

**CONDUCT UNBECOMING CONTINUES:
THE FIRST YEAR UNDER "DON'T ASK, DON'T TELL, DON'T PURSUE"**

Executive Summary

Servicemembers Legal Defense Network's review of the first year of the military's new policy on homosexuals, "Don't Ask, Don't Tell, Don't Pursue," reveals a pattern of violations that often renders the policy little more than "Ask, Pursue and Harass." SLDN has documented death threats and other specific violations of the new policy from March 1, 1994 - February 28, 1995, and concludes that many military officials continue to ask questions about sexual orientation, conduct witch hunts and condone harassment of lesbian and gay servicemembers in direct violation of "Don't Ask, Don't Tell, Don't Pursue." SLDN concludes that the chief reasons for the continuing violations are lack of information, lack of adequate training and guidance regarding the new policy, and in some cases, willful disregard of military policy by commanders and investigators.

SLDN recommends that the Department of Defense ensure the proper implementation of "Don't Ask, Don't Tell, Don't Pursue" through adequate training of all servicemembers about the new policy, common sense remedies when inquiries or investigations are started improperly, and clear accountability for violations of the policy by military officials.

SLDN reports the following findings from its monitoring activities during the past year:

1. **340 total violations of "Don't Ask, Don't Tell, Don't Pursue, Don't Harass."¹**
2. **37 cases with "Don't Ask" violations.**

¹ Multiple violations per case make total violations exceed total cases. Thus, findings that state total number of SLDN cases involving violations present the most conservative picture of violations servicewide.

3. 18 cases with "Don't Tell" violations.
4. 65 cases with "Don't Pursue" violations.
5. 62 cases with "Don't Harass" violations.
6. 15 actual or attempted witch hunts among the "Don't Pursue" violations.
7. 10 cases where servicemembers faced death threats in violation of "Don't Harass" because of their actual or perceived sexual orientation.
8. The U.S. Navy and U.S. Army accounted for the most number of cases with "Don't Ask" violations; the U.S. Army accounted for the most number of cases with "Don't Tell" violations; the U.S. Air Force accounted for the most number of cases with "Don't Pursue" violations; and the U.S. Navy accounted for the most number of cases with "Don't Harass" violations.²
9. Servicewide, violations of "Don't Pursue" and "Don't Harass" were the most significant problems.
10. Women accounted for 47 of SLDN's cases, or 25%, a percentage disproportionate to their numbers in the military.
11. The worst witch hunt occurred in the U.S. Marine Corps in Okinawa, Japan at Camp Hansen from March to June 1994 in which over 21 servicemembers were questioned about the sexual orientation and activities of themselves and other servicemembers. Despite careful documentation of abuses by SLDN and cooperating attorneys in the New York-based law firm, Skadden, Arps, Slate Meagher & Flom, U.S. Navy and U.S. Marine Corps officials have yet to acknowledge any impropriety in the witch hunt.
12. An Air Force memorandum dated November 3, 1994, violates (1) "Don't Pursue" by directing inquiry officials to start actions "against other military members" "discovered" during their investigations, and (2) "Don't Tell" by directing inquiry officials to interrogate "parents, siblings and close friends" to obtain information to be used against servicemembers for purposes of discharge.

² These figures indicate the Service with the most cases involving particular violations. The figures do not reflect, as a percentage of total active force in each Service, which Service had the highest rate of cases with violations of "Don't Ask, Don't Tell, Don't Pursue, Don't Harass."

13. **A U.S. Navy memorandum dated June 1994 violates "Don't Pursue" by (1) instructing attorneys to conduct their own off-line inquiries into the private lives of servicemembers; and (2) by expanding the scope of an investigation from a status case to an acts case, suggesting that inquiry officials find "final evidence" of acts in cases involving statements of sexual orientation only.**
14. **Despite conceding violations of "Don't Ask, Don't Tell, Don't Pursue," government officials have argued at discharge boards that violations of policy are not grounds for the servicemember to object.**
15. **The rate of discharge of homosexual servicemembers did not decrease in fiscal year 1994. In fact, the rate of discharge for 1991, 1992, 1993 and 1994 has remained constant.**
16. **At least 15 homosexual servicemembers have served openly for one to three years with only a good effect on their unit.**

SLDN received over 400 phone calls for assistance, and monitored 188 cases covering each branch of service worldwide. The cases SLDN monitored are just the tip of the iceberg and suggest a systemic problem that will require steps by the Department of Defense to ensure that its actions are consonant with law.

All findings are well-documented. Memoranda, servicemembers and attorneys who worked on the cases reported are available upon request.

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THE FIRST YEAR UNDER "DON'T ASK, DON'T TELL, DON'T PURSUE"**

Introduction

February 28, 1995 marks the first anniversary of "Don't Ask, Don't Tell, Don't Pursue," the military's new regulations on homosexuals. There are two striking results during the past year: one good and one bad.

The good news results not from the policy but from federal court and military commands with strong leadership. In cases where courts have allowed lesbian and gay servicemembers to serve openly, there have been no problems. In fact, the opposite has proven to be the case. As reported in U.S. News & World Report on February 6, 1995 in regard to Petty Officer Keith Meinhold, who won his case before the Ninth Circuit Court of Appeals last year, "Meinhold...has been not only tolerated by the majority of his colleagues - he has been embraced by them." Meinhold's flight crew was recently named the most combat effective in the Pacific fleet.

Colonel Margarethe Cammermeyer has also received strong support: after she won her court case in June 1994, she immediately received calls from her unit welcoming her back to the Washington State National Guard. Petty Officer Mark Phillips was given a chocolate cake by his crewmembers on the one-year anniversary of his coming out to his unit. And, Captain Rich Richenberg's co-workers threw a surprise birthday party for him in February 1995 as he continues to fight to stay in the military. These servicemembers are only a handful of those who have been serving openly for the past one to three years, and who, as clear documentation shows, have had a positive impact on their unit's good order, discipline and morale.

