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The Flawed Compromise of 10 U.S.C. § 654: An Assessment of the Military's "Don't Ask, Don't Tell" Policy

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COMMENTS

THE FLAWED COMPROMISE OF 10 U.S.C. § 654: AN ASSESSMENT OF THE MILITARY'S “DON'T ASK, DON'T TELL” POLICY

*Aaron A. Seamon**

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I. INTRODUCTION

In 1997, Ms. Helen Hajne, a civilian Navy volunteer, received an electronic mail (“e-mail”) message through America Online Service (“AOL”) regarding a Christmas toy drive which was being coordinated for the children of the crew members aboard the United States nuclear

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submarine, USS *Chicago*.¹ The sender of the e-mail message asked for the ages of the children so that the sender could help with the organization of the Christmas toy giveaway.² The e-mail message was simply signed "Tim." Out of curiosity regarding a prior correspondence, Ms. Hajne decided to examine the AOL "member profile directory" in an effort to ascertain the identity of the sender.³ The directory showed that "Tim" was an AOL subscriber residing in Honolulu, Hawaii, who was a member of the armed services.⁴ In addition, "Tim's" marital status was listed as "gay."⁵

"Tim," it was discovered, was actually Senior Chief Timothy R. McVeigh,⁶ a seventeen-year veteran of the United States Navy who was the senior-most enlisted member aboard the *Chicago*.⁷ Shortly thereafter, McVeigh's "marital status" was made known to Commander John Mickey, McVeigh's commanding officer.⁸ Based solely upon the information derived from the AOL member profile directory, the Navy initiated an investigation to determine the user's identity.⁹ A naval investigator

¹ Plaintiff's Complaint at 9, *McVeigh v. Cohen*, 983 F. Supp. 215 (D.D.C. 1998) (No. 98-116) (on file with the *University of Dayton Law Review*) [hereinafter Plaintiff's Complaint]; see Memorandum from LCDR Randall G. Richards to Commander, Submarine Squadron Three and Record of Proceedings of the Administrative Board in the Case of Timothy R. McVeigh, at 81-82 (Nov. 7, 1997) (on file with the *University of Dayton Law Review*) [hereinafter *McVeigh Proceedings*].

² Plaintiff's Complaint, *supra* note 1, at 9; see *McVeigh Proceedings*, *supra* note 1, at 81-82.

³ Plaintiff's Complaint, *supra* note 1, at 9; see *McVeigh Proceedings*, *supra* note 1, at 10.

⁴ Plaintiff's Complaint, *supra* note 1, at 9.

⁵ *Id.*; *McVeigh v. Cohen*, 983 F. Supp. 215, 217 (D.D.C. 1998). As noted by Judge Sporkin, "[a]lthough the profile included some telling interests such as 'collecting pics of other young studs' and 'boy watching,' it did not include any further identifying information such as full name, address, or phone number." *Id.*

⁶ Senior Chief McVeigh "bears no relation to the Oklahoma City bombing defendant." *Id.* at 216.

⁷ *McVeigh*, 983 F. Supp. at 217; Plaintiff's Complaint, *supra* note 1, at 3. As noted in Plaintiff McVeigh's Complaint:

Plaintiff Timothy R. McVeigh is a thirty-six year old senior chief petty officer in the Navy. . . . Senior Chief McVeigh joined the Navy after high school and served honorably and with distinction for over seventeen years. Senior Chief McVeigh was accepted into the Navy's elite corps of nuclear submariners and rose to become the Chief of the Boat—the senior enlisted man reporting directly to the Captain—aboard the USS *Chicago*, a nuclear-powered attack submarine.

Id.

⁸ *McVeigh*, 983 F. Supp. at 217. Ms. Hajne forwarded the user profile to her husband who was a non-commissioned officer on board the *Chicago*. *Id.* From there, the message was given to Commander Mickey. *Id.*

⁹ Plaintiff's Complaint, *supra* note 1, at 10. Senior Chief McVeigh alleged in his complaint: "[a]lthough Senior Chief McVeigh's commanding officer, Commander Mickey, was aware of the E-mail . . . , Commander Mickey chose not to initiate an investigation. In fact, Commander Mickey testified at the administrative board hearing that '[he] didn't see any point in investigating' when he received the E-mail and profile." *Id.*; see *McVeigh Proceedings*, *supra* note 1, at 64.

contacted AOL and ascertained the identity of the username.¹⁰ The naval investigators neither identified themselves as being from the armed services nor gained prior authorization for their inquiries from Senior Chief McVeigh.¹¹

In a letter dated September 22, 1997, the Navy informed McVeigh that it was commencing administrative discharge proceedings¹² “by reason of homosexual conduct as evidenced by your [McVeigh’s] statement that you are a homosexual.”¹³ Apparently, McVeigh affirmatively “told” the Navy of his sexual orientation through his anonymous e-mail profile, in violation of 10 U.S.C. § 654, the “Don’t Ask, Don’t Tell, Don’t Pursue” policy (“Don’t Ask, Don’t Tell”).¹⁴ A federal district court granted a

While Commander Mickey chose not to initiate an investigation, Christopher R. Earl, Deputy Commander for Commander, Submarine Squadron Three, relieved Commander Mickey of his duty to investigate and had Lieutenant Karin Morean of the Judge Advocate General’s office investigate the matter. Plaintiff’s Complaint, *supra* note 1, at 10-11; see McVeigh Proceedings, *supra* note 1, at 65.

¹⁰ *McVeigh*, 983 F. Supp. at 217. Lieutenant Morean instructed a Navy investigator, Legalman First Class Joseph M. Kaiser, to contact AOL to determine whether the e-mail author was Senior Chief McVeigh. Plaintiff’s Complaint, *supra* note 1, at 11; McVeigh Proceedings, *supra* note 1, at 10. Legalman Kaiser contacted AOL and spoke with a service representative. Plaintiff’s Complaint, *supra* note 1, at 11; McVeigh Proceedings, *supra* note 1, at 11. Instead of identifying himself to the AOL representative, Kaiser stated that he wanted to confirm a fax sheet which he had received to ascertain the sender’s identity. Plaintiff’s Complaint, *supra* note 1, at 11; McVeigh Proceedings, *supra* note 1, at 11. The service representative identified Timothy R. McVeigh as the name listed with the profile. Plaintiff’s Complaint, *supra* note 1, at 11-12; McVeigh Proceedings, *supra* note 1, at 11.

¹¹ Plaintiff’s Complaint, *supra* note 1, at 11.

¹² The Advisory Board on the Investigative Capabilities of the Department of Defense described administrative separation proceedings as follows:

Administrative separation proceedings result from employment decisions, and they are not a part of the criminal justice system. Although as a practical matter the results of these proceedings—discharge from the Service—can be quite detrimental, the servicemember is not convicted of or punished for a crime. Instead, a person who is discharged pursuant to an administrative separation proceedings has been found not to satisfy the Service’s standards.

1 REPORT OF THE ADVISORY BOARD ON THE INVESTIGATIVE CAPABILITY OF THE DEPARTMENT OF DEFENSE 96 n.270 (1995).

¹³ Letter from Commander, Submarine Squadron Three, Pearl Harbor, Department of the Navy, to Timothy R. McVeigh (Sept. 22, 1997) (on file with the *University of Dayton Law Review*) (regarding administrative board procedure).

¹⁴ 10 U.S.C. § 654 states in part:

(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;

permanent injunction preventing the discharge of McVeigh, finding that the Navy "violated the very essence of 'Don't Ask, Don't Pursue' by launching a search and destroy mission."¹⁵

McVeigh's history is but one example within the last five years of attempts by the U.S. armed forces to discharge servicemembers in violation of the "Don't Ask, Don't Tell" policy. Although the "Don't Ask, Don't Tell" policy was actually codified over five years ago, debate over the policy continues. Numerous critics have correctly charged that the "Don't Ask, Don't Tell" policy in its current form is a failure¹⁶ and that, as demonstrated by McVeigh's case, "the services *are* asking, *are* pursuing, and *are* discharging."¹⁷

This Comment argues that the flaws in the "Don't Ask, Don't Tell" policy, though perhaps inevitable, are not unsolvable. "Don't Ask, Don't Tell" represents a hard fought political compromise between those who sought to ban homosexuals from the military and those who sought to eradicate sexual orientation discrimination from one of the nation's oldest

(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

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

10 U.S.C. § 654(b)(1)-(3) (1994).

¹⁵ *McVeigh v. Cohen*, 983 F. Supp. 215, 219 (D.D.C. 1998).

¹⁶ After the one year anniversary of the "Don't Ask, Don't Tell" policy, Congressman Jerrold Nadler of New York stated that "[o]ne year later, it is clear that this policy is an abysmal failure. The new policy has actually made things worse." 140 CONG. REC. E1513-01 (daily ed. July 20, 1994) (statement of Rep. Nadler); see also Samuel A. Marcossan, *A Price Too High: Enforcing the Ban on Gays and Lesbians in the Military and the Inevitability of Intrusiveness*, 64 UMKC L. REV. 59 (1995) (addressing the inconsistencies within the "Don't Ask, Don't Tell" policy); Kenneth Williams, *Gays in the Military: The Legal Issues*, 28 U.S.F. L. REV. 919 (addressing the potential legal problems with "Don't Ask, Don't Tell," including the constitutional issues); Comment, *Homosexuals and the Military: Integration or Discrimination?*, 8 J. CONTEMP. HEALTH L. & POL'Y 429 (1992); Servicemembers Legal Defense Network, *Conduct Unbecoming: Third Annual Report on "Don't Ask, Don't Tell, Don't Pursue"* (visited Jan. 19, 1998) <<http://www.sldn.org/reports/third.html>> [hereinafter *Conduct Unbecoming—Third Annual Report*] (finding that the "Don't Ask, Don't Tell" policy is a poor compromise which is consistently violated).

