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Don't Ask/Don't Tell

Staff Office-Individual:

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3408

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New York Times
January 13, 2000
Pg. 1

British, Under European Ruling, End Ban On Openly Gay Soldiers

By Sarah Lyall

LONDON, Jan. 12 -- The government announced a code of conduct for the military today that ends its ban on openly gay men and women serving in the armed forces.

The action follows a European court ruling last fall that Britain could no longer keep the exclusion. It ends a decades-old practice of subjecting gays in the military to intrusive investigations and dishonorable discharges.

The change brings Britain into line with almost all other NATO nations, including France, Canada and Germany, which allow openly gay men and lesbians to serve in their armed forces.

The United States, with its "don't ask, don't tell" policy, is at variance with that trend. The policy, adopted by the Clinton administration, allows gays to serve provided they do not disclose or discuss their sexuality. President Clinton himself has objected to the results of the policy.

In the American presidential campaign, both contenders for the Democratic nomination have said they would work to change the policy so that gays could serve openly, while leading Republicans stand by the policy. The topic has become more charged since the killing of a gay soldier at a Kentucky base last summer.

The new British policy sets out a code of conduct for all manner of social and sexual relations, whether heterosexual or homosexual.

Under the guidelines, "unacceptable social conduct" that might result in disciplinary action includes sexual harassment; overt displays of affection that might offend others; and taking sexual advantage of subordinates.

The code determines that commanders have the right to be aware of and to intervene in the personal lives of their subordinates. "In the area of personal relationships," it says, there is an "overriding operational imperative to sustain team cohesion and to maintain trust and loyalty between commanders and those they command."

That "imposes a need for standards of social behavior which are more demanding than those required by society at large," the statement says.

The about-face in British policy became inevitable on Sept. 27 when the European Court of Human Rights in Strasbourg, France, unanimously ruled in favor of four former servicemen and -women who were discharged in the mid-1990's because of their homosexuality. In ruling against the British government, the court found that its ban violated the fundamental human right to privacy, as set out in the European Convention on Human Rights.

In cases where Britons argue that their rights have been violated, Strasbourg serves as a court of last resort, much the way the Supreme Court functions in the United States.

Britain signed the European convention, with 40 other countries, and thus obliged itself to abide by the court's rulings, even to the extent of changing its laws if necessary. Previous cases have forced Britain to end corporal punishment in schools and to give greater rights to prisoners and to suspected terrorists.

Today's announcement follows a decision on Tuesday by the European Union's highest legal body, the Court of Justice in Luxembourg, which ruled in favor of a woman who argued that Germany's constitutional ban against women bearing arms amounted to unlawful sex discrimination.

In the House of Commons this afternoon, Geoffrey Hoon, the defense secretary, acknowledged that the human rights court's ruling had left the government with no choice but to end the ban. "The European Court of Human Rights ruling makes very clear that the existing policy in relation to homosexuality must change," he said.

"As all personal behavior will be regulated by the code of conduct," he said, "there is no longer a reason to deny homosexuals the opportunity of a career in the armed forces."

The British Defense Department has long argued that the presence of gays in the military would depress morale among the 210,000 uniformed personnel and disrupt the services' effectiveness as fighting forces. In defending its ban, it has also pointed to surveys that it says show that members of the armed services are reluctant to serve with gay men and lesbians.

Responding to today's announcement, Iain Duncan Smith, the Conservative Party's defense spokesman, said that there was no reason to believe that people in the armed services would be more willing to accept gays than they had in the past.

"I believe and have always believed," Mr. Duncan Smith said, "that we should follow the advice of the armed forces, which has always been that lifting the ban would adversely affect operational effectiveness."

But supporters of gay rights and civil liberties applauded the change, saying that it was overdue.

Angela Mason, the executive director of the gay-rights group Stonewall, said: "When I first came to Stonewall seven years ago, I was shocked that lesbians and gay men in the armed forces were treated so brutally.

I am very proud that as from today they will be able to serve their country with dignity and respect."

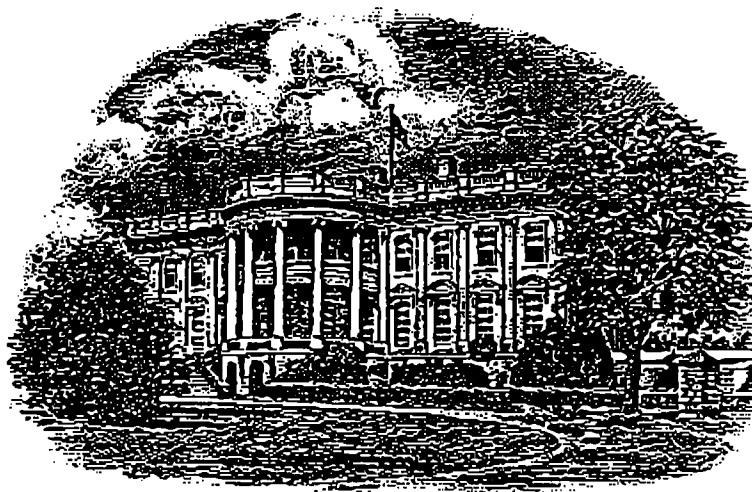
And Roger Garford, a member of Rank Outsiders, a support group for gay men and lesbians who are serving or have served in the military, said he welcomed the news that no one in the armed forces could now be forced to go through what he did in the early 1980's, when rumors that he had had a homosexual relationship with a civilian reached his commanding officer. A chief technician in the Royal Air Force, Mr. Garford had then served for about 20 years.

The Special Branch was called to investigate, he said, and interrogated him for nine hours.

After he broke down and admitted he had had an affair with a man, Mr. Garford, who was married at the time, was released by the officers. But they then embarked on a long investigation of his friends and colleagues in an effort to amass further evidence that he was gay.

Finally, Mr. Garford said, they gave him a dishonorable discharge, four months before he was to become eligible for a pension. He soon divorced, and is currently waiting, along with some 60 others who were dismissed by the military because of their homosexuality, to see whether he is entitled to compensation.

The White House



Office of the Counsel to the President
Facsimile Transmission

Date:

1/5/00

To:

May Derosa

Facsimile Number:

69110

Total Pages:

4

From: Eddie Correia

Phone: (202) 456-2024

Fax: (202) 456-5055

Note:

Here's the memo.

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Bill, Eddie
THE PRESIDENT HAS SEEN
12-21-99

THE WHITE HOUSE
WASHINGTON

December 20, 1999

INFORMATION

MEMORANDUM FOR THE PRESIDENT

FROM: SAMUEL R. BERGER ✓
SUBJECT: "Don't Ask, Don't Tell"

You have expressed concerns about the implementation of the "don't ask, don't tell" policy and asked for an objective assessment.