The bad news results from the implementation of "Don't Ask, Don't Tell, Don't Pursue" in the field. The new policy promised to stop questions about sexual orientation, witch hunts and harassment. Through a lack of proper training and willful disregard of the new policy, many commanders continue to ask, witch hunt and harass suspected homosexual servicemembers in direct violation of the new policy. The result has been that the discharge rate for homosexuals in fiscal year 1994 has not declined and the cost of training replacements for those discharged has exceeded \$17.5 million. The costs of conducting investigations, holding discharge hearings, administering the new policy and defending the policy in federal court are far higher.

This report, "Conduct Unbecoming Continues: The First Year Under "Don't Ask, Don't Tell, Don't Pursue"" details four specific violations of the new policy occurring in the field. The report documents cases where military officials have (1) asked servicemembers about their sexual orientation; (2) punished statements of sexual orientation that are permissible under the new policy or expanded the situations where telling is prohibited; (3) pursued or witch hunted suspected homosexuals; and (4) condoned harassment based on sexual orientation. This report does not include other clear violations, including situations, among others, where suspected homosexuals receive improper or inadequate legal representation within the military; are treated in an unevenhanded manner with respect to potential criminal prosecution; and are "outed" to their units and family by commanders in direct violation of the Privacy Act.

This report is based on violations of "Don't Ask, Don't Tell, Don't Pursue" documented by Servicemembers Legal Defense Network (SLDN), located in Washington, D.C. SLDN is the sole national legal aid and watch dog organization for those targeted by the military's new policy on homosexuals, and the only means currently available to document abuses. The Department of

Defense has instituted no method of identifying and correcting abuses of the new policy.

SLDN's documented cases reflect only the tip of the iceberg of all servicemembers affected by the "Don't Ask, Don't Tell, Don't Pursue" policy. Many servicemembers are discharged by the Department of Defense for homosexuality without ever having contacted SLDN, and others are removed from service for homosexuality through ulterior means, such as denial of reenlistment. SLDN's outreach is limited by its scarce resources, but even with such constraints, it received over 400 calls for direct assistance in the past year, suggesting that SLDN's figures represent only a fraction of the total violations of the new policy.

SLDN is headed by two attorneys, C. Dixon Osburn and Michelle M. Benecke. Mr. Osburn is a former legal/policy advisor to the Campaign for Military Service, the national coalition that worked to lift the ban legislatively. Mr. Osburn holds a J.D. and M.B.A. from Georgetown University, and an A.B. from Stanford University. Ms. Benecke is a former Captain and Battery Commander in the U.S. Army, and former staff attorney at the Campaign For Military Service. She has written extensively on the military policy's disproportionate impact on women. Ms. Benecke is a graduate of Harvard Law School and holds a B.A. from the University of Virginia.

Background/Definition of Terms

From March 1, 1994 to the present, over 400 servicemembers contacted SLDN needing assistance. The servicemembers were typically between the ages of 18 and 25 and had limited financial resources. The types of assistance requested ranged from basic information about how to comport one's behavior under the new policy to intensive efforts to stop witch hunts or prevent death threats from being carried out. Of the 188 calls requiring intervention, SLDN's staff

attorneys, in conjunction with aides in Republican and Democratic Congressional offices and with cooperating attorneys from SLDN's network of over 200 attorneys from the finest law firms in the country, carefully monitored and documented violations of the "Don't Ask, Don't Tell, Don't Pursue" policy. This report documents common command violations of four regulatory provisions in the "Don't Ask, Don't Tell, Don't Pursue" policy. Those provisions are called, not surprisingly, "Don't Ask," "Don't Tell," "Don't Pursue" and "Don't Harass." "Don't Harass" was never added to the common title of the new policy, but is nevertheless an explicit component of the policy.

"What is Don't Ask?" The "Don't Ask" regulations state that "servicemembers will not be asked about or required to reveal their sexual orientation." Violations of "Don't Ask" monitored by SLDN include (1) direct questions about sexual orientation, such as "Are you gay?"; (2) surrogate questions about sexual orientation where a servicemember is not asked directly about his or her orientation, but is asked through creative phrasing, as in "Do you find men attractive?"; and (3) inadvertent questions, where a commander does not realize that the question asked requires disclosure of sexual orientation, such as when a commander, out of concern for someone in his or her unit, asks what is troubling the servicemember, and the answer is that the servicemember is grappling with issues related to sexual orientation. The question would not pose a problem for a heterosexual servicemember but it does for the homosexual servicemember.

"What is Don't Tell?" With respect to "Don't Tell," the new regulations do not prohibit all statements about sexual orientation. Indeed, the new regulations do not forbid statements made to lawyers, chaplains, spouses or security clearance personnel. In violation of the new

policy, however, security clearance personnel continue to punish servicemembers who state they are gay by removal of or protracted delays in granting the clearances or, also in direct violation of the new policy, by threatening servicemembers with the denial of their clearance if they do not confess to their sexual orientation and any sexual activity. Additionally, the Pentagon has expanded "Don't Tell," in ways that the public is not aware, to include statements to family members, close friends, doctors and mental health professionals. Thus, violations of "Don't Tell" include incidents where statements to family members, close friends, doctors and mental health professionals and security clearance personnel have resulted in discharge or the threat of discharge of homosexual servicemembers.

"What is Don't Pursue?" The "Don't Pursue" portion of the new regulations states that (1) "sexual orientation is a personal and private matter;" (2) "inquiries shall be limited to the factual circumstances directly relevant to the specific allegations;" and (3) "credible information exists when the information, considering its source and the surrounding circumstances, supports a reasonable belief that a service member has engaged in homosexual conduct." Additionally, it is widely understood that the new regulations would "bring an end" to witch hunts, as President Clinton stated on July 19, 1993, and General Colin Powell reiterated upon the issuance of the new regulations. Some military commands continue to pursue homosexual or suspected homosexual servicemembers in a variety of ways. Violations of "Don't Pursue" include (1) witch hunts, (2) improper searches and seizures, (3) expanding investigations beyond the instant allegation, and (4) misapplication of the credible information standard.