¹⁷ 140 CONG. REC. E1513-01 (daily ed. July 20, 1994) (statement of Rep. Nadler) (emphasis added).

institutions.¹⁸ The background to this Comment chronicles this compromise, providing a history of the military's policy towards homosexuals before 1993 and an overview of "Don't Ask, Don't Tell."¹⁹

Like all political compromises, "Don't Ask, Don't Tell" may be flawed in the eyes of all who crafted it, but it is now the law—a law that this Comment will demonstrate is not being implemented as Congress intended. The shortcomings between the limited goals of "Don't Ask, Don't Tell" and its current implementation can, however, be eliminated. Commanders who conduct investigations concerning whether "Don't Ask, Don't Tell" has been violated should be provided with, and required to consult, a military legal advisor during the investigatory process to ensure that their actions conform with the limitations of the law.²⁰ Perhaps most significantly, the Department of Defense directives should be revised to provide an exclusionary rule of evidence applicable to administrative separation proceedings under "Don't Ask, Don't Tell."²¹ Such a rule would deter the major problem with the policy's implementation—improper gathering of information by commanding officers. Finally, new directives should be promulgated requiring all administrative separation proceeding boards to include a legal advisor to rule upon issues of evidence and procedure, ensuring that the rights of servicemembers are preserved.²²

II. BACKGROUND

Prior to 1993, directives and implementing regulations of the Department of Defense precluded from military service anyone who "has engaged in, attempted to engage in, or solicited another to engage in a homosexual act."²³ This policy, promulgated in 1981, was based upon notions that "[h]omosexuality is incompatible with military service"²⁴ and that the presence of homosexuals in the armed forces "seriously impairs the

¹⁸ *Id.*; see also *Policy Concerning Homosexuality in the Armed Forces: Hearings Before the Senate Comm. on Armed Services*, 103d Cong. 731 (1993) (statement of Sen. Lieberman) ("There are apparent inconsistencies in the policy. However, as we look at this policy, it is important to remember . . . that it is a compromise. . . . It is a compromise between those who wanted to maintain a total ban on homosexuals in military service and those who wanted to lift the ban totally.").

¹⁹ See *infra* notes 23-67 and accompanying text.

²⁰ See *infra* notes 113-23 and accompanying text.

²¹ See *infra* notes 124-42 and accompanying text.

²² See *infra* notes 143-47 and accompanying text.

²³ 32 C.F.R. pt. 41, app. A, pt. 1, § H (1992); see Dep't of Defense Directive 1332.14, encl. 3, pt. 1, § H(1) (Dec. 21, 1993).

²⁴ 32 C.F.R. pt. 41, app. A, pt. 1, § H (1992).

accomplishment of the military mission,"²⁵ since "[t]he presence of such members adversely affects the ability of the Military Services to maintain discipline, good order, and morale"²⁶ The armed forces ban on homosexuality was vigorously challenged as being violative of the due process and equal protection components of the Fifth Amendment.²⁷ However, the policy of total exclusion of homosexuals from the armed forces withstood constitutional challenge in various federal courts.²⁸

With the presidential election of 1992, the issue of gays in the military rose to the forefront when President-elect Bill Clinton stated during his campaign that he was in favor of repealing the regulations prohibiting homosexuals from serving in the armed forces.²⁹ Clinton's position was that the act of homosexuality, as opposed to one's status as a homosexual, should be the basis for exclusion or dismissal from the armed services.³⁰ With his inauguration, President Clinton directed the Secretary

²⁵ *Id.*

²⁶ *Id.*

²⁷ "The principals applicable to the states pursuant to the Fourteenth Amendment's equal protection clause are applied to the Federal Government as a component of the Fifth Amendment due process clause." *Woodward v. United States*, 871 F.2d 1068, 1075 n.7 (Fed. Cir. 1989) (citing *Beller v. Middendorf*, 632 F.2d 788, 801 n.8 (9th Cir. 1980); *Weinberger v. Weisenfeld*, 420 U.S. 636, 638 n.2 (1975) ("Fifth Amendment equal protection claims . . . precisely the same as equal protection claims under the Fourteenth Amendment"); *Schlesinger v. Ballard*, 419 U.S. 498, 500 n.3 (1975); *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954)).

²⁸ The military's former policy of excluding homosexual servicemembers was challenged as a violation of the Due Process Clause, based upon a servicemember's fundamental right to privacy. DAVID F. BURRELLI, CONGRESSIONAL RESEARCH SERVICE, CRS REPORT FOR CONGRESS: HOMOSEXUALS AND U.S. MILITARY PERSONNEL POLICY 78 (1993). However, the courts failed to establish such a fundamental right for servicemembers. *Id.*; see *Woodward v. United States*, 871 F.2d 1068 (Fed. Cir. 1989) (finding that an officer's homosexuality is not protected based upon a right to privacy); *Dronenburg v. Zech*, 741 F.2d 1388 (D.C. Cir. 1984); *Matlovich v. Secretary of the Air Force*, 591 F.2d 852 (D.C. Cir. 1978).

Challenges based on the Equal Protection Clause were also denied by various federal courts, finding that homosexuality did not constitute a suspect classification which was entitled to a heightened level of scrutiny. See *Meinhold v. United States Dep't of Defense*, 34 F.3d 1469 (9th Cir. 1994); *Steffan v. Perry*, 41 F.3d 677 (D.C. Cir. 1994) (en banc) (finding that homosexuality does not constitute a suspect classification for purposes of equal protection analysis); *Ben-Shalom v. Marsh*, 881 F.2d 454 (7th Cir. 1989) (finding that military regulations excluding homosexuals from the armed services are not violative of equal protection); *Rich v. Secretary of the Army*, 735 F.2d 1220 (10th Cir. 1984) (holding that a policy of excluding homosexual servicemembers does not violate servicemembers' rights under equal protection); *Hatheway v. Secretary of the Army*, 641 F.2d 1376 (9th Cir. 1980). Charges that the old policy violated servicemembers' right to free speech also failed. See *Pruitt v. Cheney*, 963 F.2d 1160 (9th Cir. 1991); *Ben-Shalom*, 881 F.2d at 456.

²⁹ *Clinton for the Record*, S.F. CHRON., July 20, 1993, at A6 (stating that during the campaign he [Clinton] was in favor of lifting the ban on homosexuals in the military).

³⁰ The President's News Conference: Gays in the Military, 29 WEEKLY COMP. PRES. DOC. 108-09 (Feb. 1, 1993).

The issue is not whether there should be homosexuals in the military. Everyone concedes that there are. The issue is whether men and women, who can and have served with real

of Defense to review the armed forces policy concerning homosexuality established in 1981.³¹ After intensive review, the President suspended the former policy, and on July 19, 1993, announced revised guidelines concerning homosexuals in the military.³² These guidelines became known as the “Don’t Ask, Don’t Tell, Don’t Pursue” policy.³³

In consideration of the President’s guidelines, Congress began exploring a legislative solution to the problem. Some members of Congress argued that the “Don’t Ask, Don’t Tell” policy “indulges and condones discrimination,”³⁴ while those in favor of the policy argued that “Don’t Ask, Don’t Tell” forges a compromise, allowing homosexuals to remain in the military, conditioned on their silence.³⁵ Both the Senate and

distinction, should be excluded from military service solely on the basis of their status. And I believe they should not. The principal on which I base this position is this: I believe that American citizens who want to serve their country should be able to do so unless their conduct disqualifies them from doing so.

Id. at 109.

³¹ At the request of the Secretary of Defense, a Military Working Group (MWG) committee was formed to examine Department of Defense guidelines on homosexual servicemembers and to develop and assess alternative policy options which comported with the President’s objectives. In a memorandum addressed to the Secretary of Defense, the MGW found, among other things, that “all homosexuality is incompatible with military service,” yet “a person’s sexual orientation is a private and personal matter.” Memorandum from the Military Working Group to the Office of the Secretary of Defense and Summary Report of the Military Working Group 7, 12 (July 1, 1993) (on file with the *University of Dayton Law Review*). From the MWG memorandum, the Secretary of Defense drafted a memorandum for the Secretaries of the Army, Navy, Air Force, and the Chairman of the Joint Chiefs of Staff outlining a preliminary policy guideline for dealing with homosexual servicemember conduct. Memorandum from the Secretary of Defense to the Secretary of the Army, Secretary of the Navy, Secretary of the Air Force, and the Chairman of the Joint Chiefs of Staff (July 19, 1993) (on file with the *University of Dayton Law Review*).

The Secretary of Defense’s memorandum provided guidelines for addressing homosexuality with respect to military accession policy, discharge policy, and investigations policy. *Id.* Along with the Department of Defense’s review of the policy concerning homosexuals in the armed forces, “[o]n February 4, 1993, the Senate adopted an amendment calling for a comprehensive review of the policy” by the Committee on Armed Services. S. REP. NO. 104-18, at 7-8 (1995); *see also* S. REP. NO. 103-12 at 268-70 (1993).

³² President’s Remarks Announcing the New Policy on Gays and Lesbians in the Military, 29 WEEKLY COMP. PRES. DOC. 1369 (July 26, 1993). In a speech given at the National Defense University at Fort McNair, Washington, President Clinton announced his intentions to lift the ban on homosexuals in the military. *Id.* This address became known as the “Ft. McNair speech.” *Id.*; *see also* President’s Memorandum on Ending Discrimination in the Armed Forces, 29 WEEKLY COMP. PRES. DOC. 112 (Feb. 1, 1993) (directing the Secretary of Defense to create a draft Executive order for ending discrimination in the military based upon sexual orientation); *The Pentagon’s New Policy Guidelines on Homosexuals in the Military*, N.Y. TIMES, July 20, 1993, at A16 (addressing the Pentagon’s new policy guidelines concerning homosexuals in the military).