BACKGROUND

The number of annual discharges for homosexual conduct has doubled since 1994, growing consistently from 617 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, with 400 documented cases (including death threats and verbal abuse) last year alone. As a result, SLDN argues that the Fort Campbell murder must be seen in the context of a 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, citing a 42% increase in "asking and pursuing" incidents 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 inherent contradiction is at the core of the implementation problems. While most service members receive some training on the policy, it has clearly not had a positive impact on implementation. In a culture that already

cc: Vice President

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C. Burso

K. Tramm

B. Nolan

J. Potte

THE PRESIDENT HAS SEEN
12-21-99

leans in the direction of the law banning gays, "don't ask, don't tell" may inadvertently fuel harassment while also giving homosexual military personnel a false sense of privacy and security.

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 resistance in the Services. In March 1997, OSD issued a memorandum from Undersecretary Dorn, which stated 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 also be investigated for homosexuality.

(Prior to 1997, allegations of harassment based on sexuality usually prompted a parallel investigation of the victim's sexuality.) The memo stated that a threat report should result in the prompt investigation of only the threat itself; the memo met with mixed results.

An April 1998, OSD review confirmed that the policy posed an implementation challenge to the Services and found that, although for the most part the policy has been properly applied, there was cause for concern. It recommended several steps to enhance implementation, but no policy guidelines were issued from the report. On August 13, 1999, OSD issued new guidelines based on the 1998 review. These guidelines strengthened and reissued the 1997 Dorn Memorandum, and called for its wide distribution and training on its content. In addition, OSD 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.

The Air Force has also developed new procedures at Lackland AFB which may have applicability for other Services. Basic trainees at Lackland were being discharged in statement cases at a high rate, so a new "cooling off" period was introduced which now gives the recruit an opportunity for confidential counseling and a chance to retract a previous statement on homosexuality. Since the policy was implemented, discharges for statements during basic training have dropped off dramatically.

THE PRESIDENT HAS SEEN
12-21-99

Also, last week, 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 re-ignite legislative proposals that could undermine our existing policy and spill over into other defense issues.

POSSIBLE NEXT STEPS

Short of changing the policy, there are several steps that might be taken to strengthen its implementation:

- ✓ Ensure prompt and complete Service implementation of the August 1999 guidelines.
- ✓ Conduct more vigorous anti-harassment training since current training appears inadequate.
- ✓ Take appropriate 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.

Background: The trial of Army Specialist Justin R. Fisher concluded this weekend at Fort Campbell. This is the second court martial stemming from the death of Private First Class Barry Winchell, who was allegedly killed because of his homosexuality. Private Calvin Glover was convicted of murder in a previous court martial. Specialist Fisher was the roommate of Private Winchell and was convicted of obstructing justice, making false statements, and providing alcohol to a minor.

What is your reaction to this weekend's verdict in the Ft. Campbell court marshal of Justin Fischer?

This case is in the military justice system. Although there has been a guilty plea, the process is on-going and it is not appropriate for me to comment on the case.

This case raises questions about the safety of servicemen and women on U.S. bases. At Ft. Campbell, for example, underage drinking allegedly contributed to the violence that claimed Private Winchell's life. Are you concerned? If so, what are you willing to do to improve safety?

- Of course, the safety and security of our servicemen and women on our military installations is a paramount concern.
- The Army has committed to review compliance with policies and procedures that protect the health, safety, and security of its soldiers at Ft. Campbell.
- Specifically, the commanding general at Fort Campbell has asked the Army Inspector General to review whether there were violations of the Department of Defense Homosexual Conduct Policy in the events at Fort Campbell.
- Beyond reviewing the Homosexual Conduct Policy, Fort Campbell will also undertake a review of compliance with applicable policies, procedures and regulations.
- I strongly support any measures that improve the safety of our soldiers.

Doesn't this verdict further demonstrate that your "don't ask, don't tell" policy regarding gays in the military does not work?

- As I have said before, our policy has not had a chance to work because it has not been fully implemented. I am committed to improving implementation of the existing policy rather than changing the statute passed by Congress in 1993.
- Secretary Cohen has already taken a number of steps to improve policy implementation, to include a DOD Inspector General

review of the environment at military bases as it relates to the homosexual policy and specific tasking to the services on updated training programs. I refer you to DOD for details.



Personnel and
Readiness

THE OFFICE OF THE UNDER SECRETARY OF DEFENSE**WASHINGTON, DC 20301-4000**

Facsimile Cover Sheet

To:	Hans Binnendijk
Office:	
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From:	Rudy de Leon
Office:	Office of the Under Secretary of Defense (P&R)
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Fax:	703-693-0171
Date:	10 January 00
No. Pages with Cover:	3
Comments:	



U.S. Army NEWS RELEASE

**Army Public Affairs
Washington, D.C. 20310**

FOR IMMEDIATE RELEASE

**RELEASE #00-002
10 January, 2000**

ARMY SECRETARY ORDERS FT. CAMPBELL AND ARMY-WIDE REVIEW OF DOD HOMOSEXUAL CONDUCT POLICY IMPLEMENTATION

The Secretary of the Army, Louis Caldera, today announced that he is directing the Army's Inspector General to conduct a thorough review of the implementation of the Homosexual Conduct Policy at Ft. Campbell Ky., following a request by the Commander 101st Airborne Division (Air Assault) and Ft. Campbell.

In light of allegations that surfaced during the investigations and courts martial surrounding the murder of Pfc Barry Winchell, the Inspector General is being directed to examine alleged violations of the Department of Defense Homosexual Conduct Policy during the period preceding Winchell's death. The review was requested Saturday by Maj. Gen. Robert T. Clark upon the conclusion of the second court martial and conviction in the case, and is supported by his chain of command to include Gen. Eric K. Shinseki, Army Chief of Staff.

"The soldiers who serve in the United States Army today are the best we've ever had," said Caldera. "They serve our Nation and merit our respect, and they deserve to be treated with dignity in a climate of safety and security. The Chief of Staff and I, and the entire chain of command, are committed to this cause."

Caldera is also directing the Inspector General to conduct an overall assessment of the command climate that existed at Ft. Campbell, as it related to the application, enforcement and training associated with the DoD Homosexual Conduct Policy.

Finally, Caldera is instructing the Army Inspector General to provide an overall assessment of the Department of the Army's implementation of the DoD Homosexual Conduct Policy throughout the rest of the Army.

-MORE-

REVIEW/2-2-2-2

The Inspector General's report and recommendations are to be provided the Secretary of the Army not later than May 1.

Secretary of Defense William S. Cohen announced in December that he had directed the Department of Defense (DoD) Inspector General to initiate an assessment of the environment at representative installations within each military Department with respect to the application of the homosexual conduct policy. The Army's review is being coordinated with the DoD IG.