While there is some overlap among these four prongs, each prong can be roughly defined as follows. Witch hunts are situations where inquiry officials ask servicemembers or take other

affirmative steps to identify suspected homosexuals or those they suspect have engaged in homosexual acts. "Improper searches and seizures" include illegal, warrantless searches, as well as zealous investigations where commanders confiscate personal and private property such as diaries and letters. "Expanding investigations beyond the instant allegation" includes situations, among others, where a servicemember who has been alleged to have engaged in a homosexual conduct on a specific occasion is investigated for any additional conduct in which the servicemember may have engaged in order to fish for information that could lead to criminal prosecution or lower discharge characterization. "Misapplication of the credible information standard" contemplates situations where a commander has not seriously evaluated the "source and the surrounding circumstances" of the allegations as required by the new regulations. Examples include situations where the commander has failed to examine or take into account (a) the retaliatory motives of an individual making the allegations, (b) the lack of consistency and coherence in the allegations, (c) recanted testimony, (d) exculpatory evidence, and (e) inadvertent discoveries in which no one knows about a servicemember's sexual orientation except through, for example, the discovery of a private letter by a commander during a surprise inspection.

"What is Don't Harass?" Lastly, the "Don't Harass" portion of the new regulations makes explicit that "the Armed Forces do not tolerate harassment or violence against any servicemember, for any reason." Violations of "Don't Harass" include death threats, physical harassment and verbal harassment made against servicemembers who are or are suspected of being homosexual. "Don't Harass" violations also include downgraded performance evaluations, denial of reenlistment and failure to promote due to sexual orientation.

Findings

SLDN CASES BY SERVICE

Service	Total # Cases	% Total Cases	Men	Women	Gender n/a
Air Force	49	26%	38	9	2
Army	55	29%	31	24	0
Navy	68	36%	56	11	1
Marine Corps	15	8%	12	3	0
Coast Guard	1	1%	1	0	0
TOTAL	188	100%	138	47	3

The cases received by SLDN spanned every branch of military service and were geographically dispersed. 36% of SLDN's cases came from military personnel in the U.S. Navy; 29% came from the U.S. Army; 26% from the U.S. Air Force; 8% from the U.S. Marine Corps; and 1% from the U.S. Coast Guard. Of the 188 cases followed, 138 servicemen contacted SLDN for help (73%), and 47 servicewomen contacted SLDN (25%). The number of women who contacted SLDN is disproportionate to their representation among the total active armed forces.

**SLDN CASES INVOLVING VIOLATIONS OF
 "DON'T ASK, DON'T TELL, DON'T PURSUE, DON'T HARASS"
 BY SERVICE
 (Total #, %)**

Service	Don't Ask	Don't Tell	Don't Pursue	Don't Harass
Air Force	8 (21%)	5 (28%)	24 (37%)	15 (24%)
Army	11 (30%)	9 (50%)	16 (25%)	17 (27%)
Navy	13 (35%)	2 (11%)	15 (23%)	23 (37%)
Marine Corps	4 (11%)	1 (5.5%)	10 (15%)	6 (10%)
Coast Guard	1 (3%)	1 (5.5%)	0 (0%)	1 (2%)
TOTAL	37 (100%)	18 (100%)	65 (100%)	62 (100%)

Of SLDN's 188 cases under the new policy, SLDN documented 37 cases where there were violations of "Don't Ask" (20% of its cases); 18 cases where there were violations of "Don't Tell" (18% of its cases); 65 cases where there were violations of "Don't Pursue" (35% of its cases); and 62 cases where there were violations of "Don't Harass" (33% of its cases). See Chart on the following page.

The U.S. Navy and U.S. Army accounted for the most cases involving violations of "Don't Ask," accounting for 35% and 30% of such cases respectively. The U.S. Army accounted for the most cases misapplying or redefining "Don't Tell," accounting for 50% of all such cases. The U.S. Air Force accounted for the most cases involving violations of "Don't Pursue" accounting for 37% of all such cases. The U.S. Navy accounted for the most cases involving violations of "Don't Harass," accounting for 37% of all such cases.

The total number of cases involving violations does not total the 188 cases received by SLDN because some cases did not involve any regulatory infractions by military officials. Thus,

the total number of cases involving violations reported above is 182.

The total number of cases involving violations also does not take into account multiple violations occurring in the same case. In the past year, SLDN documented 65 violations of "Don't Ask," 21 violations of "Don't Tell," 114 violations of "Don't Pursue," and 140 violations of "Don't Harass," for a documented total of 340 overall violations during the past year. The multiple violations indicate that in cases where there is one incident of asking, pursuit or harassment, others are likely.

It is clear that some commanders continue to violate "Don't Ask, Don't Tell, Don't Pursue, Don't Harass" in a myriad of ways. A few examples of how the new policy on homosexuals is being improperly implemented in the field are the following.

Examples of Violations of "Don't Ask." Violations of Don't Ask include asking direct, surrogate, or inadvertent questions about sexual orientation.

Asking direct questions about sexual orientation. One Chief of Boat asked a sailor "You not going to tell me you're a f___ faggot, are you?" In Japan, CID Special Agent Jose Abrante asked a marine point blank: "Are you gay?" In Florida, recruiters asked one recruit whether she is homosexual five times, both verbally and through use of outdated written forms. In the Washington, D.C. area, a security clearance investigator asked, "I'm not going to ask you if you're homosexual, but if I did ask, how would you respond?"