³³ *See supra* note 14 and accompanying text.

³⁴ *See, e.g.*, 140 CONG. REC. E1513-01 (daily ed. July 20, 1994) (statement of Rep. Nadler).

³⁵ *See, e.g.*, *Policy Concerning Homosexuality in the Armed Forces: Hearings Before the Senate Comm. on Armed Services*, 103d Cong. 731 (1993).

House Armed Services Committees held detailed and extensive hearings, gathering testimony from hundreds of witnesses, including military officials, sociologists, gay rights activists, and private citizen organizations.³⁶ In the final analysis, the hearings produced several congressional findings concerning homosexual servicemembers and their ability to contribute to the military.³⁷ Specifically, the findings stated that

³⁶ See 139 CONG. REC. S755 (daily ed. Jan. 27, 1993) (statement of Sam Nunn); *Policy Concerning Homosexuality in the Armed Forces: Hearings Before the Senate Comm. on Armed Services*, 103d Cong. (1993); see also *Policy Implications of Lifting the Ban on Homosexuals in the Military: Hearings Before the House Comm. on Armed Services*, 103d Cong. (1993).

³⁷ 10 U.S.C. § 654 provides:

(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. . . .
- (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 servicemembers 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.

“[t]he 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 armed forces’ high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.”³⁸ This finding was premised upon the notion that military life is distinguishable from civilian life, requiring military personnel to, at times, occupy “living and working conditions that are often spartan, primitive, and characterized by forced intimacy with little or no privacy.”³⁹ Moreover, testimony from high-ranking military personnel revealed that “[t]he prohibition against homosexual conduct is a long-standing element of military law that continues to be necessary in the unique circumstances of military service.”⁴⁰

In light of the aforementioned legislative findings concerning homosexuals and their ability to serve as members of the armed forces, Congress codified the “Don’t Ask, Don’t Tell” policy. Unlike the former policy, the new policy eliminated the statement that “homosexuality is

-
- (11) The pervasive application of the standards of conduct is necessary because members of the armed forces must be ready at all times for worldwide deployment to a combat environment.
 - (12) The worldwide deployment of the 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 long-standing 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.

10 U.S.C. § 654(a) (1994).

³⁸ 10 U.S.C. § 654(a)(14).

³⁹ 10 U.S.C. § 654(a)(12).

⁴⁰ 10 U.S.C. § 654(a)(13); see Memorandum from the Military Working Group to the Office of the Secretary of Defense and Summary Report of the Military Working Group 7 (July 1, 1993) (on file with the *University of Dayton Law Review*).

incompatible with military service.”⁴¹ “Don’t Ask, Don’t Tell” views a person’s sexual orientation as a personal matter which does not preclude entry or continuing service in the military unless that person engages in homosexual conduct.⁴²

In addition, under “Don’t Ask, Don’t Tell,” military personnel cannot investigate instances of homosexual conduct without just cause.⁴³ While the 1993 policy continues to forbid outright homosexual acts by military personnel,⁴⁴ “Don’t Ask, Don’t Tell” also addresses the consequences to service personnel who merely declare that they are homosexual without committing any homosexual acts.⁴⁵ Under the statute, a servicemember will face discharge proceedings from the armed forces for affirmatively declaring his or her homosexual orientation.⁴⁶ Under the Department of Defense implementing regulations, “homosexual conduct” is defined so as to include “a *statement* by a member that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage.”⁴⁷ One’s statement that “I am gay” will be sufficient to warrant discharge proceedings⁴⁸ unless the servicemember can prove

⁴¹ *Holmes v. California Army Nat’l Guard*, 124 F.3d 1126, 1128 (9th Cir. 1997) (quoting 32 C.F.R. pt. 41, app. A (1981)).

⁴² Dep’t of Defense Directive 1332.14, encl. 3, pt. 1 § H(1)(a) (Dec. 21, 1993) (“Sexual orientation is considered a personal and private matter, and homosexual orientation is not a bar to continued service unless manifested by homosexual conduct.”). The term “homosexual conduct” includes sexual acts. *Id.* The directive goes on to state that “[a] homosexual act means bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires.” *Id.* at encl. 2, § F(1).

⁴³ Dep’t of Defense Directive 1332.14, encl. 4, § C. As outlined in the Department of Defense directives, just cause for initiating an investigation is present when a commanding officer has credible information that a basis for discharge exists. *Id.*

⁴⁴ 10 U.S.C. § 654(b)(1) (1994).

⁴⁵ 10 U.S.C. § 654(b)(2).

⁴⁶ 10 U.S.C. § 654(b)(2). Subsection (b) states:

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: . . . (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.

Id.

⁴⁷ Dep’t of Defense Directive 1332.14, encl. 4, § B(5) (Dec. 21, 1993) (emphasis added); *see also* Dep’t of Defense Directive 1304.26, encl. 1, § B(8)(b) (Dec. 21, 1993); Dep’t of Defense Instruction 1332.40, encl. 2, § C, encl. 8, § B (Sept. 16, 1997).

⁴⁸ Dep’t of Defense Directive 1332.14, encl. 4, § B(5)(b) (Dec. 21, 1993).

that he or she is not a homosexual as defined by the statute.⁴⁹ A statement of one's homosexual identity "creates a rebuttable presumption that the officer engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts."⁵⁰ In court martial proceedings, administrative discharge proceedings, and challenges in federal court, a charged servicemember is allowed to present evidence that will refute the presumption.⁵¹

In addition to the policy established under the statute, the Department of Defense directives establish a procedural guide to assist commanders in conducting investigations.⁵² Only a servicemember's commander is authorized to conduct fact-finding inquiries into homosexual conduct.⁵³ While informal fact-finding inquiries are the preferred method for conducting investigations, commanders are advised that such inquiries must be based on credible information.⁵⁴ Defense Department regulations provide examples of what is considered inadequate information upon

⁴⁹ *Richenberg v. Perry*, 97 F.3d 256, 259 (8th Cir. 1996); *see, e.g.*, 10 U.S.C. § 654(f)(1) (1994) (defining "homosexual" as a person of either gender "who engages in, attempts to engage in, . . . or intends to engage in homosexual acts"); 10 U.S.C. § 654(f)(3)(A) (1994) (defining "homosexual acts" as "bodily contact . . . for the purpose of gratifying sexual desires").

⁵⁰ Dep't of Defense Directive 1332.16, encl. 4, § D(5) (Dec. 21, 1993); Dep't of Defense Instruction 1332.40, encl. 2, § C(1)(b) (Sept. 16, 1997). *See, e.g.*, Memorandum from the General Counsel of the Department of Defense to the General Counsels of the Military Departments, the Judge Advocate General of the Army, the Judge Advocate General of the Navy, the Judge Advocate of the Air Force and the Staff Judge Advocate to the Commandant of the Marine Corps (Aug. 18, 1995) (on file with the *University of Dayton Law Review*).

A member may not avoid the burden of rebutting the presumption merely by asserting that his or her statement of homosexuality was intended to convey only a message about sexual orientation. . . . To the contrary, by virtue of the statement, the member bears the burden of proof to show that he or she did not engage in, and does not attempt, have a propensity, or intend to engage in homosexual acts.

Id.

⁵¹ Dep't of Defense Directive 1332.14, encl. 4, § D(5) (Dec. 21, 1993) ("The Service member shall be given the opportunity to present evidence demonstrating that he or she does not engage in homosexual acts and does not have a propensity or intent to do so."). In addition, the new policy also requires that all servicemembers and those who apply to enter military service be fully informed as to the service's guidelines. *Able v. United States*, 88 F.3d 1280, 1287 (2d. Cir. 1996).

⁵² Dep't of Defense Directive 1332.14 (Dec. 21, 1993); Dep't of Defense Directive 1304.26 (Dec. 21, 1993); Dep't of Defense Instruction 1332.40 (Sept. 16, 1997).

⁵³ Dep't of Defense Directive 1332.14, encl. 4, § A(1) (Dec. 21, 1993).

⁵⁴ *Id.* at encl. 4, § A(1), (C), D(1). The regulations provide examples of what actions constitute "credible information." Credible information is present if: (1) A reliable person observes or hears a servicemember engaging in a homosexual act; (2) A reliable person hears, observes, or discovers a member communicating a statement that a reasonable person would believe to indicate he or she has engaged in or has a propensity to engage in homosexual acts; (3) A reliable person observes non-verbal behavior that a reasonable person would believe to indicate the member has engaged in or has a propensity to engage in homosexual acts. *Id.* at encl. 4, § F(1)-(3).

which to base an investigation:⁵⁵ information received by the commander which merely constitutes the opinions of another servicemember,⁵⁶ information which is based on rumor or speculation,⁵⁷ or information based solely on a servicemember's "associational activity."⁵⁸ In addition, commanders are to exercise discretion in ascertaining whether credible information exists.⁵⁹

Upon receiving credible information, a commander is permitted to ask a servicemember if he or she engages, or has engaged, in homosexual conduct.⁶⁰ The accused servicemember is to be fully advised of the Department of Defense policy on homosexual conduct and his or her rights under Article 31 of the Uniform Code of Military Justice ("UCMJ"), if applicable.⁶¹ However, the procedural guidelines further state that "nothing in this provision . . . provide[s] the member with any basis for challenging the validity of any proceeding or the use of any evidence . . . in any proceeding."⁶²

The codification of "Don't Ask, Don't Tell" did not end the legal controversy concerning homosexuals in the military. The new policy faced numerous constitutional challenges in the courts.⁶³ Homosexual servicemembers challenged the law as violative of both the equal protection clause⁶⁴ and the First Amendment.⁶⁵ To date, however, these

⁵⁵ *Id.* at encl. 4, § E(1)-(4).

