported where service members were asked and pursued for being or perceived as being homosexual, up from 359 incidents in 1997. They charge that "witch hunts" continue, harassers are not being held accountable and that training on the policy is inadequate.

Perhaps the best barometer on policy health is the number of discharges occurring as a result of homosexual conduct. Since 1994, the number of discharges has increased almost 100%; from 617 in 1994 to 1,149 in 1998, the highest number discharged since 1987. In 1997, 82% of those discharged were released because they stated they were homosexuals. 58% were discharged in their first year of service, while a total of 82% were discharged in their first four-year tour. The DOD review noted that most discharges for homosexual conduct were uncontested and processed administratively. The DOD reviewers could not determine why the trend of discharges was increasing. Some speculate that individuals are using the homosexual policy to conveniently get out of their service contracts early.

Conclusions and Recommendations

The current state of affairs for homosexuals in the military is not as the President intended in 1993. More people are being discharged for homosexual conduct today than there were prior to the legislative and policy changes in 1993, and the trend is getting worse. In addition, the SLDN indicates the reports of harassment are significantly on the rise in the military.

Rudy de Leon provided some helpful insights. Although DOD policy is being set to protect the privacy and welfare of homosexuals in the military, the implementation of that policy is getting varied implementation with the Services. The status of homosexuals is an unsettled issue within society and the generally conservative views of the military makes this issue even more unsettling. Therefore, there is both institutional and individual resistance to fully integrating homosexuals into the military.

Perhaps the most disturbing aspect of the current situation is the increasing, and seemingly unchecked, harassment of individuals perceived to be homosexuals. By policy, homosexuals are permitted to serve in the military as long as they do not engage in homosexual conduct. Those serving under this condition should not be subject to harassment or threats because of their actual or perceived sexual orientation. Harassment tears at the fabric of unit cohesion and should be dealt with decisively. This is the area in which I believe the Administration can help the cause of homosexuals in the military the most over the next year.

In August 1999, DOD issued additional policy guidance that will help reduce harassment of homosexuals. The Service Secretaries are developing their implementing instructions which should be completed shortly. To display White House support for this policy improvement, I recommend you meet with Secretary Cohen, the Service Secretaries and Service Chiefs to hear how they intend to implement and enforce the anti-harassment policy. In addition, Secretary Cohen should make regular reports on how the anti-harassment policy is working. I also recommend a rump group be developed to coordinate DOD's homosexual policies with the White House staff. This group would include Rudy de Leon, Frank Rush, Edward Correia, Laura Marcus, and Hans Binnendijk.

This is a highly emotional issue for both pro- and anti-homosexual groups with strong societal and religious overtones. I think we have learned this issue will not be resolved by edict. Steady, focused progress should be the goal. Stopping harassment of homosexuals in the military should be the immediate, short-term goal. If bigots are held accountable for their actions and harassment ends, the climate will be improved to allow further gains.

Commentary on EOP Recommendations for Improving DOD Implementation

- *NSC: Ensure prompt and complete Service implementation of the August 1999 guidelines. & Conduct more vigorous anti-harassment training since current training appears inadequate. Eddie: Prohibit harassment of service members.*

Secretary Cohen and his staff have reviewed and approved the individual Services' DADT and anti-harassment training plans which are now being implemented. All of the plans provide detailed explanations of the DADT policy and their application. The Army and Air Force plans are the most robust, explaining why harassment of any individual is counter to their core values. The Navy and Marine Corps plans are more mechanical and do not contain strong statements of support from the most senior leadership. All are a step toward implementing our recommendations.

- *NSC: Take appropriate steps to hold commanders accountable for inappropriately "asking or pursuing" and for condoning an environment conducive to harassment. Eddie: More effective enforcement of the "Don't Ask" provision.*

This follows the robust training requirement very well. The goal is to change the thinking of the conservative military culture. Holding service members accountable for complying with the policy is the next logical step. All leaders, officers and enlisted, receive evaluation reports. Services could require specific comments in these reports on the individual's contribution to a positive command climate (not just DADT). A bad evaluation will affect promotion and retention - a way to weed out those that don't comply with policy. We won't be able to easily measure the affect of this initiative, but it will have a great long-term impact on changing the conservative culture. A person either complies or is eventually out.

We should consider now what DOD will do with the results of the IG investigations. If the reports show problems, the SLDN will call for immediate action and the conservatives will attack the results. If they don't show problems, the SLDN will claim a whitewash and the conservatives will use the results to block improvements. The first DOD meeting should consider a plan to release the results soon after they are completed and be prepared with options for response. (It took DOD over a year to release their last review of the DADT policy implementation.)