Asking surrogate questions about sexual orientation. An inquiry official asked a male Sergeant, "Do you find men attractive?" An executive officer asked a PFC whether she had "homosexual tendencies." A security clearance investigator asked an Army Major about her female roommate, "Do you have a physical relationship with your roommate?" Another security clearance investigator at Ft. William, AL, asked during an interview whether the individual knew "any homosexuals?"

Asking inadvertent questions about sexual orientation. Out of concern, a Naval commander asked one his unit members why he had not reported to work one day. The servicemember honestly told him that he and his male partner had a family emergency, and was subsequently discharged for his statement. Another commander asked why a servicemember's security clearance had been held up.

The reason was that the member had followed regulations and was honest with the investigators about his orientation.

Violations of "Don't Tell." Violations of "Don't Tell" include using statements from family members, doctors and psychologists and security clearance personnel for purposes of discharge.

Using statements from family members. Air Force Capt. Earl Brown's parents were asked in detail about their son's sexual orientation and statements made by Capt. Brown to his mother and father were included among the statements for which he was to be discharged. An Air Force doctor's mother says she was shocked when an inquiry official contacted her to ask about her son's sexual activities. Indeed, the Department of Air Force issued a memorandum on November 3, 1994 specifically directing inquiry officials to "interview...parents and siblings" to obtain information to be used as a basis for discharge.

Using statements from doctors and psychologists for purposes of discharge.

Corporal Kevin Blaesing, with the Marine Security Force in Charleston, South Carolina, was turned in by his Naval psychologist for asking questions about sexuality during private counseling sessions. His commander, Lt. Col. Martinson, ordered that he face discharge proceedings despite advice from his legal advisors not to proceed. Another servicemember in the Air Force was advised by his psychologist that disclosure of his sexual orientation would be conveyed to his commanding officer for purposes of discharge; the servicemember, however, stated that his priority was mental health services and that he could not obtain full and adequate treatment without some discussion of issues related to his sexuality. He now faces discharge.

Using statements made during security clearances for purposes of discharge.

In violation of the new policy, security clearance personnel continue to punish servicemembers who state they are gay by removal of or protracted delays in granting the clearances. In direct violation of the new policy, servicemembers are also threatened with the denial of their clearance if they do not confess to their sexual orientation and sexual activity.

Violations of "Don't Pursue." Violations of "Don't Pursue" include (1) witch hunts, (2) improper searches and seizures, (3) expanding inquiries beyond the instant allegations, and (4) misapplying the credible information standard.

Witch hunts: Asking about the orientation and conduct of others. SLDN documented 15 actual or attempted witch hunts under the new regulations where commanders and inquiry officials asked military members to identify other servicemembers who were or were suspected to be homosexual. In Japan, over twenty-one servicemembers were questioned regarding the sexual orientation and private lives of their co-workers. At New River Station, North Carolina, immediately after briefing his unit about the military's new policy on March 1, 1994, a marine Master Sergeant told his troops that, despite the regulations, they had "a moral duty and an obligation" to turn in suspected homosexuals. At Pope Air Force Base, North Carolina, a commander reportedly asked for a list of all Combined Federal Campaign (CFC) contributors to gay and AIDS organizations; the commander dropped his order once the incident was publicly reported.

Improper searches and seizures. Overzealous commands continue to conduct or condone illegal searches and seizures of items belonging to suspected homosexual servicemembers. Additionally, they continue to confiscate personal and private items, as well as circumstantial evidence, that should have no bearing on an inquiry, per regulation. Commanders and inquiry officials routinely seize personal diaries, private letters, address books, personal computers, erased computer files, photos of friends, copies of popular gay-themed books and videos like "Torch Song Trilogy," HIV pamphlets, academic notes from classes on human sexuality, and, in one servicemen's case, even a pair of men's platform shoes.

Expanding inquiries beyond the "instant allegations." Commands routinely expand the scope of an investigation beyond the instant allegations. Thus, a person who has admitted to being gay will be asked to additionally confess to homosexual acts in order to gather information that could lead to criminal prosecution or lower discharge characterization. Servicemembers who are under investigation for allegations of homosexual acts are often questioned about other acts beyond the instant allegation. Inquiry officials in North Carolina, for example, asked more than 25 servicemembers to speculate about the sexual orientation and activities of one marine, beyond the two allegations she faced.

Misapplying credible information standard. A seaman faces discharge after his roommate, while snooping in the seaman's personal desk, discovered and read several letters from which he concluded that the seaman might be gay, and turned the letters over to the command. In another case, a seaman was asked by his superior if he is gay and he answered truthfully; the command has decided to proceed with a discharge board despite the clear "don't ask" violation.

Violations of "Don't Harass." Violations of "Don't Harass" include (1) death threats

based on sexual orientation, (2) targeted physical and verbal harassment based on sexual orientation, and (3) downgraded performance evaluations, denial of reenlistment and failure to promote due to sexual orientation.

Improper response to death threats. SLDN received 10 cases where servicemembers were threatened with their lives for being or being suspected of being gay. One commander in Misawa, Japan, Captain Miller reportedly told a heterosexual servicemember "You're going to die," after the servicemember's recommended separation for alleged homosexual conduct had been overturned. A new recruit at Parris Island was told she was not "going to walk out of here alive" if she reported being physically assaulted for being suspected of being lesbian. A seaman reports finding a noose next to his berthing onboard ship having previously found a note scrawled on a magazine photo that read "Die Fag." The Pentagon has established no means whereby servicemembers can report death threats with a guarantee that the report will not be used as a basis to start an investigation against them.

Improper response to harassment (physical/verbal) and extortion.

As with death threats, the Pentagon has established no means whereby servicemembers can report harassment with a guarantee that the report will not be used as a basis to start an investigation against them. SLDN has received 69 reports of targeted physical and verbal abuse based on their perceived orientation. A majority report command climates rife with derogatory comments about gays. One servicemember reports that someone gouged his new car with keys and scrawled into the paint the word "fag."