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For more information, please contact Army Public Affairs Media Relations Division (703) 697-7550. Internet availability: This document is available on Army link, a World Wide Web Site on the internet at <http://www.dtic.mil/armylink>

Pimentel, Betsy J. (DEFENSE)

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

ActionAddrees: ALARACT
Classification: UNCLASSIFIED
DateTime: 101800Z JAN 00
Distribution: SIT: NSC
Identifier: M4238561
InfoAddrees: RUEADWD/HQDA WASHINGTON DC//DAP-HR-L//
Line1: RTAUZYUW RUEADWD7977 0101914-UUUU--RHEHAAA.
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

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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

11/18/99 17:05

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NEWS RELEASE

101st Airborne Division (Air Assault)
and Fort Campbell
Public Affairs Office

FOR IMMEDIATE RELEASE

FOR MORE INFORMATION CONTACT

Maj. Pamela Hart at (270) 798-3025

U.S. v. FISHER, CHARGES REFERRED TO GENERAL COURT-MARTIAL.

FORT CAMPBELL, Ky., Nov. 12, 1999—Charges were referred yesterday against Specialist Justin R. Fisher to trial by a general court-martial. Fisher is the second soldier charged in connection with the death of Pvt. 1st Class Barry L. Winchell, formerly of the 2nd Battalion, 502nd Infantry Regiment.

In September, Pvt. Calvin N. Glover was the first soldier charged with Winchell's murder. Glover faces a trial by general court-martial in December for pre-meditated murder.

The commanding general referred the charges against Fisher after reviewing the Article 32 report of investigation and receiving recommendations from the investigating officer, the Brigade Commander, and the Staff Judge Advocate.

Fisher is charged with four offenses. He allegedly: (1) participated as a principal to premeditated murder by encouraging Glover to strike Winchell; (2) acted as an accessory after the fact; (3) made false statements to Army investigators, while under oath, concerning Winchell's death; and (4) obstructed the investigation.

-more-

U.S. v. FISHER, CHARGES REFERRED TO GENERAL COURT-MARTIAL

2/2/2

Referral of these charges to a court-martial does not imply guilt or innocence. The accused is presumed innocent unless and until proven guilty.

The court-martial will be open to the public. A date, however, has not been set for the court-martial. A press release will be distributed as soon as the time and place is determined.

Inquiries have raised questions with regard to compliance with Department of Defense and Department of Army policies, procedures, and regulations in this case. The 101st Airborne Division (Air Assault) and Fort Campbell command remains dedicated to compliance with all departmental policies, procedures and regulations and continues to take all necessary steps to protect the health, safety and security of all its soldiers. The Fort Campbell command will undertake a review of compliance with applicable policies, procedures and regulations at Fort Campbell, and will take any steps warranted by the results of that review.

This review will include the issues addressed in the August 12, 1999, memoranda issued by the Office of the Secretary of Defense, which are intended to clarify application of the homosexual conduct policy. Among other issues, these memoranda address the circumstances under which an investigation of homosexual conduct is warranted and the policy prohibiting threats against or harassment of service members based on alleged homosexuality.

The command has full confidence in the integrity of the military justice system and remains committed to resolving U.S. v. Fisher in a just manner, consistent with law and regulation.

For additional information call Major Pamela Hart at (270) 798-3025.

-end-

Don't Ask
Don't Tell

NATIONAL SECURITY COUNCIL
WASHINGTON, D.C. 20504

7708

MD

November 1, 1999

INFORMATION

MEMORANDUM FOR SAMUEL BERGER

FROM: HANS BINNENDIJK ^{HB}

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

→ Hans -

Good memo.

I will consult w/
WH legal; would
you convert into
memo for POTUS;

might strengthen
the section on downsides

You asked us to assess DOD's implementation of the President's "don't ask, don't tell" policy for gays in the military. We have reviewed relevant documents and discussed the issue with Pentagon civilians and White House staff (Richard Socarides and Edward Correia). We conclude that there are negative trends in policy implementation, that OSD is trying to improve the situation but meets resistance from the Services and criticism from conservative organizations, and that more might be done during the next year to turn this around.

reopening:
wind up
reigniting
Congressional
action.

THERE IS A PROBLEM

Three interrelated trends capture the nature of the current problem. In the time allotted, we have not done an independent investigation of these trends and simply report them to you with some analysis.

- **The number of annual discharges for homosexual conduct has doubled since 1994**, growing consistently from 617 in that year to 1149 last year. The discharges constitute a small percentage of the overall force (under .1%). 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. Women were discharged at a rate that is twice their presence in the Armed Forces. The recent trends for discharge cases by Service are: (1) increases in the Army and Air Force, (2) a decline for the Navy, and (3) a relatively constant number for the Marines.
- 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

* SERVICE MEMBERS' LEGAL DEFENSE NETWORK

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. The case in which the Navy pursued a member because of comments made on AOL is cited as a high profile example of this problem. SLDN further concludes that while reports of threats to extract confessions are up, physical abuse by investigators has declined.

REASON BEHINDS THESE TRENDS

DOD has not made extensive inquiries into "statement cases," so the reasons for the majority of the discharges are not fully known. There are, however, several observations that we can make.

- **The 1993 policy was a compromise that leaves both commanders and gay members in a gray zone.** Under legislation passed in 1993, Servicemembers with a propensity or intention to engage in homosexual acts "create an unacceptable risk" and must be separated from the Armed Forces. The President's policy, however, stresses the privacy rights of individual members. This has posed contradictions for those tasked with implementing the policy and for those trying to live with it.
- An April 1998 OSD review concluded that this contradiction has posed a challenge to the Services, but that for the most part the policy has been properly enforced. **However, constrained personal privacy for all members and a cultural emphasis on regulations leave commanders leaning in the direction of the law banning gays rather than the policy supporting privacy if the two appear to clash.** Tension remains between OSD and the uniformed military over policy implementation.
- And yet the "don't ask, don't tell" policy tends to lead some gays to believe that there may be a place for them in the military. Many join to find a culture that does not meet expectations.
- Much of the increase in the discharge cases has come from Lackland Air Force Base, which is a mixed gender training

facility. A recent policy shift at Lackland supports the belief that some statements admitting to homosexual or bisexual preferences may be designed as a short-term escape from unpleasant basic training. A "cooling off" period has been instigated during which a recruit has an opportunity to consult legal counsel to fully understand the policy and retract a privately made statement. Most tend to change their statement upon reflection. In the first seven months of the new policy, the number of gay-related discharges of Lackland recruits dropped from 195 to 31.