- *NSC & Eddie: Pursue a broader definition of the Service member communications for which confidentiality is protected.*

This can be done, but DOD will want to do it under very controlled conditions. Military personnel relinquish some of their personnel privacy rights in the interest of military integrity. For example, military members in contact with nuclear weapons must participate in the Personnel Reliability Program. This program insures those with access to nuclear weapons are both physically and mentally safe to have access to WMD. Care-givers are required to report *any* condition, including stress and anxiety, that would have an influence on a person's judgement.

Security clearance procedures also investigate whether or not an individual is vulnerable to blackmail. In a military environment where admitting one's homosexuality could end one's career, the vulnerability may be especially high. This must be considered in dealing with clearances. While security clearance procedures and homosexual conduct may not be in conflict in the civilian world, the DADT policy may complicate it in the military world.

The DADT policy puts great stress on homosexuals – they are forced to stay “in the closet” and prohibited from acting on some basic human desires. It is important they have someone to talk with but we also must be sensitive to the needs of critical military security and effectiveness concerns. The Army training says, “Information provided to a chaplain or a legal assistance attorney is generally considered privileged and will not be disclosed unless the soldier approves of the disclosure.” This privileged communication status might also be expanded to medical care givers and family service providers under certain conditions. DADT policy training should be provided to all people that might have authority to receive privileged communications.

- *Eddie: Limit pre-trial agreements. Agree.*
- *Eddie: Make it easier to rebut the presumption of homosexual conduct.*

The lawyers will need to hash this out in the context of the law.

- *NSC: Ensure there is appropriate recourse to accused service members to stop improper investigations by their commanders.*

Technically, an avenue of recourse exists. Note Article 138 of the Uniform Code of Military Justice:

"Any member of the armed forces who believes himself wronged by his commanding officer, and who, upon due application to that commanding officer, is refused redress, may complain to any superior commissioned officer, who shall forward the complaint to the office exercising court-martial jurisdiction over the officer against whom it is made. The officer exercising general court-martial jurisdiction shall examine into the complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, send to the Secretary concerned a true statement of that complaint, with the proceedings thereon."

This section of the UCMJ could be used by anyone who feels wronged in an investigation and wants to have an impact on his/her commanding officer. The beauty of this course of action is that the incident is brought to the attention of a general officer who should know the nuances of the DADT policy. The complaint is eventually brought to the attention of the Secretary for further oversight. In reality, I've never seen this Article used but this may be a situation where it could be effective.

Servicemembers Legal Defense Network

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FAX COVER SHEETTO: Hans BinnendijkFAX: (202) 456-9190FROM: Michelle M. Benecke, Esq., Co-Executive DirectorTo report any problems with this transmission, please call Steve Ralls at 202.328.3244.DATE: July 19, 2000PAGES (including cover): 3**COMMENTS:**

In the enclosed op-ed, Professor Charlie Moskos, the author of Don't Ask, Don't Tell, unequivocally states that, in order to stop harassment, the Pentagon must permit gay service members to report harassment and seek medical treatment without the threat of being expelled under his policy. The op-ed is targeted toward the DoD Working Group that is charged with making recommendations on how to stop harassment to Secretary Cohen. The working group's report is expected this Friday.

☐ Faxed _____
Initial and Date

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Tuesday, July 18, 2000

Suffering in Silence

By Charles Moskos and Michelle M. Benecke

Tuesday, July 18, 2000 ; A23

After the Pentagon released a survey in March confirming an alarmingly high rate of anti-gay harassment in the military, Secretary of Defense William Cohen formed a working group to propose steps for reducing harassment. As the group prepares to make its recommendations this week, its members should address the crux of the problem: the fact that gay and lesbian service members cannot report harassment or assaults without risking expulsion from the military. If implacable foes like us--the author of "Don't Ask, Don't Tell" and the co-founder of Servicemembers Legal Defense Network, which fights "Don't Ask, Don't Tell"--can find common ground on this issue, anyone can.

Gay and lesbian service members fear reporting harassment and assaults because many military doctors, psychologists, inspectors general and law enforcement officials erroneously believe that "Don't Ask, Don't Tell" requires them to turn in gay people who seek their help. The Department of Defense considered the issue of health care providers in an April 1998 report and conceded there is, in fact, no duty to turn in gay patients, yet top Pentagon officials have failed to so inform providers in the field. Service members have, indeed, been discharged based on confidences they shared with health care providers.

Recently, the inspector general charged with reviewing the climate at Fort Campbell, Ky., after a soldier, Pvt. Barry Winchell, was harassed and murdered at the base stated that he was required to turn in service members who were discovered to be gay in the course of investigating harassment against them. Not surprisingly, given this practice, gay and lesbian soldiers, those most affected by anti-gay harassment, do not feel safe enough to speak with inspectors general. The consequences of this practice are insidious. Servicemembers Legal Defense Network has assisted many members of the military who have been harassed and assaulted but who have not reported the incidents because they were unable to endure the added trauma of being outed, investigated and discharged. To add insult to injury, gay and lesbian service members are unable to seek medical treatment for physical injuries, post-traumatic stress syndrome, depression and other common results of harassment and assaults without the threat of being outed to their commands and discharged.