Downgraded performance evaluations, denial of reenlistment and failure to

promote due to sexual orientation. Lt. Col. Trask admitted on the record at a discharge board that he downgraded the evaluation of and recommended against promotion for Captain Rich Richenberg, an officer who ranked in the top ten percent of all Air Force officers prior to Lt. Col. Trask's actions, solely because Richenberg is gay. After Corporal Kevin Blaesing, Marine of the Quarter for his unit, succeeded in having his recommended separation overturned, his commander, Lt. Col. Martinson, downgraded his performance evaluations contrary to the recommendations of Blaesing's supervisors and gave Corporal Blaesing the lowest possible recommendation for reenlistment, thus effectively killing Blaesing's opportunity to reenlist and continue his military career.

Notably, there is little to no harassment of open lesbian and gay service personnel who

have remained in service due to court order or discharge board recommendation. In fact, all documentation shows that those individuals enjoy the wide support of their colleagues, co-workers and commands.

These cases make clear that either through a lack of training or willful disregard of the new policy, some commanders continue to ask, pursue and harass servicemembers in direct violation of the new policy.

DOD DISCHARGES OF SERVICEMEMBERS FOR HOMOSEXUALITY

Fiscal year	Air Force	Army	Navy	Marine Corps	Total	% Total Armed Forces
1991	151 (15.9%)	206 (21.7%)	545 (57.4%)	47 (5.0%)	949 (100%)	.04
1992	111 (15.7%)	138 (19.5%)	401 (56.6%)	58 (8.2%)	708 (100%)	.04
1993	152 (22.2%)	156 (22.9%)	334 (49.0%)	40 (5.9%)	682 (100%)	.04
1994	180 (30.1%)	136 (22.8%)	245 (41.0%)	36 (6.0%)	597 (100%)	.04
Total	594	636	1525	101	2936	.04

The result of the widespread violations is that the rate of discharge for homosexuals has not declined, as expected. Despite the belief that the interim and new regulations would be as President Clinton remarked, "a major step forward," the rate of discharge of homosexuals from

1991 to 1994 has remained constant at .04% of the total active force.

The distribution of discharge cases by service as reported by the Pentagon, however, has markedly changed for two services. The Navy's percentage of homosexual discharge cases compared with other services has declined from 57.4% of total discharges in 1991 to 41% of total discharges in 1994. On the other hand, the U.S. Air Force has contributed more to total discharges during the same time frame. In 1991, the U.S. Air Force accounted for only 15.9% of total homosexual discharges; in 1994, the U.S. Air Force accounted for 30.1% of total homosexual discharge cases. The Pentagon's figures suggest that the Air Force has significantly increased its efforts to target and discharge homosexual servicemembers over the last four years, and especially during fiscal year 1994.

The dollar costs of the military's policy on homosexuals continues to be high. Based on figures the Pentagon supplied to the General Accounting Office in 1992, the last time the Pentagon provided such information, the cost of training servicemembers to replace those discharged for homosexuality totaled \$17.5 million in fiscal year 1994 (See Table on following page). The costs from 1991 to 1994 totaled \$86.5 million. These figures are not adjusted for inflation and do not include the costs to investigate servicemembers, the costs of holding and preparing for administrative discharge hearings or the costs of administering the policy. Nor do the figures include the significant cost of defending the policy in federal court. SLDN has no independent estimates of the costs of the DOD policy.

**COSTS OF TRAINING REPLACEMENTS FOR SERVICEMEMBERS
DISCHARGED UNDER HOMOSEXUAL CONDUCT POLICY**

Year(s)	# Discharged	Costs³
1980-1990	16,919	\$498,555,244
1991	949	\$27,964,355
1992	708	\$20,862,764
1993	682	\$20,096,617
1994	597	\$17,591,907
TOTAL	19,855	\$585,070,887

In summary, it is clear that many military commanders continue to ask, pursue and harass servicemembers in direct violation of the new policy. Evidence of the continuing violations comes not only from servicemembers' cases documented by SLDN and its cooperating attorneys, but from memoranda issued by the Department of the Air Force, Department of Navy and others. The question is why these abuses have occurred.

Analysis

³ Costs are based on figures and percentages reported in a General Accounting Office study, Defense Force Management: Statistics Related To DOD's Policy on Homosexuality (June 1992). The GAO reported that the Department of Defense discharged 16,919 servicemembers for homosexuality from 1980-1990 at a cost of \$498,555,244. The costs figures for 1991-1994 are based on the ratio of discharges in year x divided by the costs in year x set equal to the ratio of discharges in years 1980-1990 divided by the costs in years 1980-1990. *The cost figures have not been adjusted for inflation.*

Reasons for command violations. There are four common reasons for command violations of "Don't Ask, Don't Tell, Don't pursue, Don't Harass: (1) commanders and others lack information; (2) commanders and others do not understand the policy; (3) insubordination by commanders, investigators and prosecutors; and (4) commanders and others have no incentive to learn or follow the rules.

Commanders and Other Leaders Lack Information. Some command violations can be attributed to lack of information about the new policy. A major problem has been inadequate distribution of the new regulations. Throughout the past year, numerous commanders, defense attorneys and servicemembers have contacted SLDN in search of current copies of the DoD and service regulations because they were not available in their commands. As recently as three weeks ago, SLDN was required to ship these regulations to an overseas trial defense office.

Commanders and Others do not Understand the Policy. Other command violations stem from insufficient training, and therefore understanding, of the policy. Even the Pentagon concedes that training on the new policy has been handled less diligently than other personnel policies, such as those on sexual harassment.⁴ The most striking gap in training has been the failure of the Department of Defense (DoD) to issue sufficient guidance regarding the intent of the new policy to military leaders as well as servicemembers. This is an especially critical oversight in light of the broad discretion afforded commanders under the policy. Without an understanding of the intent of the policy, many commanders and prosecutors have focused their efforts on how to skirt the letter of the regulations.