⁵⁶ *Id.* at encl. 4, § E(2) ("Credible information does not exist, for example, when . . . [t]he only information is the opinions of others that a member is homosexual.").

⁵⁷ *Id.* at encl. 4, § E(3) ("Credible information does not exist, for example, when . . . [t]he inquiry would be based on rumor, suspicion, or capricious claims concerning a member's sexual orientation.").

⁵⁸ *Id.* at encl. 4, § E(4) (stating that "associational activity" includes "going to a gay bar, possessing or reading homosexual publications, associating with known homosexuals, or marching in a gay rights rally in civilian clothes" and that "[s]uch activity, in and of itself, does not provide evidence of homosexual conduct").

⁵⁹ *Id.* at encl. 4, § D(2).

⁶⁰ *Id.* at encl. 4, § D(3).

⁶¹ 10 U.S.C. § 831 (1994). This section of the United States Code is part of the UCMJ and provides in part that "[n]o person subject to this chapter may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him." 10 U.S.C. § 831(a) (1994).

⁶² Dep't of Defense Directive 1332.14, encl. 4, § D(3) (Dec. 21, 1993).

⁶³ See, e.g., *Philips v. Perry*, 106 F.3d 1420 (9th Cir. 1997) (considering action brought by Navy servicemember, claiming the policy violated the Equal Protection Clause and his First Amendment rights); *Able v. United States*, 88 F.3d 1280 (2d Cir. 1996) (considering action brought by servicemembers challenging constitutionality of the "Don't Ask, Don't Tell" policy); *Richenberg v. Perry*, 97 F.3d 256 (8th Cir. 1996) (considering action brought by Air Force servicemember for review of discharge under "Don't Ask, Don't Tell," claiming First Amendment and Fifth Amendment violations).

⁶⁴ *Richenberg*, 97 F.3d at 260-61 (subjecting the military's "Don't Ask, Don't Tell" policy to a rational basis review, as opposed to a heightened level of scrutiny). The *Richenberg* court noted that

challenges have been unsuccessful. Various federal courts have held that the Constitution permits the discharge of homosexual servicemembers on the mere basis of homosexual orientation.⁶⁶

While federal courts have upheld the constitutionality of “Don’t Ask, Don’t Tell,” they have not fully explored challenges to homosexual discharges based upon violations of the armed services’ own policy.⁶⁷ Over the past five years, commanding officers from the various armed services have continuously violated the letter and spirit of “Don’t Ask, Don’t Tell.” More often than not, their efforts have proven successful due, in part, to the lack of procedural safeguards built into the statute and regulatory framework.

five other circuits have also declined to give heightened scrutiny to the “Don’t Ask, Don’t Tell” policy. *Id.* at 260 n.5. See, e.g., *Steffan v. Perry*, 41 F.3d 677, 684 (D.C. Cir. 1994) (en banc); *Meinhold v. United States Dep’t of Defense*, 34 F.3d 1469, 1478 (9th Cir. 1994); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989); *Rich v. Secretary of the Army*, 735 F.2d 1220, 1229 (10th Cir. 1984). See also *Thomasson v. Perry*, 80 F.3d 915, 927-28 (4th Cir. 1996) (en banc) (finding that “Don’t Ask, Don’t Tell” policy passes rational review under equal protection analysis).

⁶⁵ *Richenberg*, 97 F.3d at 256 (finding that 10 U.S.C. § 654 did not target status or speech, but that the First Amendment does not preclude the use of speech for evidentiary purposes); *Thomasson*, 80 F.3d at 931; *Thorne v. United States Dep’t of Defense*, 945 F. Supp. 924 (E.D. Va. 1996) (holding that “Don’t Ask, Don’t Tell” policy is not violative of First Amendment free speech rights, as the statute targets conduct as opposed to speech); *Selland v. Perry*, 905 F. Supp. 260, 264 (D. Md. 1995) (inferring that the prohibited conduct of homosexuality from admissions of homosexuality flows from “common sense” and that speech is not protected); *accord Able*, 88 F.3d at 1296-97 (stating that the evidentiary use of affirmative statements as to homosexuality can be used in discharge proceedings and substantially furthers the government’s interest since “there is a correlation between those who state that they are homosexual and those who engage in homosexual acts”); *Ben-Shalom*, 881 F.2d at 462.

⁶⁶ See *supra* notes 63-65 and accompanying text.

⁶⁷ *McVeigh v. Cohen*, 983 F. Supp. 215 (D.D.C. 1998). The court in the *McVeigh* case noted:

In short, this case raises the central issue of whether there is really a place for gay officers in the military under the new policy, “Don’t Ask, Don’t Tell, Don’t Pursue.” Although there have been a series of challenges to the constitutionality of the statute that codifies the policy, civil courts thus far have not interpreted the requirements of the statute assuming its constitutionality. The limits on the Navy’s right to investigate sexual orientation and the restrictions on an officer’s right to be a gay man or woman in the military—i.e., what it practically means not to ask, not to tell, and not to pursue—have yet to be litigated in the courts.

III. ANALYSIS

One private citizen organization describes "Don't Ask, Don't Tell," as a "Machiavellian system where the ends justify the means."⁶⁸ Since the inception of "Don't Ask, Don't Tell," the number of documented violations of the policy have risen, resulting in a discharge rate for homosexuals which is at a five year high.⁶⁹ Based on an examination of the methods and procedures invoked by commanding officers, it is evident that deficiencies in the framework of "Don't Ask, Don't Tell" have led to its abuse. As such, various reforms should be implemented to effectuate the underlying goals of "Don't Ask, Don't Tell."

First, commanders who are charged with conducting investigations into "Don't Ask, Don't Tell" violations should be required to consult with a duly-appointed legal advisor during the investigatory process to ensure compliance with the law. Second, new Department of Defense directives should be promulgated establishing an exclusionary rule of evidence in the administrative separation process. Such a rule would prevent improperly gathered information from being presented at a servicemember's administrative separation hearing, regardless of its evidentiary relevance. Finally, while legal advisors are often consulted in discharge proceedings, Department of Defense directives should require an impartial legal advisor to be present for every discharge proceeding pertaining to "Don't Ask, Don't Tell." The establishment of such procedural safeguards would curtail the use of improperly-gathered information, and would ensure that homosexuals who are in compliance with the policy will be able to continue serving their country with distinction and honor.

A. The Violations of "Don't Ask, Don't Tell"

While the regulatory scheme underlying "Don't Ask, Don't Tell" was intended to narrow investigative parameters, just the opposite seems to have occurred. According to government statistics, in 1996 alone, the Department of Defense discharged 850 persons under the "Don't Ask, Don't Tell" policy,⁷⁰ the highest number in five years and the highest rate

⁶⁸ *Conduct Unbecoming—Third Annual Report*, *supra* note 16, at 1.

⁶⁹ OFFICE OF THE UNDER SECRETARY OF DEFENSE FOR PERSONNEL AND READINESS, REPORT TO THE SECRETARY OF DEFENSE: REVIEW OF THE EFFECTIVENESS OF THE APPLICATION AND ENFORCEMENT OF THE DEPARTMENT'S POLICY ON HOMOSEXUAL CONDUCT IN THE MILITARY tbl. 1 (1998) [hereinafter UNDER SECRETARY OF DEFENSE REPORT].

⁷⁰ *Id.*

of discharge since 1987.⁷¹ In contrast, between 1995 and 1996, there were only 443 violations of “Don’t Ask, Don’t Tell” for all the services combined.⁷²

The Servicemembers Legal Defense Network (“SLDN”), a private organization which represents servicemembers who face separation proceedings or criminal charges based upon their sexual orientation, has charged that commanders have in fact continued to harass and pursue servicemembers accused of being homosexual.⁷³ Between 1996 and 1997, SLDN reported 191 “Don’t Pursue” violations and 132 “Don’t Harass” violations, up from 141 “Don’t Pursue” violations and 127 “Don’t Harass” violations documented between 1995 and 1996.⁷⁴

In their Fourth Annual Report on the “Don’t Ask, Don’t Tell” policy, issued February 19, 1998, SLDN cited “Don’t Pursue” violations as the most pervasive of all violations,⁷⁵ and a thirty-eight percent increase in “Don’t Harass” violations.⁷⁶ Additionally, SLDN found that the cases of

⁷¹ *Conduct Unbecoming—Third Annual Report*, *supra* note 16, at 1. The total number of active persons within the armed forces (Army, Navy, Air Force, Marine Corps) in 1996 totaled 1,471,722. *Id.* at ex. 3. The percentage of personnel discharged due to violations of “Don’t Ask, Don’t Tell” in relation to the entire armed forces in 1996 was .058%, which is up .08% from 1995 and .02% since 1994. UNDER SECRETARY OF DEFENSE REPORT, *supra* note 69, at tbl. 1.

⁷² *Conduct Unbecoming—Third Annual Report*, *supra* note 16, at ex. 3.

⁷³ See Servicemembers Legal Defense Network, (visited Jan. 19, 1998), <<http://www.sldn.org>>. The results of the SLDN studies have been cited by both congressional leaders and the mainstream media in assessing how “Don’t Ask, Don’t Tell” has been implemented. See 140 CONG. REC. E1513-01 (daily ed. July 20, 1994) (statement of Rep. Nadler). During debate on the floor of the House of Representatives, Congressman Nadler, a Democrat from New York, cited the findings of the SLDN, stating:

Despite this new policy, the services are asking, are pursuing, and are discharging. In fiscal year 1993, during which this policy was promulgated, the number of discharges for homosexual conduct actually went up. A recent article in the New Republic tells the story of an Air Force airman who was turned in by a fellow airman, because the second had intercepted the first’s private correspondence to a civilian friend. He hadn’t told, he wasn’t asked. . . . A growing body of evidence collected by the Servicemembers Local Defense Network indicates that this kind of story is not at all uncommon.