OSD EFFORTS TO IMPLEMENT THE POLICY

In general, OSD appears to be making a good faith effort to implement the President's policy, but some of their policies are criticized by SLDN. OSD has also been criticized by conservative groups for giving SLDN too much access. **The larger implementation problem may be with the Services.** OSD efforts include the following:

- In 1995, the OSD General Counsel issued a memorandum which gives the commander broad investigative powers upon receipt of "credible information" and which places the burden of proof to "rebut a presumption" on the charged member. These interpretations are criticized by SLDN.
- In 1997, OSD issued the Dorn memorandum, which stated that a report of harassment is not a cause to investigate the person being harassed. It also ordered prompt investigation of harassment charges and ordered training to prevent harassment. Issuance of the Dorn memorandum may account for some of the increase in harassment cases reported to SLDN. After SLDN criticism that the memorandum was improperly circulated, it is being reissued with strengthened language. *explain harassment by whom?*
- In April 1998, OSD reviewed the "don't ask, don't tell" policy and recommended several improvements, including consultations with higher level commands before investigations begin and improved training for those enforcing the policy.
- In August 1999, OSD issued a new policy directive implementing many of the recommendations of the 1998 review and reissuing the Dorn memorandum. **The Services are currently developing implementation plans for this directive.**

OTHER STEPS SUGGESTED BY RIGHTS ADVOCATES

SLDN and others who seek to strengthen the current policy have made a series of suggestions, which include the following:

- Increase training of Servicemembers on the policy, on harassment, and on the limits of gay investigations.
- Take additional steps to hold accountable those who inappropriately ask, pursue, or harass.
- Make commanders accountable for an environment in which harassment appears acceptable.
- Provide recourse to Servicemembers to stop improper investigations. *of whom/by whom?*
- Adopt a rule of privacy for confidential conversations.
- Exclude evidence obtained illegally or inappropriately from use in administrative discharge boards.

A PRICE FOR FURTHER ACTION

An effort to strengthen the "don't ask, don't tell" policy by pursuing some or all of the above suggestions could prove extremely controversial, particularly with the Services and opponents of the policy on the Hill. One option is to set up an informal task force to consider more fully some of the suggestions made by rights activists. Legislative Affairs recommends that, at a minimum, we do nothing further on this issue until the Congress is out of session. Legal also recommends that you consult with the White House Counsel's office before taking action with respect to this policy. *Why?*

Concurrences: NSC Legal; *in draft* Legislative Affairs

To: Mary DeRosa

8774

NATIONAL SECURITY COUNCIL
WASHINGTON, D.C. 20504

December 13, 1999

ACTION

MEMORANDUM FOR SAMUEL BERGER

FROM:

HANS BINNENDIJK *original*

SUBJECT:

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

You asked that we convert our memo on "don't ask, don't tell" to a memo for the President, and that we strengthen the section on downsides of reopening the issue. The converted memorandum for your signature to the President is at Tab I. Our original memorandum is at Tab II.

Laura Marcus asked that John Podesta have an opportunity to review the memo before it is submitted to the President. Eddie Correia from White House Counsel's office has also asked for a copy of the draft. Both Chief of Staff and White House Counsel were very much involved in initial development of Don't Ask, Don't tell, and a follow-up on implementation problem/issues. I would like to share a copy of this memo with them as I expect we may be working with them closely on the issue over the coming months.

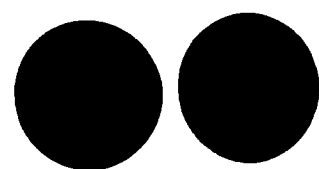
Concurrence: Mary DeRosa, Miles Lackey *in draft*

RECOMMENDATION

That you sign the attached memorandum at Tab I after consulting with Podesta.

Attachments

Tab I Information Memorandum for the President
Tab II Previous Correspondence



→ HANS
Since original memo was done six weeks ago, before current controversies, think we need to focus more on what DDP has just done. See notes @

THE WHITE HOUSE
WASHINGTON

INFORMATION

MEMORANDUM FOR THE PRESIDENT

FROM: SAMUEL R. BERGER

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

an assessment
You asked for a ~~review~~ of the "don't ask, don't tell" policy for gays in the military. The assessment below concludes that:

have been (1) there ~~are~~ negative trends in policy implementation; (2) OSD is trying to improve the situation, ~~but meets~~ resistance from the Services; (3) there are steps available to improve the situation further, but they may reignite negative congressional reaction. *overcoming*

THERE IS A PROBLEM

Three 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 percent) were triggered by a personal "statement" admitting to homosexuality. Fifty-eight percent of the discharges were within the member's first year of service.
- SLDN (Servicemembers' Legal Defense Network) 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 percent between 1997 and 1998.

SLDN further concludes that while reports of threats to extract confessions are up, physical abuse by investigators has declined.

REASONS BEHINDS THESE TRENDS

There appear to be several reasons for these negative trends.

- Under legislation passed in 1993, Servicemembers with a propensity or intention to engage in homosexual acts "create an unacceptable risk" and must be separated from the Armed Forces. The "don't ask, don't tell" policy, however, stresses privacy rights. This has posed contradictions for those tasked with implementing the policy and for those trying to live with it. #
- An April 1998 OSD review concluded that this contradiction had posed a challenge to the Services, but that for the most part the policy has been properly enforced. However, constrained personal privacy for all members and a cultural emphasis on regulations leave commanders leaning in the direction of the law banning gays. Low good has the training of officers and NCO's been?
- And yet the "don't ask, don't tell" policy tends to lead some gays to join a culture that does not meet their expectations.
- A recent policy shift at Lackland Air Force Base supports the belief that some statements admitting to homosexual preferences may be designed as a short-term escape from unpleasant basic training. A "cooling off" period has been instigated during which a recruit has an opportunity to consult legal counsel and retract a privately made statement. Gay-related discharges of Lackland recruits has dropped dramatically.

OSD EFFORTS TO IMPLEMENT THE POLICY

Bill Cohen and

OSD appears to be making a good faith effort to implement the policy, but an implementation problem remains in the Services. The

must overcome implementation

- In 1997, OSD issued the Dorn memorandum, which stated that a report of harassment by a possibly gay member is not a cause for the commanding officer to investigate the person being harassed. It also ordered prompt investigation of harassment charges made by possibly gay members and ordered training to prevent harassment. how sweeping?

or of

- In April 1998, OSD reviewed the "don't ask, don't tell" policy and recommended several improvements, including consultations with higher level commands before investigations begin and improved training for those enforcing the policy.
- In August 1999, OSD issued a new policy directive implementing many of the recommendations of the 1998 review and reissuing the Dorn memorandum. The Services are currently developing implementation plans for this directive, but OSD is concerned about Service compliance.

amplify
or
new
directive

OTHER STEPS SUGGESTED BY RIGHTS ADVOCATES

SLDN and others who seek to strengthen the current policy have made a series of suggestions, which include the following:

- Increase training of Servicemembers on the policy, on harassment, and on the limits of gay investigations.
- Take additional steps to hold accountable those who inappropriately ask, pursue, or harass.
- Make commanders accountable for an environment in which harassment appears acceptable.
- Provide recourse to accused Servicemembers to stop improper investigations by their commanders.
- Adopt a rule of privacy for confidential conversations.
- Exclude evidence obtained illegally or inappropriately from use in administrative discharge boards.

is this not
now being
done?