⁴ Art Pine, "Few Benefit From New Military Policy on Gays," Los Angeles Times, A1, A8.

Insubordination by Commanders, Investigators and Prosecutors. An alarming number of command violations documented by SLDN result from outright insubordination, not lack of information or inadequate training. These violations are fueled, in part, by a climate of backlash in many units. The controversy over President Clinton's proposal to lift the ban charged the atmosphere in the military and focused unprecedented attention on the private lives of servicemembers. Since that time, everyone from private to general officer has speculated about who in the ranks might be gay. In this climate, many commanders and others have taken the Congressional vote against lifting the ban as a license to go after those whom they suspect are gay. As Lawrence J. Korb, former Assistant Secretary of Defense for Personnel and Readiness under President Reagan, recently stated, "I think the military feels they have beaten Clinton back on this issue and they're not going to change."⁵ As a result, many servicemembers are actually worse off than before.

Commanders Have No Incentive to Learn or Follow the Rules. A major problem is that the Department of Defense has established no means to monitor cases and to correct violations and misapplications of the policy. Although Department of Defense regulations provide that commanders and others who violate the policy may be disciplined, this provision has been roundly ignored. SLDN knows of no commander or other military member who has yet been disciplined for abusing the policy, despite numerous complaints.

The military's treatment of servicemembers who are harmed by command violations of the policy exacerbates the problem of accountability. Servicemembers presently have no official means of redress for command violations. As just one example, a young sailor is currently being

⁵ Id.

discharged solely because he responded truthfully to his supervisor's direct question about his sexual orientation, even though the command admitted on the record that the supervisor's action violated the new policy. To date, DoD and the services have been unwilling to provide a common sense resolution to this and similar situations.

The clear message to commanders is that they do not have to take the new policy seriously and that, if so inclined, they may violate it with impunity.

Analysis of "Don't Ask" Violations. "Don't Ask" is a simple, well-publicized mandate. Unlike some other provisions, there is no ambiguity in this part of the regulations. Nevertheless, commanders and other leaders continue to ask servicemembers about their sexual orientation, often repeatedly. While a few commanders have done so inadvertently, the overwhelming majority have violated "Don't Ask" through direct questions about sexual orientation and surrogate questions designed to circumvent the letter of the regulations. The facts and circumstances surrounding these violations indicate that almost all were deliberate. The degree of thought and ingenuity evident in devising many of the surrogate questions further indicates a climate of insubordination in many commands.

Analysis of "Don't Tell" Violations. Most military leaders fail to understand that the new policy does not preclude all statements regarding sexual orientation and that it recognizes a zone of privacy for all servicemembers.⁶ Over the past year, military leaders have established two clear trends that violate "Don't Tell." They have (1) punished statements of sexual orientation

⁶ In announcing the new policy, President Clinton charged DoD civilian and military leaders to "carry out this policy with fairness, with balance and with due regard for the privacy of individuals." "Text of President Clinton's Announcement of the New Policy," Washington Post, July 20, 1993, A12. The new regulations also state that "sexual orientation is a personal and private matter."

that are permissible under the new policy, and (2) expanded the situations where telling is prohibited in order to reach the most private spheres of servicemembers' lives. The most prominent cases involving the first trend have occurred in the context of security clearance investigations. Security clearance regulations encourage gay servicemembers to be forthcoming about their sexual orientation and to reveal whether their family and close associates are aware of it. The regulations state that "information about homosexual orientation or conduct obtained during a security clearance investigation will not be used...in separation proceedings." The regulations further state that a servicemember may decline to answer questions about sexual orientation without adverse consequence. In reality, however, security clearance personnel continue to threaten servicemembers with denial of clearances for either stating or declining to state their sexual orientation. Denial of a security clearance effectively kills the servicemember's career. Additionally, some commands have attempted to use the information obtained during security clearance interviews for purposes of discharge, in direct violation of the new policy.

The chief problem with the security clearance regulations is that they are inconsistent with the other sections of the military's policy on homosexuals. Those charged with implementing the security clearance regulations in light of the other policy provisions do not know whether or not to ask about sexual orientation and how to respond to the answers forthcoming. Servicemembers do not know how or if to respond to questions about sexual orientation, given the regulations' conflicting guidance. Thus, confusion results and homosexual servicemembers typically receive the short end of the stick.

Servicemembers and their families have also been shocked by the Department of Defense's expansion of situations where telling is prohibited. At least some commanders have violated this

prong of "Don't Tell" as a direct result of guidance from the top levels of the Pentagon. A Department of the Air Force memo from Judge Advocate General Headquarters to all Staff Judge Advocates and military judges dated November 3, 1994 actually instructs inquiry officers to question parents about the sexual orientation and activities of their children to obtain information for purposes of discharging their sons and daughters. The memo also instructs officers to interrogate close civilian friends and mentors, such as high school guidance counselors, to determine whether a servicemember has ever discussed their orientation.

Additionally, the Department of Defense instructs psychologists to turn in servicemembers who seek private counseling about their sexual orientation. In response to public outcry in the wake of one case, the Department of Defense General Counsel's office simply announced that the military would not treat statements to psychologists as privileged and confidential. The response entirely brushes aside the issue of whether such private statements are the kind of statements contemplated as a grounds for discharge under the new policy.

This attempt to enforce a gag rule in the context of communications with family and professional health care providers is chilling. Most Americans would be appalled to learn that their tax dollars are being spent on such unprecedented invasions into relationships that are generally considered private and confidential.

A related problem is the "outing" of gay servicemembers by their commanders. Although a detailed analysis is outside the scope of this report, it should be noted that some commanders have told their units, and even a servicemember's spouse and parents, that the servicemember was under investigation for homosexual conduct, in direct violation of the Privacy Act. "Outing" is not only a violation of servicemembers' privacy, but it has also jeopardized the safety of

servicemembers in commands where harassment is tolerated.