Id.; see also Philip Shenon, *New Study Faults Pentagon’s Gay Policy*, N.Y. TIMES, Feb. 26, 1997, at A4.

⁷⁴ *Conduct Unbecoming—Third Annual Report*, *supra* note 16, at ex. 3.

⁷⁵ Servicemembers Legal Defense Network, *The Fourth Annual Report on “Don’t Ask, Don’t Tell, Don’t Pursue”* (visited Aug. 29, 1998) <<http://www.sldn.org/reports/fourth.html>> [hereinafter *Conduct Unbecoming—Fourth Annual Report*]. SLDN documented 235 “Don’t Pursue” violations during 1997, a 23% increase from 1996. *Id.* at 1.

⁷⁶ *Id.* The Department of Defense implementing regulations state that “the Armed Forces do not tolerate harassment or violence against any servicemember for any reason.” Dep’t of Defense Directive 1322.22, encl. 3, § D (Aug. 24, 1994); see, e.g., Memorandum from Under Secretary of Defense Edwin Dorn to Secretaries of the Military Departments, Chairman of the Joint Chiefs of Staff and Inspector General of the Department of Defense (Mar. 24, 1997) (on file with the University of Dayton Law Review).

"Don't Ask" violations increased by twenty-eight percent, with eighty-nine reported cases in 1996 and 124 violations in 1997.⁷⁷ According to SLDN, the Navy had committed the most violations of "Don't Ask, Don't Tell," totaling 193.⁷⁸

Based, in part, on the work of SLDN, the Secretary of Defense instructed the Under Secretary of Defense for Personnel and Readiness to conduct a review of how the "Don't Ask, Don't Tell" policy was being implemented.⁷⁹ The report concluded that "concerns that there have been widespread 'witchhunts' against suspected homosexuals and that there have been numerous other abuses in the course of investigations are unfounded."⁸⁰ However, the Under Secretary of Defense's report went on to note that "[a]lthough we conclude that the Department's policy on homosexual conduct is generally being implemented properly, a number of areas were identified in which the policy could be usefully clarified or implementation could otherwise be enhanced."⁸¹

B. The Problems with "Don't Ask, Don't Tell"

Notwithstanding the Under Secretary of Defense's report on the proper application of "Don't Ask, Don't Tell," numerous instances of clear violations of the policy have occurred. While current Department of Defense implementing regulations expressly state that military personnel are not to be asked about their sexual orientation,⁸² as such independent inquiry by a commander would be a clear violation of the law, such direct questioning continues. The examples of "Don't Ask, Don't Tell" violations cited herein demonstrate that the statutory and regulatory framework has failed to preserve the rights of servicemembers who undergo commander-led investigations. The primary deficiencies in "Don't Ask, Don't Tell" lie in its potential for abuse and the inherent tension that it creates with other sources of law.

⁷⁷ *Conduct Unbecoming—Fourth Annual Report*, *supra* note 75, at 1.

⁷⁸ *Id.* at 1.

⁷⁹ UNDER SECRETARY OF DEFENSE REPORT, *supra* note 68, at 1 ("Part of the tasking was to review the issues raised in a 1997 report by Servicemembers Legal Defense Network and issues which members of Congress and others had brought to the Department's attention.").

⁸⁰ *Id.* at 2-3.

⁸¹ *Id.* at 3. The Under Secretary of Defense made several recommendations for action including: more guidance encouraging consultation with headquarters legal affiliates, re-issuance of a memorandum providing guidelines for investigating threats, and more training for those charged with implementing the "Don't Ask, Don't Tell" policy. *Id.*

⁸² Dep't of Defense Directive 1332.14, encl. 4, § D(3) (Dec. 21, 1993); Dep't of Defense Instruction 1332.40 encl. 8, § D(3) (Sept. 16, 1997).

1. Investigatory Procedures Leave Room for Abuse

In accordance with findings that “[s]exual orientation alone is a personal and private matter,”⁸³ the “Don’t Ask, Don’t Tell” policy requires that homosexual servicemembers keep their sexual orientation a secret or face administrative separation proceedings. However, in accordance with a servicemember’s silence concerning his or her homosexual orientation,⁸⁴ the Department of Defense implementing regulations clearly dictate that commanders are not to pursue servicemembers in an effort to learn orientation.⁸⁵ Military commanders, in gathering credible information during informal investigations, are limited to investigating “factual circumstances directly relevant to the specific allegation.”⁸⁶ Such limitations were established to eliminate the prior practices of commanding officers investigating servicemembers based upon little or no credible evidence. However, while the regulations outline what constitutes “credible information,” there is little guidance in distinguishing permissive from impermissible lines of questioning. As such, “Don’t Ask, Don’t Tell” can be arbitrarily applied, leading to abuse.

In the spring of 1996, Cadet Nicole Galvan was confronted by her commander at the United States Military Academy at West Point about her sexual orientation based on comments she had memorialized in her

⁸³ Memorandum from the Military Working Group to the Office of the Secretary of Defense and Summary Report of the Military Working Group 12 (July 1, 1993) (on file with the *University of Dayton Law Review*).

⁸⁴ As noted by SLDN, “Don’t Ask, Don’t Tell” does not require that heterosexual servicemembers keep their sexual orientation a “personal and private matter.” *Conduct Unbecoming—Third Annual Report*, *supra* note 16, at 4.

⁸⁵ Dep’t of Defense Directive 1332.14, encl. 4, § D(3) (Dec. 21, 1993) (“Commanders or appointed inquiry officials shall not ask, and members shall not be required to reveal, their sexual orientation.”); Dep’t of Defense Instruction 1332.40, encl. 8, § D(3) (“Commanders or appointed inquiry officials shall not ask, and members shall not be required to reveal, whether a member is a heterosexual, a homosexual, or a bisexual.”); *Policy on Homosexuality in the Armed Forces: Hearings Before the Senate Comm. on Armed Services*, 103d Cong. 709 (1993) (statement of Gen. Colin Powell) (stating that the “Don’t Ask, Don’t Tell, Don’t Pursue” policy means that “[w]e will not ask, we will not witch hunt, we will not seek to learn orientation”).

⁸⁶ Dep’t of Defense Directive 1332.14, encl. 4, § A(3) (Dec. 21, 1993). “The inquiry should gather all credible information that directly relates to the grounds for possible separation. Inquiry shall be limited to the factual circumstances directly relevant to the specific allegations.” *Id.* Furthermore, “[i]f a commander has credible evidence of possible criminal conduct, he or she shall follow the procedures outlined in the Manual for Courts-Martial and implementing regulations issued by the Secretaries of the Military Departments concerned.” *Id.* at encl. 4, § A(4). The Guidelines for Fact Finding Inquiries into Homosexual Conduct as promulgated under Department of Defense Instruction 1332.40 are not applicable to the “activities of Defense Criminal Investigative Organizations and other Department of Defense law enforcement organizations, which are governed by Department of Defense Instruction 5505.8.” Dep’t of Defense Instruction 1332.40, encl. 8, § A(5) (Sept. 16, 1997).

personal diary.⁸⁷ Refusing to answer the questions, Galvan resigned from the Academy to avoid an investigation into her private life and sexual orientation initiated by her commanders.⁸⁸

A second example of the wide discretionary power which commanders possess in investigating "Don't Ask, Don't Tell" violations is seen in the case of Senior Airman Sonya Harden. While stationed at Eglin Air Force Base in Florida, Harden's former roommate accused her of being a lesbian.⁸⁹ Based upon this lone accusation, an investigation was initiated.⁹⁰ Harden was discharged, despite evidence that her accuser had attempted to blackmail her and despite the accuser's eventual retraction of her statement in an affidavit dated prior to Harden's discharge proceeding.⁹¹ Moreover, various witnesses testified that Harden had indeed carried on heterosexual relationships.⁹² The inept handling of factual information, and the lack of weight given to evidence by the discharge board in the Harden case illustrates the arbitrary and wide-ranging latitude which commanding officers possess, distorting the proper implementation of "Don't Ask, Don't Tell."

Perhaps most indicative of "Don't Ask, Don't Tell's" potential for abuse can be seen where military officials use legal procedures to gain improper information. At Hickman Air Force Base in Honolulu, Hawaii, Airman Bryan Harris was charged with the rape of another man.⁹³ In a pre-trial agreement, his sentence was reduced from life in prison to twenty months in jail, conditioned on his disclosure of the names of all men with whom he had engaged in consensual sex.⁹⁴ On January 10, 1997, the Air Force Inspector General found that the pre-trial agreement in which the Air Force obtained the names of seventeen other men accused of engaging in

⁸⁷ *Conduct Unbecoming—Third Annual Report*, *supra* note 16, at 4, 7.

⁸⁸ *Id.* at 4. Galvan's commander ordered that her personal diary be seized, claiming that he was in the process of investigating a separate incident involving an alleged fight which had taken place between Galvan and another person. *Id.* According to SLDN, Galvan had been instructed by counselors at West Point that she should keep a diary as therapy for dealing with the death of her mother. *Id.*

⁸⁹ *Id.* at 14.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* Harden also alleged that one of the board members who presided over the discharge hearing made a "thumbs up" sign to the Assistant Recorder during the hearing. *Id.* In addition, SLDN notes that "Harden had no effective recourse to stop an investigation that was improper from beginning to end." *Id.*

⁹³ *Id.* at 6.