A PRICE FOR FURTHER ACTION

An effort to strengthen the "don't ask, don't tell" policy by pursuing some or all of the above suggestions 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 addition, our policy has not yet felt the positive impact of OSD's recent directives. If you wish to pursue any of the steps suggested by the rights activists, a small task force might review each idea.

should
this be
rephrased
to suggest
we wait
till OSD's
new
directive
is implemented
or doesn't
it go far enough?

Killer's Trial Shows Gay Soldier's Anguish

Taunted, Beaten but Fearful of Disclosure Under Don't Tell Policy

By FRANCIS X. CLINES

FORT CAMPBELL, Ky., Dec. 8 — The graphic story of the harassment and bludgeoning slaying of an Army private who feared expulsion from the service for being homosexual emerged here today at a court-martial that gay rights proponents say lays bare the grave flaws in the military's "don't ask, don't tell, don't pursue" policy.

The 21-year-old victim, Pfc. Barry Winchell of Kansas City, Mo., was beaten to death with a baseball bat as he slept in his barracks bed early last July 3 after what fellow soldiers testified was months of vile name calling, rumor mongering and an inquiry into his private life that was supposed to be forbidden under military policy.

The court heard one of the accused, 18-year-old Private Calvin Glover of Sulphur, Okla., enter a plea of guilty to a lesser charge of unpremeditated murder. But his trial went forward on the separate charge of premeditated murder with details unfolding on the final months of Private Winchell's life as a soldier subjected to derision.

The court of five officers and enlisted men tonight pronounced him guilty of premeditated murder, solely measuring how calculating Private Glover had been in the assault. He will be sentenced on Thursday and could face life in prison.

Witnesses testified that the victim, fearful that protesting the harassment to superiors meant risking expulsion from the service as a homosexual, had been taunted by Private Glover into a fist fight. Private Winchell won the fight handily at the end of a night of barracks drinking. But the humiliated loser, Private Glover, retaliated with a baseball bat two days later as Private Winchell slept.

In pleading guilty to the lesser charge and hoping for leniency, Private Glover accused a second defendant, 25-year-old Specialist Justin Fisher of Lincoln, Neb., of supplying the baseball bat and goading him into the assault. "I was just so drunk," Private Glover tearfully told the court on Monday. "I had no intent for him to die."

The court-martial, replete with testimony about widespread drunkenness and barracks harassment and routine denunciations of Private Winchell by fellow soldiers as "a faggot," "a queer," and "a homo," was treated by the prosecution as purely a murder trial.

The Army has made no comment on the case's possible implications for its controversial policy toward gays.

But gay rights organizations contend that the slaying is a classic example of a hate crime rooted in homophobia, and that the Clinton administration's "don't ask" policy, far from making life easier for gays and

lesbians in the armed services, has left many to suffer in silence or leave the service.

Since its inception, the policy has seen a doubling of discharges of gay service members, to 312 last year, and a comparable increase in complaints of homosexual harassment, gay rights organizations say.

"This murder has shut down any illusions soldiers had," said Michelle M. Benecke, co-executive director of the Servicemembers Legal Defense Network, a gay rights organization that monitors military justice.

"Every day, service members in every service must endure anti-gay epithets and threats," Mr. Benecke said in underscoring the Pentagon's failure to circulate guidelines on its gay policy until after the slaying of Private Winchell.

In testimony at the trial and in a preliminary inquiry here last summer, witnesses said that Private

While a private is convicted in a gay man's slaying, some fault the military.

Glover, after being struck in the face and thrown to the ground in his challenge to Private Winchell, seethed with embarrassment, shouted homophobic curses and threatened a killing, declaring, "It ain't over."

Witnesses said that Private Winchell, a machine gunner in the 101st Airborne Division, had been initially labeled a homosexual by his roommate, Specialist Fisher, who is facing a separate court-martial on Monday on charges that he was an accomplice in the slaying and lied to investigators.

Private Glover's defense team sought to bring out from witnesses that Specialist Fisher was a dominant, manipulative individual while the accused private was subservient and a braggart.

The presiding judge, Col. Gary Holland, told the court that the critical question was whether Private Glover, amid a long weekend of barracks drinking, partying, and bickering, had opportunity to "cool off" from a point of initial rage and premeditate the assault.

Of Specialist Fisher, the judge stressed it had been stipulated as fact that "he's the one who handed the accused the bat" and "told him to go out and mess up" Private Winchell.

On the morning of the slaying, a military policeman testified, Specialist Fisher, his clothes covered in

blood, stood by the ambulance shouting, "Let him die! Let him die!" as Private Winchell was taken to the hospital. In the earlier hearing, Specialist Fisher swore that Private Glover spewed homophobic epithets before the assault and confessed to the slaying as he hurriedly washed blood from the bat, when the two checked on the stricken Private Winchell, Specialist Fisher said, Private Glover lifted his bloodied head and said, "Yes, he is dead."

Witnesses testified that the assault was so severe that Private Winchell's face was unrecognizable, with his eyes swollen shut and his head cracked open. Private Glover fled the scene, according to testimony, and threw bloody evidence in a dumpster. He was later arrested in his room by investigators, who said they found blood stains on the door and on his clothing.

Last March, Specialist Fisher accompanied Private Winchell to the Connection in Nashville, a nightclub favored by gays, witnesses said, and gossip soon went around the post that the Private Winchell was homosexual. Testimony established that Private Winchell had dated a female impersonator at the club, Cal Adams, a former Navy medic known as Calpernia, who eulogized Private Winchell last July as "a kind, calm gentleman."

"Pretty much everybody in the company called him derogatory names," Private Winchell's platoon sergeant, Michael Kloifgen, testified at the pretrial hearing. "They called him a 'faggot' and stuff like that. I would say on a daily basis. A lot of times, he was walking around down in the dumps."

Despite the military's "don't ask" stricture, Sergeant Kloifgen testified last summer that he decided to informally investigate after Specialist Fisher described the nightclub visit without identifying Private Winchell. The sergeant said he suspected that Private Winchell was gay but Private Winchell denied this. The sergeant dropped the matter, he testified, finally acknowledging to the amazement of some in his audience, that "the military has a policy of 'don't ask, don't tell.'"

At the same time, the sergeant said he did nothing to enforce Army regulations against the sort of harassment that Private Winchell was suffering. "Everybody was having fun," the sergeant said in explaining his reasoning.

In the welter of harassment and epithets, several witnesses testified, a few soldiers complained of homophobic denunciations of Private Winchell by ranking superiors. But nothing came of their complaints that Army policy had been violated, the witnesses said. "We did a formal I.G. complaint and nothing was done, sir," Sergeant Kloifgen testified today, referring to the inspector general's office here. The Fort Campbell public affairs office said it would inquire into the reported complaint to see what might have happened.