Analysis of "Don't Pursue" Violations. The words "Don't Pursue" do not actually appear in the policy or regulations. Instead, the concept is communicated through two primary standards. First, commanders or investigators may not initiate an inquiry or investigation unless, considering the source and surrounding circumstances, they have credible evidence that a servicemember has engaged in homosexual conduct. Information based on opinion, rumor and capricious claims does not constitute credible information. Second, inquiries and investigations must be limited to the scope of the instant allegation.

"Don't Pursue" was intended, in part, to stop the military's infamous witch hunts of suspected homosexuals. Like "Don't Ask," this concept has been well-publicized and communicated through the ranks. General Colin Powell testified before the Senate Armed Services Committee that the new regulations held forth that "We won't witch hunt. We won't chase. We will not seek to learn orientation."⁷ Nevertheless, SLDN documented fifteen attempted and actual witch hunts over the past year. Most were initiated in deliberate violation of the new policy.

Among those commanders who wish to follow the regulations, most do not comprehend the actual standards of "Don't Pursue." Some commanders know that they must be able to articulate a basis to begin an inquiry against a servicemember. Army and Air Force commanders are supposed to write down their justification for beginning an inquiry. A significant problem, however, is that the vast majority of commanders do not know what constitutes credible

⁷ Federal News Service, Testimony Before Senate Armed Services Committee, July 21, 1993.

information. The policy itself provides little guidance on how to interpret this inherently subjective and vague standard. A major consequence is that commanders apply the policy inconsistently throughout the services and even in the same commands. Additionally, commanders routinely initiate inquiries and investigations against servicemembers based only on hearsay or circumstantial evidence, contrary to the clear intent of the regulations. These trends are evident in the following examples.

In the case of Corporal Blaesing, who asked questions of his psychologist, his first commander did not consider his questions as evidence of homosexual conduct and allowed him to continue service. When this commander later retired, his successor revived the case, notwithstanding the fact that the Navy psychologist testified that she did not know Blaesing's orientation and that he had not stated it to her. As a result, Blaesing was forced to face discharge proceedings and was recommended for separation.

In identical cases from the Air Force, two commanders inadvertently discovered private letters belonging to one of their airmen that contained language that could be interpreted as hints about homosexuality. One commander made no issue of the letters and allowed the airman to stay; the other investigated and discharged the airman based solely on the letters. SLDN has also found that most commanders are not even aware of the standard to limit inquiries to the scope of the instant allegations. Thus, even where inquiries are properly initiated, they inevitably become fishing expeditions into all aspects of a servicemember's private life. In the case of Lance Corporal Elena Martinez, an inquiry that was not initiated properly, her supervisor directly solicited co-workers to make allegations of homosexual conduct against her. Two male marines lodged allegations that Martinez had danced with both men and women at a popular local club

and that, on another occasion, she had given another woman a goodbye peck on the cheek. Based on this report, the command initiated an inquiry in which they questioned over twenty-five co-workers and civilian acquaintances, including former landlords, inviting them to speculate about every detail of Martinez' private life. Further, her supervisor directly ordered co-workers to monitor and report on Martinez's social activities. Even if the basis of this inquiry had been legitimate, the command's wide-ranging campaign into Martinez's personal life clearly violated the requirement to limit inquiries to the scope of the instant allegation.

Many commanders and investigators use this tactic of expanding investigations beyond the scope of the instant allegation in a deliberate effort to dig up information to support a less than honorable discharge characterization or criminal charges against servicemembers who are or are perceived to be gay.

Analysis of "Don't Harass" Violations. Like "Don't Ask," the mandate against harassment is unambiguous. It forbids harassment of any kind against any servicemember. This mandate is not unfamiliar to commanders. In the wake of the Tailhook scandal, it has become a standard order. Nevertheless, SLDN's cases show that harassment and death threats against suspected gay servicemembers are worse than ever.

Poor leadership is the primary reason for the high incidence of harassment. A majority of servicemembers who have called SLDN report that their supervisors have witnessed incidents of harassment and have taken no steps to correct it. In an alarming number of SLDN's cases, members of the chain-of-command have actually participated in harassment against suspected gays. In addition, some commanders have retaliated against gay servicemembers through downgraded performance evaluations or by denying them reenlistment. These actions send a clear

message that harassment is condoned.

SLDN's data also show a high correlation between harassment and "Don't Pursue" violations. In units where commanders pursue gays, servicemembers report that they feel great pressure to prove that they are not gay. One way to do so is to make derogatory comments about gays in the company of co-workers and to directly harass other servicemembers who are perceived as gay. Servicemembers report that, if they do not participate in such activities, they are quickly labeled as gay and harassed.

In light of these findings, it is not surprising that the majority of servicemembers who have called SLDN report that derogatory comments and harassment of suspected gays has been a regular occurrence in their units since the national debate.

Servicemembers who wish to complain about harassment or death threats face significant obstacles. There is no guarantee that commands will not use a report of harassment or death threats as a basis for investigation and discharge of the threatened servicemember. At best, servicemembers who have dared to file complaints have simply been ignored by their chain-of-command. As a result of the lack of response and threat of discharge, most incidents of death threats and harassment go unreported.

In stark contrast, there has not been a problem with harassment in those units with openly gay servicemembers, many of whom are serving by court order. Nor has there been a problem in units with commanders who have made it clear to their troops that they will not tolerate harassment. This suggests the truth of the old maxim that "Troops follow the flag." In short, harassment occurs because of a unit's leadership, not despite it.

Conclusion/Recommendations

SLDN concludes that many military officials continue to ask questions about sexual orientation, conduct witch hunts and condone harassment of lesbian and gay servicemembers in direct violation of "Don't Ask, Don't Tell, Don't Pursue." SLDN further concludes that the chief reasons for the continuing violations are lack of information, lack of adequate training and guidance regarding the new policy, and in some cases, willful disregard of military policy by commanders and others.