⁹⁴ *Id.*

homosexual activity did not violate the “Don’t Pursue” aspect of the “Don’t Ask, Don’t Tell” policy.⁹⁵

Based on the actions of investigators at Hickman Air Force Base, the Under Secretary of Defense recommended that the Pentagon adopt a new policy precluding prosecutors from using pre-trial agreements to force servicemembers facing criminal charges into revealing the names of suspected homosexual servicemembers in exchange for a lighter sentence.⁹⁶ Such reforms indicate that the Pentagon is beginning to take notice of the numerous abuses of “Don’t Ask, Don’t Tell” which have been documented at military installations around the world. However, the use of pre-trial agreements in order to obtain improper information regarding other servicemembers’ sexual orientation is but one example of the vagueness and ambiguity which remains in the investigatory techniques permitted under “Don’t Ask, Don’t Tell.”

By giving commanding officers and investigators unfettered discretion in conducting fact-finding inquiries, servicemembers who come under scrutiny are powerless to argue that the investigation lacked credible information or was not based upon relevant factual circumstances. This position originated in the debates which occurred over “Don’t Ask, Don’t Tell” during its codification. Jamie Gorelick, former General Counsel for the Department of Defense, testified that the policy does not give “an individual the right to invalidate an administrative or judicial proceeding

⁹⁵ *Id.* According to SLDN, questions which were posed by Air Force prosecutors to the co-workers of one of the accused men, Technical Sergeant (“T.Sgt.”) Daryl Gandy, were found by the Air Force Inspector General to be within the bounds of the law. Examples of the questions posed to co-workers of T.Sgt. Gandy included:

1. Do you have any reason to believe that T.Sgt. Gandy doesn’t like girls?
2. Have you ever had the feeling that T.Sgt. Gandy is interested in men?
3. Have you ever seen T.Sgt. Gandy hug, kiss, or hold hands with another man in a way that was more than just a means of saying hello?
4. Would you be suprised to find out that T.Sgt. Gandy is gay?

Id.

⁹⁶ The recommendation to end the use of pre-trial agreements to gather information on the sexual orientation of other servicemembers was made public in the Under Secretary of Defense’s report issued in April of 1998. The report states:

[W]e concluded that agreeing to limit or reduce the sentence of a service member charged with serious criminal offenses in return for information concerning the consensual homosexual conduct of others is inappropriate in most cases. . . . For these reasons, we recommend that the Department issue additional guidance to make clear that pretrial agreements should generally not be used to obtain information on consensual sexual conduct. Our view is that such agreements should not be employed unless the conduct that the accused offers to report would warrant criminal prosecution.

... by alleging that an investigation was conducted in a manner contrary to the policy."⁹⁷ As such, "Don't Ask, Don't Tell" provides commanders with wide-ranging authority to investigate potential violations, yet no procedural safeguards exist to protect servicemembers from improper investigations that are based on less than credible evidence.

2. Conflict Between "Don't Ask, Don't Tell" and Other Areas of Military Law Is Often Used to Force Disclosure

A second deficiency in the "Don't Ask, Don't Tell" policy is its failure to recognize the potential conflict between it and other areas of law. As a result, military officials conducting commander-led investigations often use such conflicts in order to coerce witnesses into providing information. By threatening servicemembers with criminal liability for failure to answer their questions, investigators circumvent "Don't Ask, Don't Tell's" protections.

In the summer of 1996, a United States Coast Guard captain repeatedly and directly questioned servicemember Kelli Sprague about her sexual orientation.⁹⁸ According to SLDN, the Coast Guard captain asked Sprague: "Have you ever told anyone on the ship that you are gay?"⁹⁹ "Have you ever been confused about the way you are?"¹⁰⁰ "Have you ever acted on the confusion?"¹⁰¹ Sprague admitted to being a lesbian and stated in a memorandum that "[w]hen your Commanding Officer asks you a question and informs you that lying is against the UCMJ, what choice do you have, but to tell the truth."¹⁰² After informing her commanding officer that she was in fact a lesbian, Sprague was discharged from the military based upon her answers given in direct response to her commanding officer's questions.¹⁰³

⁹⁷ *Policy Concerning Homosexuality in the Armed Forces: Hearings Before the Senate Comm. on Armed Services*, 103d Cong. 826 (1993) (exchange between Sen. Nunn and Jamie Gorelick, General Counsel, Dep't of Defense); see also Samuel A. Marcossan, *A Price Too High: Enforcing the Ban on Gays and Lesbians in the Military and the Inevitability of Intrusiveness*, 64 UMKC L. REV. 59 (1995).

⁹⁸ *Conduct Unbecoming—Third Annual Report*, *supra* note 16, at 4.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* SLDN reported that Sprague's commanding officer threatened Sprague with criminal charges under the UCMJ for making false statements if she did not answer his direct questions. *Id.*

¹⁰³ *Id.* According to SLDN, Sprague filed a complaint with the Department of Defense Inspector General. However, no action had been taken on the part of the Department of Defense as of six months from the filing of the complaint. *Fourth Annual Report*, *supra* note 75, at 37.

Notwithstanding the case of Airman Harris,¹⁰⁴ tactics used by commanders in “Don’t Ask, Don’t Tell” investigations remain invasive, and often force servicemembers to choose between two alternatives: divulge information which may instigate an administrative separation proceeding, or face criminal liability under the UCMJ for failing to fully cooperate with a military investigation. Use of such methods illustrates the lack of clarity regarding “Don’t Ask, Don’t Tell.”

While aboard the USS *Simon Lake* in Sardinia, Italy, Seaman Amy Barnes was targeted for investigation.¹⁰⁵ In subsequent litigation pertaining to the investigation, servicemembers filed affidavits in federal court detailing the threatening and illegal tactics used by the military investigators.¹⁰⁶ Another servicemember testified in an affidavit dated April 27, 1996, that “[c]ommand [i]nvestigators threatened and intimidated me into giving involuntary statements by telling me I would be violating Article 78 of the UCMJ¹⁰⁷ and would go to jail if I did not answer their questions and cooperate.”¹⁰⁸

Attorneys for the military argued in subsequent litigation brought by Seaman Barnes that “‘regardless of whether the record contains evidence showing the Navy’s reason for commencement of the investigation, or the manner in which the investigation was conducted, plaintiff has no legal basis upon which to challenge those events here.’”¹⁰⁹ Moreover, the military argued that “Don’t Ask, Don’t Tell” in no way provides any enforceable rights for servicemembers who undergo investigation for alleged statements or actions indicating a homosexual orientation.¹¹⁰

Based on numerous cases in which the “Don’t Ask, Don’t Tell” policy has been abused by military personnel, it is clear that the policy is a failure. While “Don’t Ask, Don’t Tell” was thought to balance the rights

¹⁰⁴ See *supra* notes 94-96 and accompanying text.

¹⁰⁵ *Conduct Unbecoming—Third Annual Report*, *supra* note 16, at 5.

¹⁰⁶ *Id.* at 6. According to SLDN, two servicemembers stated that a command investigator threatened them with prison unless they admitted that they were lesbians, or that Seaman Amy Barnes was a lesbian. *Id.* at 5. Heather Hilbun, in an affidavit dated March 26, 1996, stated that a command investigator informed her that “[i]f you do not tell the truth, you will go to jail for 10-15 years.” *Id.* Subsequently, the investigator then proceeded to ask Hilbun about her own orientation and that of “at least six other women by name.” *Id.*

¹⁰⁷ *Id.* at 6. Article 78 of the UCMJ is codified at 10 U.S.C. § 878 and pertains to a servicemember acting as an accessory after the fact. “Any person subject to this chapter who, knowing that an offense punishable by this chapter has been committed, receives, comforts, or assists the offender in order to hinder or prevent his apprehension, trial, or punishment shall be punished as a court-martial may direct.” 10 U.S.C. § 878 (1994).

¹⁰⁸ *Conduct Unbecoming—Third Annual Report*, *supra* note 16, at 6.

¹⁰⁹ *Id.* at 6 (quoting Defendant’s Opposition to Plaintiff’s Motion for Preliminary Injunction at 11, *Barnes v. Perry*, No. 96-591-ES (D.D.C. 1996)).

¹¹⁰ *Id.*

of homosexual servicemembers with the interests of the military, what has developed is a series of distinct yet arbitrarily-applied requirements, empowering commanders to engage in what amount to sanctioned witch hunts. Specifically, "Don't Ask, Don't Tell" is subject to abuse, given the wide-ranging discretion that commanders have in conducting investigations. Furthermore, as seen in the Harden case, the tension which exists between "Don't Ask, Don't Tell" and other areas of law remains a serious issue.¹¹¹ When an investigator improperly questions a servicemember in the course of an investigation, that servicemember has no choice but to answer or face threats of military prosecution for non-compliance. The tactics used by investigators in order to elicit information once an investigation has been initiated are wide-ranging and subject to no readily apparent procedural controls. While "Don't Ask, Don't Tell" was intended to be carried out "with fairness, with balance and with due regard for the privacy of individuals,"¹¹² what has evolved is a policy that outlines impermissive conduct, yet allows commanders discretion to determine whether there are grounds for dismissal.

C. Procedures to Better Effectuate the Goals of "Don't Ask, Don't Tell"

Because of the arbitrary nature in which the "Don't Ask, Don't Tell" policy has been implemented in the past five years, various reforms should be enacted in order to better effectuate the policy and remedy the aforementioned deficiencies in the investigatory process. Requiring a legal advisor to become involved with investigations early on would ensure that servicemembers' rights are protected. Furthermore, the presence of a legal advisor would deter investigators from using threats of criminal charges to force servicemembers to divulge information in violation of "Don't Ask, Don't Tell."