Under the policy introduced by the Clinton Administration, the military cannot inquire into a soldier's sex life unless there is clear evidence of homosexual conduct. But gays who volunteer this information can be discharged for being homosexual. After the Winchell slaying and reports of white supremacists in the Army, President Clinton signed an executive order in October that allows judges to weigh hate-crime factors in meting out sentences.

The New York Times

THURSDAY, DECEMBER 9, 1999

Blast at a Nuclear Bomb Factory Injures 3

By The New York Times

WASHINGTON, Dec. 8 — A chemical explosion this morning at a nuclear bomb factory in Oak Ridge, Tenn., injured three workers, one seriously, and contaminated a fourth worker with uranium.

The incident occurred about 9:30 a.m. as workers tried to clean up a mixture of sodium and potassium that had been spilled last Friday. Something, possibly water, reacted with the sodium to cause the explosion, plant officials said.

One worker was airlifted to a hospital in Chattanooga, Tenn., with second-degree burns over 25 percent of his body, said Margaret K. Morrow, acting vice president for defense programs at Lockheed-Martin Energy Research Corp., which runs the factory for the Department of Energy. The worker was in serious but stable condition, she said. Two others with lesser burns were admitted to a hospital in Oak Ridge.

The Energy Department is assembling a team for an investigation.

HE - PRESIDENT HAS SEEN
12-10-99

Speedy
We have
to do something
about this
BS

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BINNENDIJK

TO: BERGER

FROM: PRESIDENT

DOC DATE: 10 DEC 99
SOURCE REF:

KEYWORDS: DEFENSE POLICY
MEDIA

HUMAN RIGHTS
POTUS QUESTIONS

PERSONS: CLINES, FRANCIS

WINCHELL, BARRY

SUBJECT: POTUS REQUESTS NSC RECOMS RE 9 DEC NYT ARTICLE RE MURDER OF GAY
SOLDIER

ACTION: PREPARE MEMO FOR BERGER

DUE DATE: 15 DEC 99 STATUS: S

STAFF OFFICER: BOUCHARD

LOGREF:

FILES: PA

NSCP:

CODES:

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PLEASE STAFF

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The 21-year-old victim, Pfc. Barry Winchell of Kansas City, Mo., was beaten to death with a baseball bat as he slept in his barracks bed early last July 5 after what fellow soldiers testified was months of vile name calling, rumor mongering and an inquiry into his private life that was supposed to be forbidden under military policy.

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The Department is building a team for an investigation

The New York Times
THURSDAY, DECEMBER 4, 1999

'Don't ask, don't tell' has become a

JANET E. HALLEY

We finally have reforms in the implementation of the compromise "don't ask, don't tell, don't pursue" policy meant to settle the issue of gays in the military. But the Clinton administration regulations continue to make the policy worse even than the statute adopted by Congress. Recent events implicitly confirm what critics have said all along: This policy is no compromise. It's outright anti-gay. Much of that can't be fixed without the cooperation of Congress. But any future president could take the following steps toward fairness without seeking new legislation:

- Restore "don't ask." This part of the supposed compromise never made it into the statute or the Clinton administration's implementing regulations. It appears only in informal "guidelines," where it is always coupled with a warning that it is unenforceable chit-chat. The new directives don't change that. Commanders can still ask service members whether they are gay whenever they please. "Don't ask" should be mandated and backed up with procedures for its enforcement.

- Narrow the grounds for discharging people. The

statute says that commanders must process service members for discharge if they "tell" or if they engage in bodily contacts that "manifest a propensity" to engage in same-sex erotic acts. But Clinton administration regulations still go way beyond that, requiring commanders to start proceedings against service members who have engaged in conduct that manifests a propensity.

Various military enforcers have decided that this could include having a gay friend, cutting your hair a certain way, or objecting to the "don't ask, don't tell" policy. This is a viciously antigay rule, allowing for arbitrary, even imaginary charges, and the new guidelines do nothing to alter it. The new president should stipulate that proceedings cannot begin without corroborated evidence of specifically sexual contact.

- Allow service members to challenge commanders' decisions to initiate discharge proceedings. Clinton administration regulations still allow commanders to decide unilaterally what conduct properly triggers discharge proceedings. If your commander thinks that you've manifested a propensity - bang! - you're in discharge

**Clinton co
but he**

vicious policy, here's how to fix it

proceedings, and you must be kicked out of the military unless you prove you have no propensity. You have no way of challenging that triggering decision. Commanders can be as arbitrary as they like. This is tyranny, not law. Service members should have standing to challenge every element of the case against them.

■ Reinstate "don't pursue." The new directives purport to limit investigations, but really they just clarify

who decides: commanders. Nor is it new to say they can consult top military lawyers. And we know what advice they will get. Navy lawyers have urged commanders to investigate a service member who has merely

**ould do it,
hasn't.**

come out as gay until they find evidence of same-sex acts. In one memo, Air Force lawyers advised that if investigators stumble on evidence implicating other service members, so much the better, commanders should "be creative" about how to run a witch hunt. The Marines' top lawyers have allowed commanders to hold suspected service members for up to 10 days without providing them with access to legal advice. It's time for substantive, not merely procedural, "don't pursue" rules.

■ Stop pretending that the policy is a good one. The Clinton administration has repeatedly misled the public and courts about "don't ask, don't tell." It pretends that the policy punishes service members "not for who they are but for what they do." The new directives hide behind this tired old fig leaf yet again. But homosexual identity – not homosexual acts – really is the crucial issue at every procedural moment.

The Clinton administration has further misled the public by avoiding formal promulgation of its implementing regulations. It has ducked the Administrative Procedure Act's public notice and comment period and its due process rules. Thus the regulations remain unpublished, and few people know what they are or even how to find out. The regulations should undergo the rigors of the Administrative Procedures Act.

President Clinton wanted to end discrimination in the armed forces, but he has instead presided over the institutionalization of antigay animus. Many of the really bad things about "don't ask, don't tell" come not from the congressional statute but from his implementation of it. A new president can undo his mistakes.

Janet E. Halley is the author of "Don't: A Reader's Guide to the Military's Anti-Gay Policy."

NATIONAL SECURITY COUNCIL

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From: MARA RUDMAN

To: Mary DeRosa & Hans Benendik

Agency: cc: @Legal and @Defense

Fax Number: 69190, 69110

Date/Time:

No. of pages to follow:

5

Message:



Informal
Meeting of NATO
Defence Ministers

Réunion informelle
des Ministres de la
défense de l'OTAN

Mara,

Sandy just talked
to SecDef and told
him about his MEMO
to DOD IG to survey
climate . . .