SLDN recommends that the Department of Defense ensure the proper implementation of "Don't Ask, Don't Tell, Don't Pursue" by providing (1) adequate information to and training for all servicemembers about the new policy, (2) common sense remedies to servicemembers who are harmed by command violations, and (3) clear accountability for violations of the policy by military officials.

Provide Adequate Information and Training. The Department of Defense should ensure that full DOD Directives, Guidance and Service Regulations reach the field. Attorneys and commanders often possess only the message text of the service regulations sent to the field on February 28, 1994, with no guidance on how to interpret those regulations. At a minimum, military officials should have the full DOD Directives, Commander's Guidance, DOD Guidelines dated July 20, 1993, and all DOD and service guidance necessary to interpret the regulations.

Additionally, the Department of Defense should clearly and strongly communicate the intent of the new policy to stop anti-gay harassment and pursuits of suspected homosexual servicemembers. At present, the intent of the new policy has not been adequately disseminated to the field and, thus, is not widely known or understood. In order to apply the legal standards of the new policy, commanders must, as with all regulations, understand the "commander's intent"

behind the policy itself. Advisors to the command, particularly military attorneys and Inspectors General, must also understand its intent. Clear intent is vital given the current hostile command climate in many commands, the wide discretion afforded commanders and the ambiguity of some policy standards. At a minimum, all existing command and advisory channels should be vigorously utilized to communicate and reinforce the intent of the policy. All servicemembers and unit leaders need to be trained on the policy and the expectations for their behavior.

The Department of Defense should also issue further guidance on legal standards. Even armed with all existing materials, there is still a clear need for more information on the meaning of the new standards. The credible information standard needs particular elaboration. Credible information should be defined to exclude reports of harassment or death threats, information obtained by the command through illegal means, use of private statements to parents, siblings and psychologists, or inadvertent disclosures, such as when a supervisor discovers a letter after snooping through the personal possessions of a unit member.

Provide Common Sense Remedies for Command Violations. "Don't Ask, Don't Tell, Don't Pursue" means nothing if servicemembers must pay the price for improper questions, witch hunts, and harassment. Enforcement of military regulations and acts of law is not discretionary. Thus, homosexual servicemembers who are discovered through improper methods should be afforded a common sense remedy, like other victims of command impropriety. Decisionmakers, for example, are not permitted to disregard claims by women that they have been retaliated against for reporting sexual harassment and rape. Where claims are substantiated, they must take steps to correct the retaliation.

The Department of Defense should establish measures to ensure command compliance

with the new regulations. Advisors to the command, including military prosecutors and Inspectors General, must understand their role to ensure that credible information exists at the outset of an inquiry or investigation, not merely to justify poor, let alone illegal, actions by the command. Where an inquiry is appropriate, JAGs need actively to advise inquiry officers, who typically have no legal training or experience with the regulations, on the parameters of the inquiry.

The Department of Defense should also order Staff Judge Advocates to monitor violations by investigative agents. SJAs should make clear to base MCIOs that investigative violations will not be tolerated and ensure that agents are trained in proper and improper investigative tactics.

The Department of Defense should also issue strong, clear guidance regarding harassment and threats. The one sentence in the "Don't Ask, Don't Tell, Don't Pursue" regulations forbidding harassment has proven inadequate. A top-down policy of zero tolerance is required instead. As a minimum, servicemembers must be able to report death threats and harassment and their underlying basis without fear that the report will be turned against them for purposes of investigation and discharge. Based on SLDN's experience, many complaints are likely to require disclosure of a servicemember's sexual orientation or details of their private lives. For this reason, and because even legitimate questions going to a servicemember's safety can result in "incriminating" answers, complainants should be exempted from discharge and investigation and should be afforded counsel. It is reasonably foreseeable that if the Department of Defense does not take corrective actions now, deaths of actual and perceived homosexual servicemembers, like slain sailor Allen Schindler, will occur.

The Department of Defense should prevent the use of security clearance interviews as a

loophole for targeting suspected homosexuals. DOD should take strong steps to ensure compliance by Defense Investigative Service (DIS) agents with DIS regulations and the intent of the DOD directives. The present situation putting servicemembers' careers and liberty in jeopardy for truthful responses regarding their sexual orientation is untenable. Already, without such attention, the security clearance process has become a back channel to obtain information for commands and pursue suspected homosexuals.

Provide Adequate Review And Accountability. Those who are willfully disobeying the letter and intent of the new policy on homosexuals will continue to do so unless they are held accountable for their insubordination. Those violating the new regulations out of ignorance will also continue to do so as long as there is no incentive to learn and abide by the policy.

The Department of Defense needs to amplify disincentives to prevent violations of the policy. Currently, guidance is needed regarding procedures to initiate discipline against commanders and others who violate the policy, as provided for in the DOD directives. To date, no commander has been disciplined for violating provisions in "Don't Ask, Don't Tell, Don't Pursue" despite many complaints. Further, information obtained as the result of violations should be excluded and inquiries/investigations found to have been initiated without credible information should bar prosecution and discharge. Security clearance regulations should bar transfer of information to the military command. Annotations in servicemembers files based on information obtained as the result of improper command actions should be prohibited.

These three broad recommendations, information and training, common sense remedies, and accountability, are only a handful of recommendations specifically targeted to the violations detailed in this report. The recommendations are intended to bring commanders and other

military officials into compliance with military regulations and law. The recommendations are intended to ensure that "Don't Ask" means don't ask; "Don't Tell" does not mean interrogate family, doctors and psychologists; "Don't Pursue" means don't pursue; and "Don't Harass" means don't harass.

SLDN will continue to monitor the Department of Defense's implementation of its newest policy on homosexuals and report on its progress in complying with the policy's provisions.