Changes in the administrative separation proceedings could also act to preserve servicemembers' rights during the investigation, albeit after the fact. For example, an exclusionary rule of evidence, precluding improperly-gathered information from administrative separation proceedings, would deter "Don't Ask, Don't Tell" violations. Commanders would be forewarned that improper investigatory techniques would not yield admissible evidence. Additionally, requiring a legal advisor to be present at all review hearings would ensure that evidentiary rulings are properly decided.

¹¹¹ See *supra* notes 90-93 and accompanying text.

¹¹² President's Remarks Announcing the New Policy on Gays and Lesbians in the Military, 29 WEEKLY COMP. PRES. DOC. 1372 (July 26, 1993).

While some may argue there is little need to carve out rules specifically tailored for “Don’t Ask, Don’t Tell” investigations, the personal and sensitive nature of human sexuality requires that the military have in place a system which acts to ensure efficiently-conducted investigations, while also preserving the private lives of servicemembers. The proposed changes mentioned herein to the procedural framework of “Don’t Ask, Don’t Tell” would ensure the integrity of the investigatory process and guarantee that accused servicemembers are treated in a discreet and just manner.

1. Require Involvement of Legal Counsel in Commander-Directed Investigations ¹¹³

An essential component of military discipline and order is the ability of commanders to investigate incidents within their command.¹¹⁴ While there are basic guidelines for the implementation of commander-led investigations,¹¹⁵ they are clearly recognized as being subject to abuse.¹¹⁶ In a report by the Advisory Board on the Investigative Capability of the Department of Defense, several senior judge advocates testified that while it is important for commanders to have independent investigative authority, such authority can often times be abused in an effort to “whitewash or

¹¹³ Only the Air Force requires that commander-directed investigators coordinate with a Staff Judge Advocate (“SJA”) before commencing an investigation and to have a representative from the SJA’s office review the final report of the investigation upon completion. Air Force Instruction 90-301, ch. 1, § H(1)(c), ch. 2, § C(1)(b) (Feb. 1, 1997); *see also* 1 REPORT OF THE ADVISORY BOARD ON THE INVESTIGATIVE CAPABILITIES OF THE DEPARTMENT OF DEFENSE 97 (1995).

¹¹⁴ 1 REPORT OF THE ADVISORY BOARD ON THE INVESTIGATIVE CAPABILITIES OF THE DEPARTMENT OF DEFENSE 92-93 (1995).

¹¹⁵ The UCMJ, along with the Manual for Courts-Martial establish guidelines on commander-led investigations. *See* 10 U.S.C. § 815 (1994); MANUAL FOR COURTS-MARTIAL UNITED STATES, pt. V, ¶ 1 (1995). Each service has also developed regulatory guidelines for such investigations. As stated by the Advisory Board on the Investigative Capabilities of the Department of Defense:

In addition to the investigative procedures established by the Rules for Court-Martial and the Uniform Code of Military Justice, each Service has developed regulatory guidance for the conduct of commander-directed investigations. Commander-directed investigations in the Army are conducted pursuant to the procedures established in Army Regulation 15-6. In the Navy and Marine Corps there are two commonly used types of commander-directed investigations; they are investigations conducted pursuant to the Manual for the Judge Advocate General (JAGMAN) and very informal investigations conducted by a single investigating officer in anticipation of imposing non-judicial punishment pursuant to Article 15, Uniform Code of Military Justice.

1 REPORT OF THE ADVISORY BOARD ON THE INVESTIGATIVE CAPABILITIES OF THE DEPARTMENT OF DEFENSE 93 (1995).

¹¹⁶ *Id.* at 94-96; *see supra* notes 83-97 and accompanying text.
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cover up an incident.”¹¹⁷ The report also states that “[o]ften commanders will order a commander-directed investigation when they want to keep a matter ‘in house’ until they know all the facts.”¹¹⁸ Moreover, the Advisory Board noted the lack of training for investigators who are appointed to conduct the commander-directed investigations and the lack of protection for servicemembers who are targeted by such investigations.¹¹⁹

In the context of investigations into alleged violations of “Don’t Ask, Don’t Tell,” the informal, commander-led investigation has been established as the proper method for gathering information.¹²⁰ However, because of discrepancies that emerge when investigators conduct “Don’t Ask, Don’t Tell” inquiries, safeguards should be implemented to guard against violations of servicemembers’ rights. Specifically, as was recognized by the Advisory Board, officers should be required to work in consultation with a legal officer. While many investigators utilize the services of legal counsel in conducting their inquiries, the practice is not required in the Army, Navy and Marine Corps.¹²¹ If consultation with legal counsel was mandatory, improper tactics of investigators would be subject to review and scrutiny by a legal advisor, who could ensure that all information was obtained in accordance with “Don’t Ask, Don’t Tell.” In addition, a legal officer could help ascertain whether there is credible evidence present in order to necessitate an investigation, as is required by the Department of Defense implementing regulations.¹²² The requirement for a legal advisor to work in conjunction with the commanding officer is

¹¹⁷ *Id.* at 94. “Although commander-directed investigations are very important to the maintenance of good order and discipline and the efficient operations of the Armed Services, they are, as a class, the type of investigations most subject to abuse.” *Id.*

¹¹⁸ *Id.* Based upon testimony from various sources, the Advisory committee “perceive[d] more of a problem in the Navy than in the other Services with attempts to keep investigations ‘in house’ by conducting commander-directed investigations.” *Id.*

¹¹⁹ *Id.* at 95. The report also noted that investigations which lead to administrative separation proceedings are subject to less severe penalties, therefore fewer protections are provided, due to the informal nature. *Id.*

¹²⁰ Dep’t of Defense Directive 1332.14, encl. 4, § D(1) (Dec. 21, 1993) (“Informal fact-finding inquiries and administrative separation procedures are the preferred method of addressing homosexual conduct.”); 1 REPORT OF THE ADVISORY BOARD ON THE INVESTIGATIVE CAPABILITIES OF THE DEPARTMENT OF DEFENSE 96 n.269 (1995) (“They [administrative separation proceedings] . . . are the primary method of discharging servicemembers found to be in violation of the ‘don’t ask, don’t tell’ policy.”).

¹²¹ 1 REPORT OF THE ADVISORY BOARD ON THE INVESTIGATIVE CAPABILITIES OF THE DEPARTMENT OF DEFENSE 97 (1995). The Advisory Board found that most commanders do in fact consult with a judge advocate. “Many of the commanders and judge advocates we interviewed commented that coordination was needed with a judge advocate to educate the investigating officer on how to conduct an investigation . . .” *Id.*

¹²² Dep’t of Defense Directive 1332.14 encl. 4, § C (Dec. 21, 1993).

further necessitated by the sensitive nature of the subject matter of “Don’t Ask, Don’t Tell” investigations.

As noted by the Under Secretary of Defense, there is a need to ensure that more training is implemented so that “Don’t Ask, Don’t Tell” is implemented in accordance with the statutory framework.¹²³ Mandating the coordination of investigations with a legal advisor as a prerequisite to conducting an investigation would allow commanding officers to be fully informed as to their responsibilities under “Don’t Ask, Don’t Tell,” as well as the limitations which the policy establishes. This would help ensure that harassing and threatening questions posed to witnesses during the course of an investigation concerning their own sexuality, which are in direct violation of the policy, would be significantly curtailed.

2. Establish an Exclusionary Rule of Evidence in the Administrative Discharge Process

A second way to prevent the escalation of “Don’t Ask, Don’t Tell” abuses is to establish within the Department of Defense directives and individual Service regulations an exclusionary rule of evidence specifically geared toward administrative separation proceedings to exclude improperly-gathered evidence. Such a rule would have a deterring effect on investigators, who would realize that evidence garnered through improper investigatory practices would not be admissible at a discharge proceeding.

The Department of Defense directives outline the proper procedural framework within which a servicemember accused of violating “Don’t Ask, Don’t Tell” must be processed.¹²⁴ Upon commencement of an Administrative Board, should one be required,¹²⁵ the servicemember facing

¹²³ UNDER SECRETARY OF DEFENSE REPORT, *supra* note 69, at 8. The report states:

We found that some commanders, attorneys and investigators report that they have not received training on the homosexual conduct policy. A lack of familiarity with the policy has likely been a contributing factor in those cases in which the policy has not been fully followed. Proper training of commanders, attorneys and investigators is essential to ensure that the privacy rights of our service members are respected in accordance with the policy. We recommend that the Service Inspectors General make the training of those charged with implementing the homosexual conduct policy—commanders, attorneys and investigators—a specific item of interest for inspection.

Id.

¹²⁴ Dep’t of Defense Directive 1332.14, encl. 3 (Dec. 21, 1993); Dep’t of Defense Instruction 1332.40, encl. 8 (Sept. 16, 1997).

¹²⁵ Under Dep’t of Defense Directive 1332.14, encl. 3, pt. 3, § C(4), a right to a hearing before an Administrative Board can be waived, whereby the matter will be resolved under pt. 3, § (B)(4). In that case, a Separation Authority will act to determine whether enough evidence exists to corroborate the

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possible separation is to receive proper written notice of the matter, setting forth the basis for the separation and whether the separation could result in discharge and the characterization of such discharge.¹²⁶ Moreover, the servicemember has the right to have legal counsel represent him at the Administrative Board proceeding.¹²⁷ Such counsel can be the appointed military counsel selected by the Convening Authority¹²⁸ or civilian counsel chosen by the servicemember.¹²⁹ In addition, non-lawyer counsel may be used when circumstances dictate.¹³⁰ Administrative Board procedures applicable to separation hearings further provide that the Convening Authority is to appoint at least three persons to a panel that would vote upon the proposed separation.¹³¹ A servicemember can challenge for cause one of the three voting members of the board or the board's legal advisor.¹³² The servicemember also has the right and ability to call witnesses on his or her behalf.¹³³

While military rules of evidence are present to preserve a servicemember's rights in a court-martial setting,¹³⁴ such procedural safeguards are virtually non-existent within administrative separation proceedings. "The rules of evidence for courts-martial and other judicial proceedings *are not applicable* before an Administrative Board."¹³⁵ The regulation further states generally that "[r]easonable restriction shall be

charge and to then determine if separation is warranted, without a hearing. Dep't. of Defense Directive 1332.14, encl. 3, pt. 3, § (B)(4)(c),(d) (Dec. 21, 1993).