Thanks,
Joy



National
Defence

Défense
nationale

OPTIONAL FORM 89 (7-80)

FAX TRANSMITTAL

of pages >

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Fax # <u>202 456-9460</u>	Fax #
NSN 7540-01-317-7368	5099-101

GENERAL SERVICES ADMINISTRATION



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

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





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



AUG 12 1999

PERSONNEL AND
READINESS

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF
INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE

SUBJECT: Guidelines for Investigating Threats Against or Harassment of Service Members
Based on Alleged Homosexuality

As recommended in the 1998 Report to the Secretary of Defense on the Effectiveness of the Application and Enforcement of the Department's Policy on Homosexual Conduct in the Military, this memorandum reiterates existing policy regarding the investigation of threats against or harassment of service members on the basis of alleged homosexuality. Service members should be able to report crimes and harassment free from fear of harm, reprisal, or inappropriate or inadequate governmental response. Commanders must take appropriate actions in such instances, with due consideration given to the safety of persons who report threats or harassment, and see that persons found to have made threats or engaged in threatening or harassing conduct are held fully accountable.

Under DoD policy, a commander may initiate an investigation into homosexual conduct only upon receipt of credible information of such conduct. 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 by itself constitute credible information justifying the initiation of an investigation of the threatened or harassed service member. Credible information exists only when information, considering its source and the surrounding circumstances, supports a reasonable belief that a service member has engaged in homosexual conduct.

The report of a threat or harassment should result in the prompt investigation of the threat or harassment itself. Investigators should not solicit allegations concerning the sexual orientation or homosexual conduct of the threatened or harassed person. If, during the course of an investigation, information is received that the service member has engaged in homosexual conduct, commanders shall carefully consider the source of that information and the circumstances under which it was provided in assessing its credibility. Such information does not negate the need to investigate the alleged harasser.

Please ensure that this guidance is effectively disseminated to all levels of command and is made part of training programs for law enforcement personnel, commanders, supervisors and incorporated in the training required by section 654(d) of title 10, United States Code.

Rudy de Leon





PERSONNEL AND
READINESS

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



AUG 12 1999

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS

SUBJECT: Implementation of Recommendations Concerning Homosexual Conduct Policy

The Department of Defense is committed to the fair and even-handed application and enforcement of its policy on homosexual conduct in the military. An April 1998 report responded to the Secretary of Defense tasking to review how well the Department's policy on homosexual conduct is being applied and enforced. That report provided an analysis of the data on separations for homosexual conduct in Fiscal Year 1997, as well as a discussion of various issues arising under the policy, and made several recommendations. Since that time, my office has continued to analyze the data and issues discussed in the April 1998 report, as well as the data concerning separations based on homosexual conduct in Fiscal Year 1998. It is now appropriate to take the actions outlined below to ensure that the Department's policy is being properly applied and enforced.

First, as the April 1998 report makes clear, the majority of homosexual conduct discharge cases involve minimal or no investigation; that is also confirmed by the data that were analyzed for Fiscal Year 1998. As a result, many installation-level attorneys have not had occasion to build practical expertise in the special rules applicable in this area. Accordingly, the April 1998 report found that, in more complex investigations, it has become common practice for installation judge advocates to consult for advice with more experienced judge advocates in higher headquarters legal offices. The review recommended that the Department issue guidance specifying that such consultation is recommended before initiating investigations into alleged homosexual conduct.

Second, the April 1998 report concluded that little or no investigation should be necessary in most cases where a service member has made a statement acknowledging his or her homosexuality and does not contest separation. The report recognized, however, that it is appropriate in some circumstances to undertake an investigation to determine whether recoupment of financial benefits is warranted, or whether a service member's statement may have been fabricated in an effort to avoid a service obligation. To ensure appropriate review of such cases, the report recommended that prior authorization at the Military Department secretarial level be obtained for any substantial investigation of this nature.

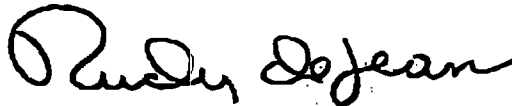
Third, the April 1998 report noted that each Service devotes substantial effort to training commanders and attorneys on the Department's homosexual conduct policy. Notwithstanding these efforts, some commanders, attorneys and investigators report that they have not received training. Accordingly, the report recommended that the Military Departments issue guidance directing that Service Inspectors General include as a specific item of interest for inspection the training of all those charged with implementing the homosexual conduct policy.



In order to implement the recommendations and findings of the April 1998 report, I request that you issue guidance as follows:

- * 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.

Please provide your draft implementing guidance on these matters to Mr. Frank Rush, Principal Deputy Assistant Secretary of Defense for Force Management Policy, within 30 days.



Rudy de Leon

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*** THIS SECTION IS CURRENT THROUGH 106-21, APPROVED 4/19/99 ***

TITLE 10. ARMED FORCES
SUBTITLE A. GENERAL MILITARY LAW
PART II. PERSONNEL
CHAPTER 37. GENERAL SERVICE REQUIREMENTS

10 USCS § 654 (1999)

§ 654. Policy concerning homosexuality in the armed forces

(a) Findings. Congress makes the following findings:

(1) Section 8 of article I of the Constitution of the United States commits exclusively to the Congress the powers to raise and support armies, provide and maintain a Navy, and make rules for the government and regulation of the land and naval forces.

(2) There is no constitutional right to serve in the armed forces.

(3) Pursuant to the powers conferred by section 8 of article I of the Constitution of the United States, it lies within the discretion of the Congress to establish qualifications for and conditions of service in the armed forces.

(4) The primary purpose of the armed forces is to prepare for and to prevail in combat should the need arise.

(5) The conduct of military operations requires members of the armed forces to make extraordinary sacrifices, including the ultimate sacrifice, in order to provide for the common defense.

(6) Success in combat requires military units that are characterized by high morale, good order and discipline, and unit cohesion.

(7) One of the most critical elements in combat capability is unit cohesion, that is, the bonds of trust among individual service members that make the combat effectiveness of a military unit greater than the sum of the combat effectiveness of the individual unit members.

(8) Military life is fundamentally different from civilian life in that--

(A) the extraordinary responsibilities of the armed forces, the unique conditions of military service, and the critical role of unit cohesion, require that the military community, while subject to civilian control, exist as a specialized society; and

(B) the military society is characterized by its own laws, rules, customs, and traditions, including numerous restrictions on personal behavior, that would not be acceptable in civilian society.

(9) The standards of conduct for members of the armed forces regulate a member's life for 24 hours each day beginning at the moment the member enters military status and not ending until that person is discharged or otherwise separated from the armed forces.

(10) Those standards of conduct, including the Uniform Code of Military Justice, apply to a member of the armed forces at all times that the member has a military status, whether the member is on base or off base, and whether the member is on duty or off duty.

(11) The pervasive application of the standards of conduct is necessary

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because members of the armed forces must be ready at all times for worldwide deployment to a combat environment.

(12) The worldwide deployment of United States military forces, the international responsibilities of the United States, and the potential for involvement of the armed forces in actual combat routinely make it necessary for members of the armed forces involuntarily to accept living conditions and working conditions that are often spartan, primitive, and characterized by forced intimacy with little or no privacy.