Military members who reveal their sexual orientation during private medical treatment, or in the course of reporting harassment or assaults, are not "telling" in a manner contemplated by "Don't Ask, Don't Tell, Don't Pursue." The Department of Defense must order inspectors general, law enforcement officials, psychologists and doctors not to out gay service members who seek their help. It should forbid military judges and members of discharge boards from considering statements from these officials as evidence of homosexuality.

Regardless of whether or not you support "Don't Ask, Don't Tell," there is no denying that harassment and violence are an unjust return to the men and women who serve our country. Recent positive steps, such as training on "Don't Ask, Don't Tell, Don't Pursue" and the formation of the Pentagon working group, will be viewed as meaningless if "Don't Ask, Don't Tell" is used to foreclose avenues of recourse normally available to service members. Other remedies may symbolize leaders' commitment to change, but until Pentagon leaders permit gay and lesbian service members to safely report harassment and assaults they will not end the violence.

Michelle Benecke is co-director of the legal aid group Servicemembers Legal Defense Network. Charles Moskos is a professor of sociology at Northwestern University.

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Anti-Harassment Action Plan

General Recommendations:

1. The Department of Defense should adopt an overarching principle regarding harassment, including that based on sexual orientation:

"Treatment of all individuals with dignity and respect is essential to good order and discipline. Mistreatment, harassment, and inappropriate comments or gestures undermine this principle and have no place in our armed forces. Commanders and leaders must develop and maintain a climate that fosters unit cohesion, esprit de corps, and mutual respect for all members of the command or organization."

*new for DoD
(Navy had)*

2. The Department of Defense should issue a single Department-wide directive on harassment.

- It should make clear that mistreatment, harassment, and inappropriate comments or gestures, including that based on sexual orientation, are not acceptable.
- Further, the directive should make clear that commanders and leaders will be held accountable for failure to enforce this directive.

Recommendations Regarding Training:

3. The Services shall ensure feedback or reporting mechanisms are in place to measure homosexual conduct policy training and anti-harassment training effectiveness in the following three areas: knowledge, behavior, and climate.

4. The Services shall review all homosexual conduct policy training and anti-harassment training programs to ensure they address the elements and intent of the DoD overarching principle and implementing directive.

5. The Services shall ^{new}review homosexual conduct policy training and anti-harassment training programs annually to ensure they contain all information required by law and policy, including the DoD overarching principle and implementing directive, and are tailored to the grade and responsibility levels of their audiences.

Recommendation Regarding Reporting:

6. The Services shall review all avenues for reporting mistreatment, harassment, and inappropriate comments or gestures to ensure they facilitate effective leadership response.

- Reporting at the lowest level possible within the chain of command shall be encouraged.
- Personnel shall be informed of other confidential and non-confidential avenues to report mistreatment, harassment, and inappropriate comments or gestures.

Anti-Harassment Action Plan

7. The Services shall ensure homosexual conduct policy training and anti-harassment training programs address all avenues to report mistreatment, harassment, and inappropriate comments or gestures and ensure persons receiving reports of mistreatment, harassment, and inappropriate comments or gestures know how to handle these reports.

8. The Services shall ensure that directives, guidance, and training clearly explain the application of the “don’t ask, don’t tell,” policy in the context of receiving and reporting complaints of mistreatment, harassment, and inappropriate comments or gestures, including:

- Complaints will be taken seriously, regardless of actual or perceived sexual orientation;
- Those receiving complaints must not ask about sexual orientation -- questions about sexual orientation are not needed to handle complaints; violators will be held accountable; and
- Those reporting harassment need not tell about or disclose sexual orientation -- information regarding sexual orientation is not needed for complaints to be taken seriously; but, admissions or disclosure of sexual orientation can be used in discharge proceedings.

Recommendations Regarding Enforcement:

9. The Services shall ensure that commanders and leaders take appropriate action against anyone who engages in mistreatment, harassment, and inappropriate comments or gestures.

10. The Services shall ensure that commanders and leaders take appropriate action against anyone who condones or ignores mistreatment, harassment, and inappropriate comments or gestures.

11. The Services shall examine homosexual conduct policy training and anti-harassment training programs to ensure they provide tailored training on enforcement mechanisms.

Recommendations Regarding Measurement:

12. The Services shall ensure inspection programs assess adherence to the DoD overarching principle and implementing directive through measurement of knowledge, behavior, and climate.

13. The Services shall determine the extent to which homosexual conduct policy training and anti-harassment training programs, and the implementation of this action plan, are effective in addressing mistreatment, harassment, and inappropriate comments or gestures.