¹²⁶ Dep't of Defense Directive 1332.14, encl. 3, pt. 3, § B(1)(a)-(c) (Dec. 21, 1993). For servicemembers accused of violating the "Don't Ask, Don't Tell" policy, the regulations provide that such separation can lead to an honorable discharge. *Id.*

¹²⁷ *Id.* at encl. 3, pt. 3, § B(1)(f).

¹²⁸ The "Convening Authority" is a body that functions as a Separation Authority. Dep't of Defense Directives 1332.14, encl. 2, § B (Dec. 21, 1993). The directives definitional section goes on to define a Separation Authority as "[a]n official authorized by the Secretary concerned to take final action with respect to a specified type of separation," *Id.* at encl. 2, § N.

¹²⁹ Dep't of Defense Directive 1332.14, encl. 3, pt. 3, § B(1)(f) (Dec. 21, 1993).

¹³⁰ *Id.* Non-lawyer counsel can be appointed "when the respondent is deployed aboard a vessel or in similar circumstances of separation from sufficient judge advocate resources." *Id.*

¹³¹ *Id.* at encl. 3, pt. 3, § (C)(5)(a)(1). Those personnel who can be appointed consist of commissioned officers, non-commissioned officers, or enlisted personnel who are grade E-7 or above and are senior in rank to the servicemember respondent. *Id.* Additionally, at least one member of the Board is to be in the grade of O-4 or higher and a majority must be commissioned or warrant officers. *Id.*

¹³² *Id.* at encl. 3, pt. 3, § (C)(5)(a)(4).

¹³³ *Id.* at encl. 3, pt. 3, § (C)(5)(c)(1).

¹³⁴ 10 U.S.C. § 831 precludes statements that are obtained through coercion or unlawful inducement from being used against a servicemember in any court-martial proceeding. 10 U.S.C. § 831 (1994).

¹³⁵ Dep't of Defense Directive 1332.14, encl. 3, pt. 3, § (C)(5)(e) (Dec. 21, 1993) (emphasis added).

observed, however, concerning relevancy and competency of evidence.”¹³⁶ In addition to the non-existent evidentiary safeguards within the Administrative Board proceeding, the presiding officer of the administrative hearing is deemed suitable to “preside and rule finally on all matters of procedure and evidence.”¹³⁷ However, should a non-voting legal advisor be appointed to “assist the Board,”¹³⁸ that legal advisor shall then rule upon all evidentiary matters.¹³⁹ Nevertheless, there are no tangible rules of evidence observed at the hearing, except for the general guideline that evidence be relevant and competent.¹⁴⁰

Within such a framework, where evidence is obtained in an impermissive manner, there are no procedural rules which act to prevent the information from being admitted before the Administrative Separation Board. Therefore, within the Department of Defense regulatory scheme, an exclusionary rule of evidence should be created to limit the admissibility of information gained through an improper investigation. The underlying rationale for such a rule is deterrence. Without an exclusionary rule of evidence, servicemembers have no way in which to challenge the legality of the investigation at the administrative separation proceeding. An exclusionary rule would provide a disincentive for military personnel charged with investigating “Don’t Ask, Don’t Tell” violations to directly question servicemembers based upon information which is not credible. In a situation where factual circumstances surrounding the investigation are suspect, evidence obtained by a commander or investigator would be excluded from that servicemember’s discharge proceeding by the legal advisor, hence providing a measure of protection for the charged servicemember.

During the congressional debates over the “Don’t Ask, Don’t Tell” policy, Senator Sam Nunn stated that “I do not believe that we should have sex squads looking for ways to investigate servicemembers private, consensual behavior.”¹⁴¹ However, Nunn later concluded that “the policy

¹³⁶ *Id.*

¹³⁷ *Id.* at encl. 3, pt. 3, § (C)(5)(b).

¹³⁸ *Id.* at encl. 3, pt. 3, § (C)(5)(a)(1).

¹³⁹ *Id.* at encl. 3, pt. 3, § (C)(5)(b).

¹⁴⁰ The Report of the Advisory Board on the Investigative Capability of the Department of Defense stated that because administrative separation proceedings pertain to non-criminal situations, such proceedings are not subject to the same procedural safeguards as are criminal courts-martial. 1 REPORT OF THE ADVISORY BOARD ON THE INVESTIGATIVE CAPABILITIES OF THE DEPARTMENT OF DEFENSE 96 n.270 (1995). However, while the Army and Air Force have regulations pertaining to the admissibility of “coerced or involuntary confessions,” they do not provide that a servicemember must be given his or her rights under Article 31 of the UCMJ before an admission can be admissible in such a proceeding. *Id.*

¹⁴¹ 139 CONG. REC. S6692 (daily ed. May 27, 1993) (statement of Sen. Sam Nunn).
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["Don't Ask, Don't Tell"] does not give an individual the right to . . . exclude the use of any evidence in such a proceeding [administrative separation proceeding] by alleging that an investigation was conducted in a manner contrary to the policy."¹⁴² Such findings leave an accused servicemember in a precarious position. While they are supposed to have protection from investigations based solely on rumor and speculation, when such policies are broken by military investigators, the accused servicemember has no way in which to challenge that misuse of power. An evidentiary rule of exclusion would prohibit such information from being received by the Administrative Separation Board and act to deter the improper gathering of information.

3. Require the Presence of a Legal Advisor at All Administrative Separation Proceedings

In conjunction with an exclusionary rule of evidence, as mentioned above, a revision of the regulatory scheme should mandate that all administrative separation proceedings include a legal advisor who will be able to rule on various motions and evidentiary matters within the separation proceeding. By providing such legal authority, an exclusionary rule could be properly applied if necessary.

As established by the current regulatory framework, upon request by an accused servicemember for a hearing before an Administrative Board, a Convening Authority is to appoint to the board "at least three experienced commissioned, warrant, or noncommissioned officers."¹⁴³ Any enlisted personnel, according to the regulatory framework, who are appointed to the board "shall be in grade E-7 or above, and shall be senior to the respondent."¹⁴⁴ Additionally, the senior member of the board is designated as the president of the board and is given authority to "preside and rule finally on all matters of procedure and evidence."¹⁴⁵

The regulatory framework goes on to provide that "[a] nonvoting legal advisor *may* be appointed to assist the Board if authorized by the Secretary concerned."¹⁴⁶ When appointed, the legal advisor is given full

¹⁴² *Policy Concerning Homosexuality in the Armed Forces: Hearings Before the Senate Comm. on Armed Services*, 103d Cong. 826 (1993) (exchange between Sen. Sam Nunn and Jamie Gorelick, General Counsel of the Department of Defense).

¹⁴³ Dep't of Defense Directive 1332.14, encl. 3, pt. 3, § C(5)(a)(1) (Dec. 21, 1993).

¹⁴⁴ *Id.* ("At least one member of the board shall be serving in the grade of O-4 or higher, and a majority shall be commissioned or warrant officers.").

¹⁴⁵ *Id.* at encl. 3, pt. 3, § (C)(5)(a)(1), (b).

¹⁴⁶ *Id.* at encl. 3, pt. 3, § (C)(5)(a)(1) (emphasis added).

authority to rule on all evidentiary matters and issues of procedure.¹⁴⁷ However, as noted by the language of the regulations, use of such a legal advisor is purely optional, as there are no requirements for such authority to be present.

While the directives provide the option of having a legal advisor present, the regulatory framework should be revised so that a legal advisor is required at all administrative separation proceedings. With the addition of an exclusionary rule of evidence, a legal advisor would ensure that improperly obtained evidence was excluded from a servicemember's separation proceeding. In this manner, evidence could be efficiently and effectively determined to be admissible or non-admissible outside the presence of the separation board that is to hear the case. Such a safeguard would provide further assurance that the rights of accused personnel are upheld, instead of relying upon officers and investigators to fully comply with "Don't Ask, Don't Tell."

IV. CONCLUSION

The "Don't Ask, Don't Tell" policy, as embodied in 10 U.S.C. § 654 and the corresponding Department of Defense directives, signifies a legislative attempt to prevent the outright alienation of servicemembers who are accused of being homosexual. However, in light of the purported goals and theoretical justifications for "Don't Ask, Don't Tell," the implementation of this policy has nevertheless been carried out in a haphazard manner. Specifically, the wide-ranging discretion of military officials to engage in improper questioning and to coerce witnesses during the investigatory process is presently above reproach. In order to eliminate such abuses, the military should consider the various institutional and procedural reforms mentioned above in order to alleviate the deficiencies within the current statutory and regulatory framework. The requirement for legal counsel to become involved in commander-led investigations, the establishment of an exclusionary rule of evidence for administrative discharge proceedings, and the required presence of a legal advisor to rule on such evidentiary issues are several examples of how the "Don't Ask, Don't Tell" policy could be revised so as to ensure that the rights of all servicemembers are protected. Such reforms would further effectuate the compromise that Congress, the President, and the military envisioned.

¹⁴⁷ *Id.* at encl. 3, pt. 3, § (C)(5)(a)(1), (b).