(13) The prohibition against homosexual conduct is a longstanding element of military law that continues to be necessary in the unique circumstances of military service.

(14) The armed forces must maintain personnel policies that exclude persons whose presence in the armed forces would create an unacceptable risk to the armed forces' high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.

(15) 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.

(b) Policy. A member of the armed forces shall be separated from the armed forces under regulations prescribed by the Secretary of Defense if one or more of the following findings is made and approved in accordance with procedures set forth in such regulations:

(1) That the member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts unless there are further findings, made and approved in accordance with procedures set forth in such regulations, that the member has demonstrated that--

(A) such conduct is a departure from the member's usual and customary behavior;

(B) such conduct, under all the circumstances, is unlikely to recur;

(C) such conduct was not accomplished by use of force, coercion, or intimidation;

(D) under the particular circumstances of the case, the member's continued presence in the armed forces is consistent with the interests of the armed forces in proper discipline, good order, and morale; and

(E) the member does not have a propensity or intent to engage in homosexual acts.

(2) That the member has stated that he or she is a homosexual or bisexual, or words to that effect, unless there is a further finding, made and approved in accordance with procedures set forth in the regulations, 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.

(3) That the member has married or attempted to marry a person known to be of the same biological sex.

(c) Entry standards and documents.

(1) The Secretary of Defense shall ensure that the standards for enlistment and appointment of members of the armed forces reflect the policies set forth in subsection (b).

(2) The documents used to effectuate the enlistment or appointment of a person as a member of the armed forces shall set forth the provisions of subsection (b).

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(d) Required briefings. The briefings that members of the armed forces receive upon entry into the armed forces and periodically thereafter under section 937 of this title (article 137 of the Uniform Code of Military Justice) shall include a detailed explanation of the applicable laws and regulations governing sexual conduct by members of the armed forces, including the policies prescribed under subsection (b).

(e) Rule of construction. Nothing in subsection (b) shall be construed to require that a member of the armed forces be processed for separation from the armed forces when a determination is made in accordance with regulations prescribed by the Secretary of Defense that--

(1) the member engaged in conduct or made statements for the purpose of avoiding or terminating military service; and

(2) separation of the member would not be in the best interest of the armed forces.

(f) Definitions. In this section:

(1) The term "homosexual" means a person, regardless of sex, 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".

(2) The term "bisexual" means a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual and heterosexual acts.

(3) The term "homosexual act" means--

(A) any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires; and

(B) any bodily contact which a reasonable person would understand to demonstrate a propensity or intent to engage in an act described in subparagraph (A).

HISTORY: (Nov. 30, 1993, P.L. 103-160, Div A, Title V, Subtitle G, § 571(a)(1), 107 Stat. 1670.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Other provisions:

Regulations. Act Nov. 30, 1993, P.L. 103-160, Div A, Title V, Subtitle G, § 571(b), 107 Stat. 1673, provides: "Not later than 90 days after the date of enactment of this Act, the Secretary of Defense shall revise Department of Defense regulations, and issue such new regulations as may be necessary, to implement section 654 of title 10, United States Code, as added by subsection (a).".

Savings provision. Act Nov. 30, 1993, P.L. 103-160, Div A, Title V, Subtitle G, § 571(c), 107 Stat. 1673, provides: "Nothing in this section or section 654 of title 10, United States Code, as added by subsection (a), may be construed to invalidate any inquiry, investigation, administrative action or proceeding, court-martial, or judicial proceeding conducted before the effective date of regulations issued by the Secretary of Defense to implement such section 654.".

Sense of Congress. Act Nov. 30, 1993, P.L. 103-160, Div A, Title V, Subtitle G, § 571(d), 107 Stat. 1673, provides: "It is the sense of Congress that--

"(1) the suspension of questioning concerning homosexuality as part of the processing of individuals for accession into the Armed Forces under the interim policy of January 29, 1993, should be continued, but the Secretary of Defense

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may reinstate that questioning with such questions or such revised questions as he considers appropriate if the Secretary determines that it is necessary to do so in order to effectuate the policy set forth in section 654 of title 10, United States Code, as added by subsection (a); and

"(2) the Secretary of Defense should consider issuing guidance governing the circumstances under which members of the Armed Forces questioned about homosexuality for administrative purposes should be afforded warnings similar to the warnings under section 831(b) of title 10, United States Code (article 31(b) of the Uniform Code of Military Justice).".

INTERPRETIVE NOTES AND DECISIONS

1. Generally
2. Constitutionality
3. Standing
4. Injunction
5. Application

1. Generally

In deciding to issue preliminary injunctions in case brought by six gay or lesbian members of armed forces challenging constitutionality of law embodying "don't ask, don't tell" policy, district court should have required plaintiffs to prove likelihood of success on merits rather than only "serious questions going to merits," since governmental policies implemented through legislation or regulations developed through presumptively democratic processes are entitled to higher degree of deference and should not be enjoined lightly. *Able v United States* (1995, CA2 NY) 44 F3d 128, 67 BNA FEP Cas 1095, 65 CCH EPD P 43399.

Claim of members of United States Armed Services, alleging that they are homosexuals and that Services' policy and regulations as to homosexuals violated their right to equal protection, is not dismissed, because although government is entitled to deference where constitutional rights of service members are implicated, plaintiffs are entitled to attempt to prove that findings underlying statute are based solely on prejudice or fear of prejudice, or otherwise that there is no rational relationship between statute's classifications of gay and lesbian service members and legitimate government purpose. *Able v United States* (1994, ED NY) 863 F Supp 112, app den (1994, ED NY) 870 F Supp 468, 67 BNA FEP Cas 1092, remanded (1995, CA2 NY) 44 F3d 128, 67 BNA FEP Cas 1095, 65 CCH EPD P 43399.

Military's "Don't Ask, Don't Tell" policy, implemented under 10 USCS § 654, which discharges homosexuals from military service who admit to being homosexuals, did not substantially further government's interest in preventing unit polarization as required under heightened scrutiny standard of First Amendment, where silent homosexuals were allowed to serve, even though they still could read gay literature, frequent gay bars, march in gay rights parades, and vociferously advocate right of gays to serve, thus causing same degree of debate, unrest, and polarization as that caused by person who admitted homosexuality. *Thorne v United States DOD* (1996, ED Va) 916 F Supp 1358, 71 BNA FEP Cas 565, summary judgment gr, dismd (1996, ED Va) 945 F Supp 924 and affd without op (1998, CA4 Va) 139 F3d 893, reported in full (1998, CA4 Va) 1998 US App LEXIS 6904 and cert den (1998, US) 142 L Ed 2d 307, 119 S Ct 371.

2. Constitutionality

In action by 6 self-identified homosexual members of Armed Services, court declares 10 USCS § 654 constitutional, where statute prohibits statement "I am homosexual or have homosexual propensities," because § 654(b)(2) advances a